DRN-5997126

The complaint

Miss T's complaint is, in essence, that Mitsubishi HC Capital UK Plc, trading as Hitachi Capital Consumer 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") and (2) deciding against paying a claim under section 75 of the CCA.

Background to the complaint

Miss T and her partner purchased membership of a timeshare ("the Fractional Club") from a timeshare provider ("the Supplier") on 26 November 2018 ("the Time of Sale"). She entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £15,430 ("the Purchase Agreement").

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

Miss T paid for her Fractional Club membership by taking finance of £15,430 from the Lender in her name only ("the Credit Agreement"). The Lender paid the Supplier a commission of £617:20. Miss T soon settled that loan using her credit card because she couldn't afford the loan payments.

Miss T wrote to the Lender on or shortly before 17 April 2020 ("the Letter of Complaint") to complain about misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.

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

Miss T says that the Supplier made a large number of pre-contractual misrepresentations at the Time of Sale – including that the Supplier:

1. told her that she could cancel her Fractional Club membership at any time, when that was not true;
2. told her that Fractional Club membership was not a timeshare but an "investment" which she could sell for a profit, when that was not true because (i) it is a timeshare and (ii) it is worthless;
3. told her that the Supplier's holiday resorts were exclusive to its members when that was not true;
4. told her that the Supplier's holiday resorts were five-star accommodation, when that was not true;
5. told her that a unit which accommodates four people could easily be exchanged for one which accommodates six, when that was not true;

6. told her that the Supplier was regulated by the Office of Fair Trading,[1] when it wasn't; and
7. told her that the annual management fees would not be increased above the inflation rate.

Miss T says that she has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Miss T.

The Lender dealt with Miss T's concerns as a complaint and issued its final response letter on 5 August 2020, rejecting it on every ground.

Miss T – using a professional representative ("the PR") – then referred the complaint to the Financial Ombudsman Service. In doing so, the PR expanded the scope of the complaint, stating that there was an unfair credit relationship between Miss T and the Lender, as defined by section 140A of the CCA.

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

The PR set out several reasons why it said that the credit relationship was unfair. In summary, they include the following:

1. She was pressured into purchasing Fractional Club membership by the Supplier.
2. The decision to lend was irresponsible because the Lender didn't carry out any creditworthiness assessment.
3. The Lender paid commission to the Supplier which was not declared to Miss T.

The complaint was assessed by an Investigator who, having considered the information on file, decided that the Supplier had marketed and sold Fractional Club membership as an investment to Miss T at the Time of Sale in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). And given the impact of that breach on her purchasing decision, the Investigator concluded that the credit relationship between the Lender and Miss T was rendered unfair to her for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision.

I issued my provisional decision on 23 September 2025. I made the following provisional findings (which form part of this final decision):

> **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.
>
> 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

[1] In fact, in 2018 the relevant regulator would have been the Financial Conduct Authority ('FCA').

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 Miss T could make against the Supplier. The Lender does not dispute that section 75 applies, and I accept that it does. So if I find that the Supplier is liable for having misrepresented something to Miss T at the Time of Sale, then the Lender is also liable.

A misrepresentation is a false statement of fact which caused Miss T to enter into a contract.

However, while I recognise that Miss T has concerns about the way in which her Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons she alleges. I will explain why.

(Although one of the alleged misrepresentations was that the club membership was an investment, to avoid repetition I will deal with that point later on, under the heading about section 140A.)

A number of misrepresentations were alleged in the Letter of Complaint, so I have considered that and to what extent they reflect Miss T's actual experiences during the sale. My first observation is that the letter appears to be based on a template which has not been edited correctly, since there is a reference on the first page to the Time of Sale (in 2018) having occurred before the Timeshare Act 1992 was passed. On the second page it even refers to "our client" where it clearly means Miss T. And on the last page, at the end of a sentence it says "[SAY:-re-sell their timeshare)"; the Supplier has suggested that this may indicate a degree of coaching by a third party,[2] and that this undermines the credibility of the letter generally.

On balance, I think it likely that Miss T has followed a template of sorts when preparing her Letter of Complaint to send to the Lender, although I am not able to make any finding on where any such template came from. For the avoidance of doubt, there is nothing wrong with using a template as they often set out clearly and concisely points of complaint. But in a complaint such as this, where the outcome turns on the evidence of what happened, it does make it more difficult to know what are Miss T's actual memories and what has been suggested in a template or other guide.

[2] This is not necessarily the PR, because this letter might pre-date the PR's involvement.

Miss T has later on provided (through the PR) a witness statement of her memories of the sale.[3] However, when comparing this statement to the Letter of Complaint, there are several alleged misrepresentations in the Letter of Complaint which Miss T did not mention in her later witness statement – for example, that the product was not a timeshare. The inclusion in the Letter of Complaint of matters which Miss T did not think to mention in her witness statement suggests to me that either they were matters that were suggested from a template or guide or, alternatively, they were not important factors in her decision to purchase the club membership as they were not mentioned again in the later statement.

So for each of those reasons, I am not persuaded that the Letter of Complaint genuinely reflects Miss T's recollections of how the club membership was sold. Because of this, I don't think the Supplier really told her that the membership was not a timeshare – but even if I thought it did, if that was really so important to Miss T that she would not have purchased it otherwise, then it is puzzling that she did not say so in her witness statement or even mention it at all. So I do not think that this is what induced her to enter into the Purchase Agreement. And for the same reasons, I am not satisfied that the other alleged misrepresentations which were raised in this letter but not mentioned in Miss T's witness statement influenced her decision either.

What is more, I don't think that some of the alleged misrepresentations (even if they were made) were untrue, for the following reasons:

- *Exclusive:* While the *resorts* were not exclusive in themselves because there were apartments in the resorts available for non-members to book accommodation, the various *benefits* of membership were only available to members. So without a more specific explanation of what the Supplier was alleged to have said by using the term 'exclusive', I can't see that there was anything untrue said.

- *Upgrading accommodation from four to six guests:* The Lender told Miss T that a larger unit could easily be obtained if she spent extra points on the exchange. That seems plausible to me, and I have not seen evidence that it was not true.

- *Regulated broker:* The firm named on the Credit Agreement as the credit intermediary was regulated by the FCA at the Time of Sale (albeit I can't see that any representation about the status of the broker was made at the Time of Sale).

Miss T did not mention in her witness statement that she was told that she could *cancel* her membership at any time, but she did say that she could *sell* it at any time, so it's possible that the ability to get out of her membership (by either means) might have been a factor in her decision to buy. So I have considered each of these allegations.

The paperwork provided at the Time of Sale made it clear that the right to cancel the agreement was subject to a deadline of 14 days, so it may be that Miss T has confused this with thinking that the Supplier told her she could cancel at any time. But as it was possible for Miss T to sell her membership to a third party (but not to the Supplier[4]) at any time, I think that if the salesman did tell her that, then that was not a misrepresentation.

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[3] I note that this statement is written in a very different tone or voice to the Letter of Complaint.
[4] Miss T has not alleged in either the claim letter or the witness statement that she was told she could sell the membership back to the Supplier.

Finally, Miss T also says that she was told the annual increases in the management fees would not exceed the rate of inflation, but they did.

The management fees in 2018 were 999 euros. In 2019 they increased to 1,024 euros. This is a 2.5% increase; in the UK[5] that year inflation was 1.79%. Although the sales paperwork does say that the fees can increase, I think this information would have been easy to overlook, as it appears in a lengthy document that Miss T might not have read, and I accept that she may not have been told this verbally at the presentation. But that is not the end of the matter; I also have to be satisfied that if Miss T had realised this at the Time of Sale, then she would not have decided to buy the Fractional Club membership.

If the increase in the management fee in 2019 had been capped at the inflation rate, then the new fee would have been £1,016:88. So the difference between that and the amount it was actually increased to is only £7:12. That seems to me to be too small an amount of money to have influenced Miss T's decision (or her partner's decision either) whether to buy a £15,430 timeshare.

As there's nothing else on file that persuades me that there were any false statements of existing fact made to Miss T by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons she alleges.

For these reasons, therefore, I do not think the Lender is liable to pay Miss T 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 denied her section 75 claim.

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

[Here I have omitted several paragraphs of my provisional decision which explained the combined effect of sections 56 and 140A of the CCA, as they are uncontroversial.]

I have considered the entirety of the credit relationship between Miss T 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; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

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

[5] I have not been provided with the complete agreement, so I'm not sure whether it was the UK or the Spanish inflation rate which was meant. But I don't think that is likely to make any difference to the conclusion I have reached in the next paragraph.

The Lender has argued about where the burden of proof lies in proceedings under section 140A. I have had regard to section 140B(9), which says: *"If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."*

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

As I've said, when this complaint was brought to our service, the PR expanded upon Miss T's original complaint to say that the Lender had been party to an unfair credit relationship with her. This was for several reasons, all of which I set out at the start of this decision. These were:

1. The Lender didn't carry out any creditworthiness assessment.
2. She was pressured into purchasing Fractional Club membership.
3. Commission was paid but not declared to Miss T.

Since these matters were not previously raised with the Lender, I have considered whether it would be fair for me to consider them.

These matters were not directly raised by Miss T or the PR, nor dealt with by the Lender, and if I had regarded them as entirely separate matters then I would not have considered them. But I think I can regard them as further arguments in support of Miss T's general complaint that the fractional club membership was mis-sold, rather than as novel and separate complaint points in their own right. I also think that the Lender has not been ambushed with them because these are arguments that it is used to dealing with, as they've been made in many other similar cases. And as I am not minded to uphold them, there is no prejudice to the Lender caused by my considering them. So I will deal with each of these arguments in the same order as I have listed them above.

(1) Creditworthiness checks

The PR says that the right checks weren't carried out before the Lender lent to Miss T. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. Indeed, the Lender has provided evidence that Miss T and her partner were both asked questions about their income, who their employers were and how long they had been employed by them, and about their residential status, so it appears that some affordability checks were carried out.

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

(2) Pressure

Miss T has vividly described how she was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I accept that she felt exhausted after a sales process that went on for a long time. But she was also given a 14-day cooling off period during which she was entitled to withdraw from her purchase and

from the loan (without needing to give any reason), and she has not provided a credible explanation for why she did not cancel her membership during that time, if she had only bought it because she felt that she'd been forced into it. The pressure was off for the following 14 days.

Furthermore, the Supplier says that in 2019 Miss T referred her friends and / or family for a promotional holiday with the Supplier (which it has a record of because it gave her a £400 credit to her management fees when one of them bought a trial membership). I think she is unlikely to have done that if the experience was really as unpleasant as she describes. So I am not persuaded that the Letter of Complaint is reliable evidence of what happened at the Time of Sale.

And with all of that being the case, there is insufficient evidence to demonstrate that Miss T made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

(3) Commission

The Supreme Court's recent judgment in J*ohnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ('*Johnson, Wrench and Hopcraft*') clarified the law on payments of commission – albeit in the context of car dealers acting as credit brokers. In my view, the Supreme Court's judgment sets out principles which appear capable of applying to credit brokers other than car dealer–credit brokers. So, once the implications of that judgment become clear, I will finalise my findings on this complaint.

But there is also another reason why the credit relationship might be unfair, and that is the reason our investigator gave for upholding this complaint. So I will consider that next.

(4) 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?

Miss T says the Fractional Club membership was marketed and sold to her as an investment. Our investigator found that this was a breach of the regulatory prohibition against selling timeshares in that way, and that this made the credit relationship unfair under section 140A. I will deal with Miss T's related complaint about misrepresentation at the same time.

The Lender does not dispute, and I am satisfied, that Miss T'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."

So I have considered whether the Supplier did that at the Time of Sale.

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.

Miss T’s share in the Allocated Property clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 Miss T 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 her or led her to believe that Fractional Club membership offered her 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 Miss T, the financial value of her 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 Miss T 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. So I accept that it’s *possible* that Fractional Club membership was marketed and sold to her 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. So, I have taken all of that into account.

This is what Miss T said in her witness statement:

“[T]hey kept going on and on saying that we have nothing to lose, as this is a good investment and if we decided to pull out one day, we could just sell it and as the market price keeps going up we would be at a profit.”

The witness statement (which is undated) was not served until July 2023, which is over three years after she first complained to the Lender and nearly five years after the Time of Sale. To be fair, Miss T acknowledges this herself, saying *“It was a long time ago, so I do not remember many details”*. So I think her recollection of what was said at the Time of Sale is not necessarily likely to be accurate.

But even if, on this occasion, membership was sold in that way, I am still not currently persuaded that this would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Miss T rendered unfair?

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. […]"* (Original emphasis.)

"[…] 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 Miss T 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) (having regard to section 56) is what led her to enter into the Credit Agreement and the related Purchase Agreement.

I have already explained why I think that neither the Letter of Complaint nor the witness statement are reliable evidence. For the same reasons I set out earlier, I do not think there is convincing evidence to show that what really motivated Miss T to purchase the Fractional Club membership was what she says she was told about the club membership being a potentially profitable investment.

On balance, therefore, even assuming that the Supplier did market or sell the Fractional Club membership as an investment in breach of regulation 14(3) of the Timeshare Regulations, I am not persuaded that Miss T'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 is consistent with her having 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 Miss T and the Lender was unfair to her even if the Supplier had breached regulation 14(3).

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Miss T was unfair to her because of an information failing by the Supplier, I'm not persuaded it was unfair.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Miss T was unfair to her for the purposes of section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Miss T's 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 her under the Credit Agreement that was unfair to her for the purposes of section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate her.

My addendum provisional decision

I also indicated that I would provide my findings on the issue of commission once I knew more about that given the circumstances of Miss T's complaint. I did that by email on 31 March 2026, saying the amount of the commission payment on Miss T's loan had been £617:20, which was only 4% of the amount borrowed and only 3.71% of the total charge for credit. Having regard to the Supreme Court's recent judgement about commission in *Johnson, Wrench and Hopcraft,* I thought this had not resulted in unfairness under section 140A, because it was so small that even if Miss T had been told about it at the Time of Sale it would not have influenced her decision to enter into the Credit Agreement. For the same reason, I thought that any related breach of regulatory guidance had not had any impact on her decision. And based on the Supreme Court's judgement, I concluded that the Supplier had not owed Miss T a fiduciary duty when it brokered her loan.

Responses to my provisional decisions

The Lender didn't respond to my provisional decision. The PR disagreed with my overall conclusion. When doing that, it provided significant submissions at first but it went on to withdraw them and replace them with more concise submissions – which, while primarily concerned with the suggestion that Miss T's Fractional Club membership had been marketed and sold as an investment in contravention of a prohibition on selling timeshares in that way, also included allegations of fraudulent misrepresentation on the basis that she was told by the Supplier at the Time of Sale that:

(1) she was buying part ownership of a physical property;

(2) Fractional Club membership was a profitable investment;

(3) the Allocated Property would be sold; and

(4) she would receive a share of the net proceeds of sale when the Allocated Property is sold.

The PR also repeated its concerns about the pressure Miss T was put under by the Supplier at the Time of Sale, the Lender's decision to lend being irresponsible, and payment of commission to the Supplier by the Lender – albeit with a focus on the Supreme Court's judgment in *Hopcraft v Close Brothers Limited; Johnson v FirstRand Bank Limited; Wrench v FirstRand Bank Limited* [2025] UKSC 33 ('*Johnson'*).

The PR argued that telling it the amount of the commission payment in a provisional decision was *"procedurally improper",* because this had not been disclosed earlier. I think that objection is misconceived. The whole point of a provisional decision is to give the PR an opportunity to consider this information and my thoughts about it so that the PR can make representations about everything before I issue the final decision.

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, where relevant: (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when 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.

And having done that afresh, I'm not persuaded to depart from my provisional decision, for reasons I'll now explain.

Before I do, I want to make it clear that I recognise that this complaint, when originally made, was wide ranging and made on a number of different grounds, including:

(1) Misrepresentations by the Supplier at the Time of Sale, giving Miss T 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 Miss T 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.

However, as the PR's more concise response to my provisional decision relates, in the main, to point (3), if I haven't been provided with new arguments and/or evidence to consider in relation to points (1) or (2), I see no reason to change or add to my conclusions (as set out in the summary of my provisional decision above) in relation to them.

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[6] Specifically Rule 3.6.4 in the Dispute Resolution Rules found in the Financial Conduct Authority's Handbook for Rules and Guidance.

Indeed, as I said in my provisional decision, my role as an ombudsman is to decide what's fair and reasonable in the circumstances of this complaint – rather than address every single point that's been made. And with that being the case, while I have read all of the PR's submissions in full, 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's more, it is important to make the point that, in contrast to what might happen in court, neither side to this complaint has a burden of proof that it must discharge. After all, the jurisdiction under which I'm deciding this complaint is inquisitorial rather than adversarial – which means that my findings are made, on the balance of probabilities, in light of the evidence and/or arguments received from both sides.

So, while the PR argues in response to my provisional decision that, under section 140B(9) of the CCA, it is for the Lender to prove that its credit relationship with Miss T wasn't unfair simply because she alleges that it was, that fails to understand that the Financial Ombudsman Service deals with complaints rather than causes of action. And, in any event, to suggest that unsubstantiated allegations of fact must be disproved by the Lender if the credit relationship isn't to be deemed unfair also oversimplifies if not misunderstands the legal position. As HHJ David Cooke said in paragraph 26 of his judgment on *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch):

"…the onus is on [the creditor] *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* [the borrower alleging an unfair credit relationship] *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."* [7]

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

It was argued by the PR, when this complaint was first made, that the Supplier misrepresented Fractional Club membership at the Time of the Sale. The reasons for this aspect of this complaint at that time were addressed in my provisional decision. And I see no reason to change or add to those. But in response to my provisional decision, the PR argues that Fractional Club membership was worthless and, as such, various representations by the Supplier (which I have set out above) were fraudulent, in that they promised that Miss T would make a profit when she received her share of the proceeds of the sale of the Allocated Property.

The PR takes that view because it says the evidence suggests that (1) any rights in the Allocated Property are personal rights rather than the rights of ownership, (2) the Lender hasn't provided any evidence that the Allocated Property exists or that it will sell in the future (making it unlikely that Miss T will receive anything from her share in it) and, (3) by the PR's own calculations, given the initial and ongoing costs of Fractional Club membership, it was never possible to make a profit from the sale of the Allocated Property.

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what

[7] As approved by the Supreme Court in *Smith v. The Royal Bank of Scotland plc* [2023] UKSC 34 – see paragraph 40.

constitutes an effective misrepresentation. Summarising the relevant pages in *Chitty on Contracts*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it did not hold it or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

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, Miss T's share in the Allocated Property clearly constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it.

But as the PR knows, while the term "investment" is not defined in the Timeshare Regulations, it was agreed by the parties in *Shawbrook & BPF v FOS* 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*" (see paragraph 56).

Yet, contrary to what the PR says, none of the contractual paperwork made any promises that a profit might be made. The PR argues that Miss T's Fractional Rights Certificate, for instance, made a clear and unambiguous "investment promise" because it indicated that, upon the sale of the Allocated Property, she would receive 1.93% of the net sales proceeds. However, nowhere did the Certificate imply let alone say that 1.93% would be worth more in real terms in the future than at the Time of Sale.

As I said in my provisional decision, the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's possible that Fractional Club membership was marketed and sold to Miss T as an investment orally.

Miss T says little about what was said, by whom and in what circumstances for the purposes of determining whether representations by the Supplier amounted to false statements of existing fact rather than expressions of honestly held opinions about the likely value of the Allocated Property in the future. And while the PR's own calculations might cast some doubt over the likelihood of the Allocated Property being sold at a profit given the initial and ongoing costs of it to Miss T, there isn't enough evidence to persuade me that the relevant sales representative(s) would have carried out that sort of calculation at the Time of Sale or would otherwise have had information that would indicate that they knew or ought reasonably to have known at the time that any such representations weren't true.

And while the PR might question the exact legal mechanism used to give prospective members an interest in allocated properties, that does not change the fact that the shares of members (such as Miss T) were clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort.

I'm not persuaded, therefore, by the allegations of fraudulent misrepresentation from the PR. And with that being the case, they aren't reasons to uphold this complaint and direct the Lender to compensate Miss T.

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

I've already explained why, in light of the PR's latest allegations of fraudulent misrepresentation, I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. And it is for those reasons that I don't think the credit relationship between Miss T and the Lender was rendered unfair to her on the basis that membership had been misrepresented.

However, there are, of course, other reasons why the PR argues that the credit relationship in question was unfair. But having reconsidered the entirety of that relationship along with everything that has now been said and/or provided by both sides, I still don't think the credit relationship between Miss T and the Lender was likely to have been rendered unfair to her for the purposes of section 140A. When coming to that conclusion, I have looked again at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances; and, when relevant
5. Any existing unfairness from a related credit agreement.

I have also reconsidered any commercial (including commission) arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.

The PR continues to argue that:

1. The Lender's decision to lend to Miss T was, in essence, irresponsible; and
2. Miss T was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

However, as neither the PR nor Miss T have submitted any new evidence to further either of the arguments above, it is for the same reasons I gave in my provisional decision that I don't think either of them render her credit relationship with the Lender unfair to her for the purposes of section 140A.

But I'll turn now to what continues to be the main reason for the PR's assertion that the credit relationship in question was unfair.

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

As I said in my provisional decision, there is competing evidence in this complaint as to whether the 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. I acknowledged that it was possible that Fractional Club membership was marketed and sold to Miss T as an investment in breach of regulation 14(3) – a view I still hold.

But I also thought and still think that it isn't necessary to make a formal finding on that particular issue for the purposes of my determination on this complaint, because a breach of regulation 14(3) by the Supplier is not itself determinative of the outcome in this complaint unless the impact of such a breach suggested otherwise.

The PR disagrees with that and cites the judgment of Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* in support – saying that she found that the selling of a timeshare as an investment (i.e. in a breach of regulation 14(3) of the Timeshare Regulations) was, itself, sufficient to create an unfair credit relationship.

However, on my reading of *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice didn't find that a breach of regulation14(3) of the Timeshare Regulations was *"causative of the legal relations entered into".* She recognised that such a breach was *"conduct that knocks away the central consumer protection safeguard"*, but she went on to say that it was the ombudsmen behind the two reviewed decisions who found that such a breach was, given the facts and circumstances of the relevant complaints, causative of the consumers in question purchasing their timeshares and taking out loans to do so.

What's more, the Supreme Court's judgment in *Plevin* makes it clear that regulatory breaches do not automatically 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 v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*') and *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*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 still seems to me that, if I am to conclude that a breach of regulation 14(3) led to a credit relationship between Miss T and the Lender that was unfair to her and warranted relief as a result, then whether the Supplier's breach of regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is still an important consideration.

Indeed, doing that accords with common sense, for if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it would be difficult to attribute any particular importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

If there had been a breach of regulation 14(3), would it have rendered the credit relationship between Miss T and the Lender unfair to her?

Having found that it was possible that the Supplier breached regulation 14(3) of the Timeshare Regulations at the Time of Sale, I have considered (as I did in my provisional decision) what impact that breach (if there was one) would have had on the fairness of the credit relationship between Miss T and the Lender under the Credit Agreement and related Purchase Agreement.

And on my reading of the evidence before me, I'm still not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Miss T decided to go ahead with their purchase, such that she would have made an entirely different purchasing decision had there not been a breach of regulation 14(3). That is mainly for the same reasons as I gave in my provisional decision. The PR has argued that it was not fair of me to *"penalise"* Miss T for using a template; I would remind it that I said there was nothing inherently wrong with using a template, only that it makes it difficult to know her what her own recollections were. The PR also said it was not fair of me to reject her witness statement because of the passage of time since the Time of Sale, because in 2018 one of my colleagues had written to them to ask the PR not to send any evidence in its complaints until an investigator asks for it. However, the relevance of the timing is the effect of the passage of time on Mrs T's memory, and so even if I accept that the statement was written at the same time as the Letter of Complaint in 2020, it still contains her concession that *"It was a long time ago, so I do not remember many details"*. Accordingly, I am still not satisfied that the witness statement is reliable evidence of Mrs T's thoughts and motives at the Time of Sale.

On balance, therefore, for the reasons I've set out above, I don't think the credit relationship between Miss T 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

Undisclosed commission

As I've already said, I set out my thoughts in relation to the implications of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench* for this complaint in my addendum provisional decision. I remain satisfied that the Lender has provided me with sufficient information to reach a conclusion about its commercial (including commission) arrangements with the Supplier. I've seen nothing in this case that leads me to think that the information in question is inaccurate. And 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 Miss T, 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 Miss T into a credit agreement that cost disproportionately more than it otherwise could have.

So while I recognise that the PR might disagree with the thoughts I shared in my addendum provisional decision, it hasn't offered any evidence and/or arguments that lead me to think that (1) the factors referenced by the Supreme Court have a bearing on the outcome of this complaint given its circumstances or (2) that there are any other reasons why the

commercial (including commission) arrangements between the Supplier and the Lender rendered the credit relationship between the latter and Miss T under the Credit Agreement and related Purchase Agreement unfair for the purposes of section 140A.

Other matters

In response to my provisional decision, the PR also argues that the Supplier breached regulation 12 of the Timeshare Regulations (which is concerned with the provision of key information) because it failed to provide Miss T with information on the market value of the Allocated Property, title deeds and a proper legal description beyond a basic unit number.

However, it isn't clear what the PR means by "proper legal description" and has provided no authority for the suggestion the Supplier had to provide Miss T with information on the title deeds of the Allocated Property. What's more, when it comes to the market value of the Allocated Property, I would draw the PR's attention to what Mrs Justice Collins Rice said in paragraphs 106 and 110 of her judgment in *Shawbrook & BPF v FOS* (my emphasis):

"Both ombudsmen rely on the reference in Sch.1 to 'exact nature and content of the rights' as being the basis for perceiving a legal obligation to provide 'value' information. But first, having regard to the high level of specificity in the Schedule, ***it is obvious that 'value' information is nowhere specified as such. And second, 'exact nature and content of the rights' is clearly intended, in context, to be a fair and objective identification and description of those rights. 'Value' information may possibly be context for, or commentary on, those rights, but the 'exact nature and content of rights' is something different from information which may (or may not) be relevant to how much they might be worth, now or in the future.****"*

"I do not, and do not need to, go so far as to infer from the Regulations a legal prohibition on the provision of valuation information. ***My conclusion is that there is no legal obligation, derivable from Reg.12 of the Timeshare Regulations, to provide it*** *… It remains my view that the principal legal consumer-protection control over buying and selling fractional ownership timeshares is the Reg.14(3) prohibition. That provision alone makes it hard enough to market a timeshare product containing a bare interest in the proceeds of the deferred sale of real property lawfully, without inviting the fleshing out of the law as positively demanding investor-protection information obligations at the same time."*

In any event, 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.

So, even if it could be said that the Supplier failed to give Miss T sufficient information, in good time, in order to satisfy the requirements of regulation 12 of the Timeshare Regulations for some of the reasons the PR gives, neither she nor the PR have persuaded me that they were deprived of information that would have led them to make a different purchasing decision at the Time of Sale when I've already found that the prospect of a financial gain from the Allocated Property was not an important and motivating factor behind her purchase. And with that being the case, even if there were information failings (which I make no formal finding on), I can't see why that could be said to have rendered the credit relationship in question unfair to her.

The overall costs of the Fractional Club

The PR has calculated that the total amount spent (or to be spent) by Miss T under the Credit Agreement and the Purchase Agreement, including the annual maintenance charges,

adds up to almost £47,700. This is said to be unfair because of (1) the alleged lack of proper affordability checks, and (2) the disparity between the value received and the financial burden imposed, leading to what it called a severe imbalance in the parties' rights and obligations.

I have already explained why I do not think there was a failure to carry out affordability checks. But to that I would add that the question of whether borrowers can afford a loan does not depend on the total financial liability incurred, considered as a lump sum, but rather on their ability to repay the loan in a sustainable manner. The loan payments were £178:22 a month, which does not strike me as unaffordable for a homeowner with an income of £40,000 a year.

As for whether the fractional points were good value for money, I don't think I need to make a finding about that. The Credit Agreement made it clear how much interest Miss T would pay and how much she would have to repay in total, and she was told there would be annual maintenance fees. She wasn't hoodwinked into thinking she would only have to pay a total of £15,430. It was her informed choice to purchase the fractional points, and she had 14 days (the cooling-off period) to reflect on her decision and to withdraw from her purchase and from her loan if they wished to change their minds. She decided that the points were worth buying, and if she has since changed her mind about that, that does not mean that her relationship with the Lender must have been unfair all along.

Conclusion

Having adopted my provisional findings, and reconsidered the facts and circumstances of this complaint, I still I don't think the Lender acted unfairly or unreasonably when it dealt with Miss T's section 75 claim. I'm still not persuaded that the Lender was party to a credit relationship with Miss T that was unfair to her for the purposes of section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable for me to direct the Lender to compensate Miss T.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss T to accept or reject my decision before 13 May 2026.

Richard Wood
Ombudsman