

## **The complaint**

Mrs S's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

The complaint is only in Mrs S's name as only she was named on the Credit Agreement. But, I will refer to both Mrs S and Mr S throughout this decision as the timeshare in question was in both of their names.

## **What happened**

Mr and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 18 January 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,790 fractional points at a cost of £5,509 (the 'Purchase Agreement'). They had previously made four other purchases, and this was their fifth.

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

Mr and Mrs S paid for their Fractional Club membership by taking finance of £11,612 from the Lender in Mrs S's name only. (the 'Credit Agreement'). This consolidated the lending for their previous, fourth purchase.

Mr and Mrs S – using a professional representative (the 'PR 1') – wrote to the Lender on 16 February 2018 (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. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

1. told them maintenance fees would always be easily affordable but this wasn't true because they have increased each year and this has become a struggle for them.
2. told them it was a one-time opportunity that was only available on the day when this wasn't true.
3. told them the product was cheap when this wasn't true.

4. told them that Fractional Club membership was an “investment” when that was not true.

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

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

Mr and Mrs S also say that they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, Mrs S says that she has a breach of contract claim against the Supplier, 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 Mrs S.

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

The Letter of Complaint set out several reasons why Mrs S 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:

1. The level of interest charged on the loan was excessive.
2. The Lender paid the Supplier commission, and this was not disclosed to Mr and Mrs S.
3. The contractual terms which set out that membership would be forfeited, and any money paid so far could be retained by the Supplier if Mr and Mrs S failed to make a payment due under the agreement were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the ‘UTCCR’).
4. The contract is unlawful as the timeshare involved a ‘floating system and these have been banned in Spain.

As they hadn’t received any response from the Lender to their complaint within the relevant timeframe required by the regulator, Mrs and Mr S then referred their complaint to the Financial Ombudsman Service.

The Lender dealt with Mr and Mrs S’s concerns as a complaint and subsequently issued its final response letter on 31 May 2018, rejecting it on every ground.

The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs S then appointed a new professional representative (the ‘PR 2’). The complaint was then assessed again by another Investigator, who also rejected the complaint on its merits.

Mr and Mrs S and the PR 2 disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

At this stage, the PR 2 provided some further comments and said the product had been sold to Mrs and Mr S as an investment, and referred to the judgment in a Judicial Review of one of the lead decisions previously issued by this Service (*R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd*; *R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) (the 'Judicial Review')).

I considered the matter and issued a provisional decision (the 'PD'). In that decision, I said:

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

*The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.*

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

*Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs S at the Time of Sale, the Lender is also liable.*

*This part of the complaint was made for several reasons that I set out at the start of this decision. They include the allegation that the Supplier told Mr and Mrs S that Fractional Club membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mr and Mrs S's membership plainly did have an investment element to them. So, such a statement, if made (which I make no finding on here), would not have been untrue.*

*As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs S have concerns about the way in which their Fractional Club membership 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 beyond the bare allegations, they haven't provided any evidence to support them such as what exactly they were told, by whom and in what context.*

*What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs S 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 Mrs S 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 Mrs S a right of*

recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mr and Mrs S say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they considers 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. I'm aware that some of the sales paperwork usually provided to consumers like Mr and Mrs S by the Supplier states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on eight occasions between May 2015 and February 2018. I accept that they may not have been able to take certain holidays. I've also seen that Mr and Mrs S made but subsequently cancelled five holidays between those dates and also had another holiday booked for February 2019 at the time they made their complaint. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs S 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 and Mrs S 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 Mrs S also says that the credit relationship between her 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 she and Mr S concerns about. It is those concerns that I explore here.

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

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

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

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under

pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier [...]”. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to “finance a transaction between the debtor and a person (the ‘supplier’) other than the creditor [...] and “restricted-use credit” shall be construed accordingly.”

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

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

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

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

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

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

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

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

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<sup>1</sup> The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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 S and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

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

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

Mrs S'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.

I have also considered the more general points made in the PR 1's submissions in relation to a recent Spanish court judgement which they felt should be taken into account in relation to this case. But the actual timeshare Mrs and Mr S took out was governed by English law, not Spanish law, so I don't think any Spanish court judgement is relevant here.

I note that the PR 1 didn't explain the reasons why they feel a timeshare that provides for the ability to use points to book holidays, is unlawful under English law or provided any evidence to support this assertion. Having taken everything into account, including all relevant legislation, rules and regulations, I can't see anything that would mean the agreement was unlawful. Points based timeshares were common models that haven't been prohibited in English law and I've seen nothing to suggest that all timeshare agreements had to refer to a specific apartment or set week.

*I'm not persuaded, therefore, that Mrs S'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 Mrs S says her credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her and Mr S as an investment in breach of prohibition against selling timeshares in that way.*

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

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

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

*"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."*

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

*The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.*

*Mr and Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*

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

*To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs S 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 Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.*

*I'm aware that this particular Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were usually, for instance, disclaimers in the sales paperwork that state that Fractional Club membership was not sold to the consumer as an investment.*

*I've considered the testimony provided by Mr and Mrs S. The PR 1 provided a witness statement when the complaint was first referred to our Service, although this was undated. And, although they briefly mentioned membership being sold as an investment, they did not describe this as something that had happened to them personally. It was only mentioned in this witness statement in the context of 'similar fact evidence' – something the PR 1 said happened to multiple consumers i.e. generic comments about how they say these products were generally sold.*

*The PR 2 appear to accept that such an allegation was not made in the original witness statement provided by Mr and Mrs S.*

*What they have referred to and sought to rely on, is a questionnaire completed by Mrs and Mr S for the PR 1 at the time the complaint was made. This was largely a 'yes/no' tick-box exercise. At the end, there was space to write answers to pre-set, presumptive questions which asked what they were told by the Supplier, why such a statement was false and why it was of material significance to them i.e. to explain any misrepresentations made to them by the Supplier at the Time of Sale.*

*Under the question "what did they tell you?", Mrs and Mr S wrote "that it was an investment". And, as outlined above, they said this was false because for it to be sold all parties have to be in agreement.*

*I acknowledge this, but apart from making the bare allegation that they were told it was an investment, they haven't expanded on this, including in their original witness statement, what was said to them, by whom and in what circumstances to support the suggestion in question.*

*If this was something they particularly remembered happened to them at the Time of Sale and that was important to them, I'd have expected this to also be included in their original witness statement beyond general comments about the sale of these products in general.*

*I acknowledge they've now provided a second witness statement dated 7 December 2023 where they go into slightly more detail about this, but this was only after receiving the second view from the Investigator and after the aforementioned Judicial Review. Most of this second witness statement only describes what happened during other sales which aren't part of this complaint. And, in relation to their fractional purchases in general, they said:*

*"22. In respect to the Fractional Property Owners Club this was different as [the Supplier] were promoting this product as an 'investment in property'. The more fractional weeks we bought the more parts we owned in the property therefore had a greater say in its management. [The Supplier] explained as the property was a commercial holiday apartment and contained in an established resort, which was managed: it was obvious that as property would increase in price. That Spain was the dominant place all Europeans took holidays at, and the holiday towns were constantly attracting more and more visitors. As holidays were increasing in price the properties were being bought and sold for higher and higher prices. The main selling point was we were investing in property and that property would increase in value, would rise and we could enjoy the profit made or sit in the investment and leave it in our will.*

*23. To protect our investment, we would be given a property certificate as we owned with others. The certificate would be proof that we had an interest in the property and the deeds would be held by a trustee."*

*Again, I'm unsure why they didn't provide such comments originally, and in any event, they don't describe in any great detail who told them this and in what circumstances. And, it also seems that at least some of the comments made such as having an interest in the property*

and being given a certificate, for example, only relate to a factual description of how the product worked in practice.

With all of that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

Nonetheless, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

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

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

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

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 S and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mrs S, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead

her (and Mr S) to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in Mr and Mrs S's initial recollections that the Supplier led them personally at this Time of Sale specifically to believe that the Fractional Club membership 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.

I again acknowledge that they have now provided testimony to this effect, but this was only after the judgement was handed down in *Shawbrook & BPF v FOS*. The original witness statement was also put together much closer to the Time of Sale. And again, if this was something that was important to them, it's difficult to explain why they didn't provide these comments originally.

I also note that in their second witness statement they go on to say:

*"24. Our experience over the last years with the Fractional club has not been a happy period. Despite [the Supplier] claiming we would be owning the property and had rights to holidays in the property was forced to take holidays elsewhere in other [Supplier] collections or had to book holiday with other travel agents yet facing demands to pay [Supplier] bill they send each year."*

From what they've said, both at the time of the original complaint and now, the main reasons for their unhappiness with the membership is the alleged difficulty with availability of holidays exactly when and where they would like them and with having to pay the annual fees. I'm also mindful that Mrs and Mr S had made several purchases previously, including of an FPOC membership (from the same Supplier). And, that they also made a further FPOC purchase just under two years after the Time of Sale here. So, I think it's reasonable to say that they were interested in taking holidays with the Supplier and this aligns with why they've said they're unhappy with the membership now – the availability of such holidays.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs S's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs S 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 and Mrs S when they purchased membership of the Fractional Club at the Time of Sale. But they and PR 1 suggested that the Supplier failed to provide them with all of the information they needed to make an informed decision. Specifically, they said the level of interest charged on the loan was excessive and some of the contractual terms were unfair.

One of the main aims of the Timeshare Regulations and the UTCCRs 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 UTCCRs being breached, and, potentially the credit

agreement being found to be unfair under Section 140A of the CCA.

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

As previously outlined, Mr and Mrs S said that the Purchase Agreement contains unfair contract terms (under the UTCCRs) in relation to the Supplier's ability to terminate membership where they failed to make a payment due under the agreement.

But, in order to conclude that a term in the Purchase Agreement rendered the credit relationship between Mrs S and the Lender unfair to her, I'd have to see that the term was unfair under the UTCCRs, and that the term was actually operated against Mrs S in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs S, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in *Link Financial v Wilson* [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mr and Mrs S have led to any unfairness in the credit relationship between Mrs S and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against Mr and Mrs S, let alone unfairly.

Mr and Mrs S also said the interest rate on the loan was excessive. But, neither they nor either of the PRs has explained why such a rate is unfair in this particular case or why this causes the credit relationship to be unfair.

Further, I can see that the Credit Agreement signed by Mr and Mrs S at the Time of Sale clearly explained the interest rate which applied to the loan and how much in total they'd be repaying including interest and charges.

So, while it's possible the Supplier didn't give Mr and Mrs S sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't seen enough to persuade me that this, alone, rendered Mrs S's credit relationship with the Lender unfair to them.

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

### **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 S 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.

### **Mrs S's Commission Complaint**

I note that one of Mrs S's other concerns relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreement. The

*Supreme Court's recent judgment in Johnson and Wrench -v- FirstRand Bank, and Hopcroft -v- Close Brothers [2025] UKSC 33 ('Johnson, Wrench and Hopcroft') clarified the law on commission payments – albeit in the context of car dealers acting as credit brokers. In my view, the Supreme Court's judgment sets out principles which appear capable of applying to credit brokers other than car dealer–credit brokers. At present, I do not know what, if any, commission was paid by the Lender in respect of Mrs S's loan. Once I find out more information about this, I will finalise my findings on this complaint."*

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

Following my provisional decision, I also communicated how I was not persuaded that Mrs S's credit relationship with the Lender wasn't unfair to her for reasons relating to the commission arrangements between it and the Supplier<sup>2</sup>.

The Lender confirmed receipt of the PD but didn't provide any further comments. The PR2 also responded – they did not accept the PD and provided some further comments and evidence they wish to be considered.

Having received the relevant responses from both parties, I'm now finalising my decision.

### **The legal and regulatory context**

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

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

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

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

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

### The FCA's Principles

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

- Principle 6

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<sup>2</sup> The Lender did not respond. The PR2 did respond and provided some further comments they wished to be considered.

- 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.

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

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD in the main relate to the issue of whether the credit relationship between Mrs S and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mrs and Mr S as an investment at the Time of Sale. The PR2 has also reiterated that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale and the complaint should be upheld for this reason. The PR2 didn't think I'd properly assessed Mr S's commission complaint. They also argued for the first time that the lack of authorisation of the credit broker is a reason the complaint should be upheld.

As outlined in my PD, the PR1 and PR2 originally raised various other points of complaint, all of which I addressed at that time. But the PR2 didn't make any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR2's points raised in response.

Firstly, the PR2 asked for the disclosure of various documents and suggested various documents that our Service should request from the Lender and Supplier and consider. They also said that Mrs S should be 'interviewed'. I think it's important to reiterate that it's up to our Service (and each individual Ombudsman) to decide what information we think we need in order to reach a fair outcome and in what format that information is provided - this is not dictated by either party to the complaint. The evidence relied on (or an appropriate summary) has been provided and clearly explained. And, I'm satisfied both parties (including Mrs S) have been given ample opportunity to provide any comments or evidence they wish to be considered.

#### The Supplier's alleged breach of Regulation 14(3) and the impact of this on the fairness of the credit relationship

Here, the PR2 has stated that I've been inconsistent with my approach compared to previous decisions issued by the Service and has provided an example it feels demonstrates this. But my decision is based on consideration of Mrs S's specific circumstances. Each complaint turns on its own facts; an ombudsman's decision on how one timeshare sale occurred does not determine their, or any other ombudsman's, decisions about the facts of other sales at different times to different purchases.

The PR2 has also reiterated that the judgment handed down in *Shawbrook & BPF v FOS*

asserted that the relevant question in this circumstance is whether the breach of regulation 14(3) was a material factor in the decision to purchase, not whether it was the only factor or principal one. It feels that the testimony Mrs S has provided demonstrates that this was the case. But, as I explained in my provisional decision, I'm not persuaded from the testimony that Mrs S has adequately demonstrated that the promise of profit was a motivating factor to their decision to move ahead with the purchase – principal or otherwise.

In my view, the PR's submissions seem to be conflating the issue of whether there was a breach of Regulation 14(3) at the Time of Sale and whether these were material to Mrs and Mr S's purchasing decision. And, they appear to be suggesting that if there was a breach of Regulation 14(3) at the Time of Sale, this is sufficient reason in and of itself to uphold this complaint. But I don't agree with that - as I explained in my PD, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision.

And, for all of the reasons I already explained in my PD, I'm simply not persuaded that any such breach by the Supplier at the Time of Sale was material to Mrs and Mr S's purchasing decision.

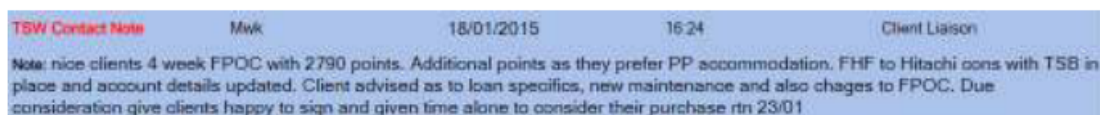
The PR also said the Allocated Property offered no useable holiday benefit as consumers like Mrs and Mr S did not have the right to stay in it. So, they say this is consistent with an 'investment narrative', rather than purchasing the product for holidays.

But again, as explained in my PD, as well as the membership clearly offering a way of taking holidays, Mrs and Mr S's share in the Allocated Property clearly constituted an investment – this is not disputed. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3) and is not therefore in and of itself, a reason to uphold this complaint, nor do I think it provides any evidence of Mrs and Mr S's purchasing motivation.

The PR2 also said that I hadn't sufficiently considered that Mrs and Mr S had already made purchases before and so they already had points with which to take holidays. And, their points increase at the Time of Sale was relatively small. Therefore, in their view, their purchase can't have been motivated by holidays.

However, to be clear, I have considered all available evidence and information about this complaint, including Mrs and Mr S's purchasing history (as I did in my PD). And here, as set out in my PD, I've relied on Mrs and Mr S's own testimony in deciding whether or not any breach by the Supplier of Regulation 14(3) was material to their purchasing decision.

Further, prior to finalising my decision I also shared with both parties the sales note made by the Supplier at the Time of Sale and allowed both parties the opportunity to comment on this. The note says:



TSB Contact Note      Mwk      18/01/2015      16:24      Client Liaison

Note: nice clients 4 week FPOC with 2790 points. Additional points as they prefer PP accommodation. FHF to Hitachi cons with TSB in place and account details updated. Client advised as to loan specifics, new maintenance and also chages to FPOC. Due consideration give clients happy to sign and given time alone to consider their purchase rtn 23/01

I explained to both parties that I felt this reinforced my provisional conclusions on this point, as it shows Mrs and Mr S made this purchase in order to get additional points for particular holiday accommodation.

In response, the PR2 said that this evidence is not reliable as they are the Supplier's own internal records, rather than a verbatim or independent account of how the product was presented at the point of sale. And, it would be unrealistic to expect the Supplier to record that there was a breach of Regulation 14(3) at the Time of Sale.

Again, I think the PR2 is conflating the issue of whether there was a breach of Regulation 14(3) at the Time of Sale with whether any such breach was material to Mrs and Mr S's purchasing decision. Here, I highlighted the sales note not as evidence of whether there was any such breach at the Time of Sale (again, I've already acknowledged this was possible), but rather, as evidence of their motivations for purchasing.

The PR2 also made some comments in relation to the sales note made by the Supplier in November 2016 (another purchase Mrs and Mr S made). I'm unsure whether this was in error due to a mis-reading of the relevant dates, but in any event while I've considered the comments made, that other purchase is not the subject of this complaint and so in my view, is of little relevance here.

I acknowledge that the PR2 doesn't feel the Supplier's sales notes are reliable evidence in a general sense, but I note they have not said that what the sales note recorded here was inaccurate or that Mrs and Mr S don't recall saying this at the time (and what they do remember saying), for example.

The PR2 has said that they don't think the reference to additional points or a preference for particular accommodation evidences that the purchase was motivated by holidays alone, particularly since by the Time of Sale, Mrs and Mr S already had 'extensive holiday access'. So, the circumstances of the sale suggest there had to have been another motivation which the PR2 suggests to be the investment element.

But I don't think this, in and of itself, is sufficient evidence of Mrs and Mr S's purchasing motivations at this Time of Sale particularly when, as I've already explained, the other evidence available (such their direct testimony), appears to contradict the PR2's assertion. I agree with the PR2 that just because a purchaser was also interested in taking holidays with the Supplier, that does not preclude them also being motivated to take out Fractional Club membership by any investment element – indeed I would find it surprising if any members were not interested in taking holidays, given the nature of the product. However, for the reasons set out in this decision and in my PD, I do not find any such investment motivation – principal or otherwise.

Regarding Mrs and Mr S's testimony, I explained in my PD that I had seen a witness statement from them when they first referred the complaint to our Service. And, I had seen a questionnaire that was completed for the PR1 at the time the complaint was made to the Lender.

A second witness statement was then provided in December 2023, which was only provided after receiving the second view from the Investigator and after the aforementioned judgment handed down in *Shawbrook and BPF v FOS*<sup>3</sup>.

In response to the PD, the PR2 has said they don't consider when testimony was provided to be a relevant factor. But I don't agree – I do think it is relevant to consider *when* it was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*.

The PR2 has said they think Mrs and Mr S's evidence does show they were motivated to purchase on the basis of a financial gain and that the later witness statement does not 'introduce a new narrative' but rather 'expands on the same one'. They also said that I should not have discounted the evidence provided on the basis of '*form and timing alone*'.

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<sup>3</sup> *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

I have thought about what the PR2 has said but I simply don't agree with their assessment here. I did not solely reach my provisional conclusions about Mrs and Mr S's evidence based purely on their form and timing (although as I've said, I maintain those are, amongst other things, relevant considerations). But rather, I simply wasn't persuaded by the content of them i.e. what Mrs and Mr S themselves had to say.

Again, I think the PR2 is conflating what Mrs and Mr S were potentially told at the Time of Sale, with whether any such breach was material to their purchasing decision. As I've already said, there was no suggestion in Mr and Mrs S's initial recollections that the Supplier led them personally at this Time of Sale specifically to believe that the Fractional Club membership 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. I again acknowledge that they have now provided testimony to this effect, but I reiterate that if this was something that was important to them, it's difficult to explain why they didn't provide these comments originally (nor have I received any such explanation in the PR2's response to my PD). So, ultimately, for the above reasons, along with all of those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mrs and Mr S's purchasing decision.

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

The PR2 has reiterated that they feel there were misrepresentations made by the Supplier at the Time of Sale. In particular, they've reiterated that Mrs and Mr S were told the product was an investment when that was not true.

But, for the reasons I've already explained, the Fractional Club membership clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, it was more than what Mrs and Mr S first put into it.

In relation to this, and the other alleged misrepresentations, the PR2 hasn't provided any new evidence in response to my PD. Rather, they've simply reiterated they think the testimony provided shows that there was a misrepresentation at the Time of Sale.

But, for all of the reasons I already explained in my PD, I'm simply not persuaded that is the case.

#### Mr S's commission complaint

Here, the PR2 said they thought I'd misapplied the judgment in *Hopcraft, Johnson and Wrench*<sup>4</sup>. They said the size of the commission paid was not the only factor to consider as the Supreme Court in the aforementioned judgment identified a number of factors to be considered, of which the size of commission was only one. Therefore, they said it was an error for me to treat the size of the commission paid alone as determinative of whether the credit relationship in this case was unfair.

But I don't think the PR2 has sufficiently taken into account everything I've previously said on this issue as I didn't solely rely on the size of the commission paid in reaching my conclusion. I did also consider, and set out my conclusions on, for example, the commercial relationship between the Lender and the Supplier and disclosure (or potential lack of) of the relevant commission arrangements, including the regulatory guidance in place at the Time of Sale as it was relevant to that disclosure. I considered this not only as it pertains to the fairness of the credit relationship, but also as separate and freestanding complaints as well.

Beyond the PR2's point above, which as I've said I think is based on a simple mis-reading or misunderstanding of my previous conclusions on this matter, I haven't been provided with

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<sup>4</sup> *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ('Hopcraft, Johnson and Wrench').

anything more in relation to this point. So, it follows that for all of the reasons previously explained, I don't think this is a reason to uphold the complaint.

#### The authorisation of the credit broker

The PR2 has now stated that the Supplier, which was the entity that brokered the Credit Agreement, was not authorised to do so by the Financial Conduct Authority (FCA), the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. They say this is a freestanding point of complaint as well as something which could cause the credit relationship between Mrs S and the Lender to be unfair.

This point was never raised as part of the original complaint made to the Lender. But, I don't see any detriment to either party in addressing it here as having considered it, I don't think this is a reason to now uphold the complaint.

I say this because it looks to me like Mrs S knew, amongst other things, how much she was borrowing and repaying each month, who she was borrowing from and that she was borrowing money to pay for Fractional Club membership. So, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to any detriment for Mrs S – such that I can say that the credit relationship in question was unfair on her as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate her, even if the loan wasn't arranged properly.

#### **Conclusion**

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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 Mrs S's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement 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.

#### **My final decision**

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 6 March 2026.

Fiona Mallinson  
**Ombudsman**