

The complaint

Mr T's complaint is, in essence, that Mitsubishi HC Capital UK PLC, trading as Novuna Consumer Finance (the 'Lender'), acted unfairly and unreasonably by (1) being party to an unfair credit relationship with his under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mr T purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 19 September 2012 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 1,346 fractional points at a cost of £28,599 (the 'Purchase Agreement'). But after trading in his existing timeshare, he ended up paying £4,915 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr T more than just holiday rights. It also included a share in the net sale proceeds of a property named on his Purchase Agreement (the 'Allocated Property') after his membership term ends.

Mr T paid for his Fractional Club membership by taking finance of £4,915 from the Lender (the 'Credit Agreement').

Mr T (along with his now former wife who was also present at the Time of Sale) – using a professional representative (the 'PR') – wrote to the Lender on 30 October 2017 (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 (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to him under the Credit Agreement was unaffordable for him.

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

Mr T says that the Supplier made a pre-contractual misrepresentation at the Time of Sale, namely that the Supplier told him that Fractional Club membership had a guaranteed end date when that was not true.

Mr T says that he has a claim against the Supplier in respect of the misrepresentation 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 T.

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

Mr T suggests that the Supplier breached the Purchase Agreement because there was no guarantee that he would receive his share of the net sale proceeds of the Allocated Property.

Mr T also says that he found it difficult to book the holidays he wanted, when he wanted.

As a result of the above, I take it that Mr T feels he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, that he believes he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr T.

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

The Letter of Complaint set out several reasons why Mr T 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. The contractual terms setting out (i) the duration of his 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 Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. He was pressured into purchasing Fractional Club membership by the Supplier.
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 those Regulations.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mr T's concerns as a complaint and issued its final response letter on 19 December 2017, rejecting it on every ground.

Mr T then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr T disagreed with the Investigator's assessment. This included him raising the new argument that the Fractional Club membership was marketed and sold to him as an investment, which would have been in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). He asked for an Ombudsman's decision – which is why it was passed to me.

I issued my provisional findings to the parties. In my provisional decision, I said:

'The legal and regulatory context

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

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*

- *The Unfair Terms in Consumer Contracts Regulations.*
- *The Consumer Protection from Unfair Trading Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*
 - *The Supreme Court’s judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 (‘Plevin’) (which remains the leading case in this area).*
 - *Scotland v British Credit Trust [2014] EWCA Civ 790 (‘Scotland and Reast’)*
 - *Patel v Patel [2009] EWHC 3264 (QB) (‘Patel’).*
 - *The Supreme Court’s judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 (‘Smith’).*
 - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 (‘Carney’).*
 - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) (‘Kerrigan’).*
 - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) (‘Shawbrook & BPF v FOS’).*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation’s Code of Conduct dated 1 January 2010 (the ‘RDO Code’).

What I’ve provisionally 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, I do not currently think this complaint should be upheld.

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

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

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

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr T 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 T at the Time of Sale, the Lender is also liable.

This part of the complaint was that Fractional Club membership had been misrepresented by the Supplier as having a guaranteed end date when that was not true, because there was no guarantee that the Allocated Property would be sold.

As for these alleged pre-contractual misrepresentations by the Supplier, while I recognise that Mr T has concerns about the way in which his Fractional Club membership was sold, he has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons he alleges.

Here, after the 19-year membership term had expired, Mr T's Allocated Property would be placed for sale and his membership ended when the Allocated Property was sold, subject to market conditions. That was made clear in the paperwork he signed at the Time of Sale and I can't see the paperwork stated that there was a guaranteed end date to the membership.

I've also considered Mr T's own evidence and thought about what I know about the Supplier's sale process to see if he could have been told something by the Supplier during the sale that there was a guaranteed end date. But I'm not aware of anything in the way that the Supplier normally sold Fractional Club membership that makes me think he would have been told that. Further, Mr T has provided a witness statement setting out his memories of sale and in neither of them has he said he was told there was a guaranteed end date to the membership. So based on that, I can't say he was either told that was the case or, if he was, that it was something important to his purchasing decision as he's not mentioned it in his statements.

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

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

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives Mr T a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mr T says that he could not holiday where and when he wanted to – which, on my reading of the complaint, suggests that he considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr T states that the availability of holidays was subject to demand. It also looks like he made use of his fractional points to holiday on two occasions in March 2013 and October 2014 – with a further holiday booked

for May 2013 which he elected to cancel. I accept that he may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr T also says that the Supplier breached the Purchase Agreement because there is no guarantee that he will receive his share of the net sale proceeds of the Allocated Property. I understand that he is saying that he fears that, when the time comes for the Allocated Property to be sold, he will not receive his share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr T any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr T 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 T'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."¹

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

¹ The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

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 T and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

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

Mr T'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 T and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave 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 T. 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 T 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 the Mr T. If there is any further information on this (or any other points raised in this provisional decision) that the Mr T wishes to provide, I would invite them to do so in response to this provisional decision.

Mr T suggests that he was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that he may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or done by

the Supplier during his sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. He was also given a 14-day cooling off period and he has not provided a credible explanation for why he did not cancel his membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr T made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr T'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 why he says his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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

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

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

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr T, the financial value of his share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr T as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And while that was not alleged by either Mr T nor his PR when he first complained about a credit relationship with the Lender that was unfair to them, I accept that it's possible that Fractional Club membership was marketed and sold to him 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 even if the sale did breach the prohibition on marketing or selling Fractional Club membership as an investment, for the reasons I will explain, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

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

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

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

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

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

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

"[...] 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 T and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr T, 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) lead him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in Mr T's initial recollections of the sales process at the Time of Sale that the Supplier led him to believe that the Fractional Club membership was an investment from which he would make a financial gain nor was there any indication that he was induced into the purchase on that basis.

In the Letter of Complaint, the PR set out that Mr T was led to believe that an earlier purchase was an investment. But with respect to the purchase that is the subject matter of this decision, it was alleged that Mr T traded in an existing Fractional Club membership to gain an extra 200 points to be able to get better accommodation in different resorts. It was said:

'This would cost them only an extra £5,000.00, which seemed a reasonable price to pay for the best holidays all over the world.'

In Mr T's witness statement, when dealing with the purchase in question, Mr T said:

'A further incentive for buying this fractional we were given another free holiday which we took... a year or so after. They invited us for another exhibition day that took place in the resort. They invited us for lunch and also [to show] the whole of the resort and the type of buildings that they have and we would use with our points. We then went back to the office to review our points and we were told that we needed an extra 200 points to be able to use all their facilities this cost us an extra £5,000. They again did all the paperwork using their finance company [Mitsubishi] and reassured us that 1,346 points should be enough for us to enjoy luxury holidays.'

But there is no suggestion from Mr T that the investment element of Fractional Club membership was the reason he took it out, rather other specific reasons seem to be the drivers behind the purchase.

The further witness statement, signed by Mr T's former wife (but not Mr T), and dated 26 January 2024 included the following regarding the Time of Sale:

'They also told us that, after the 19 years, we could potentially sell for a higher price, which convinced us that would be a great investment towards our retirement time.'

I am conscious that the above testimony was not from Mr T and, more importantly, that it was given after the outcome of the Judicial Review in November 2023, where it was held that in some circumstances a breach of Reg. 14(3) could lead to an unfair debtor-creditor relationship and after our Investigator initially rejected the complaint. That statement was provided more than ten years after the Time of Sale. I find it hard to place significant weight on those recollections given that memories naturally fade with the passing of time. Further, there seems to me to be a very real risk that these recollections are now coloured by the Judicial Review judgment and complaint process.²

² I am mindful of the summary of how court approaches the assessment of evidence as contained at paragraph 40 in the judgment in Smith v. Secretary of State for Transport [2020] EWHC 1954 (QB),

Mr T's initial recollections and the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what he remembers of the sales process at that time, and why he was unhappy with it, than his ex-wife's very recent recollections. After all, if the sale of Fractional Club membership as an investment was an important factor to him, it is difficult to understand why he did not mention that in his initial recollections and, in turn, why the PR made no mention of it in relation to the relevant sale in the Letter of Complaint either. That's especially the case given that Mr T did say the Fractional Club membership he was sold in March 2012 – that isn't subject the subject of this complaint – was marketed and sold to him as an investment.

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, as has only recently been argued, I am not persuaded that Mr T's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his 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 T 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 T when he purchased membership of the Fractional Club at the Time of Sale. But he and the PR say that the Supplier failed to provide him with all of the information he needed to make an informed decision. Further, he says the contractual terms relating to both the duration of the Fractional Club membership and the obligation to pay management charges throughout that time were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR 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 UTCCR 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.

In this case, it's possible the Supplier didn't give Mr T sufficient information, for example, on the various charges he could have been subject to as a Fractional Club member. But, even if that was the case, I'm not persuaded that led to an unfairness that requires a remedy.

Dealing first with the duration of the membership, as noted above, the information provided at the Time of Sale made clear that the membership lasted for 19 years before the Allocated Property was placed for sale. The sale of the Allocated Property could be postponed at the Supplier's discretion for up to two years, but that doesn't seem to me to be unusual or

especially the comments at paragraph 40(a) that the nature of litigation is such that witnesses often have a stake in a particular version of events.

unreasonable. So, I don't think the term in relation to the mere duration of the membership is likely to be unfair for the purposes of the UTCCR.

It is possible that some of the terms governing the Fractional Club's ongoing costs go against the requirements of the UTCCR. But given the particular circumstances of this complaint, even if some of the terms in question did constitute unfair contract terms under the UTCCR, it seems unlikely to me that they led to any actual unfairness in the credit relationship between Mr T and the Lender for the purposes of Section 140A. I say this because I cannot see that the potentially offending terms were operated against Mr T during the time that he was a party to the Credit Agreement – nor can I see that there were any ongoing effects of unfairness because of the terms in question. And with that being the case, I cannot see that the potential unfairness of those terms eventuated in practice.

I acknowledge that it is also possible that the Supplier did not give Mr T sufficient information, in good time, about these matters in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations. But even if that was the case, as I have already said, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr T nor the PR have persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12 of the Timeshare Regulations, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

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 T 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 T 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

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 T'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 him.

If there is any further information on this complaint that the Mr T wishes to provide, I would invite him to do so in response to this provisional decision.'

I've since written to the parties setting out my thoughts on why I wasn't persuaded to uphold the aspect of the complaint concerning commission disclosure.

Applying the principles and factors set out in the Supreme Court judgment³ handed down on 1 August 2025, I found nothing 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 T. Nor

³ *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 (“Hopcraft, Johnson and Wrench”)

did I see anything that persuaded me that the commission arrangements between them gave the Supplier a choice over the interest rate which led Mr T into a credit agreement that cost disproportionately more than it otherwise could have.

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Mr T had a material impact on his decision to enter into the Credit Agreement. At £503.79, it was only 10.25% of the amount borrowed and even less than that (5.61%) as a proportion of the charge for credit. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Mr T such that the Lender needed to take any action in redress.

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

The Lender didn't respond to my provisional decision or commission findings. The PR didn't accept the proposed outcome. It submitted further comments and evidence in support of Mr T's position.

Having received and reviewed these, I'm now proceeding with my 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 rules⁴ 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 the PR 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 T's Section 75 claims, which I addressed in my provisional decision. In its response, it hasn't made any further comments in relation to most of its original points or said anything that leads me to think it disagrees with my provisional conclusions in relation to those points. So I'll focus here on the points the PR *has* made in response.

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mr T 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 T as an investment at the Time of Sale, referring also to a previous timeshare-

⁴ Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

related complaint brought by Mr T, considered by this service and upheld. It has also made further submissions in support of its position that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship between the Lender and Mr T.

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

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

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

I remind the PR that in my provisional decision I accepted the possibility that Fractional Club membership was marketed and/or sold to Mr T as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law⁵ 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 T'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 T's recollections and the Supplier's training materials, I have already considered these and what was said. And I set out in my provisional decision the reasons why I didn't find that evidence sufficiently persuasive that Mr T's purchase decision would have been any different, given the other motivational factors he had described. Having re-examined the available statements 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 T'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 T and the Lender was not rendered unfair to him for this reason.

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

The PR has asked for the documents the lender has provided to evidence the commission arrangements. As the PR will be aware, under DISP 3.5.9R I may, where I consider it appropriate, accept information in confidence (so that only an edited version, summary or description is disclosed to the other party). I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive and that the summary information on commission arrangements we've already shared with the PR is appropriate in this case. I've seen nothing in this case that leads me to think what the Lender has said about the commission arrangements is inaccurate. So, there's no reason for me to reach a different finding over those commission arrangements.

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

⁵ *Carney and Kerrigan*

commission arrangements between the Lender and the Supplier. The PR says, in summary, that when the overall circumstances of those arrangements are considered in the round, the credit relationship was plainly unfair. In support of this position the PR has expressed, among other things, that:

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

I appreciate the time the PR has taken to put together its submissions on behalf of Mr T. 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 T'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 T's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mr T, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mr T, or to show that any other conflict of interest arose from the roles the Supplier did perform. For such a claim to be successful would require more than the bare assertions that have been made in this case.

In its correspondence the PR has emphasised the regulatory breaches connected with a failure to disclose commission payment. I have already set out why in my view this doesn't automatically lead to an unfair credit relationship for which the Lender needs to offer redress. 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 T and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him such that it warrants the Lender offering any redress.

Commission: The Alternative Grounds of Complaint

In my previous correspondence I mentioned that some of the grounds for complaint about the fairness or otherwise of the credit relationship could also constitute separate and freestanding complaints. I'll reiterate my findings here.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mr T (that is, secretly). The second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

For the reasons I set out previously, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr T a fiduciary duty. So, the remedies that might be available at law in relation

to the payment of secret commission aren't, in my view, available to him. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint. For the reasons I have also previously set out, I think he would still have taken out the loan to fund his purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Conclusion

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 T's Section 75 claims. And I'm not persuaded that the Lender was party to a credit relationship with Mr T 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 T.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 9 January 2026.

Nimish Patel
Ombudsman