DRN-5757967

The complaint

Mr N and Ms R's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mr N and Ms R purchased membership of a timeshare (the 'Fractional Club - FCM') from a timeshare provider (the 'Supplier') on 2 January 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1010 fractional points at a cost of £13,130 (the 'Purchase Agreement').

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

Mr N and Ms R paid for their FCM by making an advance payment of £500 and taking finance of £12,630 from the Lender, in Mr N and Ms R's names (the 'Credit Agreement').

Mr N and Ms R – using a professional representative (the 'PR') – wrote to the Lender on 1 June 2023 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them 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.
4. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

Mr N and Ms R say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that FCM had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.
4. Mr N and Ms R say that they have 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, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr N and Ms R.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr N and Ms R say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. Mr N and Ms R also say that they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, Mr N and Ms R say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr N and Ms R.

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

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

1. The contractual terms setting out (i) the duration of their FCM and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under The Consumer Rights Act 2015 ('CRA')].
2. They were pressured into purchasing FCM by the Supplier.
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
4. The money lent to them under the Credit Agreement was unaffordable for them.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs

The Lender dealt with Mr N and Ms R's concerns as a complaint and issued its final response letter on 26 May 2023, rejecting it on every ground.

Mr N and Ms R then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.The PR on Mr N and Ms R's behalf disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. The PR provided what it said was a supplementary statement from Mr N and Ms R. In summary, it also said:

- The draft letter of complaint (LOC) to the Lender was prepared based on Mr N and Ms R's instructions and a telephone conference, which was approved by them prior to being sent to the Lender on 5 May 2023.
- The LOC dealt with how Mr N and Ms R were persuaded to purchase the FCM on 2 January 2019 and they were pressured into purchasing the FCM as an investment.
- It summarised complaint points made in the LOC.
- It also referred to The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') and the Resort Development Organisation Code of Conduct.

I issued a provisional decision. In summary, I said I didn't think that the Lender acted unfairly or unreasonably when it dealt with Mr N and Ms R's section 75 claims. And I didn't find any of the arguments put forward demonstrated that the credit agreement between Mr N and Ms

R and the Lender was unfair to them under section 140A of the CCA. And in the absence of any other reason why it would be fair or reasonable to direct the Lender to compensate Mr N and Ms R, I said I didn't propose to uphold the complaint.

The Lender accepted my provisional decision and said it had nothing further to add. The PR didn't accept what I had said. It made further submissions in support of Mr N and Ms R's position. Having received and reviewed these, I'm now proceeding with my final decision.

In doing so, I'm conscious that the PR has made a series of assertions surrounding the provision of information relating to commission arrangements. These include, among other 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[1] 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:

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

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]

<u>The FCA's Principles</u>

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

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

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

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it. The PR originally raised various points of complaint, such as those giving rise to Mr N and Ms R's section 75 claim, 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.

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

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr N and Ms R could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that FCM had been misrepresented by the Supplier because Mr N and Ms R were told that they were buying an interest in a specific piece 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 N and Ms R share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr N and Ms R have concerns about the way in which their FCM was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because Mr N and Ms R have also said there isn't any guarantee the property would be sold at the end of 19 years. But after the membership term expired, Mr N and Ms R's allocated property would be placed for sale and their membership ended when the Allocated Property was sold, subject to market conditions. That was made clear in the paperwork they signed at the Time of Sale.

I've also considered Mr N and Ms R's own evidence and thought about what I know about the Supplier's sales process to see if they could have been told something by the Supplier during the sale that there was a guaranteed end date. But I'm not aware of anything in the way that the Supplier normally sold FCM that makes me think they would have been told that.

Regarding the lack of exclusivity of the accommodation, the contemporaneous documents I've seen relating to the other accommodation available through the membership, do not say that the resorts in the Supplier's portfolio were exclusive to members. Resorts owned by the Supplier were described as "mixed use", while other resorts were described as resorts in which the Supplier had "secured accommodation…under its control" or which were "available through [our] partnerships with other resorts". None of this appears to state or imply that the resorts within the portfolio could only be booked by members. While I've no doubt the Supplier would have taken the opportunity to promote the quality of its resorts and services, I've not seen evidence that it made specific false statements about them.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr N and Ms R by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr N and Ms R any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already summarised how Section 75 of the CCA works and why it gives Mr N and Ms R a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Mr N and Ms R say there was a lack of availability of holiday accommodation. And they say they found it difficult to book the holidays they wanted, when they wanted, using their FCM points – which, on my reading of the complaint, suggests they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr N and Ms R states that the availability of holidays was/is subject to demand. I accept that they 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.

Mr N and Ms R also say, the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that they are saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sale proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr N and Ms R 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 when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr N and Ms R was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr N and Ms R also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts

of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Mr N and Ms R 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 standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Time of Sale in relation to Fractional Club membership, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

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

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

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

They include the allegation that the Supplier misled Mr N and Ms R and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr N and Ms R. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr N and Ms R was actually unaffordable before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr N and Ms R. And I've not been provided with any further evidence or arguments in response to my provisional decision that suggest that it was.

I've also noted that the Lender has said that Mr N and Ms R only paid £1,150 towards their loan agreement, out of the £12,630 borrowed. And whilst the PR's LOC says the loan is still outstanding, the Lender has said that the loan has been closed, and it has written off the balance. The internal screenshot record it has provided, indicates that this took place in November 2022. The Lender went on to say that the Supplier's records indicated that the difficulties in making the payments were due to changes in their circumstances.

Mr N and Ms R say that they were pressured by the Supplier into purchasing FCM at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase FCM

when they simply did not want to. They were also given a 14-day cooling off period, and, in my opinion, they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr N and Ms R made the decision to purchase FCM because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr N and Ms R's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that FCM was marketed and sold to them as an investment in breach of the prohibition against selling timeshares in that way.

Was FCM marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

I've already summarised above the concerns raised by the PR on behalf of Mr N and Ms R to the Lender in the LOC of 1 June 2023. But that letter and the referral to this Service, didn't raise any concerns about the FCM being sold to Mr N and Ms R as an investment in contravention of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). That allegation and supporting witness statement, came in response to the non-uphold view issued by the investigator.

As that allegation hasn't been made to the Lender prior to the investigator issuing their view, I've carefully considered whether it's appropriate for me to consider that new complaint point, as the Lender hasn't previously had the opportunity to respond to that. And in the particular circumstances of this complaint, I have concluded that it is appropriate for me to consider that new complaint point. I say this because I am cognisant of the length of time Mr N and Ms R have been waiting for a decision on their complaint. And as a result, I don't want to delay providing Mr N and Ms R with a decision on their complaint any longer than is necessary. I can do this without any prejudice to either party through the issuing of this provisional decision, which will allow the parties to provide any responses they may want to make, prior to my making a final determination on the issues that have now fully been aired by Mr N and Ms R.

The Lender does not dispute, and I am satisfied, that Mr N and Ms R's FCM met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."
But the PR now says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, 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 N and Ms R's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all

investments, that was more than what they first put into it. But the fact that FCM 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 FCM was marketed or sold to Mr N and Ms R as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that FCM 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 FCM 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 Mr N and Ms R, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that FCM was not sold to Mr N and Ms R as an investment. So, it's *possible* that FCM wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned FCM as an investment. So, I accept that it's equally possible that FCM was marketed and sold to Mr N and Ms R 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 is not necessary to make a formal finding on that particular issue for the purposes of this decision.

The PR has questioned whether my provisional conclusions run contrary to precedent decisions issued by my ombudsman colleagues and the judgment handed down in *Shawbrook and BPF v FOS*. I don't believe they do. However, for the avoidance of doubt, other decisions issued by other ombudsmen do not have a precedent effect like some court judgments might, and each ombudsman must determine each case on its own specific facts. Further, the judgment referred to did not make a blanket finding that all products of the type Mr N and Ms R purchased were mis-sold in the way the PR appears to be suggesting.

Was the credit relationship between the Lender and Mr N and Ms R rendered unfair to them?

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.

And in light of what the courts had to say in *Carney* and *Kerrigan,* it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr N and

Ms R and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

Mr N and Ms R have provided a statement of their recollections of the sale. But I have a number of concerns regarding it. Firstly, I've noted it was provided in response to the investigator's assessment that didn't uphold the complaint. Also, it was received more than five years after the sale complained about, and after the case of Shawbrook Bank Limited v Financial Ombudsman Service Limited [2023] EWHC 1069 (Admin), a case which highlighted the potential significance of breaches of Regulation 14(3). I'll elaborate.

When the PR referred the complaint to this service, its covering letter set out the issues complained about. It summarised the concerns regarding misrepresentations it considered the Lender had made to Mr N and Ms R. There was no mention in that letter of Mr N and Ms R being told that FCM was an investment, that would provide them with a profit when the FCM was sold.

In its response to the view the PR said:

"….we wish to point out the draft letter of complaint to (The Lender) was prepared based on our clients' instructions, as well as a telephone conference between Mr N and the writer…..The letter was approved by our clients, and sent to.. (The Lender) on 5 May 2023. The letter of complaint dealt with how, when our clients were persuaded to purchase the fractional product, in Spain, on the 2nd January 2019, they were pressured into purchasing the fractional product as an investment."

It seems to me from what the PR has said, that some time and care was taken in taking Mr N and Ms R's instructions as to the circumstances of the sale of the FCM. And their recollections which were set out in the LOC, were approved by them. With that being the case, I am puzzled as to why in the LOC sent to the Lender, which was provided to this service as a summary of Mr N and Ms R's concerns; that there was no mention of the FCM being sold as an investment, that would provide a profit.

If that had been the case, I would have expected that concern to have been set out in the LOC. And the impression I have, is that the provision of the witness statement and reference to the FCM being sold as an investment, is as a result of a realisation of the potential significance of the conclusions reached by The Honourable Mrs Justice Collins Rice, in the case of Shawbrook Bank Limited v Financial Ombudsman Service Limited, in respect of the potential significance of breaches of Regulation 14(3).

So, as a result, I think this all limits the weight I can reasonably apply to Mr N and Ms R's statement and the further representations made on their behalf by the PR.

It seems to me from the LOC and the covering letter to this service, that Mr N and Ms R were motivated to purchase the FCM, as they were impressed with the quality of the accommodation they were shown and their perception that it was exclusive to members.

I've considered the statement provided by Mr N and Ms R after the Investigator's assessment. I've noted that they do mention being told they would recoup their investment with a profit. However, my impression from what they have said is that their concerns appear to be focussed on the pressure they say they felt during the presentation day to join up. And as I've already explained, I think there is insufficient evidence to demonstrate that Mr N and Ms R made the decision to purchase FCM, because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

And as I've already said, there was no suggestion in Mr N and Ms R's initial recollections which were set out in the LOC, that the Supplier led them to believe that the FCM was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis.

While the PR has referred me to Mr N and Ms R's recollections and the Supplier's training materials, I have already considered these and what was said. And as I've explained above, I haven't found that evidence sufficiently persuasive that Mr N and Ms R's purchase decision would have been any different, given the other motivational factors they had described. Having re-examined Mr N and Ms R's statement that remains my view, for the reasons previously given.

I remind the PR that in my provisional decision, as I've explained again above, I accepted the possibility that Fractional Club membership was marketed and/or sold to Mr N and Ms R as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law[2] indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Mr N and Ms R'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.

So, as I said before whether or not the Supplier marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3), I'm not persuaded Mr N and Ms R's decision to make the purchase was materially impacted by the prospect of a financial gain. It follows that I find the credit relationship between Mr N and Ms R and the Lender was not rendered unfair to them for this reason. On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr N and Ms R and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr N and Ms R when they purchased membership of the Fractional Club at the Time of Sale. But they and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

The PR also says that the contractual terms governing the ongoing costs of FCM and the consequences of not meeting those costs were unfair contract terms under the CRA.

One of the main aims of the Timeshare Regulations and the CRA 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 CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of

[2] *Carney* and *Kerrigan*

Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

It is possible that some of the terms governing the Fractional Club's ongoing costs go against the requirements of the CRA. But taking into account the particular circumstances of this complaint, even if some of the terms in question did constitute unfair contract terms under the CRA, it seems unlikely to me that they led to any actual unfairness in the credit relationship between Mr N and Ms R and the Lender, for the purposes of Section 140A. I say this because I cannot see that the potentially offending terms were operated against Mr N and Ms R during the time they have been parties to the Credit Agreement – nor can I see that there were any ongoing effects of unfairness because of the terms in question.

I acknowledge that it is also possible that the Supplier did not give Mr N and Ms R sufficient information, in good time, about these matters in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations. But even if that was the case, as I have already said, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as Mr N and Ms R have not 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 of the Timeshare Regulations, 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.

Also, I am not persuaded that the Supplier's alleged breaches of regulation 12 of the Timeshare Regulations / the CPUT Regulations and the CRA are likely to have prejudiced Mr N and Ms R's purchasing decision at the Time of Sale, and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. And I say this because Mr N and Ms R haven't provided any information or evidence which would lead me to believe that any potential breaches of regulation 12 of the Timeshare Regulations by the Supplier, or the inclusion of unfair terms in the Purchase Agreement, has led to any significant harm or unfairness to them arising *in practice*.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr N and Ms R was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

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

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

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

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

1. The size of the commission (as a percentage of the total charge for credit). In Mr

Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);

2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

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

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

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

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

Overall, therefore, I'm not persuaded 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 Mr N and Ms R.

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

I recognise that the Lender was and is part of the same group of companies as the Supplier. And I acknowledge that tie may not have been adequately disclosed at the Time of Sale. But I can't see why that renders the credit relationship between Mr N and Ms R and the Lender unfair to them – such that I should uphold the complaint. I say that because the Lender has explained that the Supplier would share finance proposals among its approved external finance partners; the Supplier couldn't write all its finance business "in-house" through the Lender; and the Lender largely provided loans to customers whose circumstances fell outside of its external finance partners' lending terms. So, I'm not persuaded that Mr N and Ms R were led into a credit agreement with the Lender because it was tied in some way to the Supplier.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, the Lender didn't pay the Supplier any commission at the Time of Sale. And with that being the case, even if there were information failings at that time and regulatory failings as a result

(which I make no formal finding on), I'm not persuaded 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 Mr N and Ms R.

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

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

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

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 there being no commission paid is inaccurate. So, there's no reason for me to reach a different finding over those commission arrangements.

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

Overall conclusion

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

My final decision

For the reasons set out above, my decision is not to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N and Ms R to accept or reject my decision before 19 March 2026.

Simon Dibble
Ombudsman