DRN-5184021

The complaint

Mrs H's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner 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 claims under Section 75 of the CCA.

Because the timeshare in question was bought by both Mrs H and her husband Mr H, I will refer to them both where applicable. However, as the associated credit agreement was in Mrs H's sole name, she is the only eligible complainant here.

What happened

Mr and Mrs H purchased membership of a timeshare (the 'Fractional Club 1') from a timeshare provider (the 'Supplier') on 19 January 2012 (the 'Time of Sale 1'). They entered into an agreement with the Supplier to buy 1,290 fractional points at a cost of £15,651 plus £898 for the first year's management fees (the 'Purchase Agreement 1').

Fractional Club 1 membership was asset backed – which meant it gave Mr and Mrs H 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 1') after their membership term ends.

As part payment for their Fractional Club 1 membership, Mrs H took finance in her sole name (the 'Credit Agreement 1') from the Lender of £15,307. This loan also consolidated a previous loan from the Lender that was taken out for a previous timeshare membership.

The remaining balance of the purchase price of £4,792 was paid by Mr and Mrs H taking a finance agreement from another provider ('Business B'), a complaint about which is being considered separately by this Service.

On 12 May 2015 Mr and Mrs H traded in their Fractional Club 1 membership, and purchased a further membership (the 'Fractional Club 2') from the Supplier (the 'Time of Sale 2'). They entered into an agreement with the Supplier to buy 2,090 fractional points at a cost of £18,875 (the 'Purchase Agreement 2') but after trading in their existing membership[1], they ended up paying £10,490.

They paid for Fractional Club 2 by taking finance of £29,506 in Mrs H's sole name (the 'Credit Agreement 2'). This loan consolidated both the outstanding balances from Credit Agreement 1 and the loan from Business B.

Mr and Mrs H made a further fractional purchase from the Supplier in 2016 where they traded in all of their fractional points to purchase Fractional Club 3. This purchase, and the associated credit agreement with another lender is not being considered here and is included for background purposes only.

[1] By trading in their Fractional Club 1 membership, Mr and Mrs H relinquished their rights to receive their share of the sales proceeds of the associated allocated property.

Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 15 October 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale 1 and 2 giving her 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(s) of Sale

Mrs H said that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale 1 and 2 – namely that the Supplier:

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

Mrs H says that she 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to her.

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

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

- The Fractional Club(s) were Collective Investment Schemes ('CIS') which were unlawful for the Supplier to promote and sell.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- There was a lack of availability and the Supplier's resorts were not exclusive to members.
- The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- The Supplier's sales presentation at the Times 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.

Other than acknowledging her complaint, the Lender did not send Mrs H a final response, so on 22 December 2021 the PR referred Mrs H's complaint to the Financial Ombudsman Service. The complaint was allocated to an Investigator, who asked the PR if there was a witness statement or testimony from Mrs H. The PR submitted a witness statement, dated 22 March 2021 and which was electronically signed by Mrs H.

Having considered everything, the Investigator thought:

- Mrs H had made her complaint that she was party to an unfair credit relationship with BPF (relating to Credit Agreement 1) too late.
- Mrs H's complaint of unfairness relating to Credit Agreement 2 ought not to be upheld.
- The Lender had a defence under the Limitation Act 1980 (the 'LA') to both of Mrs H's claims under Section 75 of the CCA.
- He was not persuaded that the loans in question were unaffordable for Mrs H.

Mrs H did not agree with either his assessment of our jurisdiction or the merits of her complaints. As no agreement could be reached, the matter has come to me to consider.

The provisional decision

I set out my initial thoughts in a provisional decision (the 'PD') because, having considered everything, I thought that part of Mrs H's complaint, specifically that the Lender was party to an unfair credit relationship with her (relating to the Time of Sale 1 and Credit Agreement 1) under Section 140A of the CCA, had been made too late, so was not in the jurisdiction of this Service. But I thought that the merits of her other complaints, relating to the fairness of her credit relationship with the Lender (relating to the Time of Sale 2 and Credit Agreement 2), and how the Lender dealt with all of her claims under Section 75 of the CCA, could be considered as they had been made in time under the regulator's rules. I then went on to set out my thoughts on the merits of those remaining complaint points.

Having received responses from both sides, I made a decision regarding this Service's jurisdiction. I set out that I was satisfied that this Service was unable to consider the merits of Mrs H's complaint regarding the fairness of her credit relationship with the Lender (relating only to Credit Agreement 1) because she had made the complaint too late under the regulator's rules.

As regards the merits of the remaining complaint points, in the PD I said:

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

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.

Mr and Mrs H entered into a contract with the Supplier at the Time of Sale 1 that was financed by a debtor-creditor-supplier agreement in Mrs H's name. So, I am satisfied that Section 75 of the CCA applies here and the Lender doesn't dispute this.

Section 75 says that, in certain circumstances, the borrower (Mrs H) under a credit agreement has an equal right to claim against the credit provider (the Lender) if there's either a breach of contract or misrepresentation by the supplier of goods or services (the Fractional Club 1). And, once a claim is made, the creditor must properly consider it and pay compensation if needed. Mrs H's complaint is that the Lender did not do that.

But the LA imposes time limits for people to start legal proceedings – and there are different time limits for different types of claims. Essentially, this means that if someone waits too long to make a claim, the court will usually say it's 'time-barred'. For this reason, if a consumer makes a claim after the relevant time-limit has expired, we'd usually say it was fair for the

creditor to rely on the LA to decline the claim.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim a consumer could make against the Supplier. A claim for misrepresentation against the Supplier, like that made by Mrs H here, would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued. But a claim, like the one in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

This sale occurred on 19 January 2012, and Mrs H has made a claim to the Lender under Section 75 of the CCA on 15 October 2021. She said that she and Mr H made this purchase based on the alleged misrepresentations of the Supplier, which Mrs H says they relied on. And as a credit agreement from the Lender was used to help finance this purchase, it was when Mrs H entered into the credit agreement that she suffered a loss – which means it was at that time she had everything she needed to make a claim.

So, in relation to the Time of Sale 1, Mrs H needed to notify the Lender of her claim by 19 January 2018 at the latest. But Mrs H first notified the Lender of her claims of misrepresentations by the Supplier on 15 October 2021. As that was more than six years after she entered into the credit agreement and related purchase agreement, although the Lender did not specifically rely on this defence, I don't think it would have been unfair or unreasonable for it to decline Mrs H's claim for that reason.

As such I do not think the Lender needs to do anything further in relation to this aspect of the complaint.

[…]

<u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale 2</u>

I have already explained the connected lender liability regime which was introduced under Section 75 of the CCA. And having considered everything I am satisfied that Section 75 of the CCA applies here, and the Lender doesn't dispute this.

However, as I have also explained, the LA imposes time limits for people to start legal proceedings, and the same conditions that related to Mrs H's claim relating to the alleged misrepresentations at Time of Sale 1, apply here.

Mrs H has said that she and Mr H were induced into purchasing the Fractional Club 2 membership as a result of the alleged misrepresentations made by the Supplier at the Time of Sale 2. This was on 12 May 2015, and a credit agreement from the Lender was used to make this purchase. So, it was when Mrs H entered into Credit Agreement 2 that she suffered a loss and had everything she needed to make a claim.

So, in relation to the Time of Sale 2, Mrs H needed to notify the Lender of her claim by 12 May 2021 at the latest. But Mrs H first notified the Lender of her claims of misrepresentations by the Supplier on 15 October 2021. As that was more than six years after she entered into the credit agreement and related purchase agreement, although the Lender did not specifically rely on this defence, I don't think it would have been unfair or unreasonable for it to decline Mrs H's claim for that reason.

As such I do not think the Lender needs to do anything further in relation to this aspect of the complaint.

Section 140A of the CCA – did the Lender participate in an unfair credit relationship under Credit Agreement 2?

Section 140A of the CCA is relevant law, so I do have to consider it. In determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mrs H 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 2) 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 H's membership of the Fractional Club 2 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."[2]

So, the Supplier is deemed to be the 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 Mrs H 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 2 – 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 2, including the contractual documentation and disclaimers made by the Supplier;*

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

3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale 2; and*
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 Mrs H and the Lender.

The Supplier's sales & marketing practices at the Time of Sale 2

Mrs H'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.

But in addition to those, the misrepresentations I've described previously could also be something that led to an unfair debtor-creditor relationship[3], so I've considered what Mrs H had to say with this in mind.

The PR said the Supplier told Mr and Mrs H that Fractional Club 2 membership had a guaranteed end date 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 2 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 2 can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property 2 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 H are included.

The PR also said that Fractional Club 2 membership had been misrepresented by the Supplier because Mr and Mrs H 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 H's share in the Allocated Property 2 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.

In addition, the PR also said in the letter of complaint that the Supplier told Mr and Mrs H 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 H's membership plainly did have an investment element to it.

The Letter of Complaint went on to give other reasons why Mrs H's credit relationship with the Lender was unfair to her.

These include the allegation that the right checks weren't carried out before the Lender lent to Mrs H. 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 Mrs H was actually unaffordable, 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 H. If there is any further information on this (or any other points raised in this provisional decision) that Mrs H wishes to provide, I would invite her to do so in response to this provisional decision.

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

The PR also says that the contractual terms governing the ongoing costs of Fractional Club 2 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.

Regarding the duration of the membership, the Information Statement made clear to Mr and Mrs H that the membership lasted for 19 years. I acknowledge that the sale of the Allocated Property 2 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.

I'm not persuaded, therefore, that Mrs H's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says her credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club 2 membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

<u>Was Fractional Club 2 membership marketed and sold at the Time of Sale 2 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 H's Fractional Club 2 membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

As outlined above, the PR has argued that the membership was a CIS and that led to an unfair credit relationship. However, as the Purchase Agreement 2 qualified as a 'timeshare contract' for the purposes of the Timeshare Regulations (because Mr and Mrs H acquired holiday rights when purchasing fractional membership), it was exempt from giving rise to a CIS (see paragraphs 39-54 in Shawbrook & BPF v FOS).

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 PR says that the Supplier did exactly that at the Time of Sale 2. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, 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 H's share in the Allocated Property 2 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 2 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 the Fractional Club 2 membership was marketed or sold to Mr and Mrs H in a way that breached Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club 2 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 2 as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, the financial value of their share in the net sales proceeds of the Allocated Property 2 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 2 membership was not sold to Mr and Mrs H as an investment.

But that said, I do acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club 2 membership as an investment. So, I do accept that it's possible that Fractional Club 2 membership was marketed and sold to Mr and Mrs H 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 2 as an important feature of Fractional Club 2 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 2, 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 Mrs H 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.

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 Mrs H and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[4] led them to enter into the Purchase Agreement 2, and Mrs H into the Credit Agreement 2 is an important consideration.

Mrs H set out her recollections of all her purchases from the Supplier in her statement. And this included the Time of Sale 2 where she and Mr H bought their Fractional Club 2 membership. In relation to this sale, she wrote:

> *"On the 12th May 2015, we were collected from our apartment, by a youngish European lady, with long blonde hair and who had an accent. During breakfast, she said that she was a [Supplier] member, and liked the place so much that she decided to work for them. There was another conversation about luxury holidays and [the Supplier]'s "Signature Suites" which were becoming available and which she would like to show us.*
> *After breakfast, we were taken to view the Signature Suites. They were the utmost in luxury, large and beautifully furnished, with large terraces, with nice views, sun loungers and hot tubs. Even the toiletries were top of the range, made by the White Company, with white bathrobes and mules.*
> *We were then taken to the conference centre, where they talked to us about "upgrading" to the Signature Suites and the cost of doing so. We were told that the Signature Suites were also fractional."*

[4] which, having taken place during its antecedent negotiations with Mrs H, 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).

Mrs H then goes on to talk about how she and Mr H had previously agreed to purchase a holiday home in Turkey from the Supplier in May 2015, and had lost their £5,000 deposit when they subsequently decided not to go ahead with it.

> *"We told the guy there that we were not happy to have lost our £5,000.00 deposit on the cancelled Turkey transaction, and he said he would do us a deal so we would get our money back. They said they would work it into price of the Signature Suite, and we would get our money back in the calculations.*
>
> *After approximately five-six hours, we agreed to trade in our previous fractional ownership for 2,090 Fractional Rights in [the Supplier's Signature Collection]".*

Mrs H then moves on to talk about her next purchase, in 2016.

So, I cannot see, in Mrs H's initial recollections of the events, which was set out prior to the Letter of Complaint, that there is any evidence that their purchase of Fractional Club 2 was motivated by any investment element. It seems to me that they liked the idea of upgrading to the more luxurious apartment. And I don't think it can be said that the more luxurious nature of the Allocated Property 2 was regarded by Mr and Mrs H to be something which would make them a profit – the luxuries Mrs H set out were its fixtures and fittings, and the things that they would use while staying in it, not something that they were interested in because it would increase the value of it when sold, for example.

From what I can see, Mr and Mrs H's purchase of Fractional Club 2 was motivated by the quality of the Allocated Property 2, and the luxurious nature of the holidays they would be able to take with it. And if the potential profit from the eventual sale of the Allocated Property 2 was material to their decision to make the purchase, as the PR went on to say in the Letter of Complaint, I find it hard to understand why that isn't mentioned at all in Mrs H's statement.

Indeed, at the conclusion to her statement, in what seems to be a summary, she writes:

> *"Even after "upgrading" it was always a hassle booking holidays with [the Supplier]. We were also told that we were joining an exclusive Club, but we subsequently discovered that members of the public could book holidays with [the Supplier], on the internet.*
>
> *In all this time, our family only used the Mijas Costa site approximately four or five times, and never had holidays in Tenerife. Each time they booked, we had to purchase a Guest Certificate, at an extra cost.*
>
> *By the end, we were so disappointed with what we had got, for our money, we decided that we had been duped. So, we decided to contact [the PR], to get out of [the membership] and see if we could get some compensation."*

So, Mrs H's testimony, which I think is useful in trying to understand what happened at the Time of Sale 2, provides good evidence of her and Mr H's motivation when it came to the purchase. And when they set out their reasons for wishing to cancel, these were all to do with the problems associated with using their membership for holidays.

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

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 Mrs H was unfair to her 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 didn't accept Mrs H's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement 2 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 to direct the Lender to compensate her."

The responses to the Provisional Decision

The Lender responded to accept what I had said in the PD and had nothing further to add.

The PR also responded but did not accept it. It provided a lengthy response, but this only related to the allegation that the Supplier had breached Regulation 14(3) at the Time(s) of Sale which rendered the credit relationships unfair to Mrs H. It also raised an allegation that there had been undisclosed payments of commission by the Lender to the Supplier for its arranging of Credit Agreement 1 and Credit Agreement 2.

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 either 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 Mrs H. 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 Mrs H 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 Mrs H had a material impact on her decision to enter into the Credit Agreement. At £737.65, it was only 2.5% of the amount borrowed and even less than that (2.32%) 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 Mrs H such that the Lender needed to take any action in redress. After all, Mrs H wanted Fractional Club 2 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 didn't strike me as disproportionate. So, I thought she would still have taken out the loan to fund her 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 Mrs H (i.e. secretly) because I didn't think the

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

Supplier, when acting as a credit broker, owed Mrs H 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 reason to uphold the complaint, because I thought Mrs H 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 accepted my thoughts on the commission arrangement with no further comment. The PR also responded but did not accept what I had said in this regard. It made further submissions in support of Mrs H'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

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

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

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

The FCA's Principles

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

- Principle 6
- Principle 7
- Principle 8

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 in my subsequent correspondence, I find it offers no persuasive reason to depart from the conclusions I've previously set out. I'll explain why.

The PR originally raised various points of complaint, such as those giving rise to Mrs H's Section 75 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 Mrs H 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 Mrs H 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 Mrs H.

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 Mrs H 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 2 membership was marketed and/or sold to Mrs H 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 Mrs H'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 Mrs H's recollections and the Supplier's training materials, I have already considered these and what was said. And I set out in my provisional decision the reasons why I didn't find that evidence sufficiently persuasive that Mr and Mrs H's purchase decision would have been any different, given the other motivational factors Mrs H had described. Having re-examined Mrs H's statement that remains my view, for the reasons previously given.

So, as I said before, whether or not the Supplier marketed or sold Fractional Club 2 membership as an investment in breach of Regulation 14(3), I'm not persuaded Mr and Mrs H'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 Mrs H and the Lender was not rendered unfair to her for this reason.

The provision of information by the Supplier at the Time(s) 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 Mrs H is able to make in support of her position. The PR has demonstrated its ability to present Mrs H'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

[7] *Carney* and *Kerrigan*

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 Mrs H, 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 Mrs H's arguments that her credit relationship with the Lender (relating to Credit Agreement 2) was unfair to her 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 Mrs H's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mrs H, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mrs H, 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 a commission payment. I have already set out why, in my view, this

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[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.

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 Mrs H and the Lender under the Credit Agreement 2 and related Purchase Agreement 2 was unfair to her such that it warrants the Lender offering any redress.

Commission: The Alternative Grounds of Complaint

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

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mrs H (that is, secretly). The second relates to the Lender's compliance with the regulatory guidance in place at the Time(s) of Sale insofar as it was relevant to disclosing the commission arrangements between them.

For the reasons I set out previously, I'm not persuaded that the Supplier – when acting as credit broker – owed Mrs H 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 her. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time(s) 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 she would still have taken out the loans to fund their purchases at the Time(s) of Sale had there been more adequate disclosure of the commission arrangements that applied at those times.

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 dealt with Mrs H's section 75 claims;
- I'm not persuaded that the Lender was party to a credit relationship with Mrs H (relating to Credit Agreement 2) 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 H.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 10 March 2026.

Chris Riggs
Ombudsman