DRN-5985327

The complaint

Ms K's complaint is, in essence, that Mitsubishi HC Capital UK PLC, trading as Novuna Personal Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA'), (2) deciding against paying a claim under section 75 of the CCA, (3) executing a loan agreement in her sole name without her consent (instead of jointly with her boyfriend), and (4) being responsible for the mis-sale of an unregulated collective investment scheme, which was therefore unenforceable.

Background to the complaint

Ms K and her boyfriend ('Mr O') purchased trial membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 13 January 2019 for £4,395. Mr O paid for this by taking finance from the Lender (the 'First Credit Agreement'). There is no complaint about that purchase.

Six months later, on 30 July 2019 (the 'Time of Sale'), Ms K and Mr O upgraded to full membership. They entered into an agreement with the Supplier to buy 910 fractional points at the price of £17,021 (the 'Purchase Agreement'). But after trading in their trial membership, the cost was £12,626.

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

Mr O was going to finance this purchase by taking out another loan with the Lender. But this time, he did not pass the Lender's creditworthiness checks. So instead, Ms K paid for their Fractional Club membership by taking finance of £16,466 from the Lender (the 'Second Credit Agreement'). This loan consolidated the balance of Mr O's loan.

For two years, Mr O paid the loan payments. But then Ms K and Mr O ended their relationship, which left Ms K having to make the payments herself, and she could not afford them. On 1 July 2021, Ms K phoned the Lender to explain what had happened, and also to complain that the Second Credit Agreement had been mis-sold. She said she had not consented to becoming the sole borrower or to taking on Mr O's debt by consolidating his loan into hers. She thought it was a joint loan.

The Lender dealt with Ms K's concerns as a complaint and issued its final response letter on 9 September 2021, rejecting it on every ground.

Ms K – this time using a professional representative (the 'PR') – wrote to the Lender on 8 March 2022 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

On the same day, the complaint was also referred to the Financial Ombudsman Service. The Lender did not change its position. The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Ms K disagreed with the Investigator's assessment and asked for an ombudsman's decision – which is why it was passed to me.

I issued my provisional findings to the parties on 11 September 2025. In my provisional decision, I said the following:

My provisional findings

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 Ms K was told by the Supplier:

(1) that Fractional Club membership had a guaranteed end date when that was not true;
(2) that she was buying an interest in a specific piece of "real property" when that was not true;
(3) that Fractional Club membership was an "investment" when that was not true.

The words and/or phrases allegedly used by the Supplier to misrepresent the Fractional Club for the reason given in point 1 were set out by the PR in the Letter of Complaint, and they were limited to: "*the Fractional Property Ownership Scheme had a guaranteed end date, specifically after 19 years, after which the clients would have no further legal liability to [the Supplier] under or in respect of the Scheme.*"

The PR says that such a representation was untrue because the Sales Process begins on the Sale Date as defined in the Fractional Club Rules, and under Rule 9, particularly Rules 9.2.9 and 9.2.12, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrase above would have been untrue at the Time of Sale even if it was said. It seems to me to reflect the main thrust of the contract Ms K entered into. And while, under Rules 9.1 and 9.2.9 of the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor',[1] longer than that if there were problems selling and the 'Owners'[2] agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

As for points 2 and 3, neither of them 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 – nor was it untrue to tell prospective members that they would receive some money when the allocated property is sold. After all, a share in an allocated property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give prospective members that interest, it did not change the fact that they acquired such an interest.

So, while I recognise that Ms K – 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 75 of the CCA: the Supplier's breach of contract

I have already summarised how section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not 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.

Ms K says that she could not holiday where and when she wanted to. That was framed, in the Letter of Complaint, as part of her complaint about misrepresentation – that she was told it would be possible for her to book holidays during the school holidays, when that was not true. However, on my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.

This point was of particular importance to Ms K, because she is a teacher, so she could not go on holiday during school term time. She needed to be able to book time during the school holidays, but she complains that *"Nothing was ever available in school holidays."*

[1] Defined in the FPOC Rules as "CLC Resort Developments Limited".
[2] Defined in the FPOC Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

Of course, like any holiday accommodation, availability was not unlimited – especially given the higher demand at peak times. Clearly the availability of holidays must be subject to demand. So I think it was necessary for Ms K to book well in advance. I've seen the Supplier's contact notes, which show that in January 2020 she asked to book a three-week holiday in Florida in July or August of that year. She didn't have enough points for three weeks, but a two-week booking was available instead, and she was offered three start dates to choose from in late July and early August. Two weeks later, those dates were no longer available, but the Supplier was able to offer her two other dates for holidays starting on 15 and 22 August, but she did not want them. The next day, the Supplier found her availability on 31 July, but then the phone call was cut off. Six days later, in February, a two-week holiday was booked for 23 July. That holiday later had to be cancelled due to covid travel restrictions, but I do not accept that no holidays were available outside of school term time. And the cancellation of the holiday was not a breach of contract, but was due to *force majeure*.

So, from the evidence I have seen, I do not think the Lender is liable to pay Ms K 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 in relation to this aspect of the complaint either.

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 Ms K 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 Times 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 sales given their circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Ms K and the Lender.

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

Ms K's complaint about the Lender being party to an unfair credit relationship was and is made for several reasons.

They include, for various reasons, the allegation that the Supplier misled Ms K and carried on unfair commercial practices under regulations 5 and 6 of the CPUT regulations.[3] However, as regulations 5 and 6 state, commercial practices only amount to misleading actions or omissions if, in addition to satisfying one or more of the specific matters set out in those provisions, they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. And as I haven't seen enough evidence to persuade me that, if there were any such actions or omissions at the Time of Sale (which I make no formal finding on), they led Ms K to make the purchasing decision she did, I'm not persuaded that anything done or not done by the Supplier amounted to an unfair commercial practice for the purposes of those provisions.

The PR also alleges that the Supplier acted unfairly under regulation 7 Schedule 1 of the CPUT regulations. But given the limited evidence in this complaint, I am not persuaded that the Supplier did.

In addition, the PR also says that:

1. the right checks weren't carried out before the Lender lent to Ms K;
2. Ms K was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale;
3. there was one, or more, unfair contract terms in the Purchase Agreement.

However, as things currently stand, none of these strike me as reasons why this complaint should succeed.

I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Ms K was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship with the Lender was unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Ms K.

I acknowledge that Ms K may have felt weary after a sales process that went on for a long time. But she says little about what was said and/or done by the Supplier during their sales presentation that made her feel as if she had no choice but to purchase Fractional Club membership when she simply did not want to. Overall, there is insufficient evidence to demonstrate that Ms K made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Ms K's credit relationship with the Lender was rendered unfair to her under section 140A for any of the reasons above.

It has not been alleged in this case that the Supplier mis-sold the Fractional Club as an investment, in breach of a prohibition against selling timeshares in that way. But in case that was only an oversight, I have still considered that possibility anyway, since it is a matter often raised in complaints like this one.

Did the Supplier breach regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Ms K's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated

[3] The Consumer Protection from Unfair Trading Regulations 2008.

contract" for the purposes of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (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."

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 Ms K the prospect of a financial return – whether or not, like all investments, that was more than what she 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 <u>as an investment</u>. 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 Ms K 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 her as an investment, i.e. told them or led her to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms K, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership <u>was</u> marketed and sold to Ms K 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 Ms K 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 Ms K and the Lender that was unfair to her and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement.

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 Ms K decided to go ahead with her purchase. That doesn't mean she 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 Ms K herself doesn't say that her purchase was motivated by her share in the Allocated Property and the possibility of a profit, I don't think any possible breach of regulation 14(3) by the Supplier was likely to have been material to the decision she 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 Ms K'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 she would have pressed ahead with her 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 Ms K and the Lender was unfair to her even if the Supplier had breached regulation 14(3).

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

The PR says that Ms K was not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms. It is also alleged that Ms K was not given a copy of the Second Credit Agreement until more than 14 days after the Time of Sale.

As I've already indicated, the case law on section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Ms K sufficient information, in good time, on the various charges she could have been subject to as a Fractional Club member in order to satisfy the requirements of regulation 12 of the

Timeshare Regulations (which was concerned with the provision of ‘key information’). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Ms K nor the PR have persuaded me that she would not have pressed ahead with her purchase had the finer details of the Fractional Club’s ongoing costs been disclosed by the Supplier in compliance with regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

As for the PR’s argument that there were one or more unfair contract terms in the Purchase Agreement, I can’t see that any such terms were operated unfairly against Ms K in practice, nor that any such terms led her to behave in a certain way to her detriment. And with that being the case, 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.

I haven’t seen evidence to show whether the loan documentation was or wasn’t given to Ms K within the 14-day cooling-off period. But even if I accept that it wasn’t, the fact that she did not complain when she did find out that her name was the only name on the loan agreement leads me to infer that she would not have objected within the 14 days if it had been provided earlier, so I don’t think the lateness affected the outcome. I also note that she was present at the Time of Sale, and although she says she let Mr O do all the talking with the salesman, it was not unreasonable of the salesman to assume that she was listening and understanding. I think that Mr O failing the credit check would have prompted some discussion about what to do to finance their purchase, and on the balance of probabilities I do not think that Ms K was not included in that.

[…]

Was the Fractional Club unregulated?

The PR has argued that the Fractional Club was an unregulated collective investment scheme, and that the Supplier therefore contravened a prohibition on promoting it under section 238 of the Financial Services and Markets Act 2000, making it unenforceable. The Lender is also responsible for this under section 56 of the CCA.

However, the Fractional Club was a timeshare, as defined in regulation 7 of the Timeshare Regulations. The Collective Investment Schemes Order[4] excludes timeshares from the definition of such a scheme, and timeshares are regulated by the Timeshare Regulations instead. So I’m satisfied that it was neither unregulated nor unenforceable.

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, 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 Ms K under the Credit Agreement that was unfair to her for the purposes of section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate her.

[4] That is to say, the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001. See the schedule, paragraph 13.

My addendum provisional decision

At the time of my provisional decision I deferred my conclusions on the matter of commission disclosure in order to review that issue further. I've since written to the parties setting out my thoughts on why I wasn't persuaded to uphold this aspect of the complaint.

Applying the principles and factors set out in the Supreme Court judgment[5] handed down on 1 August 2025, I found nothing to suggest to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Ms K. Nor did I see anything that persuaded me that the commission arrangements between them gave the Supplier a choice over the interest rate which led Ms K into a credit agreement that cost disproportionately more than it otherwise could have.

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Ms K had a material impact on her decision to enter into the Credit Agreement. At £658:64, it was only 4% of the amount borrowed and even less than that (3.7%) as a proportion of the charge for credit. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Ms K such that the Lender needed to take any action in redress.

I didn't find any of the other arguments put forward demonstrated that the credit agreement between Ms K and the Lender was unfair to her under section 140A of the CCA. Absent any other reason why it would be fair or reasonable to direct the Lender to compensate Ms K, I said I didn't propose to uphold the complaint.

Responses to my provisional findings

The Lender didn't respond to my provisional decision. The PR didn't accept the proposed outcome. It made further submissions in support of Ms K's position. Having received and reviewed these, I'm now proceeding with my final decision.

In doing so, I'm conscious that the PR has made a series of assertions surrounding the provision of information relating to commission arrangements. These include, among other things, expressing doubt that the Lender has provided key information, requesting that the information we have received be shared with it in full, and asking that we do not proceed with a decision before this is done and it has had an opportunity to make further submissions.

The PR's requests have been addressed by us under separate correspondence. For reasons I will explain in the course of this decision, I've concluded that it's appropriate for me to proceed with my determination.

The legal and regulatory context

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So there's no need for me to set this out again in detail here. I simply remind the parties that our rules[6] say that in considering what is fair and reasonable in all the circumstances of the complaint, I will take into account: relevant (i) law

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[5] *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench*").

[6] Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

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.

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.

After considering the case afresh and having regard for what's been said in response to my provisional decision and in my subsequent correspondence, I find it offers no persuasive reason to depart from the conclusions I've previously set out. I'll explain why.

The PR originally raised various points of complaint, such as those giving rise to Ms K's section 75 claim, which I addressed in my provisional decision. In its response, it hasn't made any further comments in relation to most of its original points, or said anything that leads me to think it disagrees with my provisional conclusions in relation to those points. So I'll focus here on the points the PR *has* made in response.

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Ms K and the Lender was unfair *per* section 140A of the CCA. In particular, the PR has provided more comment in relation to whether the membership was sold to Ms K as an investment at the Time of Sale. It has also made further submissions in support of its position that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship between the Lender and Ms K. And it has repeated and elaborated on the allegations about failing to carry out affordability checks, not giving Ms K enough time to read the sales documentation, failing to offer Ms K a choice of lenders besides the Lender, the high interest rate, and high pressure sales tactics.

I have also been provided with a new statement from Ms K in her own words. She reiterated that she had thought she was buying an investment. She also said that the Supplier had falsely described its product as an investment in real property, when in truth it was only the purchase of some points to spend in a holiday club. She said she would never have bought it if she had understood what it really was.

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

The PR has questioned whether my provisional conclusions run contrary to precedent decisions issued by my ombudsman colleagues and the judgment handed down in *Shawbrook and BPF v FOS*. I don't believe they do. However, for the avoidance of doubt, other decisions issued by other ombudsmen do not have a precedent effect like some court judgments might, and each ombudsman must determine each case on its own specific facts. Further, the judgment referred to did not make a blanket finding that all products of the type Ms K purchased were mis-sold in the way the PR appears to be suggesting.

I remind the PR that in my provisional decision I accepted the possibility that Fractional Club membership was marketed and/or sold to Ms K as an investment, in breach of regulation 14(3). I went on to explain that relevant case law[7] indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Ms K's decision whether to enter into the Purchase

[7] *Carney* and *Kerrigan.*

and Credit Agreements. It doesn't strike me that doing so flies in the face of either the handed down judgment or previous decisions the PR has mentioned.

While the PR has referred me to Ms K's recollections and the Supplier's training materials, I have already considered these and what was said. And I set out in my provisional decision the reasons why I didn't find that evidence sufficiently persuasive that Ms K's purchase decision would have been any different, given the other motivational factors she had described. Having re-examined Ms K's statement that remains my view, for the reasons previously given.

So as I said before, whether or not the Supplier marketed or sold Fractional Club membership as an investment in breach of regulation 14(3), I'm not persuaded Ms K's decision to make the purchase was materially impacted by the prospect of a financial gain. It follows that I find the credit relationship between Ms K and the Lender was not rendered unfair to her for this reason.

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

The PR has asked for the documents the lender has provided to us to show the commission arrangements. While I appreciate the PR would like to have full disclosure of all of the documents and information the Lender has provided, our rules do not require me to provide this when dealing with a complaint.

As the PR has been informed, under DISP 3.5.9R I may, where I consider it appropriate, accept information in confidence (so that only an edited version, summary or description is disclosed to the other party). That is what I have done in my provisional decision. I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive and that the summary information on commission arrangements we've already shared with the PR is appropriate in this case.

I see no reason to find that this prejudices any arguments the PR or Ms K are able to make in support of Ms K's position. The PR has demonstrated its ability to present Ms K's case and has had sufficient time to consider and make any further arguments.

As I've noted, the PR has disagreed with my provisional conclusions on whether the Lender should pay redress because of an unfair credit relationship arising in connection with commission arrangements between the Lender and the Supplier. The PR says, in summary, that when the overall circumstances of those arrangements are considered in the round, the credit relationship was plainly unfair. In support of this position the PR has expressed, among other things, that:

- The provisional decision doesn't properly apply the Supreme Court's judgment in *Hopcraft, Johnson and Wrench,* which concluded a range of factors informed whether a credit relationship between a consumer and a lender was unfair;
- A conflict of interest existed on the part of the Supplier, who provided neither independent nor competent explanation of the credit;
- Failure to disclose payment of commission – irrespective of the size of any payment - was a regulatory breach that goes to the heart of fairness.

I appreciate the time the PR has taken to put together its submissions on behalf of Ms K. But I don't find what it has said offers persuasive grounds for me to reach a different conclusion on this issue.

I've previously set out my thoughts on any impact the Supreme Court's conclusions in *Hopcraft, Johnson and Wrench* has on Ms K's arguments that her credit relationship with the Lender was unfair to her for reasons relating to commission given the facts and circumstances of this complaint.

The PR's response doesn't offer anything that leads me to think that, for the most part, any of the factors it has referenced were in fact at play in Ms K's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Ms K, any persuasive reasons to conclude that the Supplier's role was that of advisor to Ms K, or to show that any other conflict of interest arose from the roles the Supplier did perform.

For such a claim to be successful would require more than the bare assertions that have been made in this case. I'm not persuaded that it is sufficient, as the PR seems to contend, simply to suggest unsubstantiated allegations of fact and require that the Lender disprove them or else the credit relationship be deemed unfair. This issue was considered in the judgment in *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch) ("*Samra*"), where HHJ David Cooke held (at paragraph 26):

> *"…the onus is on the claimant[8] to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (i.e. personal) to the creditor and debtor. This onus on the claimant does not however mean, in my judgement…that where Mr Samra[9] makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence."* [10]

I'm satisfied the Lender has provided sufficient information in response to my enquiries to enable me to reach a conclusion about its commission arrangements with the Supplier. I've seen nothing in this case that leads me to think what the Lender has said about the commission arrangements is inaccurate. So there's no reason for me to reach a different finding over those commission arrangements.

In its correspondence the PR has emphasised the regulatory breaches connected with a failure to disclose commission payment. I have already set out why in my view this doesn't automatically lead to an unfair credit relationship for which the Lender needs to offer redress. While I've considered all that the PR has submitted, I remain of that view.

<u>*Other causes of unfairness*</u>

I don't think that the distinction between owning a share of a freehold (or Spanish equivalent) of a property and being the beneficiary of a trust which holds and then sells the property for

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[8] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.

[9] In this case the borrower making an allegation that there was an unfair credit relationship.

[10] I further note that in *Wilson v Clydesdale Financial Services Ltd t/a Barclays Partner Finance* [2021] (Unreported), the court also took the view that the burden is on the debtor to prove on the balance of probabilities *the facts* that purportedly create the unfairness. It is then that the lender's burden of proof that requires it to prove *the relationship* was not unfair kicks in. While I do not suggest this offers legal precedent, the subject matter of that case was a fractional timeshare sale, and given the similarities seems to me an appropriate approach when considering the facts in this case.

the benefit of the beneficiaries is as significant as Ms K suggests. It does not change the fact that she owned a joint share in a specific Allocated Property which was identified on the Purchase Agreement, and that she would receive her share of the sale proceeds when it was eventually sold.

I still haven't seen anything to persuade me that the right checks weren't carried out by the Lender, or that the loan was unaffordable. However, the Credit Agreement includes information about Ms K's income, employer and mortgage, so I think that she must have been asked questions about her finances at the Time of Sale.

I don't think the Supplier was under any duty to offer Ms K a choice of alternative lenders.

I think that the interest rate, the APR, the total charge for credit, and the total amount repayable were clearly presented on page 1 of the loan agreement, so Ms K was told about them when she signed it. It was her choice to accept them, and the law will not rescue a consumer from a bad bargain if she now thinks that the loan was too expensive. Furthermore, the 14-day cooling-off period gave her plenty of time and opportunity to go over the terms of the Credit Agreement, and to consider whether it was suitable for her, and to cancel it if she chose. She also had the same opportunity to consider the Purchase Agreement and other sales documentation.

Finally, I remain of the view that the 14-day cooling-off period cures any unfairness that might otherwise have resulted from any high pressure sales tactics.

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 remain unpersuaded that the credit relationship between Ms K and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her such that it warrants the Lender offering any redress.

Commission: The alternative grounds of complaint

In my previous correspondence I mentioned that some of the grounds for complaint about the fairness or otherwise of the credit relationship could also constitute separate and freestanding complaints. I'll reiterate my findings 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 Ms K (that is, secretly). 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.

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

Conclusion

After careful reconsideration of the facts and circumstances of this complaint, I adopt my provisional conclusions as part of my final decision. For the reasons I've given above and in my earlier correspondence I've mentioned, I don't think the Lender acted unfairly or unreasonably when it dealt with Ms K's section 75 claim. And I'm not persuaded that the Lender was party to a credit relationship with Ms K that was unfair to her for the purposes of section 140A of the CCA. Having taken everything into account, I see no other reason why it would be fair or reasonable for me to direct the Lender to compensate Ms K.

My final decision

For the reasons set out above, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 9 March 2026.

Richard Wood
Ombudsman