DRN-4573562

The complaint

Mr S's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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.

The purchase in question here was bought by Mr S and his wife Mrs S, but as the credit agreement was in Mr S's sole name, he is the only eligible complainant here. However, I will refer to both Mr and Mrs S where appropriate.

What happened

Mr and Mrs S were existing members of a points-based timeshare, having purchased membership in 2007 from a timeshare provider (the 'Supplier').

On 20 April 2013 (the 'Time of Sale') Mr and Mrs S traded in their existing points and purchased a new membership of a timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 2,988 fractional points at a cost of £37,509 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £9,998 for membership of the Fractional Club.

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

Mr S paid for their Fractional Club membership by taking finance of £9,998 from the Lender in his sole name (the 'Credit Agreement').

Mr and Mrs S traded in their Fractional Club membership for an 'upgraded' membership from the Supplier on 11 February 2014. They paid for this new purchase with finance from another business which consolidated and settled the Credit Agreement with the Lender.

Mr S – using a professional representative (the 'PR') – wrote to the Lender on 5 July 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA (which the Lender failed to accept and pay).
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mr S says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Told them that Fractional Club membership had a guaranteed end date, specifically

2030, after which they would have no further legal liability to the Supplier under or in respect of the Scheme, when that was not true.

- Told them that they were buying an interest in a specific parcel of "real property" when that was not true.
- Told them that Fractional Club membership was an "investment" when that was not true.
- Told them that if they did not enter into the agreement their children would inherit the ongoing liability to pay management charges in respect of the Points Membership, when that was not true.

Mr S says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to him.

(2) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr S says that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

- They did not receive a copy of the Information Statement prior to entering into the Purchase Agreement or, if they did, they did not have adequate time to review the Information Statement before signing the Purchase Agreement.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- No adequate or transparent explanation was given to them as to the features of the agreement which may have made the credit unsuitable or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age and high interest and total charge for the credit that was provided.
- The duration of the Fractional Club and/or the obligation to pay Management Charges for the duration of the Scheme was and is unfair within the meaning of regulation 5 of the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.

The PR then went on to set out the difficulties that Mr S said they were experiencing with their Fractional Club membership. In summary, where applicable to their Fractional Club membership, they were:

- They found they had been unable to book holidays where and when they wanted, as they were always unavailable.
- They had initially bought the Fractional Club to holiday in the UK. At the start there were a large number of weeks that could be booked in advance, but these became less available as time went on.

The Lender did not respond to Mr S's concerns within the eight weeks required by the regulator, so the PR referred his complaint to the Financial Ombudsman Service.

On 4 February 2019 the Lender issued its final response letter to Mr S's complaint, rejecting it on every ground.

The PR then submitted to our Service a signed statement written by Mr and Mrs S, dated 25 November 2017.

Mr S's complaint was assessed by an Investigator at this Service who, having considered the information on file, rejected the complaint on its merits.

Mr S disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. The PR also submitted a supplementary statement from Mr S dated 19 January 2024.

The provisional decision

Having considered everything that had been submitted, I didn't think the complaint ought to be upheld. I issued a provisional decision (the 'PD') setting out my reasons, and invited both sides to submit any new evidence or arguments that they wished me to consider.

In the PD 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. But 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.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75 of the CCA

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.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr S could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers under Section 75 is engaged. One of these is the price of the goods or service. The purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 cannot succeed. As the purchase price of the Fractional Club was £37,509 I am satisfied that Mr S's claim for misrepresentations under Section 75 of the CCA cannot succeed.

However, where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA, but this claim can only relate to a 'breach of contract' – misrepresentation isn't included. There are other criteria in order for Section 75A to apply, but I don't consider that I need to make a finding on that because whether it be under Section 75 or 75A, I do not think that the Lender was unfair or unreasonable when it rejected Mr S's claim.

Having considered Mr S's claim, it is my view that there is an element of the complaint which relates to a breach of contract, albeit not expressed in those exact terms. Mr S has said they found it difficult to book the holidays they wanted, when they wanted them. This, on my reading of the complaint, suggests that they felt like the Supplier wasn't living up to its end of the bargain and had breached the Purchase Agreement.

But I am not persuaded by the evidence provided that there has been a breach of contract here. 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 signed by Mr and Mrs S states that the availability of holidays was/is subject to demand. The Fractional Club membership being considered here was only in existence between April 2013 and February 2014, and it looks like Mr and Mrs S made use of their membership to take three weeks of holidays during the 10 months that they held their membership. So, whilst I accept that Mr and Mrs S may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

What's more, as there's nothing else on file that persuades me there were any other breaches of the contract by the Supplier during the course of this Fractional Club membership, I do not think the Lender is liable to pay Mr S any compensation for the alleged breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it did not accept the claim in question.

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

I have already explained why I am not persuaded that Mr S had a valid claim under Section 75 of the CCA, or that the contract entered into by Mr S was breached by the Supplier in a way that makes for a successful claim under Section 75A of the CCA and outcome in this complaint. But Mr S also says that the credit relationship between him and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that he has concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr S and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs S's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

[1] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr S and the Lender, along with all of the circumstances of the complaint, and I do not 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 Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *The inherent probabilities of the sale given its circumstances.*

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

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

Mr S's complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision.

The PR says that the right checks weren't carried out before the Lender lent to Mr S but 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 S was actually unaffordable before also concluding that he lost out as a result, and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr S. I appreciate from what Mr S has said that he and Mrs S have experienced financial difficulties since their purchase of the Fractional Club, but I've not seen anything which suggests that these difficulties were foreseeable at the time the credit was agreed. I also note that the Credit Agreement in question was settled in February 2014 when

a new loan with a different provider was taken out, and the difficulties Mr S has experienced occurred after this date. So, I cannot currently see that the Lender in the complaint I am considering here can be held responsible for this. If there is any further information on this (or any other points raised in this provisional decision) that Mr S wishes to provide, I would invite him to do so in response to this provisional decision.

The misrepresentations I've described previously could also be something that led to an unfair debtor-creditor relationship[2], so I've considered what Mr S had to say with this in mind.

They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs S were told that they were buying an interest in a specific parcel of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs S's share in the 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 them that interest, it did not change the fact that they acquired such an interest.

The PR also said in the letter of complaint that the Supplier told Mr and Mrs S that Fractional Club membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mr and Mrs S's membership plainly did have an investment element to it.

In addition, the PR said the Supplier told Mr and Mrs S that Fractional Club membership had a guaranteed end date, specifically 2030, after which they would have no further legal liability to the Supplier under or in respect of the Scheme, when that was not true. But I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed by the unanimous written consent of all fractional owners, in which Mr and Mrs S are included.

The last of the alleged misrepresentations was that Mr and Mrs S say the Supplier told them that if they did not enter into the agreement to purchase the Fractional Club, their children would inherit the ongoing liability to pay management charges in respect of the Points Membership, when that was not true. But having considered what they have said in their statement, I can't see that they have described this as happening. In their statement they have said:

> *"We were not aware we could give notice on the [points-based membership] and were **not** told this before we converted to [Fractional Club]. If we had been told this, we would have given back our points as the maintenance fees were so expensive and we were not getting the holidays we wanted." [bold my emphasis].*

So, Mr and Mrs S have described what they were not told about their points-based membership, not what they were told during the sale of their Fractional Club. I find it hard to understand why they have not mentioned something about this in their statement if they had been told something which was not true, as is later set out, in some detail, in the Letter of Complaint from the PR, if that was something important to their purchasing decision.

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[2] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

And the PR, in the Letter of Complaint, has provided some more information about this point. It said:

> *"They found themselves struggling to book the holidays they wanted, when they wanted, and **had discovered** that contrary to what they had been told when they purchased the Points Membership, there was no means by which they could sell/dispose of their membership obligations. They faced rising annual costs and a poorly performing product and were concerned that their children would inherit their liability under their Points Membership" [bold, my emphasis].*

This was a description of the position they were in prior to their purchase of Fractional Club. And what the PR says here suggests to me that Mr and Mrs S had already been told this (the source of the information is not made clear) prior to the Time of Sale. So, there is no explanation or reference, in either Mr and Mrs S's statement, nor in the details of the Letter of Complaint, of who it was that made the misrepresentation being considered here. So, I am not persuaded, on the evidence submitted, that it was made by the Supplier at the Time of Sale.

But in any event, even if this was said by the Supplier at the Time of Sale, I don't think it had a material impact on their decision to make the purchase. As I go on to explain below, I think their motivation to purchase was the potential to improve their ability to take holidays and to reduce the maintenance fees they would have to pay.

The PR also included the allegation that the Supplier misled Mr and Mrs S and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

I'm not persuaded, therefore, that Mr S's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he says his credit relationship with the Lender was unfair to him. 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.

<u>Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations?</u>

The Lender does not dispute, and I am satisfied, that Mr and Mrs S'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 membership of the Fractional Club 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 that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS[3], the parties agreed that, 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" at [56]. I will use the same definition.

Mr and Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But 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 and Mrs S 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 Mr and Mrs S, 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 evidence in this complaint 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 S, 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs S as an investment.

Further, Mr and Mrs S did say in their statement that the Supplier told them Fractional Club was an "investment in property". And I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I do accept that it's possible that Fractional Club membership was marketed and sold to Mr and Mrs S as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

But, I don't think I need to make a finding on that specific point because, for reasons I'll come on to, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr S rendered unfair?

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

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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)

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr S and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[4] led them to enter into the Purchase Agreement, and Mr S into the Credit Agreement is an important consideration.

In their statement, when talking about their reason to agree to the purchase of Fractional Club at the Time of Sale, Mr and Mrs S said:

> *"We signed the documents because we were told that our maintenance fees would be lower and that we were told we would get a greater choice of holidays."*

And in the Letter of Complaint, which the PR has stated was prepared as a result of what Mr and Mrs S had told it, set out the concerns they had with their existing points-based membership by 2013. The PR said:

> *"By 2013, our clients were concerned as to their position and their liabilities in respect of their Points Membership of [the Supplier's] time share scheme. They found themselves struggling to book the holidays they wanted, when they wanted, and had discovered that contrary to what they had been told when they purchased the Points Membership, there was no means by which they could sell/dispose of their membership obligations. They faced rising annual costs and a poorly performing product and were concerned that their children would inherit their liability under their Points Membership.*
>
> *This new scheme was attractive to our clients, in the light of their concerns which we have set out above, as it would place a time limit on their membership of the [Supplier] timeshare scheme, beyond which they would have no further liability in respect of management charges.*

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[4] which, having taken place during its antecedent negotiations with Mr S, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender).

> *Also, because they were told that "upgrading" to Fractional Property Ownership would give them a greater choice of holidays, and better availability."*

My reading of this tells me that Mr and Mrs S were unhappy with their existing membership for a number of reasons, with the main ones being that they were struggling to book holidays, high maintenance fees, and the long membership term which they feared would impact their children.

And there was no suggestion or indication in Mr and Mrs S's initial recollections of the sales process at the Time of Sale, that they made the purchase on the basis of it being an investment from which they would make a financial gain. The only mention of the 'investment' element in their statement was the following sentence:

> *"We were told all about the new [Fractional Club]. This was an investment in property and that the property would be sold in 2031. We were told we could sell our property at any time and get our money back. What we have found out now is that all members must agree to sell, so if everyone does not agree the property will not be sold."*

But this seems to be a description of how the Fractional Club and the eventual sale of the Allocated Property worked (albeit, as I've previously stated, it is not entirely accurate) rather than a reason for why they bought it. And given their apparent misgivings about how their points-based membership was working, Mr and Mrs S's motivation for purchasing Fractional Club seems to me to have been the potential for a greater choice of holidays with better availability, reduced maintenance fees and a shorter membership duration – they themselves have said this is why they signed the purchase documentation.

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 and Mrs S'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 S and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs S when they purchased membership of the Fractional Club at the Time of Sale. But they and PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision, or if it did, they did not have adequate time to review it.

But I'm not persuaded by this. They were provided copies of the Purchase Agreement, and the Right of Withdrawal document, which gave them a 14-day window to cancel the agreement without penalty if there was anything they were unhappy with. And Mr S has not given any credible explanation as to why they did not do this, if, as he is now saying, they were not given sufficient time to consider everything prior to signing.

But even if I were to acknowledge the possibility that there were information failings on the part of the Supplier, I don't think this makes a difference here anyway. I can't see that there's been any detriment caused to Mr and Mrs S as a result, or that any of these points are likely to have prejudiced their purchasing decision at the Time of Sale and rendered Mr S's credit relationship with the Lender unfair to him for the purposes of Section 140A of the CCA. I say this because I think Mr and Mrs S got what they wanted here – a timeshare which had

reduced maintenance fees and better scope for holidays than their existing arrangement.

The Letter of Complaint also says Mr and Mrs S weren't given a transparent explanation as to the features of the agreements which may have made them unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age and high interest and total charge for the credit provided.

But they haven't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Mr and Mrs S. Mr S also hasn't described what he feels should have been explained or what information should have been given about these points that wasn't. The PR has mentioned the length of the loan, his age, the interest rate and total charge for the credit provided, but hasn't given any reason as to why these are unfair in this particular case or why these cause Mr S's credit relationship with the Lender to be unfair.

PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Regarding the duration of the membership, the Information Statement made clear to Mr and Mrs S that the membership lasted for 19 years. I acknowledge that the sale of the Allocated Property could be postponed at the Supplier's discretion, but it could only be postponed for up to two years in limited circumstances which don't seem unusual or unreasonable. So, I don't think the term in relation to the mere duration of the membership is likely to be unfair for the purposes of the UTCCR.

Similarly, I don't think the term relating to the mere obligation to pay an annual management charge is likely to be unfair for the purpose of the UTCCR. The Information Statement explains that the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the scheme, which doesn't seem unreasonable. And, while I acknowledge that such an increase could be greater than what had been set out, this would be in exceptional circumstances, where there had been an extraordinary increase in costs directly related to the Resort which could not previously have been foreseen.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the CPUT Regulations and the UTCCR are likely to have prejudiced Mr and Mrs S's purchasing decision at the Time of Sale and rendered Mr S's credit relationship with the Lender unfair to him for the purposes of Section 140A of the CCA.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr S was unfair to him for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In 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 S's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him 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 him."

The responses to the provisional decision

The Lender did not respond to the PD, but the PR did. It provided a lengthy response, but this only related to the allegation that the Supplier had breached Regulation 14(3) at the Time of Sale which rendered the credit relationships unfair to Mr S. It also raised an allegation that there had been an undisclosed payment of commission by the Lender to the Supplier for its arranging of the Credit Agreement.

I then wrote to both sides setting out my initial thoughts on the commission arrangements between the Lender and the Supplier which were in place when the credit agreement was arranged.

Applying the principles and factors set out in the Supreme Court judgment[5] handed down on 1 August 2025, I found nothing 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 S. 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 S into a credit agreement that cost disproportionately more than it 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 S had a material impact on his decision to enter into the Credit Agreement. At £974.81, it was only 9.75% of the amount borrowed and even less than that (5.34%) as a proportion of the charge for credit. 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 S such that the Lender needed to take any action in redress. After all, Mr S wanted Fractional Club membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted didn't strike me as disproportionate. So, I thought he would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

I also set out that I was not persuaded that the Lender was 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 S (i.e. secretly) because I didn't think the Supplier, when acting as a credit broker, owed Mr S a fiduciary duty. And neither did I think that any breach(es) of the regulatory guidance in place at the Time of Sale was in itself a

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

reason to uphold the complaint because, for the reasons I had stated, I thought Mr S would still have taken the loan out had there been a more adequate disclosure of the commission arrangements that applied at the time.

The Lender did not respond to my thoughts on the commission arrangement. The PR did respond and did not accept what I had said in this regard. It made further submissions in support of Mr S's position. Having received and reviewed everything that has been said in response to the PD and my thoughts on the commission arrangements, I am 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 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[6] 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. But I would add that the following regulatory rules/guidance are also relevant:

The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

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

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

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 provisional decision and my subsequent correspondence, I find the responses offer 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 S's Section 75 and 75A claims, which I addressed in my provisional decision. 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. So, I'll focus here on the points the PR *has* made in response.

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

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mr S and the Lender was unfair under Section 140A of the CCA. In particular, the PR has provided more comment in relation to whether the membership was sold to Mr and Mrs S as an investment at the Time of Sale. 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 S.

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 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 Mr and Mrs S purchased were mis-sold in the way the PR appears to be suggesting.

I remind the PR that in my provisional decision I accepted the possibility that the Fractional Club membership was marketed and/or sold to Mr and Mrs S as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law[7] 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 S's decision whether to enter into the Purchase and Credit Agreements. 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 S's recollections and the Supplier's training materials, I have already considered these and what was said, both in the original statement and that submitted before my PD. And I set out in my provisional decision the reasons why I didn't find that evidence sufficiently persuasive that Mr and Mrs S's purchase decision would have been any different, given the other motivational factors they have described. Having re-examined both of Mr S's statements that remains my view, for the reasons previously given. And contrary to the PR's latest submissions, there is no mention in either of Mr S's

[7] *Carney* and *Kerrigan*

statements, when describing the Time of Sale, that he would share in the *"profits"* of the sale.

So, as I said before, 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 and Mrs S's decision to make the purchase was materially impacted by the prospect of a financial gain. It follows that I find the associated credit relationship between Mr S and the Lender was not rendered unfair to him 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 when I wrote to both sides following my provisional decision. I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive, and that the summary information on commission arrangements which has already been shared with the PR is appropriate in this case.

I see no reason to find that this prejudices any arguments the PR or Mr S is able to make in support of his position. The PR has demonstrated its ability to present Mr S'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 provisional decision 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.

Notwithstanding the time the PR has taken to put together its submissions on behalf of Mr S, 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 S's arguments that his credit relationship with the Lender was unfair to him 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 S's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were

concealed from Mr S, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mr S, 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[8] 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[9] 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."*[10]

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 is 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 relationship between Mr S and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him 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

[8] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.
[9] In this case the borrower making an allegation that there was an unfair credit relationship.
[10] 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.

breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mr S (that is, secretly). 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 arrangement between them.

For the reasons I set out previously, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr S 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 him. 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 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 he 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.

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 don't think the Lender acted unfairly or unreasonably when it did not accept Mr S's Section 75 and/or 75A claims;
- I'm not persuaded that the Lender was party to a credit relationship with Mr S that was unfair to him 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 for me to direct the Lender to compensate Mr S.

My final decision

I do not uphold this complaint.

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

Chris Riggs
Ombudsman