

## **The complaint**

Mr M's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

Although the timeshare purchase which is the subject of this complaint was made jointly by Mr and Mrs M, the associated credit agreement was in Mr M's sole name. As such he is the only eligible complainant here. I shall, however, refer to both Mr and Mrs M where it is appropriate to do so.

## **What happened**

Mr and Mrs M had been members of a points-based timeshare from a timeshare provider (the 'Supplier') since their first purchase of a trial membership in 2004. They became full members in 2006 by purchasing Vacation Club points, and increased their holdings of these in 2007 and 2011.

As members of Vacation Club, every year they were granted a number of points that they could exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 8 September 2015 (the 'Time of Sale') whilst on holiday Mr and Mrs M attended a presentation from the Supplier, and as a result they purchased membership of a new timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 1,540 fractional points (the 'Purchase Agreement'), and after trading in their existing Vacation Club membership, they ended up paying £10,592 for membership of the Fractional Club. Their new membership allowed them to stay for one week every other year in one of the Supplier's 'Signature Collection' properties.

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

Mr and Mrs M paid for their Fractional Club membership by taking finance of £10,592 from the Lender in Mr M's sole name (the 'Credit Agreement').

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 13 February 2020 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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.

3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

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

- Told them that Fractional Club membership was the way to get out of their existing Vacation Club membership, but this was untrue as the Supplier has an exit policy in place.
- Told them that Fractional Club had a fixed term and a guaranteed end date when that was not true.
- Told them that Fractional Club was an investment and ownership in property when that was not true.
- Told them that at the conclusion of the fixed term they would exit the contract and receive a guaranteed £10,000 lump sum, which is untrue.
- Told them that the Fractional Club provided members other benefits, such as free coffee, toiletries and fruit, along with a 24-hour concierge. This was untrue.
- Told them that Fractional Club was exclusive to its members, when that was not true.

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

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

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

1. Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. A breach of the Consumer Rights Act 2015 ('CRA')<sup>1</sup> by:
  - a. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair.
  - b. The terms and conditions are not expressed in plain and intelligible language.
  - c. They were not given sufficient time to read and understand the sales documentation.
  - d. They were misled about the need to pay management fees and their future cost, and the terms relating to these are complex, obscure and unhelpful.
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of

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<sup>1</sup> The Letter of Complaint said this particular issue was contrary to the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR'). However, at the time of sale the relevant regulation in force was the CRA so I have considered it as such.

those Regulations.

4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr M's concerns as a complaint and issued its final response letter on 18 February 2020, rejecting it on every ground.

Mr M then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who asked the PR if there was any witness testimony from Mr M setting out his recollections of the Time of Sale. The PR said that there was not, but said a draft statement had been prepared, in which Mr M had confirmed he and Mrs M were told that the Fractional Club was an investment in property which they would own a percentage of. When the 10 years ended, they would be out of contract and would also receive £10,000. They would have the option of renewing and extending or leaving with the £10,000. The PR said that the Letter of Complaint was prepared on the basis of what was in the draft statement.

Having considered the information on file, the Investigator upheld the complaint on its merits. She thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs M at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr M was rendered unfair to him for the purposes of Section 140A of the CCA.

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

### **The provisional decision**

Having considered everything, I didn't think Mr M's complaint ought to be upheld. So, I set out my initial thoughts in a provisional decision (the 'PD'). I said:

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

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

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

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

*Regrettably, the PR hasn't provided a (signed) witness statement from Mr and Mrs M – or anything else that sets out in their own words what happened.*

*I appreciate that the Letter of Complaint was probably prepared by the PR following a conversation or conversations with Mr and Mrs M – after all, it contains personal information that only Mr and Mrs M would know. However, a letter of complaint (or claim) is not evidence – especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations.*

*In response to a request from an Investigator, the PR says a draft statement was prepared,*

which was used to inform the Letter of Complaint, but it says Mr M hasn't made a 'formal' witness statement. The PR says the draft statement confirmed that Mr and Mrs M were told the Fractional Club was:

*'...an investment in property which we would own a percentage of. When the 10 years ended, we would be out of the contract and would also receive £10,000.00. We would have the option of renewing and extending or leaving with the £10,000.00.'*

*This information is not in the letter of complaint, and shows why direct testimony from the consumer, in full and in their own words, is so important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. Here, that simply isn't possible. It's also important that the decision-maker can see that the Letter of Complaint genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case – indeed, I'm surprised that Mr M's recollections that the term of the membership was 10 years with an option to renew or extend weren't included in the Letter of Claim, as this is a significant part of the Fractional Club and it would seem to go to the heart of the matter.*

*All things considered, I'm unable to place any evidential weight on the Letter of Claim and very little weight on what I'm led to believe is an excerpt from the draft statement.*

*In the absence of direct testimony from the consumer, I have to rely on the paperwork that's been provided.*

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

*The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.*

*In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr M could make against the Supplier.*

*Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs M at the Time of Sale, the Lender is also liable.*

*A material and actionable misrepresentation is an untrue statement of existing fact, made by the supplier, that induces a consumer into entering a contract. So, in Mr and Mrs M's case, for me to say there had been a pre-contractual misrepresentation by the Supplier, I would have to be satisfied, on the balance of probabilities, that Mr and Mrs M were told something that was factually untrue, and that this induced them to make their Fractional Club purchase. But there is no evidence from Mr M himself as to what he and Mrs M were told. All I have is the Letter of Complaint, and this contains no direct evidence of who said what, when, and in what context.*

*This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership was positioned by the Supplier as the only way for Mr and Mrs M to exit their Vacation Club membership. It is true to say that trading in was a way of exiting their contract, but as has been pointed out, it*

*wasn't the only way to do this. And I've not seen anything to suggest that Mr and Mrs M were unhappy with the nature or use of their Vacation Club membership, or even that they wanted to exit it anyway. But given the lack of any actual testimony from Mr M as to what was said, by whom and in what context, I'm simply not persuaded, on balance, that the Supplier had misrepresented the Fractional Club in this way.*

*The Letter of Complaint also said that the Supplier told Mr and Mrs M that Fractional Club had a fixed term and a guaranteed end date when that was not true. But I can't actually see that what has been allegedly said here is untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Mr and Mrs M are included.*

*It is also said that the Supplier told Mr and Mrs M that they were making an investment in ownership of a property when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs M's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.*

*As regards the allegation that the Supplier told Mr and Mrs M that at the conclusion of the fixed term they would exit the contract and receive a guaranteed £10,000 lump sum, again I'm not persuaded that this is something that the Supplier would have likely said. I've not seen anything in the contractual documentation which would suggest there would be a guaranteed return of any amount, let alone £10,000. And given the unpredictable nature of property values it seems inherently unlikely that a guarantee of this nature would be given. And again, without any testimony from Mr M setting out who said what, when, and in what context, I'm not persuaded that this was said.*

*As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise the Letter of Complaint sets out that Mr M has concerns about the way in which their Fractional Club membership was sold, I'm not persuaded that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons alleged. And I say that because I've not seen anything to suggest that the other benefits described in the Letter of Complaint are not available to members, and whilst certain parts of the Supplier's resorts may be available for non-members to book, I can't see that the accommodation provided by Mr and Mrs M's particular membership is available to non-members.*

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

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

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

*I have already explained why I am not persuaded that the contract entered into by Mr and Mrs M was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But the Letter of Complaint also says that the credit relationship between Mr M and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that there are concerns about. It is those concerns that I explore here.*

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

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

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

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

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

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

*"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective*

agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' [...] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. [...] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

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

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

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

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

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

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

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

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

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

I have considered the entirety of the credit relationship between Mr M 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.

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<sup>2</sup> The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

*When coming to that conclusion, and in carrying out my analysis, I have looked at:*

- 1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
- 2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
- 3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
- 4. The inherent probabilities of the sale given its circumstances.*

*I have then considered the impact of these on the fairness of the credit relationship between Mr M and the Lender.*

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

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

*They include the allegation that the Supplier misled Mr and Mrs M and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons given for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.*

*The PR says that the right checks weren't carried out before the Lender lent to Mr M. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr M was actually unaffordable, before also concluding that he lost out as a result, and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr M. If there is any further information on this (or any other points raised in this provisional decision) that Mr M wishes to provide, I would invite him to do so in response to this provisional decision.*

*The Letter of Complaint says that Mr and Mrs M were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale, and the Supplier knew that Mrs M had a medical issue which required her to leave and have something to eat, and didn't allow her to before signing. I acknowledge that Mr and Mrs M may have felt weary after a sales process that went on for a long time, and I have no reason to doubt that Mrs M probably did need to go and eat. But there is no testimony about what was said and/or done by the Supplier during their sales presentation that made either Mr M and/or Mrs M feel as if they could not leave and had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to make a further Fractional Club membership purchase the following year to supplement their existing holiday entitlement – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.*

*I'm not persuaded, therefore, that Mr M's credit relationship with the Lender was rendered*

unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the Letter of Complaint says his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

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

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

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

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*<sup>3</sup>, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

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

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

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs M, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous

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<sup>3</sup> *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin)

*paperwork that state that Fractional Club membership was not sold to Mr and Mrs M 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 Mr and Mrs M 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.*

*But given the specific circumstances of this case, I do not think I need to make a finding on this issue. I think this because even if Mr and Mrs M's Fractional Club membership was sold to them in a way that breached Regulation 14(3) of the Timeshare Regulations, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.*

*If there was a breach of Regulation 14(3), was the credit relationship between the Lender and Mr M 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. [...]"*

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

*So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr M and the Lender that was unfair to him and warranted relief as a*

*result, whether the Supplier's breach of Regulation 14(3)<sup>4</sup> led them to enter into the Purchase Agreement and Mr M into the Credit Agreement is an important consideration.*

*But as I've already said, there is no actual evidence that this was the case. The Letter of Complaint to the Lender provides information regarding the claim and complaint under the CCA, but this is not testimony from Mr M. It does not set out his first-hand recollections of what happened at the Time of Sale, nor does it help me in any way to understand his and Mrs M's motivation to make the purchase. And that is important here. If I am to find that a breach of Regulation 14(3) was material, I need to be persuaded that Mr and Mrs M's motivation to purchase Fractional Club membership at the Time of Sale was because it was an investment, with the possibility of a profit at the end.*

*So in the absence of direct testimony, I have looked at the circumstances surrounding the sale, and Mr and Mrs M's situation at the time.*

*As I've said, Mr and Mrs M were existing members of a points-based timeshare with the Supplier, and had been for over 10 years. And I've not seen anything which would suggest that they were unhappy with their membership, which begs the question, why would they change?. So I have considered what they got with the Fractional Club that they didn't have with their existing membership. As I've said, Fractional Club did have an investment element to it, but that was not the only difference it provided.*

*The type of Fractional Club bought by Mr and Mrs M at the Time of sale was the Supplier's 'Signature Collection'. And this purchase allowed them to stay for one week on a bi-annual basis in one of the Signature Collection properties. Signature Collection properties were apparently better equipped and more luxurious than the standard accommodation available to members of the Vacation Club and other fractional members. So, it would seem likely that this upgrade in the standard of accommodation would have been appealing to Mr and Mrs M. And my thoughts on this are strengthened by the fact that one year later Mr and Mrs M made a further Signature Collection purchase from the Supplier, and changed their bi-annual week to coincide with their new purchase. This meant they were able to stay in their accommodation for a week every year and extend this to a fortnight every other year. So this suggests to me that the holiday rights, the quality of the Signature Collection, and its availability were important motivating factors for Mr and Mrs M's purchase.*

*Fractional Club also provided a much shorter membership term than Vacation Club, and the membership term has been mentioned by the PR (albeit it was incorrectly stated that it had a 10-year term when it was actually 19) so it is possible that this was attractive to Mr and Mrs M also, as it meant they would have needed to pay an annual management fee for a shorter duration when compared to their existing Vacation Club membership.*

*So, in the absence of any direct evidence as to their motivations at the Time of Sale, and given their circumstances and variety of benefits that came with the specific type of Fractional Club membership Mr and Mrs M bought, I am not persuaded, on the balance of probabilities, that they were induced into the purchase of Fractional Club on the basis that it was an investment which could provide them with a financial gain.*

*On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs M's decision to purchase Fractional Club membership at*

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<sup>4</sup> which, having taken place during its antecedent negotiations with Mr and Mrs M, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender

*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 they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr M and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).*

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

*It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs M when they purchased membership of the Fractional Club at the Time of Sale. But the PR says that the Supplier failed to provide them with all of the information they needed, and did not give them sufficient time to make an informed decision.*

*The PR set out in the Letter of Complaint that certain aspects of the sale of Fractional Club and the contractual documentation were in breach of the UTCCR. But as I've said, the legislation in force at the Time of Sale was the CRA, so I've considered these complaint aspects under the CRA.*

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

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

*The PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms.*

*To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr M and the Lender unfair to him, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mr and Mrs M in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs M have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in *Link Financial v Wilson* [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].*

*As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.*

*Having considered everything that has been submitted, it seems unlikely to me that the contract term cited by the PR led to any unfairness in the credit relationship between Mr M and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant term in the Purchase Agreement was actually operated against Mr and Mrs M, let alone unfairly. The PR hasn't explained why exactly they feel this term causes an unfairness and as I've said, I can't see that this term has been operated in an unfair way against Mr and Mrs M in any event.*

*The PR also says that the terms and conditions set out in the Purchase Agreement and members documentation are not expressed in plain and intelligible language. But I cannot see that this has caused any unfairness here. I'm not persuaded that had the terms and conditions been set out in a different way, it would have likely made any difference to Mr and Mrs M's purchasing decision. And the PR has not explained which of the terms and/or conditions were misunderstood by Mr and Mrs M, and how this misunderstanding led them to purchase something that they didn't actually want.*

*And I think it unlikely that Mr and Mrs M would have been unaware of the need to pay management fees under their Fractional Club membership. They had, after all, been members with the Supplier for over 10 years and would have had to pay management fees annually ever since being full members of the Vacation Club. And having considered the contractual documentation I can see that the requirement to pay management fees, and how they are calculated and become payable, is set out.*

*Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the CRA are likely to have prejudiced Mr and Mrs M's purchasing decision at the Time of Sale. So, I do not think Mr M's credit relationship with the Lender was rendered unfair to him for the purposes of Section 140A of the CCA for these reasons.*

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

#### 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 Mr M was unfair to him 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

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

#### **The responses to my provisional decision**

The Lender did not respond to the PD, but the PR, on behalf of Mr M, did. It gave a comprehensive response to the PD, explaining why it did not agree, and I will address its response later in this decision. But the PR also said that the PD had not addressed whether the payment of commission by the Lender to the Supplier, and the non-disclosure of this commercial arrangement had also caused the associated credit relationship to be unfair to Mr M.

On 24 November 2025 I wrote to both sides setting out my provisional thoughts on the commission arrangements between the Lender and the Supplier. In summary, I said that the transaction did not strike me as one with features that the Supplier had an obligation of 'loyalty' to Mr M when arranging the Credit Agreement and thus a fiduciary duty. I also hadn't seen anything to suggest that the Lender and the Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr M, nor that any

commission arrangement gave the Supplier a choice over the interest rate offered to Mr M. And in Mr M's case, the Lender had supplied information demonstrating that no commission was paid in relation to the arrangements involving Mr M. With that being the case, I wasn't persuaded this position could have led to an inequality of knowledge capable of rendering the credit relationship unfair to Mr M such that the Lender needed to take any action in redress.

The PR didn't accept the proposed outcome. It submitted further comments and evidence in support of Mr M's position.

Having received and reviewed these, I'm now proceeding with my final decision. But again, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

### **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<sup>5</sup> say that in considering what is fair and reasonable in all the circumstances of the complaint, I will take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

### **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 Mr M'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.

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

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mr M 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 Mr M 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

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<sup>5</sup> Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

an unfair credit relationship between the Lender and Mr M.

*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. The judgment referred to did not make a blanket finding that all products of the type Mr and Mrs M purchased were mis-sold in the way the PR appears to be suggesting. And any complaint needs to be considered in the light of its specific individual circumstances.

I remind the PR that in my provisional decision I accepted the possibility that Fractional Club membership was marketed and/or sold to Mr and Mrs M as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law<sup>6</sup> 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 Mr M's decision whether to enter into the Purchase 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 Mr M's testimony and the Supplier's training materials, I have already considered these. But as I said in the PD, there was no direct testimony submitted in this case. And as I also set out, having looked at the circumstances surrounding the sale, and Mr and Mrs M's situation at the time, I was not persuaded that Mr and Mrs M's purchasing decision would have been any different, even if the Supplier had breached Regulation 14(3). Having re-examined everything submitted 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 Mr and Mrs M'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 Mr M and the Lender was not rendered unfair to him for this reason.

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

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'*<sup>7</sup>, 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.

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<sup>6</sup> *Carney and Kerrigan*

<sup>7</sup> *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33

I appreciate the time the PR has taken to put together its submissions on behalf of Mr M. 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 Mr M's arguments that his credit relationship with the Lender was unfair to him 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 Mr M's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mr M, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mr M, or to show that any other conflict of interest arose from the roles the Supplier did perform.

In responding, the PR has emphasised the regulatory breaches connected with a failure to disclose a 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, and I repeat, no commission was paid in this case. I remain of that view, the PR's submissions notwithstanding.

### **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 Mr M and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him such that it warrants the Lender offering any redress.

### **Conclusion**

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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 Mr M's Section 75 claim.
- I'm not persuaded that the Lender was party to a credit relationship with Mr M that was unfair to him 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 Mr M.

### **My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 6 January 2026.

Chris Riggs  
**Ombudsman**