

The complaint

Mr and Mrs M'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.

Background to the complaint

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 1 June 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £12,968 (the 'Purchase Agreement'). These points could be used in a variety of ways to reserve holidays at resorts owned and operated by the Supplier on a bi-annual basis.

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

Mr and Mrs M paid for their Fractional Club membership by taking finance of £12,968 from the Lender (the 'Credit Agreement').

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 4 November 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. 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.
3. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

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

1. told them they had purchased an investment, through which they would have a share of a property – the value of which would "*considerably increase*" and therefore provide them a "*considerable return*".
2. told them that they could sell the timeshare back to the resort or "*easily sell it at a profit*", when that was not true.
3. told them they would have access to the Allocated Property at any time throughout the year, when that was not true.

Mr and Mrs M 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 and Mrs M.

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

The Letter of Complaint set out why Mr and Mrs M 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 the obligation to pay annual management charges for the duration of their membership – and more significantly, the consequences of failing to do so – were unfair contract terms.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs M's concerns as a complaint, rejecting it on every ground as set out in its responses of 5 January 2022 and 15 September 2022.

One of our Investigators reviewed Mr and Mrs M's complaint and thought it should be upheld. In summary, they thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs M at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs M was rendered unfair to them for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision, so it was passed to me.

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

Mr and Mrs M's claim under Section 75 of the CCA

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs M could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

They include the suggestion that the Fractional Club membership had been misrepresented by the Supplier as an investment, through which Mr and Mrs M would have a share of a property and obtain a "*considerable return*". As I'll come on to in more detail below, I consider that Mr and Mrs M's acquisition of a share in the Allocated Property did amount to an investment – as it offered them the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

The amount of money Mr and Mrs M receive on their investment will only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier in this regard, I cannot say they would amount to a misrepresentation.

It is also said in the Letter of Complaint that Mr and Mrs M were told that they could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr and Mrs M were given at the Time of Sale. The Purchase Agreement they signed included a declaration to the effect that they had received this Information Statement. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr and Mrs M at the time.

Lastly it was said in the Letter of Complaint that Mr and Mrs M were "*made to believe that [they] would have access to the holiday's apartment at any time all around the year*". I understand this to mean that Mr and Mrs M thought they would be able to stay at the Allocated Property whenever they wanted, which was not the case. But it may also mean that they thought availability of accommodation more broadly was guaranteed, and I note that within a statement from Mr and Mrs M provided during our investigation that they were unhappy at the lack of availability in one destination on at least one occasion. So I read this as Mr and Mrs M saying 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 Mr and Mrs M would've been given states that the availability of holidays was subject to demand. And with regard to the usage of the Allocated Property, the Purchase Agreement that Mr and Mrs M signed clearly stated that their Fractional Points "*do not transfer or grant the right of use to any allocated property*". I find it unlikely that the Supplier would've made promises of the type suggested in the Letter of Complaint. And while I accept that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs M any compensation for the alleged misrepresentations or any breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs M 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 and Mrs M 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.

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

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

Mr and Mrs M 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.

The PR says that the right checks may not have been carried out before the Lender lent to Mr and Mrs M, as Mr and Mrs M do not remember an affordability assessment being carried out. 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 and Mrs M 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 do not think that the lending was unaffordable for Mr and Mrs M. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs M wish to provide, I would invite them to do so in response to this provisional decision.

I'm not persuaded, therefore, that this rendered Mr and Mrs M's credit relationship with the Lender unfair to them under Section 140A. 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 and Mrs M'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.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs M 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 M, 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 not sold to Mr and Mrs M as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, 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 equally possible that Fractional Club membership was marketed and sold to Mr and Mrs M 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 is 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 Mr and Mrs M rendered unfair to them?

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.

And in light of what the courts had to say in *Carney* and *Kerrigan*, 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 M 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.

To help me decide this point, I've carefully considered what Mr and Mrs M have said in the course of their complaint about how the membership was sold to them and their motivation for taking it out.

I would note first of all that the evidence in this respect is limited. Within the Letter of Complaint, it is said that Mr and Mrs M were told that:

"[they] had purchased an investment and [their] timeshare would considerably appreciate in value",

"[they] would have a share of a property and its value would considerably increase, therefore [they were] promised a considerable return on investment", and

"[they] could easily sell [the timeshare] at a profit".

There is no further detail underpinning these statements, which are rather generic in nature. In fact, such assertions are made in an identical fashion by the PR in a number of other complaints.

At our request, the PR subsequently provided a statement from Mr and Mrs M. There is very little reference to the investment element of the Fractional Club membership within their comments. The only mention of it within their two-page statement is the recollection that they were told:

"... this would be an investment and it couldn't fail to increase in value in 15 years time and our share would have gone up substantially in that time."

This somewhat broad statement isn't backed up with any further detail, such as anything said or done by the Supplier that led them to believe what sort of return they might be able to expect from the investment – as I might expect if the Supplier had indeed marketed the membership as an investment, and/or if the investment element was a significant factor in Mr and Mrs M's decision to purchase it.

It is difficult for me to be certain what motivated Mr and Mrs M's to take out the Fractional Club membership in light of the evidence and information I've received to date. But from the limited information I do have, I think it most likely that the holiday options were their primary motivation. I say this because within their statement, much greater focus is placed on the holiday options that were discussed and presented to them by the Supplier. These recollections are significantly more detailed. I note in particular that they recall being shown "how much cheaper" it was to take holidays through the Supplier when compared to their previous holiday arrangements. They go on to set out their dissatisfaction with the holidays they were able to access through the membership, again in some detail – while not expressing any concern about the investment element whatsoever.

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 M'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) – given their interest in the holiday-related benefits the membership offered them at the preferential terms they negotiated. And for that reason, I do not think the credit relationship between Mr and Mrs M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Unfair contract terms

The PR also says that the contractual terms included unfair default provisions. On my reading, the provisions in question effectively mean that if Mr and Mrs M were to fail to make a payment due under the Purchase Agreement (such as the annual management charges), they could, ultimately, forfeit their “fractional rights”. Non-payment could therefore have significant consequences for Mr and Mrs M, such as the loss of their share in the Allocated Property and the holidays to which their points would otherwise entitle to them – without getting back any of the money they've paid to acquire these rights.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs M and the Lender unfair to them, I'd have to see that the term was unfair under the CRA and operated against Mr and Mrs M in practice.

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

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

With that in mind, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mr and Mrs M and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the term was actually operated against Mr and Mrs M, let alone unfairly.

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 and Mrs M was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs M was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not regulated by the FCA to carry out that activity

The PR says that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't and isn't permitted to enforce the Credit Agreement as a result.

However, having looked at the Financial Ombudsman Service's internal records, I can see that the business named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA. The Lender says the Supplier's permissions covered credit broking. So in the absence of any evidence to the contrary, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

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 and Mrs M'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.

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 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 in the main relate to the issue of whether the credit relationship between Mr and Mrs M and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr and Mrs M as an investment at the Time of Sale. They've 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 they didn't make any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in response.

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

Firstly, it was said that while the Investigator had concluded that the membership *had* been marketed as an investment to Mr and Mrs M, I had concluded that it had not been. But that is not what I provisionally found. I set out in my provisional decision that there may have been a breach of Regulation 14(3) by the Supplier. However I did not make a firm finding on that as I did not think it mattered in determining that aspect of the complaint – as even if I found that there had been a breach, that would only lead me to uphold the complaint if I thought that breach had led Mr and Mrs M to purchase the membership (and, therefore, enter into the Credit Agreement). And I did not think that is what happened.

That was because I provisionally found that Mr and Mrs M's decision to purchase the Fractional Club membership was not motivated by the prospect of a financial gain (i.e., a profit). Based on the evidence I had, I thought Mr and Mrs M were primarily motivated by the holiday options offered by the Fractional Club membership.

The PR objects to the approach I've taken in assessing this aspect of the complaint, saying that it was not found in *Shawbrook & BPF v FOS* that the borrowers under the loan

agreements at issue had purchased their timeshare memberships *primarily* for investment reasons. But I did not say that Mr and Mrs M needed to have done so. I said that in my view, Mr and Mrs M were primarily motivated by holidays – which was a factor in my overall conclusion that they would, on balance, have pressed ahead with their purchase of the Fractional Club membership even if there had been a breach of Regulation 14(3).

This provisional finding was based, in part, on the statement Mr and Mrs M gave recalling how the membership was sold to them and setting out their concerns. I take the PR's point that, effectively, Mr and Mrs M's recollections (and indeed their unhappiness) are more likely to focus on the holiday 'element' of their membership as it is only at the end of the membership term that the investment benefit 'crystallises'. Nonetheless, in having to establish whether I think the marketing of the membership as an investment was material to Mr and Mrs M's decision to purchase it, I think it is right that I take their statement into account alongside the other evidence I have.

The PR says that Mr and Mrs M filed a claim, prior to raising this complaint, which contested that the membership was sold to them as an investment – and that the court found that it had been. The PR argues that this shows the investment element was "important" to Mr and Mrs M. This doesn't lead me to a different view of things. I accept it is a point of contention for Mr and Mrs M now, and that it may have been for a number of years. But that does not, in my view, shed any more light on Mr and Mrs M's decision-making process at the Time of Sale.

The PR also says that the exact percentage of Mr and Mrs M's share in the net sale proceeds of the Allocated Property (i.e. 1.21%) was noted within the sales documentation, which further suggests that the investment element played "quite an important role" in convincing Mr and Mrs M to purchase the membership. I do not share this view. While I can accept that it further supports that the membership was marketed and sold to Mr and Mrs M as an investment, I fail to see how this quantification of their share by the Supplier speaks to their motivation for purchasing the membership – and in particular whether the prospect of a financial gain was a factor in this.

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 and Mrs M's purchasing decision.

The provision of information by the Supplier at the Time of Sale

The PR says that a payment of commission from the Lender to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

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

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

However, the Supreme Court held that the credit relationship between the lender and

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

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

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

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

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

But I don't think *Hopcraft, Johnson and Wrench* assists Mr and Mrs M 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 M, 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 M 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 M.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr and Mrs M entered into wasn't high. At £648.40, it was only 5% of the amount borrowed and even less than that

(4.63%) as a proportion of the charge for credit. So, had they known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr and Mrs M wanted Fractional Club membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted doesn't strike me as disproportionate. So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr and Mrs M but as the supplier of contractual rights they obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to them when arranging the Credit Agreement and thus a fiduciary duty.

Overall, therefore, I'm not 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 M.

I will also address the PR's point regarding the apparent ambiguity in the proposed sale date of the Allocated Property. The PR suggests that a delayed sale date could lead to an unfairness to Mr and Mrs M in the future, as any delay could mean a delay in the realisation of their share in the Allocated Property.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2032. This same date is set out under point 1 of the Members Declaration, which has been initialled and signed as being read by Mr and Mrs M.

This date indicates that the membership has a term of 15 years. The ambiguity identified by the PR is that in the Information Statement provided as part of the purchase documentation it says the following:

*"The Owing Company will retain such Allocated Property until the automatic sale date in **19 years time** or such later date as is specified in the Rules or the Fractional Rights Certificate."* (bold my emphasis).

It seems clear to me that the commencement date for the start of the sales process is 31 December 2032. This actual date is repeated in the sales documentation as I've set out above. And I note that Mr and Mrs M refer to a term of 15 years within their statement, so it seems they understood when the sale date would fall.

So, I can't see that this is a reason to find the credit relationship unfair and uphold this complaint.

Section 140A: conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mr and Mrs M and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. 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 and Mrs M's credit relationship with the Lender wasn't unfair to them for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr and Mrs M's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

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

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

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 and Mrs M'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 I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 3 February 2026.

Ben Jennings
Ombudsman