

The complaint

Mr D and Mrs D's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr D and Mrs D were existing members of a timeshare provider (the 'Supplier'), having previously purchased a trial timeshare product. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – membership of which they bought from the Supplier on 22 May 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,390 fractional points at a cost of £20,382 (the 'Purchase Agreement'). However, after trading in their trial membership, they paid £16,437 for Fractional Club membership.

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 D and Mrs D paid for the Fractional Club membership by taking finance of £20,728 from the Lender (the 'Credit Agreement'). This figure included sufficient to repay an amount owed under an existing credit agreement with another financial business relating to their previous trial timeshare purchase.

Mr D and Mrs D – using a professional representative (the 'PR') – wrote to the Lender on 3 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 D and Mrs D's concerns as a complaint and issued its final response letter on 8 April 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 D and Mrs D 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. 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 D and Mrs D were:

1. Told that they had purchased an investment that would “considerably appreciate in value”.
2. Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.
3. Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.
4. Made to believe that they would have access to “the holiday apartment” at any time all year round.

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, while 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 one or both of those reasons, I don’t think it’s *probable*. The PR and Mr D and Mrs D have given little to none of the colour or context necessary to demonstrate that the Supplier made false statements 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 these reasons, I don’t think it was.

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

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

There are also 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 D and Mrs D and the Lender along with all 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 D and Mrs D and the Lender.

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

Mr D and Mrs D'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 D and Mrs D. 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 D and Mrs D was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr D and Mrs D.

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 D and Mrs D knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for them, 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 D and Mrs D incurring financial loss – such that I can say that the credit relationship in question was unfair on them 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 them, 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 D and Mrs D in practice, nor that any such terms led them to behave in a certain way to their 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 D and Mrs D's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of 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 D and Mrs D'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 D and Mrs D 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 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 D and Mrs D the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr D and Mrs D 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 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 D and Mrs D, 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 D and Mrs D 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 D and Mrs D 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 D and Mrs D and the Lender that was unfair to them and warranted relief as a result, the question of 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 D and Mrs D decided to go ahead with their purchase. It appears neither the PR nor Mr D and Mrs D provided any evidence to support this particular allegation at the time of making the complaint.

Upon referring Mr D and Mrs D's complaint to the Financial Ombudsman Service in September 2024, the PR provided a witness statement which appears to have been prepared by Mr D and Mrs D. That said, the statement is unsigned and undated and there is no evidence to suggest that the Lender was ever provided with a copy of the statement at any point previously. In fact, the Lender's final response refers to it having asked for such recollections albeit they weren't received.

I think it's difficult to attach much weight to a statement which was first provided more than six years after the event complained about. In particular, when compared to a statement written and provided nearer to the time when memories may have been fresher and free from the potential influence of after events. I say that recognising that the statement was only provided when the complaint was first referred to this service, suggesting to me it is likely to have been produced much later.

That said, I've considered Mr D and Mrs D's recollections. The statement described how they first became involved with the Supplier resulting in their purchase of a trial timeshare membership in February 2018. It then went on to recall the 'Prelude week' (holiday) Mr D and Mrs D took as a consequence of purchasing their trial timeshare membership. Although the statement does not mention the date of that week, it does confirm their attendance at the same resort associated with their purchase of Fractional Club membership in May 2018.

Mr D and Mrs D said:

"We were advised that our trial membership didn't meet our needs and we could upgrade our Trial Membership to a full Vacation Club membership which would give us holidays every year for the rest of our lives and which we could leave to our children who could also take holidays each year too. We were asked how much we thought we would ordinarily spend on holiday accommodation each year for the next 10 or 20 years and shown that if we paid a similar amount, we and our children would never have to pay for quality holiday accommodation again".

This appears to relate to the Time of Sale. I say that because their statement then went on to describe events that took place in 2019 and beyond – after they'd purchased Fractional Club membership.

Importantly, Mr D and Mrs D's witness statement includes no suggestion that Fractional Club membership had been represented as an investment by the supplier. Or that Mr D and Mrs D even saw it that way. This appears somewhat removed from the allegations included within the Letter of Complaint.

Furthermore, Mr D and Mrs D referred to being asked to upgrade to "a full Vacation Club membership" when they actually purchased Fractional Club membership – a different product entirely. I have also noted that they later said, "Despite signing the upgraded Holiday Owner membership in September 2019, the transfer from the trail (sic) membership didn't happen until late October 2019...". However, the documentary evidence from the Time of Sale shows that Mr D and Mrs D's trial timeshare membership was traded in towards the purchase of Fractional Club membership in May 2018 – not 2019.

I don't think this is sufficient for me to be able to conclude that Mr D and Mrs D were materially motivated by the prospect of a profit or financial gain when deciding to purchase Fractional Club membership. Their statement doesn't say that. There is a real lack of detail or colour to their testimony together with some apparent inaccuracies, which to me suggests Mr D and Mrs D may not have particularly strong recollections of what happened or what was said on the subject at the Time of Sale. Of course, that's not their fault, but it's not a reasonable basis for me to arrive at any conclusions about their motivations at the Time of Sale in May 2018.

That doesn't mean Mr D and Mrs D weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as they don't suggest or persuade me that their purchase was motivated by the share in the Allocated Property and importantly, 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 D and Mrs D 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 D and Mrs D'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 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 D and Mrs D and the Lender was unfair to them 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 D and Mrs D are not able to recover any amount that is expected to be awarded by the Spanish court.

However, as the Lender hasn't 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 D and Mrs D'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 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 D and Mrs D'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. 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 D and Mrs D and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr D and Mrs D 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 their 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 D and Mrs D 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 D and Mrs D to provide some evidence for the claim they are 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 D and Mrs D as an investment and that this was a motivating factor in their decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mr D and Mrs D 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 D and Mrs D 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 D and Mrs D to proceed with their purchase. In short, I was not persuaded that their 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 D and Mrs D in the course of their complaint. I recognise the PR has interpreted Mr D and Mrs D'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*¹ and the case law that contributed to it, by requiring Mr D and Mrs D 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. I said that, in my view, there was no suggestion in Mr D and Mrs D's witness

¹ 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').

statement that they saw Fractional Club membership as an investment that would result in financial gain and/or profit. In fact, their witness statement appears to focus upon the holiday benefits they expected to receive under Fractional Club membership - which was a factor in my overall conclusion in light of all the available evidence 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).

In its response, the PR points out that it considers Mr D and Mrs D “*were commercially unsophisticated individuals*” and “*relied heavily, and reasonably, on the representations and assurances made to them during the sales process*”. Furthermore, the PR points to comments I made in my PD. In particular where I said:

“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, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held”.

For clarity, this comment was in response to the misrepresentation claim Mr D and Mrs D under Section 75 CCA. And as I’ve already said, I’ve assessed Mr D and Mrs D’s claim under Section 140A CCA on the assumption the Supplier may well have represented Fractional Club membership as an investment. However, as I’ve already said, the key issue here is whether any breach of Regulation 14(3) was material in Mr D and Mrs D’s decision to purchase. Having again considered all the evidence together with Mr D and Mrs D’s witness statement, I’m still not persuaded it was. Simply put, I remain of the view that there was no suggestion by Mr D and Mrs D that they purchased Fractional Club membership as an investment. Or that they even saw it that way.

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 D and Mrs D’s decision to purchase the Fractional Club membership.

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 D and Mrs D 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 D and Mrs D, 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 them 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 D and Mrs D.

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 D and Mrs D entered into wasn't high. At £1,036.40, 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 D and Mrs D 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 D and Mrs D 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 D and Mrs D.

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 CONSUMER and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him/her/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 D and Mrs D'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 D and Mrs D'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 D and Mrs D (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 D and Mrs D 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 D and Mrs D's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Mrs D to accept or reject my decision before 4 March 2026.

Dave Morgan
Ombudsman