DRN-5816383

The complaint

Mr S and Mrs 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 S and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 22 June 2014 (the 'Time of Sale'). Having previously purchased six timeshare memberships (of differing nature) from the Supplier previously. They entered into an agreement with the Supplier to trade in 8000 points from a previous timeshare agreement in exchange for 8000 fractional points and to buy an additional 1000 fractional points at a cost of £7,840 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr S 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 S and Mrs S paid for their Fractional Club membership by taking out a finance agreement of £7,840 from the Lender for the credit provided (the 'Credit Agreement').

Mr S and Mrs S – using a professional representative (the 'PR') – originally wrote to the Lender on 18 August 2021 (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.
4. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

Mr S 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 that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true (because it is worthless).
4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true as described in their witness statement.

Mr S and Mrs S say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they

have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr S and Mrs S.

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

Mr S and Mrs S say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property.

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

As a result of the above, Mr S and Mrs S say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr S and 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 Mr S and Mrs S say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mr S and Mrs S' concerns as a complaint and issued its final response letter on 19 October 2021, not accepting any grounds of the complaint.

Mr S and Mrs S then referred their complaint to the Financial Ombudsman Service. In January 2024, an Investigator issued an assessment which upheld Mr S and Mrs S' complaint. The PR responded to say it agreed with the Investigator's position. The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I considered the matter and issued a provisional decision (the 'PD') dated 02 September 2025. In that decision, I said (in italics and smaller font for clarity):

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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 Mr S and 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 S and Mrs S at the Time of Sale, the Lender is also liable.

Although it hasn't been raised by the Lender it would appear to me that as the Time of Sale was June 2014 (when any misrepresentations would have been made inducing Mr S and Mrs S to purchase the membership) and Mr S and Mrs S didn't make their claim to the Lender until August 2021 that the LA would apply to any such misrepresentations and give the Lender a complete defence to any such Section 75 claim for misrepresentation. However, such alleged misrepresentations could give rise to an unfair credit relationship (Scotland and Reast) so I will consider the merits of the allegations here.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr S and Mrs S were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr S and Mrs S share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr S 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.

The PR says that Mr S and Mrs S were told that there was a guaranteed end date to the membership, but that was not true. In fact, under the terms of their membership, the Allocated Property was to be placed for sale on a set future date and their membership ended once that sale completed – not on the date it was placed for sale. But there is nothing in the contractual documentation or the sales material that I have seen that points to the Supplier saying that membership ended on a set future date. Further, I've read Mr S and Mrs S' witness statement and I can't see that they say they were told this either. So, based on the evidence in this complaint, I can't say this alleged misrepresentation is made out.

Mr S and Mrs S say that the Supplier told them Fractional Club membership was an investment and the PR argues this was a misrepresentation. However, for the reasons I will explain below, Fractional Club membership did have an investment element to it, so if they were told that it would not have been untrue. So, this would not, in my view, amount to a misrepresentation.

I note from Mr S and Mrs S' statement that they say they were told the Supplier's resorts would be 'exclusive' to it members, but that was untrue as non-members could now book to stay at resorts online. It is difficult to know precisely what Mr S and Mrs S were told and their allegations are too vague for me to say the Supplier said anything that was untrue. For example, they were not full members when they first visited the Supplier's resort, so they must have known that some non-

members were able to stay at resorts at the Time of Sale. Further, just because non-members were able to stay at the Supplier's resorts, doesn't mean that at the Time of Sale any statement made was either untrue or that the salesperson didn't believe it to be true.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mr S and 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, nor do I think there was an unfair relationship because of these issues.

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

I've already summarised how Section 75 of the CCA works and why it gives Mr S and 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.

And as I've explained the Lender can rely on the LA for a complete defence to any Section 75 claim made in relation to breaches of contract which are 'out of time'. Neither Mr S and Mrs S or their PR have been specific regarding the dates of the alleged breaches. So, I shall now address the allegations of breach made which the Lender couldn't rely on the LA for a defence.

Mr S 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 consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr S and Mrs S 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 a number of occasions since this purchase. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr S and 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 S 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 Mr S and Mrs S also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.
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 Mr S and 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 S and Mrs 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."[1]

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended. The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr S and 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 Mr S and Mrs S and the Lender.

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

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

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

The PR says that the right checks weren't carried out before the Lender lent finance to Mr S and Mrs S. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr S and Mrs S was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr S and Mrs S. If there is any further information on this (or any other points raised in this provisional decision) that Mr S and Mrs S wish to provide, I would invite them to do so in response to this provisional decision.

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

I'm not persuaded, therefore, that Mr S and Mrs 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 they say their 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.

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 S and Mrs 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 S and Mrs 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 S 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.

There is evidence in this complaint 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 S 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, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was sold to Mr S and Mrs S with the primary purpose of taking holidays and I note Mr S and Mrs S' acceptance of going through some of those documents with a named salesperson from the Supplier.

With 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. So, 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.

So, I have taken all of that into account. However, on my reading of the evidence provided and my thoughts on Mr S and Mrs S recollections of the sales process at the Time of Sale, that is not what appears to have happened at that time or have driven their claim. In their statement on the matter (dated 20 November 2020 but not supplied until January 2024) they say in relation to their financial commitments to this membership that they "now need help in having these terminated" and "The maintenance fees for this timeshare have increased dramatically over the past few years, and due to my wife's retirement and therefore reduced income, these fees are no longer financially justifiable." So, it seems clear that one of the reasons for bringing their claim is their current financial circumstances.

Mr S and Mrs S, when describing in their statement this purchase, the first reason they give for purchasing this membership was because "At this meeting, we were told that it would be possible to convert all our points to Fractionals, which would mean that within 15 years all of our timeshares would be sold, and therefore, would mean that we had a way out to this membership." So, it seems clear that a motivation for Mr S and Mrs S was reducing the term of their membership.

So, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit), given their version of events.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way given what I have already said about Mr S and Mrs S' recollections of the sales process at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway. I will explain why.

<u>Was the credit relationship between the Lender and Mr S and Mrs S rendered unfair?</u>

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 Mr S and Mrs S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr S and 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 them to enter into the Purchase Agreement and the Credit Agreement is an important consideration. And, having considered everything, I don't think that any potential breach did lead them to enter into the agreements.

In the Letter of Complaint, PR alleged that the Supplier sold Fractional Club membership as an investment, however I do not find that is reflected in Mr and Mrs S' statement. And I note that their statement is their own evidence of what happened, so I prefer it to the submissions made by PR on their behalf. They did describe being told by the Supplier that they would receive the net sale proceeds of their share in the Allocated Property once their Fractional Club membership ended. And although they did say in their statement that the Supplier led them to believe that their Fractional Club membership would lead to a "resale" and "some money back when the sale took place" at no point did they say or suggest that the Supplier led them to believe that their Fractional Club membership would lead to a financial gain (i.e., a profit). I also note that purchased a fractional membership from the Supplier around a year earlier and they made no mention of it having been sold to them as an investment. On balance, I do not think that the investment element of membership was an important factor in their purchasing decision. Indeed, their statement itself makes clear that they were attracted to a shorter-term membership and it's also clear that they received further points entitling them to a better holiday entitlement which they made use of.

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 S and Mrs 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 S and Mrs S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

<u>The provision of information by the Supplier at the Time of Sale</u>

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 S and Mrs S when they purchased membership of the Fractional Club at the Time of Sale. But they and PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

The PR also says that the contractual terms governing the end date of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR's.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

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

Here the PR has argued that the terms of the contract are unfair under the UTCCRs, and that Mr S and Mrs S were subjected to unfair sales practices as per the CPUT regulations. However, the PR hasn't given any description of how these terms were unclear or contradictory or how these sales

practices led Mr S and Mrs S to make a decision to purchase when they otherwise wouldn't have done so. But I think it's important to note that Mr S and Mrs S explain in their witness statement that they had some of the paperwork described to them by the supplier's representatives. And that paperwork, although a summary, did set out in broad terms how Fractional Club membership was designed to work. Despite what the PR has said, I don't think the evidence I've seen shows that Mr S and Mrs S would have made a different purchasing decision had more, or clearer, information been given to them at the Time of Sale.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the CPUT Regulations and the UTCCRs are likely to have prejudiced Mr S and Mrs S' purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. And I say this because it seems clear to me that Mr S and Mrs S would have made this purchase irrespective of whether there had been a failing here or not.

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

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 Mr S and Mrs S' Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them 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 them.

Following my provisional decision, I also communicated how I was not persuaded that Mr S and Mrs S' credit relationship with the Lender wasn't unfair to them for reasons relating to the commission arrangements between it and the Supplier. I said (in similar altered font):

Did the commission arrangements render the credit relationship unfair?

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

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

- *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"[2];*
- *The failure to disclose the commission; and*
- *The concealment of the commercial tie between the car dealer and the lender.*

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

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[2] *Hopcraft, Johnson and Wrench* (para 327).

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

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

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

I recognise that it's possible 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 noted in my provisional decision, case law on section 140A makes clear that regulatory breaches do not automatically lead to an unfair credit relationship, and that such breaches and any consequences must be considered in the round rather than in a narrow or technical way.

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

In stark contrast to the facts in Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging Mr S and Mrs S' Credit Agreement wasn't high. At £78.40, it was only 1% of the amount borrowed and similarly (1.36%) as a proportion of the charge for credit, which is the calculation the Supreme Court used.

Had Mr S and Mrs S known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at this level, I'm not currently persuaded that they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr S and Mrs S 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. As it wasn't acting as an agent of Mr S and Mrs S 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 their when arranging the Credit Agreement and thus a fiduciary duty.

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

Overall, I'm don't intend to conclude that the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr S and Mrs S.

So, given all of the factors I've looked at both here and in my provisional decision, and having taken all of them into account, I'm still not persuaded that the credit relationship between Mr S and Mrs S 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: alternative grounds of complaint

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

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

The second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier. As I've said, it's possible that the Lender failed to follow the relevant regulatory guidance. But I don't think any such failure on the Lender's part leads to my awarding compensation to Mr S and Mrs S because, for the reasons I also set out above, I think Mr S and Mrs S would still have taken out the loan to fund their purchase at the Time of Sale had the commission arrangements been adequately disclosed at that time.

The Lender responded to the PD and accepted it.

The PR 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
- 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 Mr S and Mrs S and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr S and Mrs S as an investment at the Time of Sale.

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

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

Included in the PR's response to my PD was an oral hearing request along with the offer to produce sworn affidavits. Oral hearings are something that I can direct happen under DISP 3.5.5. However, the Financial Ombudsman Service is set up to decide complaints informally and it is for me as the decision maker to determine what evidence I think I need to determine what is a fair and reasonable outcome to a complaint. Having considered everything, I do not think I need to hold an oral hearing to fairly determine this complaint.

This is because both parties have already provided lengthy submissions. In this case, have comments from Mr S and Mrs S, other evidence, including the documents from the sale, and full submissions from PR and Lender to decide what I think was most likely to have happened. I'm satisfied I'm able to weigh up what Mr S and Mrs S have said against the available evidence and arguments to determine what I think happened on the balance of probabilities without the need for an oral hearing. And as it's in everyone's interest to resolve this complaint as soon as possible, to grant a hearing at such a late stage would inevitably prolong the resolution of this case.

I understand that the PR also offers to have Mr S and Mrs S provide a sworn affidavit. But I must remind them that we don't have strict evidential requirements. We aren't expected to decide complaints only after receiving sworn evidence. And our jurisdiction is investigative rather than adversarial. I remain of the view that the information we have on file is enough to cover all the issues I need to consider to reach a fair decision. And as I've considered everything on file, including the specific points raised by the PR as part of its request, I'm of the view that a hearing request and/or sworn affidavits aren't required.
As I explained in my PD, although I found there was a possibility that the Supplier breached Regulation 14(3) at the Time[s] of Sale, there position makes clear they were motivated by a shorter membership and I wasn't persuaded that profit/gain was a motivation for making this purchase. So, I wasn't persuaded that the evidence suggested that Mr S and Mrs S purchased Fractional Club membership in whole or in part down to any breach of Regulation 14(3).

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

The PR 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 Mr S and 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 Mr S and Mrs S have adequately demonstrated that the promise of profit was a motivating factor to their decision to move ahead with the purchase – principal or otherwise.

I accept that within the PR's new submissions Mr S and Mrs S has provided further evidence, stating making a number of comments about how it was sold to them as an investment. However, with this evidence there is a real risk that Mr S and Mrs S' testimony has been coloured by the Investigator's view and/or the outcome in *Shawbrook & BPF v FOS* and/or my Provisional Decision. And, on balance, the timing in which this evidence has been provided makes me conclude that I can place little weight on it. And even if I felt I could place a significant amount of weight on this statement I note it doesn't give any persuasive description of what was said or why that motivated them particularly.

So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr S and Mrs S' purchasing decision.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr S and Mrs S' decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr S and Mrs S and the Lender was unfair to them for this reason.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr S and Mrs S' Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA.

And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 24 February 2026.

Rod Glyn-Thomas
Ombudsman