DRN-6161196

The complaint

Mr A and the estate of Mrs A's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

Background to the Complaint

Mr A and Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') – purchasing the following products on the dates below:

- A Trial Membership on 8 November 2018 (the 'Time of Sale 1') for £4,395 ('Purchase Agreement 1')
- 1,380 fractional points on 20 January 2019 (the 'Time of Sale 2') for £18,521 – having traded in the Trial membership ('Purchase Agreement 2')

(which, when appropriate, I'll simply refer to as the ''Purchase Agreements' and the 'Times of Sale')

Fractional Club membership was asset backed – which meant it gave Mr A and the estate of Mrs A more than just holiday rights. It also included a share in the net sale proceeds of a property named on the relevant purchase agreement (which I'll refer to as the 'Allocated Property' after the membership term ends.

Mr A and Mrs A paid for their trial membership and Fractional Club membership by taking the following amounts of finance of from the Lender:

- £4,395 on 8 November 2018 ('Credit Agreement 1')
- £22,942 on 20 January 2019 ('Credit Agreement 2')

(which, when appropriate, I'll simply refer to as the ''Credit Agreements')

Sadly, Mrs A passed away in May 2021. As the Credit Agreements were taken in joint names, and were paid off in full at the time of Mrs A's passing, the eligible complainants are Mr A and the estate of Mrs A. As Mrs A was present at the Times of Sale, I will refer to her where appropriate.

Mr A and the estate of Mrs A – using a professional representative (the 'PR') – wrote to the Lender on 19 January 2023 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

Unhappy with the Lender's response, the complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr A and the PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I issued my provisional decision (the 'PD') to the parties on 3 November 2025. In my PD, I said:

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I do not currently think this complaint should be upheld.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

Section 75 of the CCA: the Supplier's misrepresentations at the Times of Sale

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

The PR's Letter of Complaint explains that the trial membership contains a false statement as it required Mr A and Mrs A to attend a 'Prelude' holiday, but this meant that they did not use the five weeks they were given under the terms of the trial membership to "test drive" the product. But I don't see how this was untrue, as the terms do clearly state that they would need to attend the prelude holiday first. And as they chose to upgrade their trial membership to become Fractional Club members – and were given a discount equal to the full value of the trial membership – I am not persuaded that they lost out as a result. So, I do not think the Lender acted unfairly when it declined to uphold the claim about the Trial Membership.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr A and Mrs A were:

- *told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.*
- *told by the Supplier that they were buying an interest in a specific piece of "real property" when that was not true.*
- *told by the Supplier that Fractional Club membership was an "investment" when that was not true.*

The words and/or phrases allegedly used by the Supplier to misrepresent the Fractional Club for the reason given in point (1) were set out by the PR in the Letter of Complaint, and they were limited to:

"That the Fractional Property Ownership Scheme had a guaranteed end date, specifically after 14 years, after which the clients would have no further legal liability to [the Supplier] under or in respect of the Scheme".

The PR says that such a representation was untrue because the "Sales Process" begins on the Sale Date as defined in the Fractional Club Rules, and under Rule 9, particularly Rules 9.2.9 and 9.2.12, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrase above would have been untrue at the Time of Sale 2 even if it was said. It seems to me to reflect the main thrust of the contracts Mr A and Mrs A entered into. And while, under Rules 9.1 and 9.2.9 of the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor'[1], longer than that if there were problems selling and the 'Owners'[2] agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

As for points (2) and (3), neither of these strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue – nor was it untrue to tell prospective members that they would receive some money when the allocated property is sold. After all, a share in an allocated property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give prospective members that interest, it did not change the fact that they acquired such an interest.

So, while I recognise that Mr A - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

Section 75 of the CCA: the Supplier's Breach of Contract

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreements, the Lender is also liable.

Mr A says that he and Mrs A could not holiday where and when they wanted to. That was framed, in the Letter of Complaint, as part of Mr A and the estate of Mrs A's complaint about the fairness or otherwise of their credit relationship with the Lender under Section 140A of the CCA. However, on my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, potentially breaching Purchase Agreement 2.

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mr A and Mrs A states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on a number of occasions. I accept that they may not have been able to take certain holidays and can see that, unfortunately, they were unable to use the membership during the pandemic in 2020

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[1] Defined in the FPOC Rules as "CLC Resort Developments Limited".
[2] Defined in the FPOC Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

and early 2021. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement 2.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr A and the estate of Mrs A any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

Section 140A of the CCA: did the Lender participate in one or more unfair credit relationships?

I've already explained why I'm not persuaded that the trial membership and Fractional Club membership were actionably misrepresented by the Supplier at the Times of Sale. But there are other aspects of the sales processes that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationships between Mr A and Mrs A and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

- *The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Times of Sale along with any relevant training material;*
- *The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;*
- *Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;*
- *The inherent probabilities of each sale given its circumstances; and, when relevant*
- *Any existing unfairness from a related credit agreement.*

I have then considered the impact of these on the fairness of the credit relationships between Mr A and Mrs A and the Lender.

The Supplier's sales & marketing practices at the Times of Sale

Mr A and the estate of Mrs A's complaint about the Lender being party to unfair credit relationships was and is made for several reasons.

They include, for various reasons, the allegation that the Supplier misled Mr A and Mrs A and carried on unfair commercial practices under Regulations 5 and 6 of the CPUT Regulations. However, as Regulations 5 and 6 state, commercial practices only amount to misleading actions or omissions if, in addition to satisfying one or more of the specific matters set out in those provisions, they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. And as I haven't seen enough evidence to persuade me that, if there were any such actions or omissions at the Times of Sale (which I make no formal finding on), they led Mr A and Mrs A to make the purchasing decisions they did, I'm not persuaded that anything done or nor done by the Supplier amounted to an unfair commercial practice for the purposes of those provisions.

The PR also alleges that the Supplier acted unfairly under Regulation 7 Schedule 1 of the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that the Supplier did.

In addition, the PR also says that:

- *the right checks weren't carried out before the Lender lent to Mr A and Mrs A.*
- *Mr A and Mrs A were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale 2.*
- *there was one or more unfair contract terms in Purchase Agreement 2.*

However, as things currently stand, none of these strike me as reasons why this complaint should succeed.

I haven't seen anything to persuade me that the right checks weren't carried out before the Lender given this complaint's circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr A and Mrs A was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationships with the Lender were unfair to them for this reason. But from the information provided, I am not satisfied that any of the lending was unaffordable for Mr A and Mrs A.

I acknowledge that Mr A and Mrs A may have felt weary after sales processes that went on for a long time, particularly given what I know about Mrs A's medical condition at the Time of Sale 2. I can appreciate that Mrs A felt very tired after the presentation. But the PR and Mr A say little about what was said and/or done by the Supplier during the sales presentation that made Mr A and Mrs A feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And I can see that they began booking holidays during the cooling off period, which I struggle to explain if they had felt that they did not want to purchase the Fractional Club membership. And with all of that being the case, there is insufficient evidence to demonstrate that Mr A and Mrs A made the decision to purchase either the trial membership or the Fractional Club membership because their ability to exercise those choices was significantly impaired by pressure from the Supplier.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreements, I can't see that any such terms were operated unfairly against Mr A and Mrs A in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

Overall, therefore, I don't think that Mr A and Mrs A's credit relationships with the Lender were rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR now says that one of the credit relationships with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr A and Mrs A's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But the PR and Mr A say that the Supplier did exactly that at the Time of Sale 2 – saying, in summary, that Mr A and Mrs A were told by the Supplier that the Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

A share in the Allocated Property clearly constituted an investment as it offered Mr A and Mrs A the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr A and Mrs A as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale 2 as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr A and Mrs A, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr A and Mrs A as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mr A and Mrs A rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale 2, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr A and Mrs A and the Lender under the Credit Agreement 2 and related Purchase Agreement 2 as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr A and Mrs A and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement 2 and the Credit Agreement 2 is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr A and Mrs A decided to go ahead with their purchase. I will explain why I have reached that conclusion.

The PR did not provide me with any testimony in Mr A's own words prior to the Investigator issuing her view. After the complaint was rejected, the PR provided a response from Mr A which includes the following:

"During a lengthy sales presentation, we were told about [the Supplier's] Fractional Property Owners Club, which we were told involved buying a share in a property, which would be sold after 19 years [sic], and we would get our money back. They said that we might even make a profit, although that could not be guaranteed. Thus, it was a good investment.
…

I think it's important from the outset that I make myself clear that the only reason we signed for a fractional rights property was because we were categorically told the property would be sold at the end of our contracted time and the proceeds, after their company costs were taken, would go to us, with a 5-7% growth per year.

They specially used the words invest and investment many times. We were told that because it was 'bricks and mortar' we would know how secure that was, and typically we could expect on our investment anything from 5-7% return per year on our Fractional ownership which would be due at the end of our contracted term. It was also said that this was just an average, as everyone knows how quickly properties rise over a longer period.

Also, due to the high standard of property we were being encouraged to buy into it was likely to be more.

I do not have anything in writing like that, but I do not lie. When I challenged them about this, because it was the first thing I had heard from them that made financial sense to me, was when they said that the reason the fractional product was set up like that was so that you got a free holiday out of your money, whilst having a savings and investment plan working alongside it.

We were told that, by the end of the term, the money we invested would have increased significantly, and we would have had free holidays too as a bonus. They said it was a 'no-brainer' that we would get our money back plus interest, as property prices continued to rise around the area we would be investing in, for our future pension pot.

They said they couldn't put this in writing, because there was no set figure to quote or guarantee, but we would know how sure property prices would rise as we had purchased our own home.

They openly talked of it as an investment and said that they knew we wanted to invest in our future. They said that the investment was secure, because of their reputation, where they build the properties, plus the quality of the builds.

I know my maths very well, so I was aware that £22,000 at even 5% growth per year would give me a return of over £43,000.00, and if it was 7% then it could be over £56,000 after 14 years. That was the main thing that changed our minds in the end.
…

Finally, and importantly to me, I want it said as it is. They sell this product as an investment, with a holiday resort attached as a bonus. It is how it works for them. You basically get a verbal guarantee of getting your money back at the end of the period, plus year-on-year interest, which makes it sound like a very attractive investment. Obviously now I see it's a con and just another trick to get you to buy a timeshare under a different guise."

I have thought carefully about Mr A's testimony – both about what he says and when he said it, as it was only after the Investigator issued her view, and after the judgment in Shawbrook & BPF v FOS[3] was handed down, that Mr A recalled that the Supplier led him to believe that Fractional Club membership offered him and Mrs A the prospect of a financial gain. And as experience tells me that, the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and/or influenced by discussion with others, I find it difficult to understand why the Financial Ombudsman Service was only given such evidence when it was.

I also think it is unlikely that the Supplier told Mr A that he could expect to achieve annual growth of 5-7% as I have not seen any persuasive evidence that indicates to me that the Supplier sold its Fractional Club memberships by giving figures such as the projected return he recalls, or that customers could expect to earn interest through their membership. I am unsure of why Mr A thought he would make specific annual gains from the Allocated Property. Indeed, Mr A says that the Supplier did not put anything in writing because "there was no set figure to quote or guarantee". He also says that he was told the property would increase in value, but he then says that he would receive a return through "year-on-year interest". So, I cannot conclude that Mr A's very recent testimony is clear and consistent in its telling of what he says he was told by the Supplier at the Time of Sale 2.

I have thought about what else our service has received from Mr A and his PR, in relation to what Mr A alleges took place at the Time of Sale 2.

In September 2023, prior to the Investigator issuing her view, the PR says:

"Further to previous correspondence herein, unfortunately we have not got a Witness Statement to send you.

However, a draft s.75 letter of complaint was prepared, in January 2023, based on the information provided by the clients. The writer then spoke to [Mr A] on the 19th of January 2023[.]

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[3] *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*')

In the course of that telephone conference, [Mr A] confirmed as follows:- it was confirmed as follows:- [sic]

That Fractional Property Ownership involved buying a share in a property.

The length of the contract was 19 years [sic], after which the property would be sold, and the proceeds split between all the owners. It was indicated to our clients that there would be a financial return when the property was sold.

The s.75 letter of complaint was then sent to the bank the same day, on that basis."

This submission indicates that the PR must have received <u>something</u> from Mr A prior to it writing the Letter of Complaint, as it says it did, but the PR has not provided me with what it received. And the Letter of Complaint does not include much, if any, of the details Mr A covers in his response to the view. Indeed, there isn't any other evidence on file to corroborate Mr A's very recent evidence about his motivations at the Time of Sale 2, so there seems to me to be a very real risk that Mr A's recollections were coloured by the judgment in Shawbrook & BPF v FOS and/or the involvement of the PR. And with that being the case, I'm not persuaded that I can give his written recollections the weight necessary to finding that the credit relationship in question was unfair for reasons relating to a breach of the relevant prohibition.

That doesn't mean Mr A and Mrs A weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr A and the PR don't persuade me that Mr A and Mrs A's Fractional Club purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr A and Mrs A's decision to purchase Fractional Club membership at the Time of Sale 2 was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr A and Mrs A and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

<u>The provision of information by the Supplier at the Times of Sale</u>

The PR says that Mr A and Mrs A were not given sufficient information at the Time of Sale 2 by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr A and Mrs A sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied

unfairly in practice. And as neither Mr A and Mrs A nor the PR have persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreements, I can't see that any such terms were operated unfairly against Mr A and Mrs A in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

In summary, I wasn't minded to think that the Lender acted unfairly or unreasonably when it dealt with Mr A's section 75 claims.

At the time of my PD I deferred my conclusions on the matter of commission disclosure in order to review that issue further. I've since written to the parties setting out my thoughts on why I wasn't persuaded to uphold this aspect of the complaint.

Applying the principles and factors set out in the Supreme Court judgment[4] handed down on 1 August 2025, I found nothing to suggest to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr A and Mrs A. Nor did I see anything that persuaded me that the commission arrangements between them gave the Supplier a choice over the interest rate which led Mr A and Mrs A into credit agreements that cost disproportionately more than they otherwise could have.

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Mr A and Mrs A had a material impact on their decisions to enter into the Credit Agreement. At £219.75 and £1,147.10, it was only 5% of the amount borrowed towards the Trial membership and the Fractional Club membership respectively, and as a proportion of the charge for credit it was 27.2% and 5.02% respectively. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Mr A such that the Lender needed to take any action in redress.

I didn't find any of the other arguments put forward demonstrated that the Credit Agreements between Mr A and Mrs A and the Lender were unfair to them under section 140A of the CCA. Absent any other reason why it would be fair or reasonable to direct the Lender to compensate Mr A, I said I didn't propose to uphold the complaint.

Responses to my provisional findings

The Lender accepted my PD. The PR didn't accept the proposed outcome. It made further submissions in support of Mr A's position and Mr A also provided his thoughts on the PD. Having received and reviewed these, I'm now proceeding with my final decision.

In doing so, I'm conscious that the PR has made a series of assertions surrounding the provision of information relating to commission arrangements. These include, among other

[4] *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench"*)

things, expressing doubt that the Lender has provided key information, requesting that the information we have received be shared with it in full, and asking that we do not proceed with a decision before this is done and it has had an opportunity to make further submissions.

The PR's requests have been addressed by us under separate correspondence. For reasons I will explain in the course of this decision, I've concluded that it's appropriate for me to proceed with my determination.

The legal and regulatory context

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So there's no need for me to set this out again in detail here. I simply remind the parties that our rules[5] say that in considering what is fair and reasonable in all the circumstances of the complaint, I will take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

After considering the case afresh and having regard for what's been said in response to my PD, and in my subsequent correspondence, I find it offers no persuasive reason to depart from the conclusions I've previously set out. I'll explain why.

The PR originally raised various points of complaint, such as those giving rise to Mr A's section 75 claim, which I addressed in my PD. In its response, it hasn't made any further comments in relation to most of its original points or said anything that leads me to think it disagrees with my provisional conclusions in relation to those points. It has also largely focused its response on the Fractional Club membership sale, and not the Trial membership. So I'll focus here on the points the PR and Mr A *have* made in response to the PD.

The PR's response to my PD relates mainly to the issue of whether the credit relationship between Mr A and the Lender was unfair *per* section 140A of the CCA. In particular, the PR has provided more comment in relation to whether the membership was sold to Mr A as an investment at the Time of Sale 2. It has also made further submissions in support of its position that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship between the Lender and Mr A.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The PR has questioned whether my provisional conclusions run contrary to precedent decisions issued by my ombudsman colleagues and the judgment handed down in *Shawbrook and BPF v FOS*. I don't believe they do. However, for the avoidance of doubt, other decisions issued by other ombudsmen do not have a precedent effect like some court

[5] Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

judgments might, and each ombudsman must determine each case on its own specific facts. Further, the judgment referred to did not make a blanket finding that all products of the type that Mr A and Mrs A purchased were mis-sold in the way the PR appears to be suggesting.

I remind the PR that in my PD I accepted the possibility that Fractional Club membership was marketed and/or sold to Mr A and Mrs A as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law[6] indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Mr A's decision whether to enter into Purchase Agreement 2 and Credit Agreement 2. It doesn't strike me that doing so flies in the face of either the handed down judgment or previous decisions the PR has mentioned.

While the PR has referred me to Mr A's recollections and the Supplier's training materials, I have already considered these and what was said. And I set out in my PD the reasons why I didn't find that evidence sufficiently persuasive that Mr A's and Mrs A's purchase decisions would have been any different, given the other motivational factors Mr A had described. Having re-examined Mr A's statement and his response to the PD, that remains my view, for the reasons previously given. I will cover what I think are the key reasons for this again below, as well as responding to the additional points raised by Mr A in his response.

I will first repeat what the PR sent our investigator prior to her issuing her opinion:

"Further to previous correspondence herein, unfortunately we have not got a Witness Statement to send you.

However, a draft s.75 letter of complaint was prepared, in January 2023, based on the information provided by the clients. The writer then spoke to [Mr A] on the 19th of January 2023[.]

In the course of that telephone conference, [Mr A] confirmed as follows:- it was confirmed as follows:- [sic]

That Fractional Property Ownership involved buying a share in a property.

The length of the contract was 19 years [sic], after which the property would be sold, and the proceeds split between all the owners. It was indicated to our clients that there would be a financial return when the property was sold.

The s.75 letter of complaint was then sent to the bank the same day, on that basis."

As I set out in the PD, the PR did not provide our investigator with any direct testimony from Mr A until after she completed her investigation. And the bare allegation that it did provide us is clearly not consistent with the contemporaneous paperwork, which reveals the correct length of the contract as 14 years. It does not contain much information to help me understand what happened at the Time of Sale 2. And it is not in Mr A's own words.

In response to the investigator, the PR provided a witness statement from Mr A which included the following paragraph:

"During a lengthy sales presentation, we were told about [the Supplier's] Fractional Property Owners Club, which we were told involved buying a share in a property, which would be sold

[6] *Carney* and *Kerrigan*

after 19 years [sic], and we would get our money back. They said that we might even make a profit, although that could not be guaranteed. Thus, it was a good investment."

Again, the allegation that Mr A was told that the Allocated Property would be sold after 19 years is not reflected in the paperwork that he signed. And this statement suggests that the prospect of making a profit was not guaranteed, only that Mr A "might" make a profit.

Mr A then says that he was told he could expect "*anything from 5-7% return per year on our Fractional ownership which would be due at the end of our contracted term".* This is not consistent with being told he "might" make a profit and he has not explained why he thought he could expect an annual return on a product that did not offer any obvious means to provide such a return. Mr A has not consistently remembered the length of the contract term, which makes it difficult for me to agree that the prospect of a profit at that time was of significance to his decision to enter the agreement. In short, I do not think his testimony about what he was told about the investment element of his purchase is clear and consistent and I don't find his recollections about the potential profit to be consistent with how I know the product worked or how it was sold. This is not the same as finding that Mr A is not being truthful as he suggests. Rather, it's that I think he has not been able to remember everything that he was told and that there are understandable reasons for this as I have covered in the PD, and as I will repeat below:

"*… as experience tells me that, the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and/or influenced by discussion with others, I find it difficult to understand why the Financial Ombudsman Service was only given such evidence when it was.*

Regarding the events at the Time of Sale 2, Mr A has pointed out the following, among other things, in his response to the PD:

"Its clear it's a timesale [sic] now, but it wasn't sold as that, you even got taken to the property you had part ownership of and despite asking time and again they give you all ever answer but the truth".

I can see from the Purchase Agreement 2 that the sale of the Fractional Club membership took place in Tenerife, and that the Allocated Property is located in Fuengirola in the Costa del Sol, on mainland Spain. I think it's most likely that Mr A recalls being shown properties as part of the sales process, and I am aware that Mr A did visit the resort where his Allocated Property is situated in February 2019, so it's possible that he may have been taken to see it then. But I think this is further evidence that the passing of time has rendered Mr A's recollection of the sale to be inaccurate, through no fault of his own.

Mr A also says:

"If the Ombudsman looks at the times we went he will see it doesn't go to the original five holidays, we never planned to have a 14 year holiday setup…"

I have seen a copy of the Supplier's records of the bookings Mr A and Mrs A made using their membership. This shows me that they completed seven bookings in 2019, in addition to the holiday they took at the Time of Sale 2 using the trial membership, and they made four further bookings for 2020 and 2021 that were cancelled. So, I think this shows they did use the membership to take more holidays than they would have been able to take with their trial membership.

As I said in the PD, this doesn't mean Mr A wasn't also interested in his share of the Allocated Property. But, I have carefully considered everything provided to me by Mr A and

the PR and for the reasons I've given above, whether or not the Supplier marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3), I'm not persuaded Mr A's decision to make the purchase was materially impacted by the prospect of a financial gain. It follows that I find the credit relationship between Mr A and Mrs A and the Lender was not rendered unfair to them for this reason.

The provision of information by the Supplier at the Time of Sale

The PR has asked for the documents the lender has provided to us to show the commission arrangements. While I appreciate the PR would like to have full disclosure of all of the documents and information the Lender has provided, our rules do not require me to provide this when dealing with a complaint.

As the PR has been informed, under DISP 3.5.9R I may, where I consider it appropriate, accept information in confidence (so that only an edited version, summary or description is disclosed to the other party). That is what I have done in my PD. I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive and that the summary information on commission arrangements we've already shared with the PR is appropriate in this case.

I see no reason to find that this prejudices any arguments the PR is able to make in support of Mr A's position. The PR has demonstrated its ability to present Mr A's case and has had sufficient time to consider and make any further arguments.

As I've noted, the PR has disagreed with my provisional conclusions on whether the Lender should pay redress because of an unfair credit relationship arising in connection with commission arrangements between the Lender and the Supplier. The PR says, in summary, that when the overall circumstances of those arrangements are considered in the round, the credit relationship was plainly unfair. In support of this position the PR has expressed, among other things, that:

- The PD doesn't properly apply the Supreme Court's judgment in *Hopcraft, Johnson and Wrench,* which concluded a range of factors informed whether a credit relationship between a consumer and a lender was unfair
- A conflict of interest existed on the part of the Supplier, who provided neither independent nor competent explanation of the credit
- Failure to disclose payment of commission – irrespective of the size of any payment - was a regulatory breach that goes to the heart of fairness

I have read and considered the submissions made by the PR on behalf of Mr A. But I don't find what it has said offers persuasive grounds for me to reach a different conclusion on this issue.

I've previously set out my thoughts on any impact the Supreme Court's conclusions in *Hopcraft, Johnson and Wrench* has on Mr A's arguments that his and Mrs A's credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

The PR's response doesn't offer anything that leads me to think that, for the most part, any of the factors it has referenced were in fact at play in Mr A's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mr A, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mr A, or to show that any other conflict of interest arose from the roles the Supplier did perform.

For such a claim to be successful would require more than the bare assertions that have been made in this case. I'm not persuaded that it is sufficient, as the PR seems to contend, simply to suggest unsubstantiated allegations of fact and require that the Lender disprove them else the credit relationship be deemed unfair. This issue was considered in the judgment in *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch) ("*Samra*"), where HHJ David Cooke held (at para.26):

> *"…the onus is on the claimant[7] to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (i.e. personal) to the creditor and debtor. This onus on the claimant does not however mean, in my judgement…that where Mr Samra[8] makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence."*[9]

I'm satisfied the Lender has provided sufficient information in response to my enquiries to enable me to reach a conclusion about its commission arrangements with the Supplier. I've seen nothing in this case that leads me to think what the Lender has said about the commission arrangements is inaccurate. So there's no reason for me to reach a different finding over those commission arrangements.

In its correspondence the PR has emphasised the regulatory breaches connected with a failure to disclose commission payment. I have already set out why in my view this doesn't automatically lead to an unfair credit relationship for which the Lender needs to offer redress. While I've considered all that the PR has submitted, I remain of that view.

Section 140A: Conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I remain unpersuaded that the credit relationships between Mr A and Mrs A and the Lender under the Credit Agreements and related Purchase Agreements were unfair to them such that it warrants the Lender offering any redress.

Commission: The Alternative Grounds of Complaint

In my previous correspondence I mentioned that some of the grounds for complaint about the fairness or otherwise of the credit relationship could also constitute separate and freestanding complaints. I'll reiterate my findings here.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mr A and Mrs A (that is, secretly). The second relates to the Lender's

[7] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.
[8] In this case the borrower making an allegation that there was an unfair credit relationship.
[9] I further note that in *Wilson v Clydesdale Financial Services Ltd t/a Barclays Partner Finance* [2021] (Unreported), the court also took the view that the burden is on the debtor to prove on the balance of probabilities *the facts* that purportedly create the unfairness. It is then that the lender's burden of proof that requires it to prove *the relationship* was not unfair kicks in. While I do not suggest this offers legal precedent, the subject matter of that case was a fractional timeshare sale, and given the similarities seems to me an appropriate approach when considering the facts in this case.

compliance with the regulatory guidance in place at the Times of Sale insofar as it was relevant to disclosing the commission arrangements between them.

For the reasons I set out previously, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr A and Mrs A a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to Mr A. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Times of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint. For the reasons I have also previously set out, I think Mr A and Mrs A would still have taken out the loans to fund their purchases at the Times of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Conclusion

After careful reconsideration of the facts and circumstances of this complaint, I adopt my provisional conclusions as part of my final decision. For the reasons I've given above and in my earlier correspondence I've mentioned, I don't think the Lender acted unfairly or unreasonably when it dealt with Mr A's section 75 claims. And I'm not persuaded that the Lender was party to a credit relationship with Mr A and Mrs A that was unfair to them for the purposes of section 140A of the CCA. Having taken everything into account, I see no other reason why it would be fair or reasonable for me to direct the Lender to compensate Mr A.

My final decision

For the reasons set out above, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A and the estate of Mrs A to accept or reject my decision before 17 March 2026.

Andrew Anderson
Ombudsman