DRN-5780069

The complaint

Mr and Mrs R's complaint is, in essence, that Shawbrook Bank Limited (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 a claim under Section 75 of the CCA.

What happened

Mr and Mrs R were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 17 June 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 21,000 fractional points at a cost of £14,280 (the 'Purchase Agreement').

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

Mr and Mrs R paid for their Fractional Club membership by taking finance of £14,280 from the Lender (the 'Credit Agreement').

Mr and Mrs R complained directly to the Supplier and Lender in June 2016, and the Lender provided a response to that on 17 August 2016.

Mr and Mrs R – using a professional representative (the 'PR') – then wrote to the Lender again on 29 November 2016 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender initially said they would not look into the same complaint again and the matter was then referred by the PR to the Financial Ombudsman Service.

There was some dispute initially as to whether our Service could consider the matter – the Lender has now accepted that we can and ultimately issued a final response letter to the complaint on 27 March 2019..

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

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

The PR sent a further letter of complaint to the Lender on 18 February 2025, but having reviewed this, it simply provides more detail on the points raised previously.

I issued a provisional decision, in which I made the following provisional findings (which form

part of this final decision):

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

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

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr and Mrs R were told or led to believe by the Supplier that Fractional Club membership:

(1) *had a guaranteed end date when that was not true.*

(2) *was the only way of releasing themselves from their existing membership when that was not true.*

As I understand it, the sale of the Allocated Property could be postponed in certain circumstances according to the Fractional Club Rules. But Mr and Mrs R say little to nothing to persuade me that they were given a guarantee by the Supplier that the Allocated Property would be sold on a specific date when such a promise would have been impossible to stand by given the inevitable uncertainty of selling property some way into the future. And as there isn't enough evidence on file to support the PR's allegation that Fractional Club membership had been misrepresented for reasons relating to point 2, I'm not persuaded that there were representations by the Supplier on the issues in question that constituted false statements of existing fact.

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

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

The PR says, for instance, that:

1. *the right checks weren't carried out before the Lender lent to Mr and Mrs R;*
2. *Mr and Mrs R were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale; and*
3. *Fractional Club membership was marketed and sold as investment in breach of a prohibition on doing so.*

However, having considered the entirety of the credit relationship between Mr and Mrs R and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
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; and, when relevant*
5. *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 and Mrs R and the Lender.

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

While the PR says that the right affordability checks weren't carried out at the Time of Sale, 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 and Mrs 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. But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs R.

I acknowledge that Mr and Mrs R 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 Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and 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 and Mrs R made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr and Mrs 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, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs R'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 Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

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

But the PR says that the Supplier did exactly that at the Time of Sale.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

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

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

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

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs 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.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs 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's not necessary to make a formal finding on that

particular issue for the purposes of this decision.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs R and the Lender under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

I've considered the testimony provided in this case. The PR has said that they provided a witness statement when they first referred the complaint to our Service, but I can't see this is the case.

What has been provided is copies of correspondence between Mr and Mrs R and the Supplier dated between 2014 and 2016 where they have provided their comments on what happened and why they're unhappy with the membership.

In early 2015, I note they said:

> *"We were mis-sold the Fractional Points concept especially concerning the possible 'wish to let' financial returns, the guaranteed resale after 15 years and the ability to sell back to Diamond at any time on the understanding that we might not receive what we had paid for them.*
>
> *We were fraudulently sold Fractional Points. It is your policy to permit surrender of other points when someone is 75 in the following year. In June 2013 [Mr R] was 72 so could have surrender [sic] the points in a couple of year's [sic] time. He will be 87 after 15 years so unlikely to be able to travel! The whole transaction was therefore unnecessary and cost us over £14,000 for no benefit at all."*

And, in May 2016 they said:

> *"[Mr R] will be over 87 by the end of the 15 year period; we are now far worse off and our 'in perpetuity problem' has not been resolved! Indeed that we have had to pay £14,280 to convert holiday points we already owned seems, in the cold light of day, hard to credit!*
>
> *Your email 'Discover Diamond Fractional Ownership' of 13 March 2013 (see attachment B) stated 'own a fractional share of a Diamond Resorts property and enjoy the benefits of worldwide travel for a 15 year term with a share in the eventual residual value of the property'.*
>
> *This was also reiterated by the information we were given by your sales staff, i.e. that at the end of the 15 years the [Supplier resort] would be sold and we would share in the proceeds so resolving the 'in perpetuity problem', besides profiting from the 'wish to let' programme. This was the only reason why we considered spending over £14,000 to move into Fractional Points.*

We were assured that we could sell back to Diamond our Fractional Points at any time, although, depending on how long we had them, there could be some financial loss – our 40 year old daughter who was present during the presentation vividly remembers this option and it was the reason why she thought the idea was reasonable.

[…]

You also fail to acknowledge that [Supplier's] intransigent action has permitted, or some would say, even encouraged, a whole fraudulent industry around firms taking money to resolve the very real problems of exorbitant management fees, the imposed 'in perpetuity' provision and the difficulty booking holidays at the desired time and locations; this is compounded by subsequent problems associated with these frauds and fraudulent firms.

[…]

We were not advised of [Supplier's] policy of permitting disposal of [previous membership] once one person reached 75. Instead we were sold a product that would still be an enormous responsibility when [Mr R] will be over 87 years old so unlikely to be able to travel or take holidays! Had we been informed of this we would not have proceeded with the purchase.

[…]

In reality the Fractional Points system does not overcome the 'in perpetuity problem' as suggested in your publicity and sold to us at the sales presentation."

I acknowledge here that Mr and Mrs R seem to have had an interest in the Supplier's 'Wish to Rent' programme and money they could potentially make from this. But I'm not persuaded this was material to their purchasing decision. I say this because the clear emphasis of Mr and Mrs R's testimony is the shorter membership term Fractional Club membership offered (in comparison to their existing points-based membership, which they traded in for their purchase at the Time of Sale). For example, Mr and Mrs R have referred to their 'in perpetuity problem' with their previous membership and how this has not been 'resolved' despite this purchase. And, they've said that if they'd been informed of the possibility of surrendering the membership at age 75, they would not have proceeded with their purchase, i.e. they wouldn't have made the purchase for any other reason or benefit.

I also note that Mr and Mrs R have said their understanding was that there could be some financial loss in relation to selling their membership, and that depending on how long they had held the membership, they might not receive back what they had paid.

Indeed, it's difficult in the context of this complaint to understand why, if Mr and Mrs R had made the purchase because they were motivated by a financial gain or profit, they tried to relinquish the membership so soon after they bought it. In the context of the rest of their testimony, this again seems to support that they made the purchase based on the shorter membership term it offered them.

So, on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs R decided to go ahead with their purchase. That doesn't mean they weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs R themselves don't persuade me that their

purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs R'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 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

The PR suggests that Mr and Mrs R were not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also suggests that there were unfair contract terms such as the terms governing the ongoing costs of membership and consequences of non-payment.

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

I acknowledge that it is also possible that the Supplier did not give Mr and Mrs R sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the 2010 Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr and Mrs R nor the PR have persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mr and Mrs R in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy even if they could be said to be unfair contract terms, which I make no formal finding on.

Mr and Mrs R's Commission Complaint

I note that one of Mr and Mrs R'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 Mr and Mrs R's loan. Once I find out more information about this, I will finalise my findings on this complaint."

Having said that I would provide my findings on the issue of commission once I knew more about that given the circumstances of Mr and Mrs R's complaint, I did that by email on 2 January 2026, saying:

"*In my provisional decision, I noted that one of Mr and Mrs R's other concerns related to the alleged payment of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreement. But, I said that the Supreme Court's recent judgment on this issue may prove important to this complaint. So, I explained that I wouldn't finalise my thoughts until I'd considered its implications on this complaint, if there are any.*

As I've now considered it, I'm outlining my thoughts on this issue in this letter so that both parties have the opportunity to respond before I finalise 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 Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

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

- *Paragraph 2.2*
- *Paragraph 2.3*
- *Paragraph 5.5*

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

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

- *Paragraph 2.2*
- *Paragraph 3.7*
- *Paragraph 4.8*

The PR says 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 and Mrs 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.

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

I acknowledge that it's possible that the Lender and the Supplier failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

But as I've said before, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. And with that being the case, it isn't necessary to make a formal finding on that because, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it is for the reasons set out below that I don't currently think any such failure is itself a reason to find the credit relationship in question unfair to Mr and Mrs R.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr and Mrs R entered into wasn't high. At £1,142.40, it was only 8% of the amount borrowed and 8.7% as a proportion of the charge for credit. So, had they known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr and Mrs R wanted Fractional Club membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted doesn't strike me as disproportionate. So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr and Mrs 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.

Overall, therefore, I'm not currently 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 and Mrs R.

Section 140A: Conclusion

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

Commission: The Alternative Grounds of Complaint

While I've found that Mr and Mrs R's credit relationship with the Lender wasn't unfair to them for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr and Mrs R's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the

Lender without telling Mr and Mrs R (i.e., secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr and Mrs R a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to them. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think they would still have taken out the loan to fund their purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time."

So, in summary, I wasn't persuaded by any of the arguments put forward for why the credit relationship between Mr and Mrs R and the Lender was unfair to them under Section 140A of the CCA. And I couldn't see any other reason why it would be fair or reasonable to direct the Lender to compensate Mr and Mrs R – all of which led me to provisionally conclude that there was no basis on which to uphold the complaint.

The Lender accepted my provisional decision. The PR disagreed with my overall conclusion. When doing that, it provided significant submissions at first but it went on to withdraw them and replace them with more concise submissions – which, while primarily concerned with the suggestion that Mr and Mrs R's Fractional Club membership had been marketed and sold as an investment in contravention of a prohibition on selling timeshares in that way, included allegations of fraudulent misrepresentation on the basis that they were told by the Supplier at the Time of Sale that:

(1) They were buying part ownership of a physical property;

(2) Fractional Club membership was an investment;

(3) The Allocated Property would be sold; and

(4) They would receive a share of the net sales proceeds of sale when the Allocated Property is sold.

The PR also repeated its concerns about the pressure Mr and Mrs R were put under by the Supplier at the Time of Sale, the Lender's decision to lend being irresponsible, and a payment of commission to the Supplier by the Lender – albeit with a focus on the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*.

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

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 (when appropriate), what I consider to have been good industry practice at the relevant time.

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

What I've decided – and why

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

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

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

However, as the PR's more concise response to my provisional decision only relates, in the main, to misrepresentations, whether the membership was sold as an investment, concerns about the pressure Mr and Mrs R were put under by the Supplier at the Time of Sale, the Lender's decision to lend being irresponsible and the payment of commission to the Supplier by the Lender, I see no reason to change or add to my conclusions (as set out above) in relation to the other points they originally raised.

Indeed, as I said in my provisional decision, my role as an Ombudsman is to decide what's fair and reasonable in the circumstances of this complaint – rather than address every single point that's been made. And with that being the case, while I have read all of the PR's submissions in full, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What's more, it is important to make the point that, in contrast to what might happen in court, neither side to this complaint has a burden of proof that it must discharge. After all, the jurisdiction under which I'm deciding this complaint is inquisitorial rather than adversarial – which means that my findings are made, on the balance of probabilities, in light of the evidence and/or arguments from both sides.

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

It was argued by the PR, when this complaint was first made, that the Supplier misrepresented Fractional Club membership at the Time of Sale. The reasons for this aspect of this complaint at that time were addressed in my provisional decision. And I see no reason to change or add to those. But in in response to my provisional decision, the PR argues that Fractional Club membership was worthless and, as such, the following representations by the Supplier were fraudulent:

(1) Mr and Mrs R were buying part ownership of a physical property;

(2) Fractional Club membership was an investment;

(3) The Allocated Property would be sold; and

(4) They would receive a share of the net sales proceeds of sale when the Allocated Property is sold.

The PR takes that view because it says the evidence suggests that (1) any rights in the Allocated Property are personal rights rather than the rights of ownership, (2) the Lender hasn't provided any evidence that the Allocated Property exists or that it will sell in the future (making it unlikely that Mr and Mrs R will receive anything from their share in it) and, (3) by the PR's own calculations, given the initial and ongoing costs of Fractional Club membership, it was never possible to make a profit from the sale of the Allocated Property.

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. Summarising the relevant pages in *Chitty on Contracts*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it did not hold it or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue – nor was it untrue to tell prospective members that they would receive *some* money when the allocated property is sold.

After all, Mr and Mrs R's share in the Allocated Property clearly 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 as the PR knows, while the term "investment" is not defined in the Timeshare Regulations, it was agreed by the parties in *Shawbrook & BPF v FOS* 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*" (see paragraph 56).

Yet, contrary to what the PR says, none of the contractual paperwork made any promises that a profit might be made nor does it imply let alone suggest that the share in the net sale proceeds from the Allocated Property would be worth more in real terms in the future than at the Time of Sale.

As I said in my provisional decision, the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's possible that Fractional Club membership <u>was</u> marketed and sold to Mr and Mrs R as an investment orally.

But Mr and Mrs R say little about what was said, by whom and in what circumstances for the purposes of determining whether representations by the Supplier amounted to false statements of existing fact rather than expressions of honestly held opinions about the likely value of the Allocated Property in the future. And while the PR's own calculations might cast some doubt over the likelihood of the Allocated Property being sold at a profit given the initial and ongoing costs of it to Mr and Mrs R, there isn't enough evidence to persuade me that the relevant sales representative(s) would have carried out that sort of calculation at the Time of Sale or would otherwise have had information that would indicate that they knew or ought reasonably to have known at the time that any such representations weren't true.

And while the PR might question the exact legal mechanism used to give prospective members an interest in allocated properties, that does not change the fact that the shares of members (like Mr and Mrs R) were clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort.

I'm not persuaded, therefore, by the allegations of fraudulent misrepresentation from the PR. And with that being the case, they too aren't reasons to uphold this complaint and direct the Lender to compensate Mr and Mrs R.

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

I've already explained why, in light of the PR's latest allegations of fraudulent misrepresentation, I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. And it is for those reasons that I don't think the credit relationship between Mr and Mrs R and the Lender was rendered unfair to them on the basis that membership had been misrepresented.

However, there are, of course, other reasons for why the PR argues that the credit relationship in question was unfair. But having reconsidered the entirety of that relationship along with everything that has now been said and/or provided by both sides, I still don't think the credit relationship between Mr and Mrs R and the Lender was likely to have been rendered unfair to them for the purposes of Section 140A. When coming to that conclusion, I have looked again 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, 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; and, when relevant
5. Any existing unfairness from a related credit agreement.

I have also reconsidered any commercial (including commission) arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.

The PR continues to argue that the right checks weren't carried out when the Lender lent to Mr and Mrs R at the Time of Sale. But as I already explained, even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I still make no such finding), I would have to be satisfied that the money lent to Mr and Mrs 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. But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs R – I haven't been provided with any new evidence in response to my provisional decision which makes me think this is the case. The PR has highlighted Mr and Mrs R's age at the Time of Sale (72 and 65 years old respectively) and has suggested they shouldn't have been lent to for this reason. But this isn't a reason, in and of itself not to lend to a consumer - indeed such a decision could be discriminatory. So, I don't think this is a reason to now uphold the complaint or to conclude that the credit relationship was unfair to Mr and Mrs R.

The PR has also reiterated their allegation that Mr and Mrs R were unduly pressured into their purchase at the Time of Sale. And, they've now provided two questionnaires completed by Mr and Mrs R in July 2017. Most of the answers to the various questions simply say "*see notes*", with no other notes having being provided. But the PR has pointed to certain parts of these questionnaires in support of this particular allegation. For example, Mr and Mrs R have noted their sales presentation was seven hours long and they were only given one break, and ten minutes to read through the paperwork.

I already acknowledged in my PD that Mr and Mrs R may have felt weary after a sales process that went on for a long time. But they continue to 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 the Fractional Club membership when they simply did not want to. Their previous correspondence with the Supplier (outlined in my PD), does not suggest that they were pressured into the purchase which is difficult to reconcile with the allegation now being made. And, in the questionnaire I note that they've confirmed they were given the opportunity to ask the Supplier to clarify any points in relation to the documentation and that they were not asked to sign the documents until they had read them.

And with all of that being the case, there remains insufficient evidence to demonstrate that Mr and Mrs R made the decision to purchase Fractional membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

But I'll turn now to what continues to be the main reason for the PR's assertion that the credit relationship in question was unfair.

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

As I said in my provisional decision, there is competing evidence in this complaint as to whether the Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations. I acknowledged that it was possible that Fractional Club membership was marketed and sold to Mr and Mrs R as an investment in breach of Regulation 14(3). A view I still hold.

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

The PR disagrees with that and cites the judgment of Mrs Justice Collins Rice in *Shawbrook & BPF v FOS*[2] in support – saying that she found that the selling of a timeshare as an investment (i.e. in a breach of Regulation 14(3) of the Timeshare Regulations) was, itself, sufficient to create an unfair credit relationship.

However, on my reading of *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice didn't find that a breach of Regulation14(3) of the Timeshare Regulations was *"causative of the legal relations entered into".* She recognised that such a breach was *"conduct that knocks away the central consumer protection safeguard"*, but she went on to say that it was the ombudsmen behind the two reviewed decisions who found that such a breach was, given the facts and circumstances of the relevant complaints, causative of the consumers in question purchasing their timeshares and taking out loans to do so.

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

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[2] *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 am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*') and *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*') (respectively) on causation.

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

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

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

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

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

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

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

If there had been a breach of Regulation 14(3), would it have rendered the credit relationship between Mr and Mrs R and the Lender unfair to them?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I have considered (as I did in my provisional decision) what impact that breach (if there was one) had on the fairness of the credit relationship between Mr and Mrs R and the Lender under the Credit Agreement and related Purchase Agreement.

And on my re-reading of the evidence before me, I'm still not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs R decided to go ahead with their purchase to the extent that they would have made an entirely different purchasing decision had there not been a breach of Regulation 14(3). I'll explain.

As I outlined in my PD, the PR didn't provide any witness statement when they referred this complaint to our Service. I explained that I have seen copies of correspondence between Mr

and Mrs R and the Supplier dated between 2014 and 2016 where they have provided their comments on what happened and why they're unhappy with the membership.

And I noted that in early 2015, they said:

> "*We were mis-sold the Fractional Points concept especially concerning the possible 'wish to let' financial returns, the guaranteed resale after 15 years and the ability to sell back to Diamond at any time on the understanding that we might not receive what we had paid for them.*
>
> *We were fraudulently sold Fractional Points. It is your policy to permit surrender of other points when someone is 75 in the following year. In June 2013 [Mr R] was 72 so could have surrender [sic] the points in a couple of year's [sic] time. He will be 87 after 15 years so unlikely to be able to travel! The whole transaction was therefore unnecessary and cost us over £14,000 for no benefit at all.*"

And, in May 2016 they said:

> "*[Mr R] will be over 87 by the end of the 15 year period; we are now far worse off and our 'in perpetuity problem' has not been resolved! Indeed that we have had to pay £14,280 to convert holiday points we already owned seems, in the cold light of day, hard to credit!*
>
> *Your email 'Discover Diamond Fractional Ownership' of 13 March 2013 (see attachment B) stated 'own a fractional share of a Diamond Resorts property and enjoy the benefits of worldwide travel for a 15 year term with a share in the eventual residual value of the property'.*
>
> *This was also reiterated by the information we were given by your sales staff, i.e. that at the end of the 15 years the [Supplier resort] would be sold and we would share in the proceeds so resolving the 'in perpetuity problem', besides profiting from the 'wish to let' programme. This was the only reason why we considered spending over £14,000 to move into Fractional Points.*
>
> *We were assured that we could sell back to Diamond our Fractional Points at any time, although, depending on how long we had them, there could be some financial loss – our 40 year old daughter who was present during the presentation vividly remembers this option and it was the reason why she thought the idea was reasonable.*
>
> *[…]*
>
> *You also fail to acknowledge that [Supplier's] intransigent action has permitted, or some would say, even encouraged, a whole fraudulent industry around firms taking money to resolve the very real problems of exorbitant management fees, the imposed 'in perpetuity' provision and the difficulty booking holidays at the desired time and locations; this is compounded by subsequent problems associated with these frauds and fraudulent firms.*
>
> *[…]*
>
> *We were not advised of [Supplier's] policy of permitting disposal of [previous membership] once one person reached 75. Instead we were sold a product that would still be an enormous responsibility when [Mr R] will be over 87 years old so*

unlikely to be able to travel or take holidays! Had we been informed of this we would not have proceeded with the purchase.

[…]

In reality the Fractional Points system does not overcome the 'in perpetuity problem' as suggested in your publicity and sold to us at the sales presentation."

I acknowledged that Mr and Mrs R seem to have had an interest in the Supplier's 'Wish to Rent' programme and money they could potentially make from this. But I explained I wasn't persuaded this was material to their purchasing decision. I said this because the clear emphasis of Mr and Mrs R's testimony is the shorter membership term Fractional Club membership offered (in comparison to their existing points-based membership, which they traded in for their purchase at the Time of Sale). For example, Mr and Mrs R have referred to their 'in perpetuity problem' with their previous membership and how this has not been 'resolved' despite this purchase. And, they've said that if they'd been informed of the possibility of surrendering the membership at age 75, they would not have proceeded with their purchase, i.e. they wouldn't have made the purchase for any other reason or benefit.

I also noted that Mr and Mrs R have said their understanding was that there could be some financial loss in relation to selling their membership, and that depending on how long they had held the membership, they might not receive back what they had paid.

Indeed, I said that it's difficult in the context of this complaint to understand why, if Mr and Mrs R had made the purchase because they were motivated by a financial gain or profit, they tried to relinquish the membership so soon after they bought it. In the context of the rest of their testimony, this again seems to support that they made the purchase based on the shorter membership term it offered them.

The PR didn't provide any comments on the above evidence or the conclusions I had drawn from it in their response to my PD.

What they have said is that they feel Mr and Ms R's 'original impact statement' does support that the membership was sold to Mr and Mrs R as an investment, although they haven't explained why exactly. And I can see they've provided for the first time a document written and signed by Mr and Mrs R which is described as an 'impact statement'.

It's unclear when exactly this was drafted as it's not dated. But, it seems to me that it must have been drafted in 2018 at the earliest as Mr and Mrs R have referred to the complaint being submitted to our Service in January 2017 and say that this was, at the time of writing, "*over twelve months ago*". So, it appears to have been drafted later, more than a year after they first made their complaint to the Lender.

I also note that this statement isn't a witness statement which describes Mr and Mrs R's recollections of what happened at the Time of Sale and why they made their purchase, for example – it doesn't particularly give any insight into that. Rather the purpose of it appears to be to explain the impact of the length of the complaint process has had on them and the difficulties they've experienced in terms of their personal circumstances since the complaint was made.

I'm sorry to hear about the circumstances Mr and Mrs R have described and I note they've again briefly re-stated some of the points they say they were told by the Supplier at the Time of Sale. But, this only seems to align with what I've already explained above regarding the correspondence they had with the Supplier a few years earlier.

So, I'm still not persuaded that any breach of Regulation 14(3) by the Supplier at the Time of Sale was material to their purchasing decision. On balance, therefore, for the reasons I've set out above and in my PD, I don't think the credit relationship between Mr and Mrs 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

As I've already said, I set out my thoughts in relation to the implications of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench* for this complaint on 2 January 2026. I remain satisfied that the Lender has provided me with sufficient information to reach a conclusion about its commercial (including commission) arrangements with the Supplier. I've seen nothing in this case that leads me to think that the information in question is inaccurate. And while I recognise that the PR might disagree with the thoughts I shared on 2 January 2026, it hasn't offered any evidence and/or arguments that lead me to think that (1) the factors referenced by the Supreme Court have a bearing on the outcome of this complaint given its circumstances or (2) there are any other reasons why the commercial (including commission) arrangements between the Supplier and the Lender rendered the credit relationship between the latter and Mr and Mrs R under the Credit Agreement and related Purchase Agreement unfair for the purposes of Section 140A.

Conclusion

Having adopted my provisional findings, and reconsidered the facts and circumstances of this complaint, I still don't think the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs R's Section 75 claim. I'm also still not persuaded that the Lender was party to a credit relationship with Mr and Mrs R 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 for me to direct the Lender to compensate Mr and Mrs R.

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 Mr R and Mrs R to accept or reject my decision before 6 May 2026.

Fiona Mallinson
Ombudsman