DRN-5959473

The complaint

Mrs N's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance[1] (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her 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.

Although the timeshare purchase in question was in the joint names of Mr and Mrs N, the credit agreement used to make the purchase was in Mrs N's sole name. As such she is the only eligible complainant here. I will, however, refer to both Mr and Mrs N where appropriate to do so.

What happened

Mr and Mrs N were existing holders of a trial timeshare membership which they had bought from a timeshare provider (the 'Supplier') in 2018.

Mr and Mrs N purchased a new full membership (the 'Fractional Club') from the Supplier on 7 April 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £20,384 (the 'Purchase Agreement'). But after trading in their trial membership, they ended up paying £15,989 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs N 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.

Mrs N paid for their Fractional Club membership by taking finance of £19,868 from the Lender in her sole name (the 'Credit Agreement'). This amount consolidated the outstanding balance of a previous loan taken when the trial membership was purchased.

Their Fractional Club membership was traded in towards the purchase of further fractional points and a new membership in October 2019. As such they no longer hold an interest in the Allocated Property.

Mrs N – using a professional representative (the 'PR') – wrote to the Lender on 14 January 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA.
2. A breach of contract by the Supplier giving her a claim against the Lender under Section 75 of the CCA.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The 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

[1] At the time the loan was arranged the Lender was trading as Hitachi Personal Finance.

activity.

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

Mrs N says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Told them that they had purchased an investment and that their timeshare would considerably appreciate in value, when this was not true.
- Told them that they would have a share of property, and its value would considerably increase, therefore they were promised a considerable return on investment, when this was not true.
- Told them that they could sell the timeshare back to the resort or easily sell it at a profit, when this was not true.
- Told them that they would have access to the holiday apartment at any time all year round, when this was not true.

Mrs N says that she has 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs N.

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

Mrs N says that the Supplier breached the Purchase Agreement because it went into liquidation, which means she will not be able to recover any amounts due to them.

As a result of the above, Mrs N says that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs N.

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

The Letter of Complaint set out several reasons why Mrs N says that the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA. In summary, they include the following:

- 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').
- The contractual term (Clause D) setting out that the membership would be defaulted in the event of non-payment by the member is an unfair contract term[2].
- 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.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mrs N's concerns as a complaint and issued its final response letter on 8 February 2022, rejecting it on every ground.

[2] Although not set out as such, this is alleging a breach of the Consumer Rights Act 2015 ('the CRA').

Mrs N then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mrs N disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that I didn't think this complaint ought to be upheld, but I expanded somewhat on the reasons for not doing so. As such I set out my initial thoughts in a provisional decision (the 'PD'), and invited both sides to submit any new evidence or arguments that they wished me to consider prior to me making my final decision.

The provisional decision

I began by setting out what I considered to be the legal and regulatory context that was relevant to the case, and then addressed the merits of the complaint. I said:

"*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint*.

And having done that, I do not currently think this complaint should be upheld.

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

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

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mrs N 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.

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

It has also been alleged that the Supplier misrepresented that Fractional Club was an investment that would considerably increase in value. I will address this further below, but for reasons I will explain, had Mr and Mrs N been told Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

In addition, it has been said that the Supplier told Mr and Mrs N that they could sell their membership back to the resort, or easily sell it at a profit, when that was untrue. But other than setting out the bare allegation in the Letter of Complaint, there is no evidence to support that they were told this by the Supplier. And the terms and conditions of the membership expressly set out that the Supplier has no repurchasing programme.

As for the Supplier's other alleged pre-contractual misrepresentation, while I recognise that Mrs N has concerns about the way in which their Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reason she alleges. And I say that because there is no evidence to suggest that the Supplier told them that they would be able to have access to the Allocated Property at any time, all year round. And I think it is inherently unlikely that the Supplier would have said this anyway as this is not the way their Fractional Club membership worked. This membership gave Mr and Mrs N no rights to access or use the Allocated Property in any way, and this is set out in bullet point 4 of the Purchase Agreement. And in any case, holiday accommodation was subject to availability, and each membership has a limit to the number of weeks holiday members can take, dependant on the number of points they had. So, I am not persuaded that the Supplier would have told Mr and Mrs N that they would be able to use their membership to stay at the property at any time, all year round.

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

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

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

I've already summarised how Section 75 of the CCA works and why it gives Mrs N a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Although not set out in terms of a breach of contract, Mrs N says that the Supplier went into liquidation in December 2020, and this means that they would be unable to recover any monies which may be due to them from the Spanish Court.

But the PR's argument is difficult to square with claim that seems to be made here under Section 75. After all, suing the Supplier in a Spanish court follows from, and is separate to, the rights and obligations that the parties to a contract might have.

I can, however, see that certain parts of the Supplier's business were put into administration. But it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain. And in any case, neither Mrs N nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. *members of the Fractional Club;*
2. *able to use their Fractional Club membership to holiday in the same way they could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.*

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs N any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mrs N 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 Mrs N also says that the credit relationship between her 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 she has concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Mrs N 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;*
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; and*
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 Mrs N and the Lender.

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

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

They include the allegation that there is an unfair term in the contractual documentation (Clause D) which means that their Fractional Club membership can be defaulted should Mrs N fail to make a required payment within 14 days of it being due.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mrs N and the Lender unfair to them, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against her in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs N, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in 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. Having considered everything that has been submitted, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mrs N and the Lender for the purposes of Section 140A of the CCA. I say this because I

cannot currently see that the relevant term in the Purchase Agreement has actually been operated against Mrs N, let alone unfairly. The PR hasn't explained why exactly it feels this term causes an unfairness, and as I've said, I can't see that this term has been operated in an unfair way against Mrs N in any event.

The PR has also said that the Credit Agreement was not brokered by a properly authorised person, because although the Supplier had the correct authorisation by the regulator, the specific salesperson did not as they were not an employee of the Supplier. But I am not persuaded that this is the case. I can see that the Supplier was correctly authorised by the Financial Conduct Authority to broker credit, and it was the Supplier, not an individual, who was named as the credit broker. And in any case, the Lender has confirmed that the relevant sales representative who dealt with Mr and Mrs N's sale was employed by the Supplier and had undertaken training in brokering credit agreements. I have no reason to doubt this, so I'm not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

The PR says that the right checks weren't carried out before the Lender lent to Mrs N. 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 Mrs N was actually unaffordable, before also concluding that she lost out as a result, and then consider whether the credit relationship with the Lender was unfair to her for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mrs N. If there is any further information on this (or any other points raised in this provisional decision) that Mrs N wishes to provide, I would invite her to do so in response to this provisional decision.

I'm not persuaded, therefore, that Mrs N's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says her credit relationship with the Lender was unfair to her. 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.

<u>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?</u>

The Lender does not dispute, and I am satisfied, that Mrs N'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 in the Letter of Complaint the PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs N's share in the Allocated Property clearly, in my view, constituted an investment

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs N 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 N, 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 N 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.

In addition to this, after the Investigator gave his answer to the merits of Mrs N's complaint, there was an unsigned and undated statement sent to this Service by the PR on 7 December 2023, which purports to set out Mr and Mrs N's recollections of the Time of Sale. In this they say:

> *"We were told that we would have a share of ownership of the property and so when is sold it [sic] we would benefit from the profit are."*

So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs N 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 Mrs N 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 Mrs N and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led Mr and Mrs N to enter into the Purchase Agreement and Mrs N into the Credit Agreement is an important consideration.

Up until the PR sent in a statement in the name of Mr and Mrs N, there had been no first-hand testimony from them as to what happened at the Time of Sale, and why they ended up purchasing the membership of the Fractional Club. It was only after the Investigator sent his answer to their complaint, and didn't uphold it, that the PR sent in a short statement. As I've said, this testimony was sent to this Service on 7 December 2023 and is set out as follows:

Witness statement

[Mr N] and [Mrs N]

"The presentation was all day and we felt really pressured to finalize this ,,deal,, With it being all day we was tired and wanting go back to our apartment.
We were told that we would have a share of ownership of the property and so when is sold it we would benefit from the profit are. We were informed that apartment it was not for our holiday purposes only. They told us when we take that offer on the same day will own a piece of this property since we signed the papers!. They do everything they can to convince us to this ,, opportunity,,
Give us little time to make the decision."

So, this does seem to set out, in Mr and Mrs N's own words, what happened at the Time of Sale.

But I have considerable doubt as to how much weight I can place on this testimony when making my decision. I say this because this exact same testimony has been submitted on another case, on 1 February 2024, by this same PR, in relation to a different complaint by Mr and Mrs N against a different Lender.

In this other complaint, which is with this Service, the following was submitted as Mr and Mrs N's testimony regarding that later sale.

Witness statement

[Mr N] and [Mrs N]

"The presentation was all day and we felt really pressured to finalize this ,,deal,, With it being all day we was tired and wanting go back to our apartment.
We were told that we would have a share of ownership of the property and so when is sold it we would benefit from the profit are. We were informed that apartment it was not for our holiday purposes only. They told us when we take that offer on the same day will own a piece of this property since we signed the papers!. They do everything they can to convince us to this ,, opportunity,,
Give us little time to make the decision."

I acknowledge that the subsequent complaint was also regarding a sale of the same type of timeshare by the Supplier, in October 2019, so the sales processes were likely to be similar.

But I cannot see that it is likely that exactly the same thing happened, in different locations, at different times.

So, I do not think that the testimony provided by the PR here can be relied upon. I am unable to say with any degree of confidence that what is said in it reflects what happened at the Time of Sale, because Mr and Mrs N are saying, in effect, that exactly the same thing happened at both sales. And as I've said, I cannot believe that to be true.

Given both statements are identical, down to the same grammatical errors, it is clear that the same statement has been submitted to this Service in evidence twice. And this concerns me, as it has been presented as evidence of Mr and Mrs N's recollections of the Time of Sale that I am considering here, whilst at the same time also purports to be their recollections of a completely separate sale.

But in addition to the above, I also don't feel able to place much weight on the statement given when it was submitted. This was after the Investigator's view, and after the judgement in Shawbrook and BPF v FOS. So, I think there is a very real risk that Mr and Mrs N's recollections may have been tainted, even subconsciously, by either or both of these outcomes.

The PR may say that what is contained in the Letter of Complaint is sufficient for me to understand what is likely to have happened at the Time of Sale. And I appreciate that the Letter of Complaint was probably prepared by the PR following a conversation or conversations with Mr and Mrs N – after all, it contains personal information that only Mr and Mrs N would know. However, a letter of complaint (or claim) is not evidence – especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations.

Direct testimony from the consumer, in full and in their own words, is very important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. Here, that simply isn't possible. It's also important that the decision-maker can see that the Letter of Complaint genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case, because, as I have explained above, I feel unable to accept the testimony presented.

So, on balance, 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 N'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) as alleged in the Letter of Complaint. There is simply no reliable evidence to suggest this.

And for that reason, I do not think the credit relationship between Mrs N and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I am not persuaded that the credit relationship between the Lender and Mrs N was unfair to her 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.

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 Mrs N's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 Mrs N."

The responses to the provisional decision

The Lender did not respond, but the PR said Mr and Mrs N did not accept the outcome, and submitted a further statement from Mr and Mrs N, signed and dated 14 June 2025. The PR also sent a comprehensive response explaining why it did not agree with the provisional decision. In summary, it said:

- Mr and Mrs N were not provided with a copy of the Investigator's rejection of their complaint, nor the provisional decision. When the view was rejected, Mr and Mrs N did so because they rejected the outcome.
- The statement submitted in both claims was Mr and Mrs N's brief, but honest recollection of events, how the product was presented to them, and the benefits which were explained to them at the Time of Sale, and these were the same for both sales.
- Mr and Mrs N had not heard or read anything about the Judicial Review[3], nor did they have any legal background and would not understand the legal terms and issues in the Judicial Review decision.
- There is no possibility that Mr and Mrs N's recollections in their additional witness statement have been influenced by the Investigator's view or the Judicial Review judgement.
- It was wrong of the Ombudsman to highlight the grammatical errors in Mr and Mrs N's initial recollections, and these don't reflect on their honesty or knowledge of the facts.
- The primary goal of witness testimony is to convey facts and information relevant to the case. It has been difficult for Mr and Mrs N to write the statement and what to include in it, as the PR has not been allowed to help them, or correct their witness statement, in order not to influence their recollections.

The PR also said that Mr and Mrs N had not been informed by the Supplier that the Lender paid the broker commission, and the Financial Conduct Authority (the 'FCA') handbook obliges credit intermediaries (such as the Supplier) to disclose to the customer, before entering into a finance agreement, the existence of commission payable to the intermediary by the Lender. As Mrs N (as a party to the Credit Agreement) was not advised of such commission, this was a breach of CONC 4.5.3 and 4.5.3A. And the judgement in *Johnson v Firstrand Bank Ltd t/a Motonovo Finance* which had similarities to this complaint, should also be considered here.

[3] *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)

The further statement from Mr and Mrs N, submitted following the PD, set out what they remembered about their fractional purchases. As regards the Time of Sale being considered here, they said:

> *"On 06/04/2019 we attended our Prelude holiday at [the Supplier] Fuengirola, Spain with 2 of our children. We get accommodation in luxury Signature apartment whit [sic] private pool and beautiful view. We never expect this kind of standard on our first week.*
>
> *Next day were taken for breakfast and attended a presentation as a condition of our Prelude holiday. During the presentation we were shown around various apartments on the resort, all of a similar high standard and we were shown a video about the many resorts around the world with the same standard of accommodation. We were advised that we could upgrade our Trial Membership to a full membership whit [sic] Fractional Property Owners Club, which would give us holidays every year till the end of the contract and which we could leave to our children being a valuable asset. Whit [sic] membership we would no longer have to pay a booking fee when we took our holydays [sic].*
>
> *We spent approximately 7 hours with various representatives who explained the benefits of joining to this Club. Reps, very strong convince [sic] us so our holyday [sic] deal is best [sic] then others, even he need to get approval from head manager to sell this offer to us. We were never left fully on our own to discuss with each other whether we wanted to go ahead or not, and we feel pressure from representative to make decision instantly. We were informed that apartment it was not for our holiday purposes only. We were told that we would have a share of ownership of the property and so when is sold it we would benefit from the profit. We will get some money back on top of what we paid. This sounded as a good deal because it was a kind of investment. With this deal we get another ,,free bonus week,, to use in Tenerife resort or Fuengirola.*
>
> *The cost of Club membership was £20384. We paid £500 by card and traded in our Trial Membership, entering into another Finance Arrangement for £15989 paying £229 per month.*
>
> *[…]*
>
> *From time perspective I see now [the Supplier] is one big scam, to put naive people like we and many others families by promises of luxury holyday for best price in the market and investments, to go for big finance with massive interest and crazy maintenance fees to pay every single year. Each employee of this company plays his own role to sell as much as he can to get bigger provision.*
>
> *We have spent many hours of pressurised sales. The presentations always make the timeshare product sound good value and logical to trade in previous products for an upgrade because you will receive so much more as a result. The reality is that management fees are ignored, finance fees are ignored and the cost for the product is higher than you would spend on similar holiday accommodation elsewhere, and we doubt we will receive anything at the end."*

This statement is signed by both Mr and Mrs N and dated 14 June 2025.

As both parties have now responded to the PD, the case has come back to me.

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 Mrs N 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 N as an investment at the Time of Sale. The PR 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 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 PR has said that it is unfair not to place weight on the testimony originally submitted as part of this complaint. It said the statement submitted in both claims was Mr and Mrs N's brief, but honest recollection of events, how the product was presented to them, and the benefits which were explained to them at the Time of Sale, and these were the same for both sales. The PR has also cited *Pomphrey v Secretary of State for Health & North Bristol NHS Trust* [2019] EWHC [2019] Med LR Plus 25 and *Muyepa - V- Ministry of Defence (2022)* EWHC 2648 (KB) in which the following was said:

> *"When evaluating the evidence of a witness whose testimony has been challenged it should be broken down into its component parts. If one element is incorrect it may, but does not necessarily, mean that the rest of the evidence is unreliable. There are a number of reasons why an incorrect element has crept in."*

But having thought about what the PR has said, I still find this hard to accept. As I said in my PD, the two sales being referred to here by the PR were at different times and different locations. And the products actually bought, although both fractional, were significantly different – the first, which is the sale that is being considered here, was known as FPOC2, which did not provide guaranteed rights to stay in a property, so all reservations were subject to availability. The second purchase was what was referred to as from the Supplier's 'Signature Collection'. These memberships were sold as being more luxurious, and importantly, guaranteed the member's accommodation in their property on set weeks. So, the products would have been sold in a different way, and with markedly different presentations, as they were different products. But, in addition, the first sale, which is being considered here, involved the trading in of a trial membership, so would likely have been Mr and Mrs N's first experience of the concept of fractional membership. The second sale

involved the trading in of their existing fractional membership, for additional points. So, I cannot see that the sales presentation would have likely been the same for the two sales, given their circumstances and products purchased at each time were quite different.

The PR also said that it was wrong of the Ombudsman to highlight the grammatical errors in Mr and Mrs N's initial recollections, and these don't reflect on their honesty or knowledge of the facts. But I think the PR has misunderstood the point I was making here. I wasn't in any way highlighting that there were grammatical errors in the statement as a way of discrediting what was said. I was merely pointing out that the two submitted statements were identical, even down to the same grammatical errors. It was because the same statement was clearly submitted as testimony in two different complaints about two different sales, that I felt unable to rely on its contents – and that was nothing to do with the fact that it contained grammatical errors.

So, I remain of the opinion that the original testimony provided by the PR here cannot be relied upon. I am unable to say with any degree of confidence that what is said in it reflects what happened at the Time of Sale, because Mr and Mrs N are saying, in effect, that exactly the same thing happened at both sales. And as I've said, I cannot believe that to be true.

As I've set out, the PR has submitted a further statement from Mr and Mrs N in which they recall what they were told at the Time of Sale.

I have considered the new testimony provided, and the assurances given by the PR that Mr and Mrs N had confirmed they had not been influenced by the Investigator's view, my provisional decision nor the Judicial Review.

Part of my assessment of the testimony was to consider *when* it was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*.

I have thought about what the PR has said, but on balance, I don't find it a credible explanation of the contents of Mr and Mrs N's evidence. Here, the PR responded to the PD to say that Mr and Mrs N alleged that Fractional Club membership had been sold to them as an investment and it provided evidence from them to that effect. I fail to understand how Mr and Mrs N disagreed with the view and PD on the basis that the timeshare was sold as an investment if they didn't know the Investigator's or the PD's provisional conclusions. It follows, I think it more likely than not, that Mr and Mrs N did know about the Investigator's view and the PD's outcome before their additional evidence was provided.

So, I maintain that there is a risk that Mr and Mrs N's latest testimony was coloured by the Investigator's view, the PD and/or the outcome in *Shawbrook & BPF v FOS*. And, on balance, the way in which the evidence has been provided makes me conclude that I can place little weight on it. 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 N'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 FCA’s Dispute Resolution Rules (‘DISP’).

But I don’t think *Hopcraft, Johnson and Wrench* assists Mrs N in arguing that her credit relationship with the Lender was unfair to her 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 Mrs N, 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 Mrs N 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 Mrs N.

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 Mrs N entered into wasn't high. At £794.72, it was only 4% of the amount borrowed and even less than that (2%) as a proportion of the charge for credit. So, had she 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 Mrs N either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr and Mrs N wanted the 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 Mrs N needed for a timeshare they wanted doesn't strike me as disproportionate. So, I think she 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, 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 Mrs N 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 Mrs N 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 Mrs N.

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 Mrs N and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her. 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 Mrs N's credit relationship with the Lender wasn't unfair to her 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 Mrs N'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 Mrs N (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 Mrs N 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 her. 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 she 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 Mrs N's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 Mrs N.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 16 December 2025.

Chris Riggs
Ombudsman