DRN-6060859

The complaint

Mr R complains Mitsubishi HC Capital UK Plc (the "Lender") has failed to honour a claim under Section 75 of the Consumer Credit Act 1974 (the "CCA") and has participated in an unfair credit relationship with him under Section 140A of the CCA.

Mr R is represented in his complaint by a professional representative ("PR").

What happened

A colleague issued a provisional decision on Mr R's complaint on 12 August 2025. As this colleague no longer works for the Financial Ombudsman Service, the complaint has been passed to me to decide.

I could summarise the complaint as follows:

- Mr R bought a timeshare from a timeshare provider (the "Supplier") on 24 April 2018 (the "Time of Sale"). He traded in a previous "Trial" membership, which left a price to pay of £12,374. This balance was financed by a loan from the Lender (the "Credit Agreement") of £16,351. The loan included the consolidation of some existing borrowing relating to the Trial membership.

- The timeshare was a type of asset-backed timeshare which entitled Mr R to more than holiday rights. It also entitled him to a share in the proceeds of a property named on his purchase agreement (the "Allocated Property") after his contract came to an end.

- Mr R later complained, via a professional representative ("PR"), to the Lender about a number of concerns which included misrepresentations by the Supplier giving Mr R a claim against the Lender under Section 75 of the CCA, and matters giving rise to an unfair credit relationship between Mr R and the Lender.

- The Lender rejected the complaint and it was then referred to the Financial Ombudsman Service for an independent assessment.

In her provisional decision my colleague said she didn't think the complaint should be upheld. I could summarise her findings as follows:

- The Lender had not been unfair or unreasonable in declining Mr R's Section 75 claim for misrepresentation because:

    - Some of the alleged misrepresentations were in fact true statements or statements of opinion which there was no evidence to demonstrate were not honestly held.

    - The remaining alleged misrepresentations were too vague and lacking in colour and context to be able to draw a positive conclusion that the Supplier had made false statements of specific fact to Mr R.

- The Lender had not participated in a credit relationship with Mr R that was unfair to him because:

    - She hadn't seen anything to persuade her that the Lender had failed to carry out the right checks before lending to Mr R. But even if it hadn't, there was a lack of evidence the loan had been unaffordable for Mr R at the time.

    - The regulatory status of the credit broker which had arranged the Credit Agreement wasn't relevant because she could not see how Mr R had been caused a financial loss if the broker had not held the relevant regulatory permissions.

    - While PR had pointed to allegedly unfair terms in the Purchase Agreement, she couldn't see that these terms had been operated unfairly against Mr R in practice, nor that they had led him to behave in a certain way to his detriment. So they were not likely to have led to any unfairness that warranted a remedy.

    - While it was possible the Supplier had breached Regulation 14(3) of the Timeshare Regulations by marketing the timeshare to Mr R as an investment, my colleague was not persuaded by Mr R's testimony that a prospect of a financial gain was an important motivating factor in Mr R's purchasing decision. She noted that although Mr R had referred to thinking the Fractional Club membership was a "sound investment", he had also sought to exit the contract because he was disappointed with its holiday benefits. My colleague found this difficult to reconcile with any investment aspect of the product having been important to Mr R's decision at the Time of Sale.

My colleague invited the parties to the complaint to respond to her provisional decision. The Lender accepted the provisional decision. PR didn't agree with the provisional decision, and asked that various additional points be considered, mostly relating to the alleged sale of the timeshare as an investment, but also relating to the alleged non-disclosure of a commission paid by the Lender to the Supplier for arranging the Credit Agreement, and apparently contradictory information relating to the timescale for the sale of the Allocated Property.

As mentioned earlier, the case has since been passed to me to decide following the departure of my colleague. Having reviewed the evidence on file, along with my colleague's provisional decision, I wrote to PR with some observations regarding the commission arrangements in Mr R's case. I noted the commission had been £654.04, or 4% of the amount borrowed, opining that this didn't appear to be set at a problematic level. I also asked PR to clarify when Mr R's witness statement, which my colleague had considered when coming to her conclusions regarding the Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations, had been produced.

PR responded to say that it had been sent Mr R's witness statement on 18 November 2023. It also said that the size of the commission wasn't the only thing to consider when deciding whether the commission arrangements had led to an unfair credit relationship. It was also necessary to consider the underlying contractual arrangements between the Lender and Supplier, and the misleading reality which had been presented to Mr R.

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.

The legal and regulatory context that I think is relevant to this complaint is, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

The Consumer Credit Sourcebook ("CONC") – Found in the Financial Conduct Authority's (the "FCA") Handbook of Rules and Guidance

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3R
- CONC 4.5.3R
- CONC 4.5.2G

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ("PRIN"). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

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.

Following the responses from PR, I've considered the case again and, having done so, I've adopted the findings of my colleague in her provisional decision (as summarised above), and I share her view that the complaint ought not to be upheld. I don't think PR's additional submissions assist Mr R, for reasons I'll go on to explain.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

PR's comments in response to the provisional decision relate only to the issue of whether the credit relationship between Mr R and the Lender was unfair. In particular, PR has provided further comments in relation to whether the membership was sold to Mr R as an investment at the Time of Sale. It has also now argued for the first time that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.

As outlined in the provisional decision, PR originally raised various other points of complaint, all of which were addressed at that time. But it didn't make any further comments in relation to those in its response to the provisional decision. Indeed, it hasn't said it disagrees with any of my colleague's provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to depart from her conclusions in relation to them as set out in her provisional decision and summarised above. So, I'll focus here on PR's points raised in response.

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

PR says it hadn't shared the Investigator's assessment on this complaint with Mr R, saying this was done in order not to influence his recollections. PR said Mr R was also unaware about the judgment handed down in *Shawbrook and BPF v FOS*[1]. PR said this means his recollections have not been influenced by either the Investigator's assessment or the judgment. PR also says that the fact Mr R mentioned his thought that the Fractional Club product was a sound investment, meant this was something which played an important role in his decision making process at the Time of Sale.

My colleague did not argue that Mr R's recollections may have been influenced by the Investigator's assessment or the judgment in Shawbrook and BPF v FOS. Rather, she thought Mr R's recollections didn't really support a conclusion that any breach of Regulation 14(3) by the Supplier had led to him entering the Purchase Agreement. I agree with my colleague's assessment of the content of Mr R's recollections, but I would add that the timing of Mr R's recollections damage their credibility.

Part of any assessment of Mr R's testimony needs to consider *when* it was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*. It is now known that PR only received (and sent to us) Mr R's witness statement in November 2023, after the publication of the outcome of *Shawbrook and BPF v FOS,* and our Investigator's unfavourable assessment of the complaint.

Experience tells me that, the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and/or influenced by discussion with others. In light of this, I find it difficult to understand why the Financial Ombudsman Service was only given such evidence when it was.

I have thought about what PR has said, but on balance, I don't find it a credible explanation of the contents of Mr R's evidence. PR responded to our Investigator's assessment to say that Mr R alleged that Fractional Club membership had been sold to him as an investment and it provided evidence from Mr R to that effect. I fail to understand how Mr R disagreed with the assessment on the basis that the timeshare was sold as an investment if he didn't know our Investigator's conclusions. It follows, in my view, that Mr R probably did know about our Investigator's assessment before his evidence was provided.

So, I maintain that there is a risk that Mr R's testimony was coloured by later events such as our Investigator's assessment and/or the outcome in *Shawbrook & BPF v FOS*. And, on balance, the way in which the evidence has been provided makes me conclude that I have to treat it with considerable caution and can place little weight on it.

So, ultimately, for the above reasons, I am unpersuaded that any breach of Regulation 14(3) was material to Mr R's purchasing decision.

The discrepancies between dates on the Purchase Agreement and Mr R's timeshare certificate

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[1] *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*').

I will also address a point made by PR regarding an apparent ambiguity in the proposed sale date of the Allocated Property. PR suggests that a delayed sale date could lead to an unfairness to Mr R in the future, as any delay could mean a delay in the realisation of his share in the Allocated Property.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2035. This date indicates that the membership has a term of 17 years. I can see that the same sale date appears on a "Member's Declaration" signed by Mr R at the Time of Sale. The ambiguity identified by PR is that in the Information Statement provided as part of the purchase documentation it says the following:

> "*The Owning Company will retain such Allocated Property until the automatic sale date in **19 years time** or such later date as is specified in the Rules or the Fractional Rights Certificate.*" (bold my emphasis).

While the wording of the Information Statement appears generic and is unfortunate in that it seems to suggest the sale date would be in 19 years or later, it seems clear to me that the commencement date for the start of the sales process in respect of the Allocated Property is 31 December 2035, as set out on the owners' certificate and the Member's Declaration.

So, I can't see that this is a reason to find the credit relationship unfair and uphold this complaint.

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

PR says 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.

As both sides 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 did not 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, is not enough.

However, the Supreme Court 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 Mr R in arguing that his 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 R, 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 R 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 do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. 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 is 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 R.

In contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr R entered into wasn't high. At £654.04, it was only 4% of the amount borrowed and less than that as a proportion of the charge for credit. So, had he known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr R had no obvious means of his own to pay for the timeshare. And at such a low level, the impact of commission on the cost of the credit he needed doesn't strike me as disproportionate. So, I think he would still have gone ahead at the time had the details of the commission been disclosed.

What's more, 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 R 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.

Overall, therefore, 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 R.

S140A 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'm not persuaded that the credit relationship between Mr R and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Mr R's credit relationship with the Lender wasn't unfair to him for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr R's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis 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 R (i.e. secretly). And 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.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr R 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 because, for the reasons I also set out above, I think he would still have taken out the loan to fund the purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

My final decision

For the reasons explained above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 4 February 2026.

Will Culley
Ombudsman