DRN-4641641

The complaint

Mrs L's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her 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

Mrs L and her husband purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 27 September 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 800 fractional points at a cost of £10,780 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs L 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.

Mrs L paid for their Fractional Club membership by taking finance of £14,174 from the Lender (then trading as Hitachi) in her sole name (the 'Credit Agreement'). This loan also consolidated an earlier loan which had financed their purchase of trial membership.

In 2018 they bought more fractional points, but then cancelled that purchase during the 14-day cooling off period. In early 2019, their payments of the annual management charges were in arrears.

Mrs L – using a professional representative (the 'PR') – wrote to the Lender on 23 August 2019 (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 Mrs L's concerns as a complaint and issued its final response letter on 30 November 2020, rejecting it on every ground.

By then the complaint had been referred to the Financial Ombudsman Service. It was assessed by an investigator who, having considered the information on file, upheld the complaint on the ground that the Fractional Club membership had been sold or marketed as an investment, in breach of a regulation which prohibits timeshares being sold in that way.

The Lender disagreed with the investigator's assessment and asked for an ombudsman's decision – which is why it was passed to me.

I issued my provisional decision on 19 March 2026. I made the following provisional findings (which form part of this final decision):

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and

reasonable in the circumstances of this complaint. And having done that, I do not currently think this complaint should be upheld.

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

Section 75 of the CCA: the Supplier's misrepresentations at the 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 doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mrs L was told by the Supplier:

1. that Fractional Club membership had a guaranteed end date when that was not true;
2. that she was buying an interest in a specific piece of "real property" when that was not true;
3. that Fractional Club membership was an "investment" when that was not true.

The words and/or phrases allegedly used by the Supplier to misrepresent the Fractional Club for the reason given in point 1 were set out by the PR in the Letter of Complaint, and they were limited to: "*The Fractional contract was not fixed at 19 years,"* and *"There is no guarantee that the contract will end on the sale date."*

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

However, I cannot see why the phrase above would have been untrue at the Time of Sale even if it was said. It seems to me to reflect the main thrust of the contract Mrs L entered into. And while, under Rules 9.1 and 9.2.9 of the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor',[1] and only for longer than that if there were problems selling and the 'Owners'[2] agreed, or for an otherwise specified period provided there was *unanimous*

[1] Defined in the FPOC Rules as "CLC Resort Developments Limited".

agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

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

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

Section 75 of the CCA: the Supplier's breach of contract

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

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

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mrs L states that the availability of holidays was/is subject to demand. I accept that she may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

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

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

Having considered the entirety of the credit relationship between Mrs L 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 Times of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Times 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 Times of Sale; and
4. The inherent probabilities of the sales given their circumstances.

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

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

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

They include, for various reasons, the allegation that the Supplier misled Mrs L and carried on unfair commercial practices under regulations 5 and 6 of the CPUT regulations.[3] However, as regulations 5 and 6 state, commercial practices only amount to misleading actions or omissions if, in addition to satisfying one or more of the specific matters set out in those provisions, they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. And as I haven't seen enough evidence to persuade me that, if there were any such actions or omissions at the Time of Sale (which I make no formal finding on), they led Mrs L to make the purchasing decision she did, I'm not persuaded that anything done or not done by the Supplier amounted to an unfair commercial practice for the purposes of those provisions.

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

In addition, the PR also says that:

1. the right checks weren't carried out before the Lender lent to Mrs L;
2. Mrs L was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale;
3. the Fractional Club membership was marketed and sold to her as an investment in breach of a prohibition against selling timeshares in that way;
4. there was one, or more, unfair contract terms in the Purchase Agreement.

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

[3] The Consumer Protection from Unfair Trading Regulations 2008.

I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mrs L was actually unaffordable at the Time of Sale (not just later on) before also concluding that she lost out as a result, and then consider whether the credit relationship with the Lender was unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mrs L in September 2017.

I acknowledge that Mrs L may have felt weary after a sales process that went on for a long time. But she was given a 14-day cooling-off period, and she has not provided a credible explanation for why she did not cancel her membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs L made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

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

The Lender does not dispute, and I am satisfied, that Mrs L's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.[4]

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 that the Supplier did exactly that at the Time of Sale – saying, in summary, that she was 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 Mrs L the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to

[4] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.

Mrs L as an investment in breach of regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to her as an investment, i.e. told them or led her 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 is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs L, 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. For example, the Member's Declaration, which Mr and Mrs L both signed, says in paragraph 5:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] *makes no representation as to the future price or value of the Fraction."*

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

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

Was the credit relationship between the Lender and Mrs L rendered unfair?

Having found that 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 Mrs L 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 am to conclude that a breach of regulation 14(3) led to a credit relationship between Mrs L and the Lender that was unfair to her and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement.

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

I have been provided with a joint witness statement signed by Mr and Mrs L, dated 15 April 2019. It does say that they expected to make a profit, and this would

normally be enough to persuade me that their decision was influenced by the regulatory breach. However, I am afraid that I have serious misgivings about certain aspects of this statement which call into question its credibility.

It appears to be a template prepared by the PR, to which consumers such as Mr and Mrs L were asked to add their own words in certain places. Mr and Mrs L did not finish filling it in, and they left several placeholders in place, such as these examples:

> 7. After [HOW LONG] we agreed to purchase a Trial Membership at a cost of £3,995.00

And:

> 23. We were then taken back to the resort for the presentation at the sales suite. We were told that we didn't have enough Points to have the holidays that we wanted and were offered an upgrade at a cost [£AMOUNT]. We agreed to purchase [DETAILS].

There are several of these. It follows that I can't assume that the sentences about Mr and Mrs L buying fractional points because they expected to make a profit from their investment were their own recollections, rather than having been written for them in advance by the PR.

I am reinforced in that view by an additional page which is annexed to the witness statement, headed 'Additional information' (it is not signed or dated). Its paragraphs are numbered non-consecutively, and the contents of each paragraph correspond with the same-numbered paragraphs in the witness statement; so they elaborate on the statement. It seems to have been written by Mr and Mrs L entirely in their own words. Paragraphs 13 and 14 of the witness statement are about what happened at the Time of Sale, and paragraph 13 of the Additional Information appears to be about that too. But whereas paragraph 14 of the witness statement (which may have been written by the PR) refers to profits, paragraph 13 of the Additional Information (which I'm satisfied was written by Mr and Mrs L themselves) makes no mention of profit. Instead it just says:

> 13. We were informed the benefits of purchasing a fractional share was that we would gain more points and receive 2% share of the property in Tenerife alongside this. Also by gaining more points we then can go further a field / long haul and stop in their 5 star accommodation. We later on discovered this is untrue , and checked out if we booked ourselves (ie through a travel agents) that it would work out cheaper !

There are also some errors in Mr and Mrs L's evidence, which tend to make their evidence unreliable too. For example, paragraph 6 of the witness statement is about the sale of the trial membership, which was not a fractional timeshare. But paragraph 6 of the Additional Information describes how a fractional timeshare works. So Mr and Mrs L appear to be saying that the trial membership was described and sold as a fractional product, but I do not accept that that happened; it is clearly a mistaken recollection.

All of 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 L 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 am not persuaded that Mr and Mrs L'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 Mrs L and the Lender was unfair to her even if the Supplier had breached regulation 14(3).

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

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

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

I acknowledge that it is also possible that the Supplier did not give Mrs L sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mrs L nor the PR have persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

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

Commission

In November 2024 the PR asserted on behalf of Mrs L that the payment of commission made the financial arrangement unfair. The PR didn't give a level of commission at which it considered unfairness arose, but its arguments included the following:

- Despite requests, there had been no disclosure of the actual amount of commission paid by the Lender to the Supplier;

- per the Court of Appeal's judgment in *Johnson*[5], the percentage of commission should be based upon "*the sum borrowed"*;
- the amount of the annual percentage rate of interest ("APR") is key and was unusually high, substantially increasing the total charge for credit;
- commission paid by the Supplier to its self-employed sales representatives should also be disclosed and taken into account in the calculation used to determine unfairness.

My reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench* is that it sets out principles which can apply to credit brokers other than car dealer–credit brokers. So I've taken into account those principles when considering the allegations of undisclosed payments of commission in this complaint.

In *Hopcraft, Johnson and Wrench* the Supreme Court ruled that, in each of the three cases, commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or for 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 & others 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:

- 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";* [6]
- The failure to disclose the commission; and
- 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:

- The size of the commission as a proportion of the charge for credit;
- The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
- The characteristics of the consumer;
- 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
- Compliance with the regulatory rules.

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[5] The PR's submission references the Court of Appeal judgment (*Johnson v FirstRand Bank Limited, Wrench v FirstRand Bank Limited and Hopcraft v Close Brothers* [2024] EWCA Civ 1106 *("Johnson"*)). The Supreme Court has since handed down its judgment clarifying the position in law.
[6] *Hopcraft, Johnson and Wrench* (para 327).

After careful consideration, I don't think *Hopcraft, Johnson and Wrench* assists Mrs L in arguing that her credit relationship with the Lender was unfair to her for reasons relating to commission, given the facts and circumstances of this complaint.

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

I recognise that 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 her. But as I noted above, case law on section 140A makes clear that regulatory breaches do not automatically lead to an unfair credit relationship, and that such breaches and any consequences must be considered in the round rather than in a narrow or technical way.

With that being the case, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, I'm not minded to think any such failure is itself a reason to find the credit relationship in question unfair to Mrs L. I say this for the following reasons.

In stark contrast to the facts in Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging Mrs L's Credit Agreement wasn't high. At £566:96, it was only 4% of the amount borrowed and even less than that (3.71%) as a proportion of the charge for credit, which is the calculation the Supreme Court used.

Had Mrs L known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at this level, I'm not currently persuaded that she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mrs L wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the impact of commission on the cost of the credit she needed for a timeshare she wanted doesn't strike me as disproportionate. So, I think she would still have taken out the loan to fund her purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, 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. As it wasn't acting as an agent of Mrs L but as the supplier of contractual rights she 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 her when arranging the Credit Agreement and thus a fiduciary duty.

I don't consider it necessary for me to take into account any commission the Supplier might have paid to its sales representatives, or that this should be disclosed or factored into any calculation used to determine unfairness. Even if any such arrangement was in place (and I make no finding in this respect), its disclosure and/or payment would be further removed from any obligations the Supplier might have held, and even less likely to have an impact on Mrs L's decision to enter into the Credit Agreement.

Overall, I'm don't intend to conclude that 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 Mrs L.

So, given all of the factors I've looked at and having taken all of her into account, I'm still not persuaded that the credit relationship between Mrs L and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: alternative grounds for complaint

Although the PR's submissions expressed the view that payment of commission made the financial arrangements unfair, I'm conscious that there might be some alternative grounds that could constitute separate and freestanding complaints to Mrs L's allegation of an unfair credit relationship.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because the Supplier took a payment of commission from the Lender without telling Mrs L (that is, secretly). But given I'm not persuaded the Supplier – when acting as credit broker – owed Mrs L a fiduciary duty, I can't see how I could properly uphold on this ground.

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 it and the Supplier. As I've said, it's possible that the Lender failed to follow the relevant regulatory guidance. But I don't think any such failure on the Lender's part leads to my awarding compensation to Mrs L because, for the reasons I also set out above, I think Mrs L would still have taken out the loan to fund her purchase at the Time of Sale had the commission arrangements been adequately disclosed at that time.

Conclusion

In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with Mrs L under the Credit Agreement that was unfair to her for the purposes of section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate her.

Responses to my provisional decisions

The Lender accepted my provisional decision. The PR disagreed with my overall conclusion. It made submissions which were primarily concerned with the suggestion that Mrs L's Fractional Club membership had been marketed and sold as an investment in contravention of a prohibition on selling timeshares in that way. In summary, it said:

(1) regulation 14(3) imposes a strict prohibition, and it is not necessary to demonstrate that a breach was the sole or dominant cause of the transaction; it is enough that it had a material influence or that the sale was the result of a tainted sales process;

(2) the fact that Mr and Mrs L's evidence was given in a template is not a proper basis for

rejecting it;

(3) Mr and Mrs L's account is the only first-hand account, and so I should accept it;

(4) they surely would not have bought such an expensive product unless they were expecting a financial return;

(5) I had only said that I found that their evidence was unreliable, not that it was false;

(6) standard disclaimers in the sales paperwork do not override oral representations;

(7) my provisional decision departs from other decisions in similar timeshare cases.

As a result, the complaint was passed back to me for further thought and my final decision.

The PR also asked for disclosure of the Lender's response to the investigator's uphold view. I am unable to share that because it was sent to us in confidence. But I do not think that the PR is prejudiced by that, because it is not the Lender's submissions which they have to answer, but my own provisional findings.

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[7] say that in considering what is fair and reasonable in all the circumstances of the complaint, I will take into account, where relevant: (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when appropriate), what I consider to have been good industry practice at the relevant time.

What I've decided – and why

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

And having done that afresh, I'm not persuaded to depart from my provisional decision, for reasons I'll now explain.

Before I do, I want to make it clear that I recognise that this complaint, when originally made, was wide ranging and made on a number of different grounds, including:

(1) Misrepresentations by the Supplier at the Time of Sale, giving Mrs L a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.

(2) A breach of contract by the Supplier, giving Mrs L a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.

(3) 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.

However, as the PR's more concise response to my provisional decision relates, in the main, to point (3), if I haven't been provided with new arguments and/or evidence to consider in relation to (1) or (2), I see no reason to change or add to my conclusions (as set out in the summary of my provisional decision above) in relation to them.

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[7] Specifically Rule 3.6.4 in the Dispute Resolution Rules found in the Financial Conduct Authority's Handbook for Rules and Guidance.

Indeed, as I said in my provisional decision, my role as an ombudsman is to decide what's fair and reasonable in the circumstances of this complaint – rather than address every single point that's been made. And with that being the case, while I have read all of the PR's submissions in full, 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's more, it is important to make the point that, in contrast to what might happen in court, neither side to this complaint has a burden of proof that it must discharge. After all, the jurisdiction under which I'm deciding this complaint is inquisitorial rather than adversarial – which means that my findings are made, on the balance of probabilities, in light of the evidence and/or arguments received from both sides.

So, while the PR argues in response to my provisional decision that, under section 140B(9) of the CCA, it is for the Lender to prove that its credit relationship with Mrs L wasn't unfair simply because she alleges that it was, that fails to understand that the Financial Ombudsman Service deals with complaints rather than causes of action. And, in any event, to suggest that unsubstantiated allegations of fact must be disproved by the Lender if the credit relationship isn't to be deemed unfair also oversimplifies if not misunderstands the legal position. As HHJ David Cooke said in paragraph 26 of his judgment on *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch):

"…the onus is on [the creditor] *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* [the borrower alleging an unfair credit relationship] *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."* [8]

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

As I said in my provisional decision, the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, notwithstanding the disclaimers in the sales paperwork. So I accepted, and I still accept, that it's possible that Fractional Club membership was marketed and sold to Mrs L as an investment orally. I certainly didn't say that a standard disclaimer automatically gets the Supplier off the hook.

But I also thought and still think that it isn't necessary to make a formal finding on that particular issue for the purposes of my determination on this complaint, because a breach of regulation 14(3) by the Supplier is not itself determinative of the outcome in this complaint unless the impact of such a breach suggested otherwise.

The PR disagrees with that and cites the judgment of Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* in support – saying that she found that the selling of a timeshare as an investment (i.e. in a breach of regulation 14(3) of the Timeshare Regulations) was, itself, sufficient to create an unfair credit relationship.

[8] As approved by the Supreme Court in *Smith v. The Royal Bank of Scotland plc* [2023] UKSC 34 – see paragraph 40.

However, on my reading of *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice didn't find that a breach of regulation14(3) of the Timeshare Regulations was *"causative of the legal relations entered into".* She recognised that such a breach was *"conduct that knocks away the central consumer protection safeguard"*, but she went on to say that it was the ombudsmen behind the two reviewed decisions who found that such a breach was, given the facts and circumstances of the relevant complaints, causative of the consumers in question purchasing their timeshares and taking out loans to do so.

What's more, the Supreme Court's judgment in *Plevin* makes it clear that regulatory breaches do not automatically 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 v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*') and *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*') (respectively) on causation.

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 still seems to me that, if I am to conclude that a breach of regulation 14(3) led to a credit relationship between Mrs L and the Lender that was unfair to her and warranted relief as a result, then whether the Supplier's breach of regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is still an important consideration.

Indeed, doing that accords with common sense, for if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it would be difficult to attribute any particular importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

<u>If there had been a breach of regulation 14(3), would it have rendered the credit relationship between Mrs L and the Lender unfair to her?</u>

Having found that it was possible that the Supplier breached regulation 14(3) of the

Timeshare Regulations at the Time of Sale, I have considered (as I did in my provisional decision) what impact that breach (if there was one) would have had on the fairness of the credit relationship between Mrs L and the Lender under the Credit Agreement and related Purchase Agreement.

Just because some other complaints have been upheld by other ombudsmen (and sometimes by me) does not mean that this complaint has to be upheld too. Each case turns on its own facts and on its own evidence. Similar allegations do not always result in similar outcomes. The evidence in one case may be more persuasive than the evidence in another.

And on my reading of the evidence before me, I'm still not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mrs L decided to go ahead with their purchase, such that she would have made an entirely different purchasing decision had there not been a breach of regulation 14(3). And I say that for essentially the same reasons I gave in my provisional decision. I will explain why I have not changed my mind.

Firstly, the fact that part of their evidence was given in a template means that it was not written by them, but was written for them by someone else. So it does not necessarily reflect their recollections. Secondly, the evidence which *is* written in their own words is not consistent with what is written in the template, which casts doubt on the accuracy of the template's contents. Thirdly, just because their account (that is, so much of their account as is actually written by them) is a first-hand account of what happened does not mean that I am obliged to accept it without scrutiny. Fourthly, I do not have to go so far as to find that their evidence is definitely *false,* only that I do not accept that it is reliable and consistent enough for me to find that their decision to purchase was affected by any breach of regulation 14(3).

And fifthly, the inference which the PR invites me to draw from the various expenses that were incurred by Mr and Mrs L under the Purchase Agreement and (in Mrs L's case) the Credit Agreement does not persuade me that they would not have entered into those agreements but for the prospect of getting a financial return to off-set the cost. That is mainly because Mr and Mrs L do not refer to this in their evidence, and also because they appear to have been motivated by the prospect of better holidays.

On balance, therefore, for the reasons I've set out above, I don't think that the credit relationship between Mrs L and the Lender was unfair to her even if the Supplier had breached regulation 14(3).

Conclusion

Having adopted my provisional findings, and reconsidered the facts and circumstances of this complaint, I still I don't think the Lender acted unfairly or unreasonably when it dealt with Mrs L's section 75 claim. I'm still not persuaded that the Lender was party to a credit relationship with Mrs L that was unfair to her 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 Mrs L.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 7 May 2026.

Richard Wood
Ombudsman