DRN-5984476

The complaint

Mr D's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance[1] (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mr D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 06 February 2018 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 910 fractional points, and after trading in his trial membership, he paid £13,572 (the 'Purchase Agreement') for his Fractional Club membership.

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

Mr D paid for his Fractional Club membership by taking finance of £17,185 from the Lender in his sole name (the 'Credit Agreement'). This consolidated the balance of an existing loan from another provider.

Mr D – using a professional representative (the 'PR') – wrote to the Lender on 6 October 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
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 activity.
5. The Credit Agreement ought to be rescinded as the Purchase Agreement was declared null and void by the Spanish court.

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

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

- Told him that he was buying a share in property which would considerably increase in value, therefore he was promised a considerable return on the investment.

[1] At the time of the sale the Lender was trading as Hitachi.

- Told him that Fractional Club membership was an "investment", and the timeshare would considerably appreciate in value.
- Told him that he could sell the timeshare back to the resort or easily sell it at a profit.
- Told him he would have access to the apartment at any time all year round.

Mr D says that he 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, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr D.

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

Although not set out in these exact terms, Mr D says that the Supplier has gone into liquidation and therefore he is unable to recover any monies that he is due to receive.

As a result of the above, Mr D has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr D.

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

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

- Fractional Club membership was marketed and sold to him 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 terms (Clause D) setting out that the membership may be forfeited upon non-payment of any payment was an unfair contract term[2].

(4) Other matters

- The Supplier was not duly authorised by the FCA to broker the Credit Agreement.
- The Fractional Club Purchase Agreement has been declared null and void by the Spanish Court. Therefore, the Credit Agreement should be rescinded.

The Lender dealt with Mr D's concerns as a complaint and issued its final response letter on 24 November 2022, rejecting it on every ground.

Mr D then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, thought the complaint had been referred to this Service too late under the FCA's rules, so it could not be considered.

Mr D did not agree and asked for an Ombudsman to consider whether this Service had jurisdiction, so it was passed to me.

The PR, on Mr D's behalf, submitted a statement from him, dated 19 February 2025, setting out his recollections of the Time of Sale.

Having considered everything on file, I issued a decision that Mr D's complaint *had* been made in time, and it is therefore in this Service's jurisdiction.

[2] Although not specified, this would be considered under the Consumer Rights Act 2015 (the 'CRA')

The provisional decision

I then considered the matter and issued a provisional decision (The 'PD') dated 14 March 2025. In that PD I set out what I considered to be the legal and regulatory context, before addressing the merits of Mr D's complaint:

"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

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.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr D could make against 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 does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr D at the Time of Sale, the Lender is also liable.

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 D was told that he was buying an interest in property which would considerably increase in value, when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr D'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 given that the sale of the Allocated Property at the end of the membership term lies in the future, any resale value is currently uncertain. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that he acquired such an interest.

The PR also says that Mr D was told that Fractional Club membership was an "investment" that would considerably appreciate in value. But for the reasons I'll explain later in this decision, had Mr D been told his Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

The Letter of Complaint also says that Mr D was told by the Supplier that he could sell the timeshare back to the resort or easily sell it at a profit. But other than this bare allegation, there is nothing further to add colour or context to this. There is nothing to say who said this or when, and I am aware that the Members' Declaration section of the contractual paperwork does set out that the Supplier does not have a re-sale department, so I think it unlikely that the Supplier would have said his membership could be sold back to it. Mr D was able to try and sell his membership privately if he wished, so without there being anything more in terms of a description of what exactly was said, I'm not persuaded that there was a misrepresentation here.

The PR also said that Mr D was told he would have access to the apartment at all times, all year round. But again, there is nothing to say who said this, when and in what context. And it seems inherently unlikely that something of this sort would be said. Mr D was, after all, buying the right to one week's accommodation in the Supplier's resorts. And, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. And some of the sales paperwork signed by Mr D states that the availability of holidays was/is subject to demand. So, I'm not persuaded that Mr D would have been, in effect, told he would always be able to stay wherever and whenever he wanted.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mr D 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 Mr D a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

The Letter of Complaint says that because the Supplier went into liquidation, Mr D would not be able to recover any monies that might be due to him. I can see that certain parts of the Supplier's business were put into administration, and I can understand why the PR is saying there was a breach of the Purchase Agreement as a result. However, neither Mr D nor the PR have said, suggested or provided evidence to demonstrate that due to this liquidation[3] he is no longer:

1. *A member of the Fractional Club;*
2. *Able to use his Fractional Club membership to holiday in the same way he could initially; and*
3. *Entitled to a share in the net sales proceeds of the Allocated Property when his Fractional Club membership ends.*

[3] It is apparent that Mr D's membership has been suspended due to his non-payment of the 2019 annual management fees. I should point out this this non-payment may mean that he is unable to utilise his membership, but that is not due to the liquidation of part(s) of the Supplier's business.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr D 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 Mr D was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr D also says that the credit relationship between him 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 he has concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr D and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr D's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[4]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

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[4] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

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

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

Mr D'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.

The PR says that the contractual term (Clause D) setting out that the membership may be forfeited upon non-payment of any payment due under the agreement was an unfair contract term. Although not specified by the PR, this likely relates to the CRA.

One of the main aims of the Timeshare Regulations and the CRA was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

For me to conclude that Clause D caused any unfairness to Mr D in his credit relationship with the Lender, I'd have to see that Clause D was applied in a way that was unfair to Mr D. Yet, having considered everything that has been submitted, it seems unlikely to me that Clause D has led to any unfairness in the credit relationship between Mr D and the Lender for the purposes of Section 140A CCA. I say this because I cannot currently see that Clause D was actually operated against Mr D, let alone unfairly, whilst he was party to the Credit Agreement.

I'm not persuaded, therefore, that Mr D'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 he says his 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.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr D's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But PR, in the Letter of Complaint, says that the Supplier did exactly that at the Time of Sale. And this is also later set out in the statement from Mr D, when he said:

> *"We were told that if we upgraded our trial membership to a fractional ownership we could take up to 4-5 holidays per year and we would also have a fraction from a Monterrey apartment. This meant that we would be part-owners of that property and it was presented as an investment because in time the price of the apartment will increase. We were told that after 17 years the apartment would be sold and we would receive our percentage of the profit. In this way we would have the advantage of 4-5 holidays in the year and the main thing was that we would get a profit. They also said it could be sold before the term ends. At the time we thought it would be nice to have the holidays and reasonable to invest."*

So, whether the Fractional Club was sold as an investment 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 D's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 D as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to 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 evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr D, the financial value of his share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and

rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr D as an investment.

With that said, 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. And this is what was alleged by the PR in the Letter of Complaint, and later in Mr D's statement, so I accept that it's possible that Fractional Club membership was marketed and sold to Mr D as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

However, I don't think I need to make a finding on this point because, for reasons I'll go on to explain, I don't think it would make a difference to the outcome of this complaint anyway.

<u>Was the credit relationship between the Lender and Mr D rendered unfair?</u>

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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr D and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr D, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the

purposes of 140A(1)(c) of the CCA and deemed to be something done by the Lender) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The Letter of Complaint was prepared and submitted to the Lender on Mr D's behalf on 6 October 2022. There are elements of the letter, such as Mr D's personal details and his purchase history which could only have been included had Mr D had an input to the contents of the letter. However, the letter itself is quite generic and follows the format of many like complaints submitted from this PR. It is not evidence of a consumer's direct recollections, especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations. So, I do not find it particularly useful in deciding what is likely to have happened and am unable to place any evidentiary weight on it.

But Mr D has now submitted a signed statement. This was dated 19 February 2025 and was submitted following this Service asking the PR if a statement had been written. This statement is evidence, so I have gone on to think about how much weight I can place on this statement.

The events being described by Mr D occurred some seven years earlier, so there is always the risk of memories fading over time. And I think there is also a risk of Mr D's memories being affected, even subconsciously, by the generic contents of the Letter of Complaint and by the judgment in Shawbrook & BPF v FOS which was handed down in 2023.

In addition to the statement as set out above, I have also considered everything else that has been submitted. In response to my jurisdiction decision the Lender has submitted some account notes made by the Supplier's staff following Mr D's purchase.

It seems that on 19 February 2018, so within the 14-day cooling off period, Mr D called the Supplier wishing to cancel his Fractional Club membership due to the cost of the flights needed to take the holiday he wanted, and said he had friends who had booked for four people to go to the same island for £1,400 all inclusive. The Supplier persuaded Mr D not to cancel by offering him cash back to help with the cost of flights and a discount voucher. This makes me think that it was the holidays he wanted to take that were the reason he decided to make the Fractional Club purchase. I can't see that if the investment element of the purchase was important to him, he would've sought to cancel the membership in this way.

And then later, on 6 April 2019, when Mr D had failed to make his 2019 management charge payment, Mr D told the Supplier that he was OK with his membership being suspended. This again in my view, is not the action of someone who had bought Fractional Club as an investment, as not paying the annual management fees brought with it the risk of his membership ultimately being forfeited.

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 D's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchase for the holidays it could provide, whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr D and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

<u>The other matters</u>

The PR also states that the entity that brokered the Credit Agreement between Mr D and the Lender was not duly authorised to do so. But I don't agree. Having checked the appropriate

register I can see the Supplier, which was named on the Credit Agreement as the credit intermediary, was authorised and regulated by the FCA to broker credit so I see no merit in this argument.

The Letter of Complaint also set out that Mr D's Purchase Agreement had been declared null and void by a court in Spain, and as such the Credit Agreement ought to be rescinded. However, since I have been considering this matter, the PR has said that this court decision has not yet been finalised, and is unlikely to be for some time, so Mr D wishes to withdraw this aspect of the complaint.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr D's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him."

The responses to the provisional decision

The Lender responded to the PD and accepted it.

The PR also responded – it did not accept the PD and provided some further comments and evidence it wished to be considered.

Having received the relevant responses from both parties, I'm now finalising my decision.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this

complaint:

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD in the main relate to the issue of whether the credit relationship between Mr D and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr D as an investment at the Time of Sale.

It also submitted a further statement, dated 17 March 2025, signed by both Mr and Mrs D. This statement said:

> *"In addition to our previous witness statement, we would like to clarify that we were not aware of the Judicial Review decision. We have no legal background or knowledge in order to understand it. We have not been influenced by anybody when making our witness statement, which was a summary of our true experience with [the Supplier].*
>
> *We feel that we have been heavily misrepresented by [the Supplier], we have been misled about the benefits of the fractional ownership product and that we have lost our money.*
>
> *We have been provided with the provisional decision of the ombudsman. We have read it and noted that the ombudsman said that we called to talk to [the Supplier] about the cost of the flights needed to take the holiday we wanted, and we said we wanted to cancel. We would like to clarify that at the time we wanted to try the product, and see how it worked. This does not mean that the investment was not important to us. We do not know how this conclusion was drawn. At that stage we could only try to see how the holidays worked. We would only be able to see the profit from the investment after 17 years. However, at the time, we started to have doubts if all would work as it was presented to us at the sales presentation, and this is the reason why we called [the Supplier]. Otherwise, we would have to wait for 17 years to get our profit. It now appears that we were right to have doubts, though. We now believe that we have lost our money.*
>
> *Further, it is mentioned in the decision of the ombudsman that on 6 April 2019 we did not pay the management charge and as a result the membership was suspended. We would*

like to clarify that at the time we had already contacted a lawyer, and we were hoping as a result of our claim to receive our money back as a compensation. We were advised that we did not need to pay maintenance fees, as we were officially in dispute with [the Supplier]. Again, this does not mean that the investment was not important to us when we purchased this product. On the contrary, if it wasn't for the investment, we would not get involved with [the Supplier] at all, and we would have just continued holidaying as we did before [the Supplier]."

The PR also maintained that Clause D in the contractual documentation was unfair and had been applied in Mr D's case rendering his credit relationship with the Lender unfair.

The PR also now argued for the first time that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.

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

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

The allegation that Clause D is in itself an unfair term, and has been applied to Mr D's membership

In this part of my PD, I explained that it seemed unlikely to me that the contract term(s) cited by Mr D led to any unfairness in the credit relationship between him and the Lender for the purposes of Section 140A of the CCA. And I said this because I could not see that the relevant terms in the Purchase Agreement had actually been operated against Mr D, let alone unfairly. So, I couldn't see that this caused an unfairness in the credit relationship which requires a remedy.

In its response, the PR referred to another decision, made by another Ombudsman at this Service where they say this point was considered. It also cited *Link Financial v Teresa North Wilson [2014] EWHC 252 (Ch)* where it says the court decided that the clause was unfair. And it provided a copy of a '*notice of impending cancellation*' which was sent to Mr D by the Supplier dated April 2019.

But from what's been provided, the membership was only suspended temporarily at that point, and the purpose of the aforementioned notice was only to make Mr D aware of this and that there was an outstanding balance of management fees. And, that the membership might be cancelled if the relevant fees remained unpaid, but that Mr D could apply for reinstatement of his membership anytime within the next five years. The PR has not said that any cancellation actually proceeded to happen, and I haven't seen any evidence that is the case either.

I've also considered the aforementioned case and decision the PR has referred to. But those were ultimately decided on their own individual facts and circumstances, so don't change my own findings here.

For all of the above reasons, along with those I outlined in my provisional decision, I don't think that the relevant term in the Purchase Agreement was actually operated in an unfair

way against Mr D or that this caused an unfairness in the credit relationship which requires a remedy.

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

The PR also said Mr D has confirmed in his subsequent witness statement that he hadn't heard about the judgement handed down in *Shawbrook and BPF v FOS*[5].

The PR said this means Mr D's recollections have not been influenced by either the Investigator's view or the aforementioned judgment.

Part of my assessment of the original 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 both what the PR has said, and what Mr and Mrs D have said in their subsequent statement in this regard. But on balance, I don't find it a credible explanation of the contents of Mr D's original evidence. Here, the original statement was submitted in February 2025, which is six years after Mr and Mrs D first began to take action against the Supplier via a lawyer. So, I think it is a fair assumption that they would have had a reasonable understanding of the arguments being put before the Spanish court in relation to their particular case – after all, it was centred on the allegation that the Supplier had sold the membership to them as an investment.

I also think it is a fair assumption that Mr D would have had a continuing interest in whether the Lender could be held responsible for the Supplier's actions, because that is exactly what his complaint to the Lender, submitted with the help of the PR, alleged in 2022.

There was then the hearing and judgment in *Shawbrook & BPF v FOS* and it was after this that the PR referred Mr D's complaint to this Service. I find it hard to believe that Mr D would have had no understanding or knowledge of this crucial judgement, especially as it was central to his complaint.

So, I maintain that there is a risk that Mr D's memories have been affected, even subconsciously, by the generic contents of the Letter of Complaint and by the judgment in *Shawbrook & BPF v FOS* which was handed down in 2023. And for this reason I do not feel able to place much, if any weight on what they have said.

I have also considered what Mr and Mrs D have said in their subsequent statement in clarifying why they sought to cancel their membership, and why they stopped paying their maintenance fees.

But what they say here doesn't persuade me that they were motivated to purchase the Fractional Club membership for its investment element and potential profit. Mr D was unhappy with how much it seems he would need to pay for flights to use his membership, so sought to cancel it. I still find it hard to understand how, if the membership was bought, even partly, for its investment element, Mr D would seek to cancel it so soon because he thought the holidays it would provide would be too expensive. So, I remain unpersuaded that any breach of Regulation 14(3) was material to their purchasing decision. I still think that they would have gone ahead and bought the membership for the holidays it could provide, whether or not the Supplier breached Regulation 14(3).

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[5] *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*').

The PR also said that in the judgment handed down in *Shawbrook & BPF v FOS*, it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my provisional decision, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold. And the judgment referred to did not make a blanket finding that all such products were mis-sold in the way the PR appears to be suggesting. Any complaint needs to be considered in the light of its specific circumstances.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr D's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr D and the Lender was unfair to him for this reason.

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

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

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

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

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

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

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

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as

Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and

5. Compliance with the regulatory rules.

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

But I don't think *Hopcraft, Johnson and Wrench* assists Mr D 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 D, nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mr D into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge that it's possible that the Lender and the Supplier failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

But as I've said before, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. And with that being the case, it isn't necessary to make a formal finding on that because, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it is for the reasons set out below that I don't think any such failure is itself a reason to find the credit relationship in question unfair to Mr D.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr D entered into wasn't high. At £687.40, it was only 4% of the amount borrowed and even less than that 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 D wanted Fractional Club membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted doesn't strike me as disproportionate. So, I think Mr D would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

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

Section 140A conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mr D 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 D'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 D's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

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

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

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr D's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mr D.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 27 December 2025.

Chris Riggs
Ombudsman