DRN-5890431

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 claims under Section 75 of the CCA.

What happened

Mr and Mrs R was the member of a timeshare provider (the 'Supplier') – having purchased several 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 22 June 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 3,500 fractional points at a cost of £6,986 (the 'Purchase Agreement') after trading in their existing timeshare.

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 trading in their existing timeshare and taking finance of £6,986 from the Lender (the 'Credit Agreement').

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 30 July 2021 (the 'Letter of Complaint') to raise several different concerns. Since then, the PR has raised some further matters it says are relevant to this outcome of the complaint. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above.
The Lender dealt with Mr and Mrs R's concerns as a complaint and issued its final response letter on 12 September 2021, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was 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. I issued a provisional decision explaining that I was not planning to uphold the complaint. I later sent an email to the Lender and the PR explaining my provisional findings on commission, which were that the commission arrangements between the Lender and Supplier did not create an unfair relationship between the Lender and Mr and Mrs R.

The Lender provided no further comments in response to my provisional findings.

The PR disagreed with my provisional findings and provided some comments and documents it wanted me to consider when making my final 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 no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out 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. Having done so, I've reached the same decision as that which I outlined in my provisional findings – and for broadly the same reasons. A copy of my provisional findings is below. I do not uphold this complaint.

START OF COPY OF PROVISIONAL FINDINGS

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") if 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:

(1) Told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.

(2) Told by the Supplier that Fractional Club membership was an "investment" when that was not true.

Neither the PR nor Mr and Mrs R have set out in any detail what words and/or phrases where allegedly used by the Supplier to misrepresent Fractional Club for the reason given in point 1. However, the PR says that such a representation was untrue because the Allocated Property was legally owned by a trustee and there was no indication of what duty of care it had to actively market and sell the property. Further, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrases in point 1 above would have been untrue at the Time of Sale even if it was said. It seems to me to reflect the main thrust of the contract Mr and Mrs R entered. And while, under the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor'[1], longer than that if there were problems selling and the 'Owners'[2] agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

As for point 2, it does not strike me as a misrepresentation even if such a representation had been made by the Supplier (which I make no formal finding on). 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, a share in an 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 prospective members that interest, it did not change the fact that they acquired such an interest.

The PR has raised other matters as potential misrepresentations, but it seems to me that they are not allegations of the Supplier saying something that was untrue. Rather, it is that Mr and Mrs R weren't told things about the way the membership worked. For example, that the obligation to pay management fees could be passed on to their beneficiaries. It seems to me that these are allegations that Mr and Mrs R weren't given all the information they needed at the Time of Sale, and I will deal with this further below.

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 Section 75 claim.

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[1] Defined in the FPOC Rules as "CLC Resort Developments Limited".
[2] Defined in the FPOC Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

Section 75 of the CCA: the Supplier's Breach of Contract

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not 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.

The PR says that Mr and Mrs R have never been able to book the holiday apartment of their choice and found it difficult to secure holidays due to the wait list or unavailability. That was framed in the Letter of Complaint, as an alleged misrepresentation. However, on my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.

Yet, 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 likely to have been signed by Mr and Mrs R 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. 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 breached the terms of the Purchase Agreement.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs R any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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.

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. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.

4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale.

5. The inherent probabilities of the sale given its circumstances.

6. Where relevant, 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.

Reasons Mr and Mrs R say the relationship was unfair

Mr and Mrs R's complaint about the Lender being party to an unfair credit relationship was and is made for several reasons.

They include allegations that:

1. Fractional Club membership was an Unregulated Collective Investment Scheme.

2. Mr and Mrs R were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

3. The right checks weren't carried out before the Lender lent to Mr and Mrs R.

4. The loan interest was excessive.

5. Mr and Mrs R were not given a choice of lender by the Supplier.

6. The length of the Credit Agreement was not explained, and Mr and Mrs R were under the impression that it was for two years.

7. The commission arrangements between the Lender and Supplier were not disclosed to Mr R.

However, as things currently stand, none of this strike me a reason why this complaint should succeed.

The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment in *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)*.

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.

I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's 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 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 the Mr and Mrs R.

Mr and Mrs R were aware of the interest rate, which was 0% as set out on the face of the Credit Agreement, as well as the term of the loan and the monthly repayments. Indeed, the loan was better than interest free, Mr and Mrs R borrowing £6,986 and being required to repay only £6,985.92. So, I think they understood what it was they were agreeing to, and I am surprised that the PR has suggested the Lender received *"an extortionate interest rate"*. Clearly the rate of interest was not excessive, given there was no interest, so I can't say it would be fair or reasonable to tell the Lender to do anything because of this.

The PR has not explained how, if it were true, Mr and Mrs R not being offered a different lender to pay for Fractional Club membership caused them any unfairness or financial loss. As mentioned above, they were given sufficient information about the loan to know what they were agreeing to. This included the loan term being 24 months (or two years), which the PR has indicated (albeit while saying that this was not explained to them) is what Mr and Mrs R understood it to be.

Overall, therefore, I don't think that Mr and Mrs R credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above (I will deal with the matter of commission below). But there is another reason, perhaps the main reason, why the PR now says the credit relationship with the Lender was unfair to Mr and Mrs R. 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 and Mr and Mrs R say that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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*.[3]

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 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 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.

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[3] The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment in *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).

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.

But 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. I say this because:

- Although the Letter of Complaint alleges that Fractional Club membership was misrepresented to Mr and Mrs R as an investment, it simply said, *"[the Supplier] claimed they bought an investment which would grow in value like normal property and which they could sell and recoup some of their total investment. Our Clients were over their head with information the reps were giving them, making them believe this is an investment from which they will benefit in the future."* This appears to be a fairly generic allegation, in that it does not go into detail about what happened or what was said specifically to Mr and Mrs R at Time of Sale. Indeed, it does not even specify that the Supplier said Mr and Mrs R could profit financially from the purchase – only that they would recoup some of their investment or benefit from it in future (while not specifying how). In itself, I do not find it to be persuasive evidence of what happened. However, it could help persuade me if it was supported by other evidence that was consistent in the allegations, for example by Mr and Mrs R's direct recollections of what happened.

- On 20 December 2023, the PR provided an unsigned and undated statement from Mr and Mrs R. The PR said this statement was taken on 22 October 2021 and had not been provided sooner since the Lender nor the Financial Ombudsman Service had requested it. I'm mindful this was provided after the ombudsman's approach to this type of complaint had been the subject of a judicial review, which confirmed that it was open to an ombudsman to find that a Supplier selling or marketing a timeshare as an investment *could* result in an unfair credit relationship *if* this was material to the decision the customer made. Given the statement is undated and unsigned there is the possibility that it was written later than 22 October 2021, and that it was influenced by knowledge of the ombudsman's approach to this type of case.

- This statement said that:

    - When purchasing Fractional Club membership in 2012 the Supplier had told Mr and Mrs R that, *"A Fractional would be sold after 19 years and we would get our money back. It was an investment that we could cash it in and add it into our pension pot."*

    - And when purchasing an upgrade to their Fractional Club membership in 2013, they were *"convinced to upgrade the Fractional to Paradise in Tenerife as a better investment and better holidays"*.

- However, when it comes to describing what happened at the Time of Sale, the statement just says:

    - *"It was in Spain at Pueblo del Marina and they said that they would reduce the maintenance fees. There was the usual presentation and [the Supplier] arranged the [Lender] loan. We wanted to pay by credit card but they said no. They told us to take the loan and pay it off when u get back, which we did."*

- Taking the statement at face value as being Mr and Mrs R's genuine recollections as of 22 October 2021, the statement alleges that Fractional Club membership was sold to Mr and Mrs R in 2012 and 2013 as being an investment, but the same allegation is not made about the Time of Sale. The statement does not suggest that Mr and Mrs R having previously been told that Fractional Club membership was an investment was a material factor in their decision to purchase at the Time of Sale. In fact, the statement only specifies reduced maintenance fees[4] as being a benefit of the purchase. This makes it very difficult for me to conclude that Mr and Mrs R entered into the Purchase Agreement because they held out the hope or expectation of making a profit on the purchase, and that this was a material factor in their decision. If that had been of importance, I think they would've mentioned it in their statement. But they have not said that was the case, and I do not think there is sufficient evidence here to justify me inferring that this was the case.

- While I have not seen evidence that it did actually do so, the Lender has said that it did request a statement from Mr and Mrs R when it was investigating the complaint, but this was not provided to it. If that is correct, this may cast further doubt on when the statement was written, as I can see no reason why it wouldn't have been provided to the Lender when it was requested.

- On 3 June 2025, the PR provided a copy of some handwritten notes, which it says were made during a phone call with Mr and Mrs B on 22 October 2021, and from which the statement was prepared. While some of the handwritten note matches up with what is said in the statement, the statement is more detailed. But when it comes to the Time of Sale, the handwritten note says the following:

    - "2018 Fractional… Pueblo Marina – presentation etc – Reduce maint fees – Again, better for pension pot. Wanted to pay credit card said no must take loan. Paid off immediately."

- So, the handwritten note adds that the purchase at the Time of Sale was better for Mr and Mrs R's pension pot – suggesting it was seen as an investment. But, as mentioned above, this is not included in the statement. It is unclear why that would be the case. But I would take the statement, which presumably was checked and amended by Mr and Mrs R, to be the more accurate reflection of their memory of what happened.

- Among the documents provided by Mr and Mrs R in support of the complaint, there is a document completed at the Time of Sale which sets out details of the timeshares they were trading in. This shows that their existing timeshares required an annual maintenance fee of €3,240. And that the Purchase Agreement had a maintenance fee in the first year or €2,652. This is significantly less, and I think is persuasive evidence in support of what is said in the statement – that the reason Mr and Mrs R decided to enter the Purchase Agreement was due to reduced maintenance fees. Given that Mr and Mrs R have not themselves said there were other reasons that were material to their decision at the Time of Sale, I am not persuaded there were.

[4] Mr and Mrs actually paid management fees, not maintenance fees. Although part of those fees likely contributed to maintaining the Allocated Property, they were probably for more than just that purpose (such as contributing towards the running costs of the Fractional Club).

That doesn't mean Mr and Mrs R weren't interested in a share in the Allocated Property or the additional fractional points they were purchasing. 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 say that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I cannot fairly conclude that 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 says that Mr and Mrs R were not given sufficient information at the Time of Sale by the Supplier about membership, including about the ongoing costs of Fractional Club membership and the fact that Mr and Mrs R's heirs could inherit these costs.

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 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 Mr and Mrs R's beneficiaries would inherit the on-going management charges, I fail to see how that could be the case or that it could have led to an unfairness that warrants a remedy.

Commission complaint

Mr and Mrs R say 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 Cort 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 think any such failure is itself a reason to find the credit relationship in question unfair to Mr and Mrs R.

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 that 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.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, the Lender didn't pay the Supplier any commission at the Time of Sale. And with that being the case, even if there were information failings at that time and regulatory failings as a result (which I make no formal finding on), I'm not persuaded that the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr and Mrs R.

END OF COPY OF PROVISIONAL FINDINGS

The PR's response to my provisional findings about an unfair relationship

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 provisional decision only relate to the issue of whether the credit relationship between Mr and Mrs R and the Lender was unfair.

As outlined in my provisional decision, the PR originally raised various other points of complaint, all of which I addressed as above. But the PR didn't make any further comments in relation to those in their response to my provisional decision. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my provisional decision. So, I'll focus here on the matter of whether there was an unfair credit relationship between Mr and Mrs R and the Lender.

The PR has provided further comments and evidence which in my view relate to whether Fractional Club membership was marketed or sold as an investment in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. However, as I explained in my provisional decision, while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it isn't necessary to make a finding on this as it is not determinative of the outcome of the complaint. I explained that Regulatory breaches do not automatically create unfairness and

that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

The PR's comments and evidence in this respect do not persuade me that I should uphold Mr and Mrs R's complaint, because they do not make me think it's any more likely that the Supplier's breach of Regulation 14(3) led Mr and Mrs R to enter into the Purchase Agreement and the Credit Agreement.

The PR has provided its further thoughts as to Mr and Mrs R's likely motivations for purchasing Fractional Club membership. I recognise it has interpreted Mr and Mrs R's evidence differently to how I have and thinks it points to them having been motivated by the prospect of a financial gain from Fractional Club membership.

In my provisional decision, I explained the reasons why I didn't think Mr and Mrs R's purchase was motivated by the prospect of a financial gain (i.e., a profit). And although I have carefully considered the PR's arguments in response to this, I'm not persuaded the conclusions I reached on this point were unfair or unreasonable.

The PR has provided some pricing sheets from the Time of Sale, which show how much value was given to the trade-in of Mr and Mrs R's previous timeshare. This shows they held a 7.73% fraction of the property linked to the previous timeshare, and a 9.01% fraction of the Allocated Property as part of the Purchase Agreement. The PR has also done some calculations[5] to extrapolate the value of the allocated properties from the timeshare's purchase prices (or trade-in value) to show that the Allocated Property was higher than the value of the property allocated to Mr and Mrs R's previous timeshare. But there is insufficient evidence to persuade me that either comparison was specifically highlighted to Mr and Mrs R at the Time of Sale nor that this helped persuade them to enter the purchase when they otherwise would not have done so.

The PR has said that it has no record of the Lender requesting a statement from Mr and Mrs R. While I mentioned this in my provisional decision as something that could call into question when Mr and Mrs R's statement was written, I nevertheless assessed that evidence as being Mr and Mrs R's genuine recollections as of 22 October 2021. And doing so, I was not persuaded by it that I should uphold this complaint.

The PR has highlighted part of the Judgment in *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 and BPF v FOS*') suggesting from this that the term investment extends beyond profit or financial gain to the prospect of money back. I have taken *Shawbrook and BPF v FOS* into account when making my decision and I don't think that is what the judge intended in the paragraph the PR has highlighted. I explained in my provisional decision that the definition of investment I used was that agreed by the parties in *Shawbrook & BPF v FOS* and I see no reason to view this differently.

So, ultimately, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr and Mrs R's purchasing decision. And for that reason, I do not think the credit relationship between Mr and Mrs R and the Lender was unfair to Mr and Mrs R even if the Supplier had breached Regulation 14(3).

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[5] These calculations seem rather crude and speculative, since the purchase and trade-in prices of the timeshares were not simply derived from the value of the allocated properties, but included holiday rights and potentially other costs (such as the Supplier's overheads).

Conclusion

In conclusion, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with Mr and Mrs R under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate Mr and Mrs R.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and Mr R to accept or reject my decision before 20 February 2026.

Phillip Lai-Fang
Ombudsman