DRN-5976905

The complaint

Mr P complains Mitsubishi Capital HC UK Plc (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

I issued a provisional decision on this complaint on 21 July 2025, in which I set out the background to this case and my provisional findings on it. A copy of that provisional decision is appended to, and forms part of, this final decision. For that reason, it's not necessary to go over all the details again, but to summarise:

- Mr P purchased a timeshare from a timeshare provider (the "Supplier") on 12 June 2018 (the "Time of Sale"), for £14,430 (the "Purchase Agreement"). Under the agreement, Mr P gained 1,040 points in the Supplier's "Fractional Club", which could be exchanged for holiday accommodation within the Supplier's portfolio. The product was also asset backed, entitled Mr P to a share in the net sale proceeds of a property named on the Purchase Agreement (the "Allocated Property") at the end of the membership term.

- The timeshare was purchased with a loan (the "Credit Agreement") with the Lender of £14,330, which was arranged by and paid to the Supplier.

- Mr P later complained to the Lender, seeking to hold it responsible for various alleged wrongful acts or omissions of the Supplier, by virtue of Sections 75 and 140A of the CCA. Mr P also complained the Lender had failed to check properly that he could afford the Credit Agreement. The Lender rejected the complaint.

In my provisional decision, I said that I didn't think the complaint should be upheld. The full reasons can be found in the appended provisional decision, but summarising again:

- I didn't think there was persuasive evidence that the Supplier had misrepresented the timeshare to Mr P, which would have given Mr P a valid claim against the Lender under Section 75 of the CCA. Some of the alleged misrepresentations seemed to be honest statements of opinion as opposed to false statements of fact, while other allegations were too vague and lacking in colour or context for me to be able to conclude an actionable misrepresentation had occurred.

- I didn't think any of the things Mr P had mentioned which might have rendered the credit relationship with the Lender unfair to him within the meaning of Section 140A of the CCA, were in fact things which had caused unfairness in the credit relationship. These included allegations of irresponsible lending; unfair contract terms in the Purchase Agreement; excessive pressure being put on Mr P to purchase, and the improper marketing or sale of the timeshare to Mr P as an investment.

- There was one matter on which I said I would need to reserve judgment, that being

the question of whether the commission arrangements between the Lender and the Supplier might have rendered the credit relationship between Mr P and the Lender unfair to him. I noted there were ongoing legal developments in this area which needed to be properly considered.

PR said it disagreed with my provisional decision, asking that I consider various points relating to the matter of whether or not the Supplier had sold the timeshare to Mr P as an investment, and the impact this had had on his decision-making process.

More recently, I wrote to both parties to set out the position I intended to take in my final decision regarding the matter of commission. I'll explain these in full later in this decision, but in essence I noted that I had found nothing about the arrangements between the Lender and Supplier in this case to be causative of unfairness in the credit relationship between Mr P and the Lender. The amount of commission had been low, and the method of its calculation and the commercial ties between the Supplier and Lender were not such as to have caused Mr P to lose out, even if it was possible that not enough information had been disclosed to Mr P at the Time of Sale.

Neither PR nor the Lender have commented on my provisional conclusions regarding commission.

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 3.7.3R
- CONC 4.5.3R
- CONC 4.5.2G

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.

Having done so, I've arrived at the same conclusions as set out in my appended provisional decision and my more recent communications with the parties, 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.

PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mr P and the Lender was unfair. In particular, PR has provided further argument in relation to whether the timeshare was sold to Mr P as an investment at the Time of Sale. As noted above, PR also originally brought multiple other points of complaint, which were addressed in the provisional decision. PR hasn't commented on or indicated serious disagreement with my findings on these points, and I see no reason to change the conclusions as set out in the appended provisional decision. I will instead focus on the points PR has made in response to that provisional decision. These points could be summarised as:

- It hadn't shared the Investigator's assessment on this complaint with Mr P, saying this was done in order not to influence his recollections. Mr P was also unaware about the judgment handed down in *Shawbrook and BPF v FOS*[1]. PR said this means Mr P's recollections have not been influenced by either the Investigator's assessment or the judgment, and can, in essence, be relied on.

- It was unfair for Mr P to be penalised for the way he had articulated himself in his witness statement, in not being able to find the specific words that would cause his complaint to be upheld. PR disagreed with my interpretation of Mr P's words, arguing that Mr P quite clearly referred to the Supplier having sold the timeshare to him as an investment, and because this was the main benefit of the product mentioned in the witness statement, it was obviously important to his decision to make the purchase, thus rendering the credit relationship between him and the Lender unfair to him.

- The Supplier routinely sold the Fractional Club product as an investment, and it would be entirely reasonable, given the nature of the product, that Mr P would expect it to appreciate in value.

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

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

To restate things briefly: Regulation 14(3) of the Timeshare Regulations prohibits the marketing or selling of timeshare as an investment. If the Supplier did this in Mr P's case,

[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*').

and the prospect of making a financial gain or profit from the product was a material factor in his purchasing decision, then there is a reasonable argument that his credit relationship with the Lender was rendered unfair to him.

Part of my assessment of Mr P's 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 PR has said, but on balance, I don't find it a credible explanation of the contents of Mr P's evidence. Here, PR responded to our Investigator's assessment to say that Mr P alleged that Fractional Club membership had been sold to him as an investment and it provided evidence from Mr P to that effect. I fail to understand how Mr P disagreed with the assessment on the basis that the timeshare was sold as an investment if he didn't know our Investigator's conclusions. It follows, in my view, that Mr P did know about our Investigator's assessment before his evidence was provided.

So, I maintain that there is a risk that Mr P's testimony was coloured by the Investigator's assessment 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. This means that even if I thought Mr P's testimony made a strong enough case for the Supplier both having sold the timeshare to him as an investment, and this having been material to his decision to purchase it, I would not be able to arrive at a conclusion that the credit relationship between the Lender and Mr P had been rendered unfair to him, due to my concerns over the credibility of the evidence.

And I remain unconvinced, in any event, that Mr P *does* make a strong case in his testimony. While he does mention the Supplier describing the product in a way that could have breached the prohibition on marketing timeshares as investments, there is very little emphasis on this having been a reason for him to buy the product. It is not the "main benefit" mentioned in his statement, as PR has argued. Most of Mr P's statement refers to the holiday benefits of the product, and how these were a disappointment to him. I do not share PR's interpretation of the witness statement.

Finally, while I partially accept PR's point regarding *how* the Supplier sold Fractional Club memberships to prospective purchasers – in that I accept there may have been a tendency for it to be framed in a way which sounded like it was an investment – it is still necessary to show that any such improper selling led Mr P into making the purchase. I don't see evidence of that in his testimony. And I have difficulty accepting another point made by PR, which seems to be that, because of the nature of the Fractional Club product, all prospective purchasers would have an expectation of making a financial gain from it and an investment motive would therefore be material to their purchasing decision. I don't think it would be reasonable to draw such a general conclusion as, in my experience, motivations tend to vary between different purchasers.

So, ultimately, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr P's purchasing decision.

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

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 P in arguing that his credit relationship with the Lender was unfair to him for reasons relating to commission given the facts and circumstances of this complaint.

I haven’t seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn’t properly disclosed to Mr P, nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mr P 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 P.

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 P entered into wasn't high. At £572.20, it was only 4% of the amount borrowed and 3.7% as a proportion of the charge for credit. So, had he known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr P had no obvious means of his own to pay for the timeshare. And at such a low level, the impact of commission on the cost of the credit he needed doesn't strike me as disproportionate. So, I think he would still have taken out the loan to fund the 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 P but as the supplier of contractual rights he obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of "loyalty" to him when arranging the Credit Agreement and thus a fiduciary duty.

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

S140A conclusion

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

Commission: The Alternative Grounds of Complaint

While I've found that Mr P's credit relationship with the Lender wasn't unfair to him for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr P'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 P (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 P a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to him. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think he would still have taken out the loan to fund the purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

My final decision

For the reasons explained above, and in my appended provisional decision, I do not uphold Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 24 December 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at the same conclusions as our Investigator, but I've explained some of my reasons in more detail, so I'm giving the parties to the complaint a further opportunity to provide submissions before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **4 August 2025**. Unless the information changes my mind or there are developments regarding the issue of commission raised recently by Mr P's representative, my final decision is likely to be along the following lines.

The complaint

Mr P complains Mitsubishi Capital HC UK Plc (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr P purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 12 June 2018 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £14,330 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr P 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 his membership term ends.

Mr P paid for his Fractional Club membership by taking finance of £14,330 from the Lender (the 'Credit Agreement').

Mr P – using a professional representative (the 'PR') – wrote to the Lender on 18 October 2021 (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 P's concerns as a complaint and issued its final response letter on 1 December 2021, rejecting it on every ground.

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

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

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii)

regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

What I've provisionally 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.

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I do not currently think this complaint should be upheld.

However, 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.

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 P was:

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

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 a honestly held opinion, as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) did not hold the opinion stated or had no reasonable grounds for doing so.

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*. There's none of the detail, 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 P - 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?

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr P and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; 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 Mr P and the Lender.

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

Mr P'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 P. 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, I would have to be satisfied that the money lent to Mr P was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. But from the extremely limited information provided, I am not satisfied that the lending was unaffordable for Mr P.

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 P knew, amongst

other things, how much he was borrowing and repaying each month, who he was borrowing from and that he was borrowing money to pay for Fractional Club membership. So, 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 how that led Mr P to suffer a financial loss – such that I can say that the credit relationship in question was unfair on him as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate him, even if the loan wasn't arranged properly.

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

Following our Investigator's assessment, the PR provided a witness statement from Mr P, in which he described having been put under pressure by the Supplier over the course of an eight hour sales pitch, and suggested that this was the reason why he agreed to the purchase on the day. I acknowledge Mr P may have felt worn down by a sales process which went on for a considerable length of time, but I can't see that he's been able to explain what the Supplier said or did which made him feel as though he simply had *no choice* but to buy the Fractional Club membership. I note he was also given a 14-day cooling off period and he hasn't provided a credible explanation for why he did not cancel his membership during that time if he'd signed due to having been pressured to do so. And with all of that being the case, there is insufficient evidence to demonstrate that Mr P made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr P's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr P'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 P was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr P as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr P, 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. The Supplier sought to achieve this through the use of disclaimers and declarations within the paperwork completed at the Time of Sale.

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 P 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 P 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 P and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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 he decided to go ahead with his purchase. I'll explain why.

Prior to our Investigator having sent his assessment on Mr P's complaint, we had received no testimony from him, in his own words, as to what had happened at the Time of Sale. We have now received such a statement, but given the circumstances in which it has been received, some years after the events complained of, following the case of *Shawbrook & BPF v. FOS* and our Investigator's unfavourable assessment, it's difficult to attach as much weight to it as a statement produced closer to the Time of Sale.

That said, I've given careful thought to Mr P's testimony. I note that, perhaps understandably given the time which has elapsed between the Time of Sale and his recollection of events, what he has said doesn't feature much detail. What comes across however, is that Mr P felt pressured to make a purchase (which I don't think rendered the credit relationship unfair, for the reasons explained above), and that he anticipated great holiday benefits:

"We though[t] wow this would be great, it was offered as a great holiday home, free use of facilities and many other perks and availability, best of rooms etc!"

Mr P does refer to the Supplier having provided some information about how the fractional asset worked, saying that he was told:

"…it would have a monetary value at the end of the term and we would receive a payment because it was deemed a valuable asset and would be able to gain from this over time!"

If this is how things were put to Mr P (and I repeat my observation that overall the testimony is somewhat vague and dates to many years after the Time of Sale) then it seems to be rather close to the line in terms of marketing or selling timeshares as an investment. But ultimately, I don't think what I've seen is sufficient for me to be able to conclude both that the Supplier sold or marketed the Fractional Club membership to Mr P as an investment *and* that this played a material part in his decision to go ahead with the purchase.

That doesn't mean Mr P wasn't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr P himself doesn't persuade me that his purchase was motivated by his share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision Mr P 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 P's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his 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 P and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

Mr P's Commission Complaint

I note that one of Mr P's other concerns, which has been highlighted recently by the PR, relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreements. The Court of Appeal's recent judgment in *Johnson and Wrench -v- FirstRand Bank, and Hopcroft -v- Close Brothers* [2024] EWCA Civ 1282 ('*Johnson, Wrench and Hopcroft*') sought to clarify the law on secret and partially disclosed commission – albeit in the context of car dealers acting as credit brokers. In my view, the Court of Appeal's judgment sets out principles which appear capable of applying to credit brokers other than car dealer–credit brokers. But as it was recently appealed to the Supreme Court, whose judgment is still pending, I don't intend on finalising my thoughts on this complaint until it is handed down and its implications on this complaint, if there are any, considered.

Conclusion

In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claim(s), and if I put the issue of commission to one side for the time being, I am not persuaded that the Lender was party to a credit relationship with Mr P under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA – nor do I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

But, as I've already suggested, the Supreme Court's pending judgment on *Johnson, Wrench and Hopcroft* may prove important to this complaint. And with that being the case, it is necessary to wait and consider the possible implications of that judgment before finalising my thoughts on the merits of this complaint.

My provisional decision

For the reasons explained above, I'm currently not minded to uphold this complaint, but will be considering any further submissions from the parties to the complaint, along with the implications of *Johnson, Wrench and Hopcroft*, before making my decision final.

Will Culley
Ombudsman