DRN-6011387

The complaint

The estate of Mr N's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with Mr N 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.

The claims which are the subject of this complaint are the estate of Mr N's because they stem from a loan taken out in his sole name. However, as the timeshare was purchased by Mr and Mrs N, I'll also refer to Mr and Mrs N at times in this decision.

What happened

Mr and Mrs N purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 9 August 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,110 fractional points at a cost of £34,291 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £30,962 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs N 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 N paid for their Fractional Club membership by taking finance of £34,291[1] from the Lender in Mr N's sole name (the 'Credit Agreement').

On 23 August 2023 Mr N sadly passed away.

The estate of Mr N – using a professional representative (the 'PR') – wrote to the Lender on 7 December 2023[2] (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving it a claim against the Lender under Section 75 of the CCA, which it 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.

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

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

1. told Mr and Mrs N that Fractional Club membership was an "investment" *"and could be sold at a later date for a profit"* when that wasn't true.
2. told Mr and Mrs N that their *"membership would ensure that their holiday*

[1] £3,329 of this finance was used to settle previous finance with the Lender, finance taken for an earlier purchase.
[2] Not 4 April 2024 as previously referenced by me

accommodation would be secured for the term of the contract, as they could book from the many options available".

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

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

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

1. Fractional Club membership was marketed and sold to Mr and Mrs N as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out (i) the duration of Mr and Mrs N's Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. Mr and Mrs N were pressured into purchasing Fractional Club membership by the Supplier.
4. 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').
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

On 4 April 2024 the estate of Mr N referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld it on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs N at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on Mr and Mrs N's purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr N 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.

I issued my provisional decision on 30 July 2025. And, in summary, I made the following provisional findings (which form part of this final decision):

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I've taken into account relevant law and regulations, regulators' rules, guidance and standards and codes of practice, and (where appropriate), what I consider to have been good industry practice at the relevant time.

Where necessary, I've made my decision on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

…

After careful consideration, I'm currently minded not to uphold the estate of Mr N's complaint. Before I explain why, I want to make it clear that my role as an ombudsman doesn't mean I need to address every single point that has been made to date. Rather, it's to decide what's fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

There are various aspects to the estate of Mr N's complaint. These include the allegations of misrepresentation (and possibly of breach of contract) in respect of the Fractional Club membership, and the suggestion that the Lender ought to have accepted and met its claim under Section 75 of the CCA. I'll deal with those concerns first.

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

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 the debtor could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including the cash price of the purchase. The purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 can't succeed. But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included. I've gone on to say what I think this means in respect of the estate of Mr N's Section 75 claim.

The purchase price of Fractional Club was £34,291. This is the price which needs to be considered when determining if a claim under Section 75 is valid, irrespective of any trade-in allowance, so I'm satisfied that the estate of Mr N's claim for misrepresentations under Section 75 of the CCA can't succeed.

But as I've said, Section 75A of the CCA allows for a claim should the price of the purchase be over £30,000, but only in relation to a breach of contract by the Supplier.

And having considered the estate of Mr N's claim, it's my view that there is an element of the complaint which could relate to a breach of contract, albeit not expressed in those exact terms.

The PR says that the Supplier told Mr and Mrs N that *their "membership would ensure that their holiday accommodation would be secured for the term of the contract, as they could book from the many options available"*.

I assume from this that the estate of Mr N is saying that Mr and Mrs N found it difficult to book the holidays they wanted, when they wanted, meaning that it felt the Supplier wasn't living up to its end of the bargain and had breached the Purchase Agreement.

But I'm not persuaded by the evidence provided that there has been a breach of contract here.

Like any holiday accommodation, availability wasn't unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs N states that the availability of holidays was/is subject to demand. It also looks like that Mr and Mrs N made use of their fractional points to holiday on several occasions between 2017 and 2018. Whilst I accept that they may not have been able to take certain holidays, I've not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

I've explained why I'm not persuaded Mr N's relationship with the Lender could lead to a successful section 75 claim and outcome in this complaint by his estate. But the estate of Mr N also makes arguments that either say or infer that the credit relationship between Mr N and the Lender was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including the Supplier's representations and parts of its sales process at the Time of Sale it has mentioned.

Mr N's loan from the Lender is one that's regulated by the CCA, so section 140A of the CCA is relevant law. So determining what's fair and reasonable in all the circumstances of the complaint includes considering whether the credit relationship between Mr N and the Lender was unfair.

Under section 140A, 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).[3]

Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and 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.

I see no great difficulty with the position that the Supplier is deemed agent of the Lender for the purpose of the pre-contractual negotiations.

[3] Section 140A(1) of the CCA

With this in mind I've considered the entirety of the credit relationship between Mr N and the Lender along with all of the circumstances of the complaint. Having done so, I don't think the credit relationship between Mr N was likely to have been rendered unfair for section 140A purposes.

The PR (on behalf of the estate of Mr N) complained about the Lender being party to an unfair credit relationship for several reasons, which I've set out in this decision. It included in its submissions several examples in support of the allegation that the Supplier misled Mr and Mrs N, either by misrepresentation[4] or by omission, and that the Supplier carried on unfair commercial practices (contrary to the CPUT Regulations).

Despite the breadth of the unfair relationship test under section 140A, a credit relationship isn't rendered unfair to a debtor simply because of a breach of a legal or equitable duty.

Rather, the protection afforded to debtors by section 140A is the consequence of all of the relevant facts. 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."*

The PR submits that the Supplier misled Mr and Mrs N and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I'm not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The estate of Mr N says Mr and Mrs N were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

However, the estate of Mr N and the PR have said little about what the Supplier actually said and/or did during the sales presentation that made Mr and Mrs N feel as if they had no choice other than to purchase the Fractional Club membership when they didn't want to. Neither the overall time Mr and Mrs N spent with the Supplier during the sales process nor the number of documents they needed to read and sign appear to me to be particularly excessive, given the nature of the purchase they were making.

Mr and Mrs N were also given a 14-day cooling off period. I've seen no indication that they attempted to cancel their membership during that time, or anything else that suggests that they felt pressured or that they didn't have time to think about their decision.

Taking all of this into account, I don't propose to reach a finding that the available evidence demonstrates that Mr and Mrs N made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by undue coercion or pressure from the Supplier.

The PR submitted that The Supplier failed to provide sufficient information to Mr and Mrs N in relation to the Fractional Club's ongoing costs.

[4] A misrepresentation is a false statement of fact (or law) that induces a party to contract.

However, it's my understanding that the various documents Mr and Mrs N signed explain that purchasers would be required to pay an annual management charge and this would be payable whether weeks were used or not. It also explained that the charges would be distributed among the fractional owners fairly and equitably according to the number of weekly periods each owner was entitled to use each year. And, that charges would be subject to increase or decrease according to the costs of managing the Fractional Club and would be due annually in advance each year.

The estate of Mr N also hasn't explained what information Mr and Mrs N were given about this at the Time of Sale, and why this was insufficient. So, I'm not persuaded this caused an unfairness in the credit relationship that requires a remedy.

The PR also submitted that the contractual terms setting out (i) the duration of Mr and Mrs N's Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of his membership were unfair contract terms under the UTCCR, although the relevant legislation in this respect is 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 didn't 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 doesn't 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.

I've read the relevant terms relating to the Fractional Club membership, the management charges and other costs, and the potential consequences for Mr and Mrs N of not paying these. I've not analysed the position in detail regarding whether any of these terms were unfair under the CRA and I make no formal findings on this, but I think it's possible that terms which could lead to Mr and Mrs N forfeiting their membership and Fractional Club rights for non-payment of management fees had the potential to operate in an unfair way.

But given the facts and circumstances of this complaint, I'm not persuaded that the Supplier's alleged breaches of the CRA are likely to have prejudiced Mr and Mrs N's purchasing decision at the Time of Sale and rendered Mr N's credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA. I say this because although Mr and Mrs N's membership might be currently suspended for non-payment of management charges it's my understanding that on payment of these membership is fully available for use.

I will now turn to the PR's submission that Fractional Club membership was marketed and sold to Mr and Mrs N as an investment in breach of regulation 14(3) of the Timeshare Regulations.

I accept that it's possible that the Supplier marketed and sold Fractional Club membership to Mr and Mrs N as an investment. Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. The provision at the Time of Sale said that *"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."* I've thought about the submitted evidence in this respect, and what, more likely than not, prompted Mr and Mrs N to enter into the Purchase Agreement.[5]

Unfortunately the PR's Letter of Complaint is somewhat generic in nature, and I've not found it to be of much assistance in this regard. However, I accept that Mrs N has provided a statement in which she refers to the Supplier marketing and selling Fractional Club membership to her and Mr N as an investment.

I accept that Mrs N's statement was provided to the Lender by the PR at the outset. But equally I'm mindful this statement was provided following the outcome in *Shawbrook & BPF v FOS* and at least seven years after the Time of Sale[6], so to me there is a real risk that this has affected Mrs N's recollection of what happened.

Furthermore, the notes taken by the Supplier over the course of Mr and Mrs N's membership suggest that Mr N was in regular contact over a number of years to raise concerns and questions over the holidays he was entitled to, wanted to take and had taken, suggesting it was the holidays that Fractional Club membership could provide that was the motivating factor in his and Mrs N's decision to purchase.

Finally, I note that in 2018 the Lender wrote to Mr N to say it wasn't upholding a complaint he had made to it. It's unclear what Mr N was complaining about in 2018 but in addressing his complaint I note that the Lender said, amongst other things, that it was clear from the documentation that had been signed that his and Mrs N's purchase was made for holidays and not financial gain. In my opinion, if Mr N was of the view that Fractional Club membership had been marketed to him and Mrs N as an investment, and this was a motivating factor in his and Mrs N's purchasing decision, I might have expected him to have pursued this 2018 complaint further with the Lender, or our Service, but he doesn't appear to have ever done so.

With all of the above in mind I'm simply not persuaded that Mr and Mrs N's purchase decision was prompted by the Supplier marketing and selling membership to them as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

In conclusion, then, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr N was unfair to him for the purposes of Section 140A. So I don't propose to uphold this aspect of the complaint on that basis.

I then emailed the PR, on 2 March 2026, to address what I understood was the estate of Mr N's commission complaint. Under cover of that email I said:

It's my understanding that you are saying that a payment of commission from the Lender to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

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[5] I'm mindful here of what HHJ Waksman QC (as he then was) and HHJ Worster respectively had to say in Carney (paragraph 51) and Kerrigan (paragraphs 213 and 214) on causation.

[6] Based on the estate of Mr N not appointing the PR until August 2023

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

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

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

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

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

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

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

But I don't think *Hopcraft, Johnson and Wrench* assists the estate of Mr N in arguing that Mr N's credit relationship with the Lender was unfair to him for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr N nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mr N into a credit agreement that cost disproportionately more than it otherwise could have.

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

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

Based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr N but as the supplier of contractual rights he obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to him when arranging the Credit Agreement and thus a fiduciary duty.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, the Lender didn't pay the Supplier any commission at the Time of Sale. And with that being the case, even if there were information failings at that time and regulatory failings as a result (which I make no formal finding on), I'm not persuaded that the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr N.

Section 140A: Conclusion

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

So, in summary, I wasn't persuaded by any of the arguments put forward for why the credit relationship between Mr N and the Lender was unfair to him under Section 140A of the CCA. And I couldn't see any other reason why it would be fair or reasonable to direct the Lender to compensate the estate of Mr N – all of which led me to provisionally conclude that there was no basis on which to uphold the complaint.

The Lender said it agreed with my provisional decision and had no further comment to make.

The PR disagreed with my provisional decision. In summary it said:

- The relationship between Mr N and the Lender was fundamentally unfair under section 140(A) of the CCA.
- Fractional Club membership was marketed and sold to Mr and Mrs N as an investment in breach of regulation 14(3) of the Timeshare Regulations.

- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the CPUT and Timeshare Regulations. In particular the Supplier failed to provide fundamental material information to Mr and Mrs N prior to the execution of the contract, including (but not restricted to) title deeds, a deed of trust, the management documents, a plan of the property, a full description of the property, an independent valuation of the property, the total shares sold in the property, the total value of the shares sold in the property, and the registered use of the property.
- Mr and Mrs N were subject to aggressive sales practices and were pressured by the Supplier into purchasing Fractional Club membership.
- I had incorrectly drawn an adverse inference against Mrs N's first-hand account of the sales presentation, which wasn't provided any sooner than it was because our service had previously advised, under cover of a letter dated 30 April 2018, that personal statements shouldn't be provided unless specifically requested by us.
- I had placed disproportionate weight on a historic complaint raised by Mr N in 2018 in dismissing the estate of Mr N's investment allegations.
- I had placed disproportionate weight on contact notes provided by the Supplier in dismissing the estate of Mr N's investment allegations.
- In concluding that Mr N's purchase was motivated by holidays rather than for financial gain I ignored the commercial reality of the transaction and its complete lack of economic viability as a simple holiday product.

Following the above response to my provisonal decsion the estate of Mr N's complaint has been passed back to me for further thought and a 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[7] say that in considering what's 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 (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 the estate of Mr N a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
(2) A possible breach of contract by the Supplier giving the estate of Mr N a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

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

(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 because of the commission arrangements between it and the Supplier.
(4) 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 because of other reasons.

The PR's response to my provisional decision relates to (4) with no new arguments and/or evidence being provided in relation to (1) (2) and (3). Therefore I see no reason to change or add to my conclusions (as set out in the summary of my provisional decision and subsequent email above) in relation to (1) (2) and (3).

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've read all of the PR's submissions in full, if I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

What's more, it's 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 from both sides.

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 in response to my provisional decision, the PR seems to suggest that Fractional Club membership wasn't worth enough to make Mr N a profit and, as such, the following constitute misrepresentations by the Supplier:

(1) He was buying part ownership of a physical property;
(2) Fractional Club membership was an investment;
(3) The Allocated Property would be sold; and
(4) He would receive a share of the net sales proceeds of sale when the Allocated Property is sold.

It's my understanding that the PR takes that view that because the Lender hasn't provided any evidence that the Allocated Property exists or that it will sell in the future (making it unlikely that the estate of Mr N will receive anything from Mr N's share in it) and, 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 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 didn't hold it or couldn't 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 wasn't untrue – nor was it untrue to tell prospective members that they would receive *some* money when the allocated property is sold.

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

But as the PR knows, while the term "investment" isn't 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, none of the contractual paperwork made any promises that a profit might be made and nowhere did the Certificate imply let alone suggest that Mr N's fraction or share (of 5.43%) 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 <u>was</u> marketed and sold to Mr N as an investment orally.

The estate of Mr N 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, 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 doesn't change the fact that the shares of members (like Mr N) were clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort.

Notwithstanding that in my provisional decision I found that the conditions necessary to bring a section 75 claim for misrepresentation aren't met in this case, I'm not persuaded by the allegations of misrepresentation from the PR. And with that being the case, they too aren't reasons to uphold this complaint and direct the Lender to compensate the estate of Mr N.

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 misrepresentation, I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. And it's for those reasons that I don't think the credit relationship between Mr N and the Lender was rendered unfair to him on the basis that membership had been misrepresented.

However, there are, of course, other reasons for 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 Mr N and the Lender was likely to have been rendered unfair to him for the purposes of Section 140A. When coming to that conclusion, I've 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.

The PR continues to argue that:

1. Mr N was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

However, as neither the PR nor the estate of Mr N have submitted any new evidence to further this argument, it's for the same reasons I gave in my provisional decision that I don't think this rendered Mr N's credit relationship with the Lender unfair to him 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 Mr N 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 isn't itself determinative of the outcome in this complaint unless the impact of such a breach suggested otherwise.

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 don't 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'm 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'm to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr N and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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 Mr N and the Lender unfair to him?

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

And on my re-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 Mr N decided to go ahead with his purchase, such that he would have made an entirely different purchasing decision had there not been a breach of Regulation 14(3).

Based on documentation provided by the PR it wasn't until 25 August 2023 that Mrs N appointed it to represent her. Therefore her first-hand account of the sales presentation would have been produced, in my view and on the balance of probabilities, on or after this date. Therefore I remain of the view that there is a real risk that Mrs N's recollections may have been affected by the outcome in *Shawbrook & BPF v FOS* and that more than seven years after the event in question her memories may have faded.

The PR submits I placed disproportionate weight on a historic complaint raised by Mr N in 2018 and on contact notes provided by the Supplier in dismissing the estate of Mr N's investment allegations, but I disagree.

Regardless of the reasons for Mr N's complaint in 2018 and regardless of the involvement or otherwise of a third party claims management company, the Lender clearly felt it necessary to say under cover of its final response letter dated 31 May 2018, *"the documentation signed clarifies that the purchase is made for holidays and not purchased for a financial gain"*. This, together with what appears to have been clear confidence on the part of Mr N to engage with both the Lender and the Supplier, leads me to conclude, as previously, that had Fractional Club membership been marketed to Mr and Mrs N as an investment and this was a motivating factor in their purchasing decision, I might have expected Mr N to have pursued this complaint point further with the Lender and almost immediately. Therefore I'm not persuaded I attached disproportionate weight on Mr N's 2018 complaint.

I've revisited Supplier's notes and I remain of the view that the weight I attached to them wasn't disproportionate. In my view these notes suggest it was the holidays that Mr N understood Fractional Club membership could provide that was the motivating factor in his and Mrs N's purchasing decision.

As covered above the PR also argues that the cost of Fractional Club membership (either taking into account the loan interest and/or the management fees over the membership term) proves that Fractional Club membership must have been sold as an investment, as no rational consumer would make the purchase unless promised a substantial financial return.

But I don't think that is an inevitable conclusion, or even a fair and reasonable one in this case. Mr and Mrs N purchased 2,110 Fractional Points – enough to book multiple weeks of holidays each year of the membership term (not just the one week which the PR suggests). And it isn't inconceivable that a rational consumer might think those holiday rights made the purchase worthwhile even without the possibility of some money back at the end. And in this respect I note that Mr N took two weeks holiday in 2017 and three weeks in 2018 – equating to a cost of £2,174 and £1,449 per week respectively[8]

[8] £4,347 as calculated by the PR as being the cost of one weeks holiday divided by two and three respectively

On balance, therefore, for the reasons I've set out above, I don't think the credit relationship between Mr N and the Lender was unfair to him even if the Supplier had breached Regulation 14(3). And for the sake of completeness I would add that in coming to this view I've had regards to all three points addressed above together and in the round, not just one point on its own and in isolation.

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

In response to my provisional decision, the PR argues that the Supplier breached the CPUT and Timeshare Regulations because it failed to provide Mr N with information including (but not restricted to) title deeds, a deed of trust, the management documents, a plan of the property, a full description of the property, an independent valuation of the property, the total shares sold in the property, the total value of the shares sold in the property, and the registered use of the property.

However, the PR hasn't provided any authority for the suggestion the Supplier had to provide Mr N with this information. 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:*

"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,*** *and that the ombudsmen's solution is, in its own terms, distinctly problematic for the regulatory framework. 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."*

(My emphasis added)

In any event, as I've already indicated, the case law on Section 140A makes it clear that it doesn't 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 Mr N sufficient information, in good time, in order to satisfy the requirements of the CPUT and Timeshare Regulations for some of the reasons the PR gives, neither the estate of Mr N nor the PR have persuaded me that Mr N was 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 wasn't an important and motivating factor behind his 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 Mr N.

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 the estate of Mr N's section 75 claim. I'm still not persuaded that the Lender was party to a credit relationship with Mr N 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 for me to direct the Lender to compensate the estate of Mr N.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr N to accept or reject my decision before 13 May 2026.

Peter Cook
Ombudsman