DRN-6219147

The complaint

Mr and Mrs W'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 a claim under Section 75 of the CCA.

Background to the complaint

Mr and Mrs W were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is their membership of a Timeshare that I'll call the 'Fractional Club' – which they bought on 15 September 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,330 fractional points which, after trading in part of their existing membership, cost £7,679 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs W more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs W paid for their Fractional Club membership by taking finance of £12,451 from the Lender (the 'Credit Agreement'), which also consolidated lending they had taken out to finance a previous purchase of membership.

Mr and Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 1 February 2022 (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.

The Lender dealt with Mr and Mrs W's concerns as a claim and issued its response on 12 July 2022, rejecting it on every ground. The Lender later dealt with the matter as a complaint and issued its final response letter on 8 June 2023, maintaining its decision to reject the claim.

The complaint was subsequently referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision. So the complaint was passed to me to decide. I considered the matter and issued a provisional decision (the 'PD') dated 13 February 2026. In that decision, I said:

"I've considered all the available evidence and arguments to decide what's 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's to decide what's 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.

The legal and regulatory context

In considering what's fair and reasonable in all the circumstances of the complaint, I'm required under DISP 3.6.4 R to 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.

The legal and regulatory context that I think is relevant to this complaint is, in many ways no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it's not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- *CONC 3.7.3 [R]*
- *CONC 4.5.3 [R]*
- *CONC 4.5.2 [G]*

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- *Principle 6*
- *Principle 7*
- *Principle 8*

Section 75 of the CCA: the Supplier's misrepresentations at the Time 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 does not 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.

In general, lenders can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 (the "LA"), as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose, and after a limitation defence would have been available in court. So, it's relevant to consider if Mr and Mrs W's Section 75 claim was time-barred under the LA before it was put to the Lender.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued. Any claim against a lender under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. Such claims also have a time limit of six years from the date the cause of action accrued.

In claims for misrepresentation, the cause of action accrues at the point a loss is incurred. In Mr and Mrs W's case, that was at the Time of Sale because they entered into the agreement to purchase fractional club membership, and the related Credit Agreement to finance the purchase, based on the alleged misrepresentations of the Supplier which they say they relied on.

Mr and Mrs W first notified the Lender of their Section 75 claim on 1 February 2022. As that was more than six years after the Time of Sale, I don't think it was unfair or unreasonable of the Lender to reject their claim relating to the Supplier's alleged misrepresentations.

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

I've already explained why I don't think the Lender acted unfairly or unreasonably by rejecting Mr and Mrs W's Section 75 claim relating to the Supplier's alleged misrepresentations. But I must explore these alleged misrepresentations, along with other aspects of the sales process that are the subject of dissatisfaction, 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 relationship between Mr and Mrs W and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was 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:

1. *The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*

2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*

3. *The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;*

4. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*

5. *The inherent probabilities of the sale given its circumstances; and, when relevant*

6. *Any existing unfairness from a related credit agreement.*

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

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

Mr and Mrs W's complaint about the Lender being party to an unfair credit relationship was made for several reasons.

The PR says that Fractional Club membership was misrepresented by the Supplier at the Time of Sale because Mr and Mrs W were:

1. *Told they had purchased an investment that would "considerably appreciate in value."*

2. *Promised a considerable return on their investment because they were told they would own a share in a property that would considerably increase in value.*

3. *Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.*

4. *Made to believe that they would have access to "the holiday apartment" at any time all year round.*

However, neither points 1 nor 2 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. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than an honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's possible that Fractional Club membership was misrepresented at the Time of Sale for one or both of those reasons, I don't think it's probable. They're given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I don't think it was.

The PR also says that the right checks weren't carried out before the Lender lent to Mr and Mrs W. I haven't seen anything to persuade me that was the case in this complaint given its 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 and Mrs W was actually unaffordable before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. But from the information provided, I'm not satisfied that the lending was unaffordable for Mr and Mrs W.

Connected to this is the suggestion by the PR that the person(s) the Credit Agreement was arranged by were self-employed and unauthorised to broker credit in their own right, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr and Mrs W knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. And as the lending does not look like it was unaffordable for them, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mr and Mrs W experiencing a financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate them, even if the loan wasn't arranged properly.

Another reason the PR has given is that there were one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr and Mrs W in practice, nor that any such terms led them to behave in a certain way to their detriment, 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 and Mrs W's credit relationship with the Lender was 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 says the credit relationship 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 the 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'm satisfied, that Mr and Mrs W'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 says the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr and Mrs W were told by the Supplier that 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 and Mrs W the prospect of a financial return – whether or not, like all investments, that turned out to be more than what they first put into it. But it's 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 does not 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 and Mrs W as an investment in breach of Regulation 14(3), I have to be persuaded 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 as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

On the one hand, it's 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 and Mrs W, 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 the Supplier's sales process left open the possibility that the sales representative(s) may have positioned Fractional Club membership as an investment. So, I accept it's also possible that Fractional Club membership was marketed and sold to Mr and Mrs W 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.

Would the credit relationship between the Lender and Mr and Mrs W have been rendered unfair to them had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs W and the Lender under the Credit Agreement and related Purchase Agreement, 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'm to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs W 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 and the Credit Agreement 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 they decided to go ahead with their purchase.

Mr and Mrs W have said in a statement provided to us by the PR that:

> *"We did exchange some of our points and paid more money to purchase a fractional ownership as we were also led to believe we would get this money and a good profit in 19 years' time when [the Supplier] sells this and it did seem at the time this was the only way we could recoup some of our money."*

But Mr and Mrs W did not say anything in their statement about what the Supplier told them that led them to believe that. In addition, Mr and Mrs W said elsewhere in their statement in relation to a previous purchase of a timeshare membership from the Supplier, that they were told it was "a good investment and should increase in value over the years." That indicates they thought their existing membership was an investment that would also provide them with a profit. So I find it difficult to understand their statement where they say that they purchased Fractional Club membership at the Time of Sale because it seemed to be "the only way" they could recoup some of their money.

Having said that, Mr and Mrs W's previous purchase was of a timeshare membership that was not asset backed, which means it did not include a share in the net sales proceeds of a property. So I think it's unlikely they were told their previous purchase was an investment.

I acknowledge Mr and Mrs W's previous purchase is not the subject of this complaint. But the analysis above shows their statement is unlikely to be entirely accurate, and does not seem to be consistent with itself in relation to their reasons for making their purchase at the Time of Sale. And I find those inaccuracies and inconsistencies difficult to overlook considering Mr and Mrs W made their statement less than two years after the Time of Sale.

Furthermore Mr and Mrs W's statement does not reflect all of the relevant circumstances that led to their purchase at the Time of Sale. They stated they made a purchase in 2013 that was also financed by the Lender and that at the Time of Sale, they had more than 6,000 points under their existing membership. However, the Lender has said their 2013 purchase was also of Fractional Club membership and that Mr and Mrs W cancelled it. The Lender has provided us with an extract of the Supplier's sales notes from the Time of Sale which said:

> *"bought and cnx [Fractional Club membership] in 2013 as didn't think it was a good deal, assured me they were absolutely fine with this one as it is better value for money and it solves the availability prob's they have experienced so far…(sic)"*

It's not clear from the evidence before me why Mr and Mrs W thought their purchase at the Time of Sale was better value for money than the purchase they made and later cancelled in 2013. But what is apparent is that their purchase at the Time of Sale rectified problems they had experienced making use of the holiday rights under their membership. This is alluded to in the sales notes above and in Mr and Mrs W's statement where they said:

"…The apartment we ended up booking was very substandard to what we thought we had purchased i.e. no hot tub, no sea view and very small in comparison…We also experience great difficulty in booking a holiday to where we want to go telling [the Supplier] we would be taking holidays at fairly short notice because of being a famer we were told this was not a problem even if we wanted a long weekend or a mid week break they were readily available, we found to our cost that this was not the case…We now have a bank of 6000+ points and we cannot use them for the actual holiday we want."

Mr and Mrs W's purchase at the Time of Sale was of the Supplier's 'Signature Collection' version of membership. As I understand it, under this version of membership they obtained the right to stay in the Allocated Property for the week stated on their Purchase Agreement, and that property was of a higher standard than the properties they were able to book under their existing membership. So it seems to me that their purchase at the Time of Sale did rectify the problems they said they were having with their existing membership.

With all of that said, and as the other evidence before me does not corroborate Mr and Mrs W's statement about why they purchased Fractional Club membership at the Time of Sale, I cannot place sufficient weight on it to be persuaded that the prospect of a financial gain was an important and motivating factor behind their purchase.

That doesn't mean they 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 and Mrs W themselves don't persuade me that their 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'm not persuaded that Mr and Mrs W's decision to purchase Fractional Club membership at the Time of Sale 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 and Mrs W and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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'm not persuaded that the credit relationship between Mr and Mrs W and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

The Supplier's alleged breach of Spanish Law and its implications on the Credit Agreement

The PR argues that, because the Purchase Agreement was unlawful under Spanish law in light of certain information failings by the Supplier, I should treat that Agreement and the Credit Agreement as rescinded by Mr and Mrs W and award them compensation accordingly – in keeping with the judgment of the UK's Supreme Court in Durkin v DSG Retail [2014] UKSC 21 ('Durkin').

However, as the Lender hasn't been party to any court proceedings in Spain, it seems to me that there is an argument for saying that the Purchase Agreement is valid under English law for the purposes of Durkin.

I also note that the Purchase Agreement is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in Diamond Resorts Europe and Others (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract was governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.

What's more, as Mr and Mrs W have gone some way to taking advantage of the Purchase and Credit Agreements, an English court might hesitate to uphold a claim for rescission of either Agreement because there are equitable reasons to do so.

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, and given the facts and circumstances of this complaint, I'm not persuaded that it would be fair or reasonable to uphold it for this reason."

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs W's Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

I gave both parties the opportunity to respond to the PD. The PR responded stating it did not accept the PD, and it provided some further comments and evidence it wished to be considered. The Lender confirmed it accepted the PD.

As the parties have now had the opportunity to respond to the PD, and having received the responses I mentioned above, I'm now finalising my decision on this complaint.

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman is not to address every single point which has been made to date, but to decide what's fair and reasonable in the circumstances of this complaint. If I have not commented on, or referred to, something that either party has said, this does not mean I have not considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD in the main relate to the issues of whether the credit relationship between Mr and Mrs W and the Lender was unfair to them, and whether the Purchase Agreement and Credit Agreement can be avoided in light of the outcome of a court case in Spain. In particular, the PR has provided further comments in relation to whether the membership was sold to them as an investment at the Time of Sale. It has also now argued for the first time that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to all of those points in its response to my PD. Indeed, it hasn't said it disagrees with any of my provisional conclusions in relation to those other points. Since I have not been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in its response.

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

As I explained in my PD, Mr and Mrs W's statement did not set out what the Supplier told them that led them to believe they would make a profit at the end of their membership term. Their statement was also inconsistent with itself, and it did not accurately reflect all the relevant facts and circumstances surrounding their purchase at the Time of Sale. So, I was not persuaded that the evidence suggested Mr and Mrs W purchased Fractional Club membership in whole or in part down to any breach of Regulation 14(3).

And as I also said in my PD, it seemed to me from what Mr and Mrs W said in their statement that their purchase at the Time of Sale may have been made to rectify problems they said they were having making use of the holiday rights under their existing membership. I did not think that meant they were not interested in a share in the Allocated Property. But as they themselves did not persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I did not think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

The PR argues, in summary, that:

- The fact Mr and Mrs W were interested in holidays does not change the fact that the possibility of a profit from Fractional Club membership motivated them to go ahead with their purchase at the Time of Sale.

- The possibility of a profit was implied to them because the Supplier told them there was a high demand for these properties, and it showed them a number of features that led them to expect the Allocated Property would increase in value.

- Mr and Mrs W clearly stated the benefits that obviously convinced them to make their purchase at the Time, which included the potential profit from the sale of the Allocated Property

I have thought carefully about what the PR has said, but I'm not persuaded to depart from my provisional conclusions. Like I said above, I accept that Mr and Mrs W having an interest in the holiday rights under membership did not necessarily mean they were not interested in a share in the Allocated Property. But as I set out in my PD, to uphold their complaint because of a breach of Regulation 14(3), I would have to be persuaded that any breach, if it did occur, led them to enter into the Purchase Agreement and Credit Agreement. I still do not find their statement sets out what the Supplier told them that led them to believe they would make a profit from Fractional Club membership, nor do I find they said anything to the effect that what the Supplier told them about the Allocated Property led them to believe it would increase in value. So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to their purchasing decision.

In addition, the PR says that as the Supplier's pricing sheet set out the "Unit share" Mr and Mrs W acquired under their Fractional Club membership, this shows the investment element played *"quite an important role*" in convincing them to purchase it. I don't agree with that analysis. The pricing sheet was a proforma document that captured a number of details about the purchase in a standardised format. The fact the unit share acquired was recorded indicates the purchase included an investment element. But it follows that the Supplier would have recorded that information irrespective of the customer's motivations for making the purchase. So I don't consider this document offers an insight in this case into Mr and Mrs W's motivation for making their purchase.

The PR also said that in the judgment handed down in *Shawbrook & BPF v FOS*[1], it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my PD, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold. And the judgment referred to did not make a blanket finding that all such products were mis-sold in the way the PR appears to be suggesting. Any complaint needs to be considered in the light of its specific circumstances.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr and Mrs W's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between them and the Lender was unfair to them for this reason.

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

The PR says that a payment of commission from the Lender to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

As both sides already know, the Supreme Court handed down an important judgment on 1 August 2025 in a series of cases concerned with the issue of commission: *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd [2025] UKSC 33* ('*Hopcraft, Johnson and Wrench*').

[1] *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*').

The Supreme Court ruled that, in each of the three cases, the commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or the dishonest assistance of a breach of fiduciary duty, had to be predicated on the car dealer owing a fiduciary duty to the consumer, which the car dealers did not owe. A "disinterested duty," as described in *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471, is not enough.

However, the Supreme Court held that the credit relationship between the lender and Mr Johnson was unfair under Section 140A of the CCA because of the commission paid by the lender to the car dealer. The main reasons for coming to that conclusion included, amongst other things, the following factors:

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);

2. The failure to disclose the commission; and

3. The concealment of the commercial tie between the car dealer and the lender.

The Supreme Court also confirmed that the following factors, in what was a non-exhaustive list, will normally be relevant when assessing whether a credit relationship was/is unfair under Section 140A of the CCA:

1. The size of the commission as a proportion of the charge for credit;

2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);

3. The characteristics of the consumer;

4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and

5. Compliance with the regulatory rules.

From my reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, it sets out principles which apply to credit brokers other than car dealer–credit brokers. So, when considering allegations of undisclosed payments of commission like the one in this complaint, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to consider under DISP 3.6.4 R.

But I don't think *Hopcraft, Johnson and Wrench* assists Mr and Mrs W in arguing that their credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

I have not seen anything to suggest that the Lender and the Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr and Mrs W, nor have I seen anything that persuades me the commission arrangement between them gave the Supplier a choice over the interest rate that led Mr and Mrs W into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge it's possible that the Lender and the Supplier failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

But as I've said before, 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. And with that being the case, it isn't necessary to make a formal finding on that because, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it's for the reasons set out below that I don't think any such failure is itself a reason to find the credit relationship in question was unfair to Mr and Mrs W.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr and Mrs W entered into wasn't high. At £1,245.10, it was only 10% of the amount borrowed and even less than that (5.44%) as a proportion of the charge for credit. So, had Mr and Mrs W known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not persuaded that they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr and Mrs W wanted Fractional Club membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted does not strike me as disproportionate. So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr and Mrs W but as the supplier of contractual rights they obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to them when arranging the Credit Agreement, and thus a fiduciary duty.

Overall, therefore, I'm not persuaded the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr and Mrs W.

S140A: 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'm not persuaded that the credit relationship between Mr and Mrs W and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. So, I don't think it's fair or reasonable that I uphold this complaint on that basis.

Commission: The alternative grounds of complaint

While I've found that Mr and Mrs W's credit relationship with the Lender wasn't unfair to them for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr and Mrs W's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis 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 and Mrs W (i.e. secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr and Mrs W 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 them. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between itself and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think Mr and Mrs W would still have taken out the loan to fund their purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Other points

Here, the PR has asked us to determine the rights and obligations of the Lender based on the outcome of a court case in Spain. In my PD, I said that in the absence of a judgment in an English jurisdiction on this issue, I was not persuaded it was fair and reasonable to conclude the loan agreement was able to be set aside. I remain of this view for the following reasons:

- The Lender wasn't a party to the proceedings the PR has referred to, so its rights under the Credit Agreement have not been determined.

- I still think that the Purchase Agreement is governed by English law for the reason already set out in my PD. The PR has pointed to a different decision of the European Court of Justice that points the other way. But in the absence of any authorities under English law, I'm still not persuaded that (1) the Purchase Agreement, properly governed by English law, could be avoided following the Spanish Judgment to which the PR refers, and (2) that the Credit Agreement was also something that could be successfully avoided.

- And lastly, in any event, the PR has not provided any arguments as to why the relevant agreements could be set aside given Mr and Mrs W's use of the membership.

So again, I'm still not persuaded that it would be fair or reasonable to uphold the complaint for this reason.

Overall conclusion

Given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs W's Section 75 claim, and I'm not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

For the reasons set out above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs W to accept or reject my decision before 9 April 2026.

Asa Burnett
Ombudsman