DRN-5893529

The complaint

Mr S's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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 S (together with his wife) purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 9 April 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 900 fractional points at a cost of £13,949 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave them 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 S paid for their Fractional Club membership by taking finance of £13,949 from the Lender in his sole name (the 'Credit Agreement'). So, whilst the Purchase Agreement was in joint names, Mr S is the only eligible claimant (and therefore complainant) under the Credit Agreement. Because of that, I shall refer to Mr S only throughout this decision.

Mr S – using a professional representative (the 'PR') – wrote to the Lender on 11 November 2022 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr S's concerns as a complaint and issued its final response letter on 27 November 2024, 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 S 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') in which I explained why I didn't think this complaint should be upheld. In that decision, I said:

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

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.

Furthermore, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has been time-barred under the Limitation Act 1980 (the 'LA'). The reason being that it wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court.

Having considered everything relating to the Purchase Agreement, I think Mr S's claim for misrepresentation under it is likely to have been made too late under the relevant provisions of the LA, which means it would have been fair for the Lender to have turned down his section 75 claim for this reason

A claim under section 75 is a "like" claim against the creditor. It essentially mirrors the claim Mr S could make against the Supplier. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see section 2 of the LA).

But a claim under section 75, like this one, is also *"an action to recover any sum by virtue of any enactment"* under section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued here was the Time of Sale. I say this because Mr S entered into the purchase of the Fractional Club membership at that time based upon the alleged misrepresentations of the Supplier – which Mr S says he relied upon. And as the Credit Agreement with the Lender provided funding to help finance that purchase, it was when he entered into the Credit Agreement that he allegedly suffered the loss.

Mr S first notified the Lender of his concerns in November 2022. Since this was more than six years after the Time of Sale, I don't think it was ultimately unfair or unreasonable of the Lender to reject his concerns about the Supplier's alleged misrepresentations at the Time of Sale.

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

I've already explained why I'm not persuaded I don't think it was ultimately unfair or unreasonable of the Lender to reject Mr S's concerns about the Supplier's alleged misrepresentations 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 S and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances; and, when relevant
5. Any existing unfairness from a related credit agreement.

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

The alleged misrepresentations

In determining if the relationship is unfair under Section 140A, I think the alleged misrepresentations are relevant here. So, even though I think it likely they couldn't be considered under Section 75 due to the effects of the LA, I think they could still be considered under s.140A CCA[1]. So, in trying to establish whether I think a court would likely find that an unfair relationship existed, I've considered those alleged misrepresentations further in addition to the various other points raised in this complaint.

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 S was:

1. Told that he had purchased an investment that would "appreciate in value" when that was not true.
2. Told that he would own a share in a property that would increase in value during the membership term when that was not true.
3. Told that he could sell his Fractional Club membership to the Supplier or easily to third parties at a profit.
4. Made to believe that he would have access to "the holiday apartment" at any time all year round when that was not true.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations 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. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than an honestly held opinion as there isn't enough evidence to persuade me that the relevant sales representative(s) said something that, whilst an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's *possible* that Fractional Club membership was misrepresented at the Time of Sale for those reasons, I don't think it's *probable*. The PR and Mr S have given little to none of the colour or context necessary to demonstrate that the Supplier made a false statement of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for those reasons, I don't think it was.

[1] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

So, while I recognise that Mr S and the PR have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim for misrepresentation, 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 can't reasonably conclude that the alleged misrepresentations resulted in an unfair credit relationship between the Lender and Mr S under Section 140A.

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

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

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mr 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 was actually unaffordable before also concluding that he lost out as a result. And then consider whether the credit relationship with the Lender was unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for the Mr S.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr S knew, amongst other things, how much he was borrowing and repaying each month, who he was borrowing from and that he was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for him, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mr S suffering financial loss – such that I can say that the credit relationship in question was unfair to him as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate him, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract term in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr S and in practice, nor that any such terms led them to behave in a certain way to his detriment, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

Overall, therefore, I don't think that Mr S's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to as an investment in breach of the 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 S's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr S was 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 S the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 S, the financial value of his 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 S as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

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

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

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

To help me decide this point, I've carefully considered what Mr S has said, in the course of his complaint, about how the membership was sold to him and his motivation for purchasing it. I have also considered what the PR has put forward in the Letter of Complaint on his behalf.

At the outset, I note that the evidence in this respect is quite limited. For example, within the Letter of Complaint, it is said that Mr S was told that he had purchased an investment and could expect a return on this. But there was no further detail or evidence underpinning this statement within the Letter of Complaint.

I have seen a statement from Mr S (and his wife) which is signed and dated 11 November 2024 – two years after the Letter of Complaint - although it seems this was not provided to the Lender to consider at any point. I think it's difficult to attach much weight to a statement which was first produced more than eight years after the event complained about. In particular when compared to a statement written nearer to the time when memories may have been fresher and free from the potential influence of after events. However, I have considered its contents in reaching my decision.

In the statement, it's said:

> *"Using computer software they showed us various properties around the world and discussed the points scheme as well as a free holiday if we were to purchase 900 points and talked through the benefits…"*

And having confirmed that he agreed to purchase Fractional Club membership, Mr S then adds:

> *"…they reiterated that the purchase would enable us to have enough points to enjoy holidays within the school holidays."*
>
> *"Our understanding of the fractional property ownership was that we would purchase points which could be used to purchase a holiday at any time of the year. The benefits being medical facilities on site, access to a variety of different holiday locations, memberships to other holiday providers discount airport lounges. We were told that you could book within a 3 month period. Whether it be hotels, apartments at different holiday locations from the large brochure provided".*

Having explained all of this, Mr S goes on to say:

> *"It was described and we understood that the ownership was buying part of a property in a certain location, which we would pay via the loan company. This was an apartment in a complex and when fully paid off, we would be able to sell the ownership at a profit. Once the 15yr investment was up we would get a return on our investment with extra. Therefore, the fractional would bear monetary value/investment over the long term"*
>
> *"The key benefits were the long term investment of profit, and be able to enjoy holidays at at* (sic) *any time in vast locations".*

I acknowledge Mr S's comments here. And as I've already said above, any suggestion that a share in the Allocated Property constituted an investment wouldn't be untrue given that this was clearly a feature of the Fractional Club product. However, Mr S certainly makes no suggestion that he decided to purchase Fractional Club membership as an investment.

Mr S also adds:

> *"It was sold to us that the high interest and costly loan would be outweighed by the savings on the holidays working out cheaper from using* [Fractional Club membership] *profit. The only additional costs would be accommodation, the only upfront cost for a holiday would be flights. This particular point was a hard sell and very much the focus of the sales pitch".*

I don't think this is sufficient for me to be able to conclude that Mr S was materially motivated by the prospect of a profit or financial gain when deciding to purchase (and later upgrade) his Fractional Club membership. His statement doesn't say that. There is a real lack of detail or colour to that part of his testimony, which suggests to me that Mr S may not have particularly strong recollections of what happened or what was specifically said on the subject at the Time of Sale. Of course, that's not his fault, but it's not a reasonable basis for me to arrive at any conclusions about his motivations at the Time of Sale.

Mr S's statement then goes on to highlight generally problems he had when trying to book the holidays he wanted which it seems to me is very much the crux of his dissatisfaction here. That doesn't mean he wasn't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr S himself doesn't persuade me that his purchase was motivated by a share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision Mr S 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 S's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with the 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 the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

Insolvency of the Supplier and its implications under the Credit Agreement

The PR argues that, because the Supplier, together with various associated businesses, entered into a liquidation procedure in December 2020, Mr S is not able to recover any amount that is expected to be awarded by the Spanish court.

However, as the Lender doesn't appear to have been party to any court proceedings in Spain, and as I can't see that the Supplier (i.e., the company that entered into the Purchase Agreement) is itself the subject of a Spanish court judgment in Mr S's favour, it seems to me that there is an argument for saying that the Purchase Agreement remains valid under English law for the purposes of the ruling set out in *Durkin v DSG Retail* [2014] UKSC 21.

I also note that the Purchase Agreement specifically states that it is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in *Diamond Resorts Europe and Others* (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract was governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, and given the facts and circumstances of this complaint, I'm not persuaded that it would be fair or reasonable to uphold it for this reason.

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

The Lender responded to the PD confirming it had nothing further to add.

The PR also responded. It did not accept the PD and provided some further comments it wanted me to take into account.

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 only relate to the issue of whether the credit relationship between Mr 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 as an investment at the Time of Sale. It has also now argued for the first time that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.

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

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

The PR has highlighted under Section 140B (9) of the CCA, the burden of proof falls on the Lender to disprove the allegation that its relationship with Mr S was unfair. I agree that this is correct, placing a burden on lenders during the process of litigation. That does not mean, though, that the Lender – or I – should take a claim at face value. There remains an onus on Mr S to provide some evidence for the claim he is making, despite the overall burden of proof resting with the Lender, as was set out in the judgment in *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34 at paragraph 40. I also remind both parties that it is my role to make findings on what I consider to be fair and reasonable in all the circumstances of any given complaint.

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

In its response to my PD, the PR has reasserted its view that the Supplier marketed the Fractional Club membership to Mr S as an investment and that this was a motivating factor in his decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mr S in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it wasn't necessary for me 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 response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mr S to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

In my PD I explained the reasons why I didn't think any breach of Regulation 14(3) had led Mr S to proceed with his purchase. In short, I was not persuaded that his decision was motivated by the prospect of a financial gain (i.e., a profit). In reaching that view, I took into account the testimony given by Mr S in the course of his complaint. I recognise the PR has interpreted Mr S's testimony differently to how I have, and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion.

The PR objects to the approach I've taken in assessing this aspect of the complaint, believing that I have detracted from the judgment in *Shawbrook & BPF v FOS*[2] and the case law that contributed to it, by requiring Mr S to have been "primarily or mainly motivated" by the investment element in order to uphold the complaint. But I did not make such a finding. Rather, I thought Mr S's statement appeared to focus heavily upon the holiday benefits offered by the Supplier. And the crux of his complaint was that the Supplier hadn't provided

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

those holiday benefits due to his inability to secure the bookings he wanted to. This suggested to me that Mr S was highly motivate by those holiday benefits when deciding to purchase and was a factor in my overall conclusion that in light of all the available evidence, Mr S would, on balance, have pressed ahead with his purchase of the Fractional Club membership even if there had been a breach of Regulation 14(3).

The PR has pointed to various parts of Mr S's witness statement in which he says:

- *"It was described and we understood that the ownership was buying part of a property in a certain location, which we would pay via the loan company."*
- *"This was an apartment in a complex and when fully paid off, we would be able to sell this ownership at a profit".*
- *"Once the 15-yr investment was up we would get a return on our investment with extra".*
- *The Key benefits were the long-term investment of profit, and be able to enjoy holidays at any time in vast locations".*

The PR argues that this demonstrates that the investment element did play an important part during the sales process and was a motivating factor in Mr S's decision making.

I've carefully considered the PR's arguments here, bearing in mind I had previously referred to those recollections in my PD. Having done that, I remain of the view that Mr S's purchase decision was highly motivated by the holiday benefits associated with Fractional Club membership. So much so that his witness statement repeatedly highlights his frustrations with an apparent inability to enjoy those holiday benefits.

I also remain mindful that Mr S's witness statement was not provided to the Lender as part of the claim submitted by the PR. It was only produced when his complaint was referred to this service – having been dated 11 November 2024. I find it unusual that such recollections would not have been provided when the claim was first submitted - whether it was a requirement or not. Particularly as Mr S's claim appears to rely heavily upon those personal recollections.

In my PD, I explained the difficulty I have placing weight on a statement that was first produced more than nine years after the event complained about and two years after the claim was first submitted. Particularly when compared to a statement written nearer to the time when memories may have been fresher and free from the potential influence of later events.

I'm also mindful that Mrs S's witness statement wasn't provided until after the important judgement in the case of *Shawbrook & BPF v FOS*; a case which highlighted the potential significance of breaches of Regulation 14(3). This despite his claim predating that judgment. So, I can't rule out the possibility that Mr S's witness statement may have been influenced in some way by the outcome of that case.

So, for the reasons given in my PD and above, I still do not think that any breach of Regulation 14(3), if there was one, was material to Mr S's decision to purchase the Fractional Club membership.

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

The PR says that a payment of commission from the Lender to the Supplier at the

Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

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

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

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

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);
2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

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

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

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

But I don't think *Hopcraft, Johnson and Wrench* assists Mr S in arguing that his credit relationship with the Lender was unfair to him 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 S. 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 S 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 S.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr S entered into wasn't high at only 0.91% of the amount borrowed. So, had he known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr S wanted Fractional Club membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted doesn't strike me as disproportionate. So, I think he would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

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

Overall, therefore, I'm not persuaded that the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr S.

S140A conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mr S and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Mr S's credit relationship with the Lender wasn't unfair to him for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding

complaints to Mr S's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mr S (i.e., secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

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

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's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him 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 him.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 17 March 2026.

Dave Morgan
Ombudsman