DRN-6079795

The complaint

Mr and Mrs H's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them 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.

What happened

Mr and Mrs H were members of a timeshare (the European Collection ('EC')) from a timeshare provider (the 'Supplier') – having purchased a number of EC points from it over time.

On 6 August 2013 they converted 11,000 of their EC points into fractional points, paying £7,480 to do so. They paid for this with a loan[1] from a different business, and this is set out here for background purposes only.

The product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 8 April 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 19,500 fractional points. After converting their remaining EC points this membership of the Fractional Club cost them £14,820 (the 'Purchase Agreement').

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

Mr and Mrs H paid for their Fractional Club membership by taking finance of £14,820 from the Lender (the 'Credit Agreement'). The outstanding balance of this loan was cleared on 20 August 2014.

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 28 February 2017 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 26 April 2017, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. As part of the PR's submissions, it sent in a statement from Mr and Mrs H setting out their recollections of their relationship with the Supplier.

[1] A complaint about this purchase and the associated credit agreement is being considered by this Service separately.

They said, where relevant to their purchases of fractional points:

> *"We were becoming aware that, although we had originally bought into a Club that had an end date, the situation was now that it was in perpetuity.*
>
> *As the future of one of our children was uncertain we did not want to leave the burden of our membership on their shoulders. We discussed this concern with the Marketing reps while on holiday at Cromer Resort. They told us of members who had lost spouses or were now too frail to travel and whose children did not want the membership but were unable to get out of the Club. In fact, the position of [the Supplier] was represented as you were in it to the bitter end, even if it meant pursuing you through the courts for Management Fees, whatever your situation. When you hear stories like that you look for options that allow you to get out. The Fractional Membership was presented to us as the solution to this. We were told that the Fractional membership was for 15 years but that we could sell our fractions at any point and, in addition, that the financial value of the fractional units would increase over time with the expected increase in the value of the property. It was sold as the "right" way to go with our membership… We bought fractions at 2 separate meetings, 8 months apart and at both we were told that we could sell at any time and we would see a return on our investments."*

Mr and Mrs H's complaint was assessed by an Investigator who, having considered the information on file, rejected it on its merits.

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

The provisional decision

Having considered everything that had been submitted, I set out my initial thoughts on the merits of Mr and Mrs H's complaint in a provisional decision (the 'PD'). In the PD I said:

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

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

However, 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.

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.

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 doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr and Mrs H were told or led to believe by the Supplier that Fractional Club membership:

(1) *had a guaranteed end date when that was not true.*

(2) *was the only way of releasing themselves from their existing membership when that was not true.*

As I understand it, the sale of the Allocated Property could be postponed in certain circumstances according to the Fractional Club Rules. But Mr and Mrs H say little to nothing to persuade me that they were given a guarantee by the Supplier that the Allocated Property would be sold on a specific date when such a promise would have been impossible to stand by given the inevitable uncertainty of selling property some way into the future.

And there isn't enough evidence on file to support the PR's allegation that Fractional Club membership had been misrepresented for reasons relating to point 2. Mr and Mrs H have said that the Supplier, at their first purchase on 6 August 2013, presented Fractional Club as a solution to their concerns about a lengthy membership term that was held in perpetuity. They have said little about what they were told in this regard at the Time of Sale being considered here. So, I'm not persuaded that the Supplier would have likely presented Fractional Club membership as the only solution to their wish to prevent their remaining VC points being held in perpetuity. There is simply no evidence to support that. So, I'm not persuaded that there were representations by the Supplier on the issues in question that constituted false statements of existing fact.

So, while I recognise that Mr and Mrs H and the PR have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

The PR says, for instance, that:

1. *The right checks weren't carried out before the Lender lent to Mr and Mrs H;*
2. *Mr and Mrs H were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale; and*
3. *Fractional Club membership was marketed and sold as an investment in breach of a prohibition on doing so.*

However, having considered the entirety of the credit relationship between Mr and Mrs H and the Lender along with all of the circumstances of the complaint, I don't 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 standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

While the PR says that the right affordability checks weren't carried out at the Time of Sale, 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 and Mrs H was actually unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs H.

I acknowledge that Mr and Mrs H may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs H made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr and Mrs H's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

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

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership 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 says that the Supplier did exactly that at the Time of Sale.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

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

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

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

There is competing evidence in this complaint as to whether 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.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs H as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs H and the Lender under the Credit Agreement and related Purchase Agreement, as 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.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs H and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs H decided to go ahead with their purchase.

As said earlier, Mr and Mrs H submitted a statement setting out their entire relationship with the Supplier. Whilst very little is said in the statement about the Time of Sale being considered here, I think it is safe to assume that their thoughts and motivations would not have changed a great deal in the eight months between the two sales. After all, they converted all of their EC points into fractional points over the course of these two sales, and they haven't said that they did that for different reasons.

So when I look at their possible motivations for converting their remaining EC points into fractional points at the Time of Sale, I'm guided by what Mr and Mrs H were apparently thinking before the previous sales meeting eight months earlier. They say:

> *"We were becoming aware that, although we had originally bought into a Club that had an end date, the situation was now that it was in perpetuity.*
>
> *As the future of one of our children was uncertain we did not want to leave the burden of our membership on their shoulders."*

So this makes it clear that the length of their EC membership, and the risk of this being passed on to their children, was a concern. And they raised this concern with the Supplier at that previous meeting:

> *"We discussed this concern with the Marketing reps while on holiday at Cromer Resort. They told us of members who had lost spouses or were now too frail to travel and whose children did not want the membership but were unable to get out of the Club. In fact, the position of [the Supplier] was represented as you were in it to the bitter end, even if it meant pursuing you through the courts for Management Fees, whatever your situation. When you hear stories like that you look for options that allow you to get out. The Fractional Membership was presented to us as the solution to this. We were told that the Fractional membership was for 15 years but that we could sell our fractions at any point and, in addition, that the financial value of the fractional units would increase over time with the expected increase in the value of the property. It was sold as the "right" way to go with our membership…"*

Having read this, there is little doubt in my mind that Mr and Mrs H wanted to convert their EC points into the fractional points with the Fractional Club due to its shorter membership term. And as I've said, I think it likely that they thought the same at the Time of Sale being considered here. I think they wanted to convert their remaining EC points into fractional

points because of their fears that the EC points may become a burden to their children in the future.

That doesn't mean they weren't interested in a share in the Allocated Property, which is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs H themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs H'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 they would have pressed ahead with their purchase for the shorter membership term it offered, 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 and Mrs H and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

The PR says that Mr and Mrs H were not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that, because some of the terms of the Purchase Agreement weren't individually negotiated, they were unfair contract terms, as were the terms governing the ongoing costs of membership and consequences of non-payment.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is possible that the Supplier did not give Mr and Mrs H sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the 2010 Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr and Mrs H 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, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mr and Mrs H in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy even if they could be said to be unfair contract terms, which I make no formal finding on."

The responses to the provisional decision

The Lender responded and accepted the outcome I had provisionally reached. It also provided details about the commission arrangements it had with the Supplier relating to Mr and Mrs H's credit agreement.

The PR did not accept the provisional outcome, and sent a 34-page submission setting out why it disagreed. In summary, it said that systematic failings by both the Supplier and the Lender had rendered Mr and Mrs H's credit relationship unfair to them under s.140A of the CCA, meaning that this complaint ought to be upheld.

Following these submissions, I wrote to both sides setting out my thoughts on Mr and Mrs H's complaints regarding the commission arrangements between the Lender and the Supplier. I said:

"What I currently think – and why

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 and Mrs H] in arguing that their credit relationship with the Lender was unfair to them 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 and Mrs H], 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 and Mrs H] 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 currently think any such failure is itself a reason to find the credit relationship in question unfair to [Mr and Mrs H].

In stark 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 and Mrs H] entered into wasn't high. At £148.20, it was only 1% of the amount borrowed 1.36% as a proportion of the charge for credit. So, had they 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 they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, [Mr and Mrs H] wanted Fractional Club membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted doesn't strike me as disproportionate. So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of 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 and Mrs H] but as the supplier of contractual rights they 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 them when arranging the Credit Agreement and thus a fiduciary duty.

Overall, therefore, I'm not currently 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 and Mrs H].

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'm not persuaded that the credit relationship between [Mr and Mrs H] and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that [Mr and Mrs H] credit relationship with the Lender wasn't unfair to them 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 and Mrs H] 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 and Mrs H] (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 and Mrs H] 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 them. 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 they would still have taken out the loan to fund their purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

My provisional decision - commission

In conclusion, given the facts and circumstances of this complaint, I am not persuaded that the Lender was party to a credit relationship with [Mr and Mrs H] under the Credit Agreement and related Purchase Agreement that was unfair to them 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 them."

The further responses

Following my provisional findings on the commission arrangements at the Time of Sale, the Lender did not provide any further evidence or arguments that it wanted me to consider, but the PR did. It sent an 11-page response setting out everything that it wished me to consider regarding the merits of Mr and Mrs H's complaint, and reiterated that it thought the complaint should be upheld.

As the deadline for further submissions has now passed, the complaint has come back to me for further consideration.

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.

When deciding complaints, I am required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."

Where I need to make a finding of fact based on the evidence, I have made my decision on the balance of probabilities. In other words, when I make a finding that something happened, that is because I think it is more likely than not that that thing did happen.

And having considered everything afresh, and having read and considered all of the reasons the PR gave in its final 11-page response for why it disagreed with my provisional findings on Mr and Mrs H's complaint, I am satisfied that it would not be fair or reasonable to uphold their complaint.

The PR's further comments in its final response to the PD, in the main, relate to the issue of whether the credit relationship between Mr and Mrs H and the Lender was unfair. And in particular it has provided comment in relation to whether the Fractional Club membership was sold to Mr and Mrs H as an investment, and my interpretation and application of case law to the question of whether this caused an unfairness to the associated credit agreement.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in its final response to my PD. Indeed, it hasn't said it disagrees with any of my 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 change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in response.

But in doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable, on the balance of probabilities, in the circumstances of this complaint. So, while I have read the PR's responses in full, I will confine my findings to what I believe are the salient points. 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.

The legal and regulatory context

In the PD I didn't set out the legal framework in detail, only that which was related to the allegations regarding the commission payment. Several hundred ombudsmen decisions have been issued on very similar complaints to this one, so I don't think I need to repeat it all in detail here. Following the PR's response to the PD, in this decision I will set out the relevant law in more detail where I think it will be helpful to clarify its relevance to particular complaint points.

Section 140A of the CCA

Mr and Mrs H said that the Lender was liable to pay compensation due to the operation of the CCA, specifically that the Lender was party to an unfair debtor-creditor relationship, as defined by s.140A CCA, caused by the sale of the Fractional Club membership. I explained that as that provision is relevant law, I have to think about it when coming to what I think is a fair and reasonable outcome to this complaint (DISP 3.6.4 R).

Under s.140A 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 s.56 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.

s.56 CCA 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 s.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 s.12(b) CCA as "*a restricted-use credit agreement which falls within s.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 s.11(1)(b) CCA says that a restricted-use credit agreement is a regulated credit agreement used to "f*inance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly.*"

The Lender does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs H's Fractional Club membership were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by s.12(b). That made them antecedent negotiations under s.56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per s.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 s.56 CCA cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin v. Paragon Personal Finance Limited [2014] UKSC 61 ("Plevin")* at para 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."*

This was recognised by Mrs Justice Collins Rice in *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*') at para 135:

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

In the case of *Scotland & Reast v. British Credit Trust* [2014] EWCA Civ 790, the Court of Appeal said, at para 56, that the effect of s.56(2) 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 at para 74:

> *"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude Section 140A. Moreover, the words in Section 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."*[2]

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

Furthermore, the scope of that responsibility extends to both acts and omissions by the Supplier, as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing s.56. And, as s.56(3)(b) says that an applicable agreement cannot try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under s.56.

However, an assessment of unfairness under s.140A is not 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 v. Patel* [2009] EWHC 3264 (QB) (which was approved by the Supreme Court in *Smith v. The Royal Bank of Scotland plc [2023] UKSC 34 ("Smith")*), that determining whether or not the relationship complained of was unfair had to be made "*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*", which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under s.140A, therefore, is stark. But it is not 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 para 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.*"

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[2] The Court of Appeal's decision was followed in *Smith v. The Royal Bank of Scotland plc [2023] UKSC 34*

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Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by s.140A is the consequence of all of the relevant facts. The impact of this on Mr and Mrs H's complaint is discussed more fully below.

Other relevant matters

In addition to the CCA, the regulatory requirements of particular importance to this complaint include:

i. The Timeshare Regulations
ii. The Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR')
iii. The Consumer Protection from Unfair Trading Regulations 2008 ('CPUTR')

The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And 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. In this complaint, that includes the Resort Development Organisation's Code of Conduct (the 'RDO Code') dated 1 January 2010.

In the PD, I said that the sale of timeshares like Mr and Mrs H's was regulated by the Timeshare Regulations, Regulation 14(3) of which reads:

> *"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 when thinking about the effect of any breach of these regulations on the fairness of the credit relationship, I think the following judgments, amongst others, help to set out the approach to take:

i. *Plevin*
ii. *Carney v. NM Rothschild & Sons Ltd [2018] EWHC 958 ("Carney")*
iii. *Kerrigan v. Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ("Kerrigan")*
iv. *Shawbrook & BPF v. FOS*

Having considered those judgments, in my PD I explained that I thought the following principles could be drawn:

i. The question of whether the relationship between Mr and Mrs H and the Lender is or was unfair is the central issue to determine in this complaint. The standard of commercial conduct is relevant.
ii. The breach of a legal duty, such as the breach of the Timeshare Regulations by a supplier acting on a creditor's behalf (due to s.56 CCA), is neither necessary for a finding of an unfair debtor-creditor relationship, nor does it automatically lead to such a finding.
iii. For a breach of Regulation14(3) to lead to an unfair debtor-creditor relationship that requires relief from that unfairness, it is a relevant consideration whether the breach caused the debtor to enter into the timeshare and/or loan agreement.

So, a finding that a sale has breached Regulation14(3) is not determinative of the issue of whether or not there is an unfair debtor-creditor relationship arising out of that sale.

The PR has disagreed with my interpretation of the law here. It said that I had contradicted the legal findings in *Shawbrook & BPF v FOS.* It said that Mrs Justice Collins Rice had found that the selling of a timeshare as an investment (i.e. a breach of Regulation 14(3) of the Timeshare Regulations) was, in itself, sufficient to create an unfair relationship. I do not agree with this position and will explain why.

Section 140A CCA – relevant unfair relationship case law

In the PD I made mention of the case law on s.140A that makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision.

The judgment in the case of *Plevin* provides the leading judgment on unfair debtor-creditor relationships, in which it was held that the level of commission paid in respect of an insurance policy, paid for by a loan, was so high it created an unfair relationship due to the extreme inequality of knowledge and understanding between the creditor and the debtor, Mrs Plevin. In *Plevin*, the Court held that the standard of commercial conduct was something to consider when determining the fairness of any debtor-creditor relationship, and relevant rules can be evidence of what that standard was. But whether a creditor (or someone acting on their behalf) had broken a rule is not determinative to the question asked by s.140A CCA. Lord Sumption held (at para 17):

> *"…Section 140A, by comparison, 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 the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty..."*

The *Plevin* case concerned the duty to disclose certain information under the Financial Services Authority's (as it was then) rules for financial firms conducting certain business, in particular the Insurance Conduct of Business ("ICOB") rules. It was further held (at para 17):

> *"…The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages.* ***Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion.*** *The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment.* ***It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules.*** *They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters." (emphasis my own)*

It is apparent that the question of 'fairness' in s.140A CCA is broader than simply considering whether the supplier or the lender (or its agent) has breached a rule or other obligation during the course of relevant dealings. And Lord Sumption went on to explain (at para 18):

> *"…A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non- commercial debtor. It is a question of degree…"*

Paragraph 10 of the judgment made clear that there will normally be large differences of financial knowledge and expertise between a debtor and a creditor, and this unequal relationship is not necessarily unfair. Rather it was when the inequality of knowledge and understanding was "*sufficiently extreme*".

Finally, it was held (at para 20):

> *"On that footing, I think it clear that the unfairness which arose from the nondisclosure of the amount of the commissions was the responsibility of Paragon [the lender]. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."*

Here, the Court found that it was enough that Mrs Plevin would have questioned whether the insurance provided good value for money when considering the question of the fairness of the relationship. So in her case, it was the non-disclosure that caused the unfairness. The Court made no finding whether Mrs Plevin would have made a different purchasing decision had she known more, but that did not prevent it finding unfairness.

So, in my PD I concluded that the breach of a legal duty does not automatically mean a credit relationship is unfair. However, when considering how to remedy any unfairness, it is necessary to consider the impact of that on the debtor.

I was also mindful of the judgment in *Carney* where HHJ Waksman QC (as he then was) held, in relation to s.140A CCA, (at para 51):

> *"Causation is perhaps less straightforward.* ***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.*** *And thus in Plevin, while the unfairness was said to be the failure to disclose the commission, there was at least a finding that the debtor would have "certainly questioned this" the size of the commission being of "critical relevance" – see paragraph 18 of the judgment. However, the Supreme Court then remitted the case back to the Manchester County Court to decide what relief, if any, under s140B should be awarded.* ***But 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.*** *See also the case of Graves v CHL [2014] EWCA Civ 1297 at paragraph 22 of the judgment of Patten LJ where it was held (among other things) that the impugned conduct of the LPA receivers was not causally related to the loss complained of by Mr Graves." (emphasis my own)*

And of the judgment in *Kerrigan*, where HHJ Worster held (at paras 213 and 214):

> *"Having considered which relationships are likely to be unfair, I turn to the question of relief.* ***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. The order must be from the menu of orders provided for under section 140B in connection with the credit agreement, but otherwise there is very little in the way of guidance in the section. As Mr Justice Hildyard put it in his judgment in McMullon v Secure the Bridge Limited [2015] EWCA Civ 884 @ [13]:*
>
> > *'Suffice it to say as to the powers of the court that considerable discretionary latitude is supplied.'*
>
> *That is not to say that the court is free to do anything. Having determined that the relationship is unfair to the debtor, the court will look to relieve that unfairness by making an order or orders under section 140B(1). Whilst HHJ Platts emphasised that his decision as to remedy in Plevin turned on the particular facts of that case and was no precedent, it is a helpful illustration of how the jurisdiction works on well known facts.* ***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. If the court decides to make an order, then it "should reflect and be proportionate to the nature and degree of unfairness which the court has found": Patel v Patel [2009] EWHC 3264 (QB) George Leggatt QC at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, to the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place****…" (emphasis my own)*

The timeshares judicial review - *Shawbrook & BPF v. FOS*

As I have said, the PR, in response to my PD, said that Mrs Justice Collins Rice, in this judicial review, had found that the selling of a timeshare as an investment (i.e. a breach of Regulation 14(3) of the Timeshare Regulations) was, in itself, sufficient to create an unfair relationship.

However, having considered the submissions that I have received, I see no reason to depart from the findings that I reached in the PD, as set out above, and formally adopt them into this final decision. I will explain why.

By way of background, two decisions of the Financial Ombudsman Service, upholding complaints, were challenged by way of judicial review in the High Court in *Shawbrook & BPF v. FOS*. Here the Court considered two decisions concerning the sale of fractional timeshares similar to Mr and Mrs H's, paid for with loans provided by Shawbrook Bank Ltd and Barclays Partner Finance. In each case, the ombudsman decided the timeshare package had been mis-sold and the contractual arrangement, including the associated loan, should be unwound. Broadly, Shawbrook Bank Ltd and Barclays Partner Finance argued that the ombudsman had erred in law in each of the two decisions.

Mrs Justice Collins Rice held:

(1) The ombudsman in the first case did not err in law in his construction of, or approach to, Regulation14(3) of the Timeshare Regulations.

(2) Both ombudsmen did not err in law in concluding that the deemed agency provisions of s.56 CCA, read together with s.140A(1)(c) CCA, meant that the acts and omissions of the timeshare companies in conducting negotiations with consumers antecedent to forming timeshare contracts fell to be regarded by a court as things done or not done by or on behalf of the lenders, for the purposes of considering whether they caused the debtor/creditor loan relationship between lenders and consumers to be unfair.

(3) In these circumstances, both ombudsmen did not err in law in holding that an unfair relationship had been created for the purposes of s.140A CCA or in providing remedies having regard to the provisions of s.140B.

Overall, the claims were dismissed. The judge highlighted that the ombudsman's task was a "*fundamental case-by-case evaluative*" one, with a "*high degree of fact-sensitivity*" (at para 189). In finding there was a breach of Regulation14(3) the first ombudsman made an "*entirely fact-sensitive and evaluative decision. The ombudsman did not make a blanket or 'in principle' decision, referable to the inherent qualities and properties of fractional ownership timeshare contracts. It was a decision directed to finding, interpreting and evaluating the material facts and the communications which took place in this particular case*" (at para 73).

In *Shawbrook & BPF v. FOS*, Mrs Justice Collins Rice considered the effect of a breach of Regulation14(3) on the question of assessing the fairness of the debtor-creditor relationship. It was held (at para 185):

> *"Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness – in particular to whether they had regard to all relevant matters within the terms of Section 140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in mind. Breaching Regulation14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial and the constituent conduct causative of the legal relations entered into: timeshare and loan. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair. It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations leading up to the contractual commitments. Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."*

To summarise, the passages in the judgment in *Plevin* set out above made plain that the breach of a legal duty, such as either the breach of the FCA's rules by a creditor or the breach of the Timeshare Regulations by a supplier on a creditor's behalf, is neither a prerequisite for a finding of an unfair debtor-creditor relationship, nor is it an automatic gateway to such a finding.

Further, the judgment in *Plevin*, read alongside that in *Carney* and *Kerrigan*, makes clear that in a case such as Mr and Mrs H's, an important consideration is whether the relevant

misconduct impacted the debtor's decision to enter into the agreements. Finally, in *Shawbrook & BPF v. FOS*, in dismissing the judicial review claims, including that each ombudsman had erred in law in their approach to ss.56 and 140A CCA, the judge said:

> *"The ombudsmen held the breach [of Regulation14(3)] in each case to be serious/substantial* ***and the constituent conduct causative of the legal relations entered into****: timeshare and loan." (emphasis my own)*

For those reasons, in the PD I said that for a breach of Regulation14(3) to lead to a credit relationship between Mr and Mrs H and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Credit Agreement is an important consideration.

Further, in relation to any findings in the *Shawbrook & BPF v. FOS* judgment on whether the sale of the Fractional Club membership, per se, would have almost certainly breached Regulation14(3), the following passages are important. First, Mrs Justice Collins Rice held that it was not the nature of the membership that breached the Regulation14(3), rather it was the way in which it was sold (at para 66):

> *"My necessary starting point is the ombudsman's explicit acceptance that a fractional ownership timeshare does not inevitably or inherently – purely by virtue of its fractional ownership component – transgress the prohibition in Regulation14(3). That is a point of some importance. Regulation14(3) prohibits the marketing or selling of a timeshare contract as an investment. It does not prohibit the existence of an investment component in a timeshare contract or the marketing or selling of such a product per se. The ombudsman accepted it was at least in principle possible to sell a fractional ownership timeshare without infringing Regulation14(3)."*

So, Mrs Justice Collins Rice did not find that a breach of Regulation14(3) of the Timeshare Regulations was *"causative of the legal relations entered into".* Rather the judge noted that such a breach was *"conduct that knocks away the central consumer protection safeguard"*, but then noted that it was the ombudsmen in the two reviewed decisions that found that such a breach was, in those decisions, causative of those particular consumers taking out their timeshares and associated loan agreements.

I accept that any breach of Regulation14(3) would be serious misconduct on behalf of any timeshare supplier that did so, in fact it would amount to a criminal offence. However, paragraph 17 of *Plevin* makes plain that a breach of a regulation is not the same as there being an unfair credit relationship, those are two separate matters to be considered.

So, I do not accept that a breach of Regulation14(3) inevitably leads to an unfair credit relationship, for example, where a consumer did not enter into the timeshare and loan due to any such breach.

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

So, as I said in the PD, 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.

But, for the reasons set out above, it is not necessary to make a formal finding on that particular issue for the purposes of this decision. That is because whether or not there was a breach of Regulation 14(3) by the Supplier is not ultimately determinative of the outcome in this complaint, and, in the circumstances of this case, I do not think it would have likely made a difference to Mr and Mrs H's purchasing decision.

If there had been a breach of Regulation 14(3) would it have rendered the credit relationship between Mr and Mrs H and the Lender unfair to them?

As set out above, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs H and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Credit Agreement is an important consideration. This, in my view, accords with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

But, having reconsidered everything submitted by both sides, and having thought about what the PR has said in its final response to my provisional findings, I remain of the opinion that Mr and Mrs H would most likely have bought the membership whether or not the Supplier had breached Regulation 14(3), because they were concerned about the length of the EC membership term and the risk of it being passed on to their children.

I think this after reading what they have said in their testimony. Although very little is said in the statement about the Time of Sale being considered here, as I said in the PD, I think it is safe to assume that their thoughts and motivations would not have changed a great deal in the eight months between the two sales. And it is, I think, important to note that they converted all of their EC points into fractional points over the course of these two sales, and they haven't said that they did that for different reasons at the second sale.

They say:

> *"We were becoming aware that, although we had originally bought into a Club that had an end date, the situation was now that it was in perpetuity.*
>
> *As the future of one of our children was uncertain we did not want to leave the burden of our membership on their shoulders."*

They then say they went on and discussed these concerns with the sales representative:

> *"We discussed this concern with the Marketing reps while on holiday at Cromer Resort. They told us of members who had lost spouses or were now too frail to travel and whose children did not want the membership but were unable to get out of the Club. In fact, the position of [the Supplier] was represented as you were in it to the bitter end, even if it meant pursuing you through the courts for Management Fees, whatever your situation. When you hear stories like that you look for options that allow you to get out. The Fractional Membership was presented to us as the solution to this. We were told that the Fractional membership was for 15 years but that we could sell our fractions at any point and, in addition, that the financial value of the fractional units would increase over time with the expected increase in the value of the property. It was sold as the "right" way to go with our membership…"*

This testimony, from Mr and Mrs H, sets out their concerns and how the Supplier positioned the conversion of their EC points into a Fractional Club membership as a way of addressing their concerns.

And they have made it clear that their specific family circumstances meant that having the shorter membership term was of particular importance to them.

The PR hasn't submitted any new evidence in this case which relates to Mr and Mrs H's purchase of the Fractional Club at the Time of Sale. But in Mr H's separate complaint

regarding their previous timeshare purchase and a different finance provider, the PR submitted two questionnaires that Mr and Mrs H completed in August 2017 as part of its case preparation. Although neither of these questionnaires relate to the Time of Sale and the Credit Agreement being considered here, the PR has said in its post-PD response that they are relevant and should be taken into account in my deliberations. So, I have considered them to see if they assist me in understanding what likely happened at the Time of Sale and what Mr and Mrs H's motivations were when they decided to purchase the membership of the Fractional Club at the Time of Sale.

Not all of the questions are relevant to the matter I am considering here, but my attention was drawn to the following, which I will set out below:

Q. 13 - *Did The sales presentation match the reason you believed you were attending upon the timeshare owner?*

This was ticked 'No' and was followed by:

Q. 14 – *If the answer to 13 is 'no', please explain why you had originally attended upon the timeshare owner.*

This was answered with the following free text:

"We attended an update on changes to the resorts - what new ones were available, and how to get more from our membership. We were discussing the escalating management fees when converting to fractional was offered as an exit strategy."

Q. 15 - *What product did you understand you were purchasing from the timeshare owner?*

This was answered freehand:

"We believed that we were exchanging our membership type to one that allowed us to exit the club when we wished to. The exit was up to 15 yrs. But we were told that we could exit anytime we wished to."

Then later in the questionnaire:

Q. 20 – Were you ever guaranteed a profit at the end of your membership?

In response Mr H has ticked 'No'.

Q. 22 - *Were you ever advised that there was an option to exit your membership?*

To which the following answer was given at Q 23:

"We were told that at the end of 15 years the property would be sold. A hint that there would be a profit. But that we could exit and sell up at any point in the 15 years."

Q. 24 - *What were the main reasons for you to enter into a contract with the timeshare owner?*

Which was responded to as follows:

"There is a nine year age gap between us. [Mr H] was concerned that [Mrs H] would be possibly left with the financial burden of management fees. Our son is autistic so future

burden could be placed on our daughter. We wanted an exit strategy. We discussed all of this at the sales talk."

These answers don't, as I've said, actually relate to the Time of Sale being considered here. But they do relate to Mr and Mrs H's purchase of fractional points in very similar circumstances and made only eight months prior to the Time of Sale I am considering. So, as I've said, I think it unlikely that their circumstances and reasons for the purchases would have varied much over that short space of time. And indeed, their written testimony sets out both fractional purchases as one.

And these answers set out, in my view, that Mr and Mrs H wanted to convert their EC points into fractional points with the Fractional Club due to its shorter membership term. There is only one mention of a potential profit in the answer given at Q 23, but this in no way sets it out as the reason they bought the membership and in my view was nothing more than an aside. And as I've said, Mr H ticked a box to say that they were not told of any guaranteed profit at the end of the membership.

Indeed, how the membership was sold to them was set out even more clearly in the second questionnaire. This comprised 28 questions, some of which again allowed for a free-hand response.

Many of the questions are not relevant to my considerations of this part of the complaint, but the following is:

Q. 28 - *Please provide us with any further information regarding the finance agreement and/or timeshare product which you believe may be of note.*

This was answered freehand:

"The product was sold to us exclusively as an exit strategy from our [existing] membership."

So, given what Mr and Mrs H said in their statement, and the answers they have given in the questionnaires (extracts of which are set out above) I remain of the opinion that Mr and Mrs H wanted to convert their EC points into the fractional points with the Fractional Club due to its shorter membership term.

I am aware that the Supplier had an 'exceptional circumstances' policy, where a member could give up their membership if they satisfied this policy. However, I can't see that either Mr or Mrs H would have met any of these at the Time of Sale, and so the Fractional Club membership did offer them a shorter membership term to the one that they already held.

I am not persuaded that their purchase was motivated by their share in the Allocated Property and the possibility of a profit. So, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

So, I am satisfied that the credit relationship between Mr and Mrs H and the Lender was not rendered unfair to them even if the Supplier had breached Regulation 14(3) at the Time of Sale.

Other matters

The PR has said that the Supplier engaged in a series of misrepresentations and omissions during the sales process. It says that Mr and Mrs H were led to believe they were purchasing a valuable asset that would be sold at the end of the term, yielding a significant financial

return. It said this was a fraudulent misrepresentation, as the Supplier knew, or ought to have known, that there was no viable resale market and the product was effectively worthless.

But I addressed this point in the PD, and the PR hasn't provided any new evidence to support this point – it has just repeated it. But I have reconsidered everything I have said in this regard. And having done so, I am not persuaded that the Supplier likely made the representations being alleged here. Mr and Mrs H say little to nothing to persuade me that they were given a guarantee by the Supplier that the Allocated Property would be sold on a specific date when such a promise would have been impossible to stand by given the inevitable uncertainty of selling property some way into the future. And I also do not think it likely the Supplier would have told Mr and Mrs H that the sale of the Allocated Property was guaranteed to yield a significant financial return. Indeed, Mr and Mrs H, in their testimony, do not say this. They say, *"the financial value of the fractional units would increase over time with the* ***expected*** *increase in the value of the property"* (bold my emphasis). This is not a guarantee. And I also refer back to the answer Mr H gave to question 20 in the second questionnaire set out above - *Were you ever guaranteed a profit at the end of your membership?* To which Mr H has ticked 'No'.

The PR has questioned whether the share in the Allocated Property actually exists, and says for the Lender to show that the credit relationship was fair, it must prove the underlying asset exists, and has never done so. It says that once an allegation of unfairness is made, the burden of proof is on the Lender to prove the contrary.

But for a claim of an unfair credit relationship to be successful, it would require more than the bare assertions that have been made in this case. I'm not persuaded that it is sufficient, as the PR seems to contend, simply to suggest unsubstantiated allegations of fact and require that the Lender disprove them else the credit relationship be deemed unfair. This issue was considered in the judgment in *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch) ("*Samra*"), where HHJ David Cooke held (at para.26):

> *"…the onus is on the claimant[3] to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (i.e. personal) to the creditor and debtor. This onus on the claimant does not however mean, in my judgement…that where Mr Samra[4] makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence."*

I'm satisfied the Lender has provided sufficient information in this case to enable me to reach a conclusion about the existence of the Allocated Property and Mr and Mrs H's share in it. I've seen nothing in this case that leads me to think what the Lender has said about their share and the Trustee's obligations at the end of the membership term is untrue. So, there is no reason for me to reach a different finding on the fairness of the credit relationship for this reason.

I have also considered what the PR has said about the 'true cost' of Mr and Mrs H's Fractional Club membership. It is unclear why the PR has raised this argument, but it seems it is saying that the actual cost, which it says was significant, of something that only provides

[3] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.
[4] In this case the borrower making an allegation that there was an unfair credit relationship.

holidays is evidence that it must have been bought for investment reasons. It has argued that once maintenance fees and the cost of the credit had been factored in, the membership would have cost Mr and Mrs H in excess of £41,000 which equates to a one-week annual holiday costing £4,984.

But I think the PR's calculations and reasoning are wrong here. The true cost of the membership includes maintenance fees that Mr and Mrs H were always going to have to pay as they were already members. The true cost of the membership was the initial outlay plus the interest they paid over the time the loan was running – which was only four months.

But in any case, it seems likely that Mr and Mrs H were aware, at the Time of Sale, of the cost of the Fractional Club membership, the interest they were being charged, as well as that they needed to pay maintenance fees every year and the cost of those fees in the first year. So, I think Mr and Mrs H had a clear indication of the likely cost to them of taking out the membership and it is something that they agreed to purchase. It follows, I cannot say that the actual cost of the product was in and of itself something that gave rise to an unfair credit relationship, and I do not agree that the total cost of the product is clear proof that it was bought for its investment potential.

Commission

In response to my provisional findings regarding the commission arrangement in place between the Supplier and the Lender for arranging the Credit Agreement, the PR did not agree with the outcome I reached. It said the Supreme Court in *Johnson v FirstRand Bank Ltd* specifically identified that an unfair relationship under s.140A can be created by the non-disclosure of a commercial tie, independent of the physical size of any Commission payment.

In addition to that already set out, the following regulatory rules/guidance are also relevant here:

<u>The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010</u>

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of s. 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

<u>The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011</u>

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

As set out in my PD, my reading of the judgement in *Hopcraft, Johnson and Wrench* is that the nature of the tie between the parties, as well as the disclosure of that tie, is a relevant

consideration when deciding if there is an unfair credit relationship. I can't see that the judgement leads to a position that any commercial tie or financial interest between parties, if not disclosed, must necessarily lead to an unfair credit relationship.

But as I've said, the Supreme Court held that the credit relationship between the lender and Mr Johnson was unfair under s.140A of the CCA because of the commission paid by the lender to the car dealer. The main reasons for that were:

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 Lender has provided this Service with an unredacted copy of the commercial agreement it had with the Supplier at the Time of Sale. However, having read it, I cannot see that there was any contractual tie between the Lender and the Supplier, such that the Supplier was required to place its customer's loans with the Lender. And I have seen numerous examples of when loans were arranged by the Supplier with other lenders.

And in this case, the Lender has provided evidence that it paid the Supplier £148.20 commission for it arranging the Credit Agreement at the Time of Sale. As I said in the PD this was only 1% of the amount borrowed and 1.36% as a proportion of the charge for credit, which was in stark contrast to the facts in Mr Johnson's case.

So, for the reasons I set out in my provisional findings on this matter, had Mr and Mrs H known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I am not persuaded that they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of commission been disclosed.

What's more, 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 and Mrs H but as the supplier of contractual rights they 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 them when arranging the Credit Agreement and thus a fiduciary duty.

I am aware that this commercial agreement has not been disclosed to the PR, and the PR has, on other similar complaints, said that this non-disclosure was unfair and not in line with natural justice. But I am of a view which accords with this Service's position in relation to the disclosure of this type of commercial agreement - I think it is appropriate for me to accept it in confidence in line with DISP 3.5.9 R. That Rule reads:

"The Ombudsman may:

1. *exclude evidence that would otherwise be admissible in a court or include evidence that would not be admissible in a court;*
2. *accept information in confidence (so that only an edited version, summary or description is disclosed to the other party) where he considers it appropriate;*

3. *reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested; and*

4. *treat the complaint as withdrawn and cease to consider the merits if a complainant fails to supply requested information."*

In this instance, I consider that the commercial agreement between the Lender and the Supplier is plainly commercially sensitive and therefore I exercise my discretion to accept it in confidence. But again, I can say that in this commercial agreement, the Lender did not offer a cheaper loan for people taking a 10-year term such as the one taken by Mr and Mrs H, so I cannot see that Mr and Mrs H have paid more for this loan than they otherwise would have because of a financial incentive paid to the Supplier.

Conclusion

Having considered everything that has been said and submitted by both sides, I adopt my provisional conclusions as part of my final decision. For the reasons I've given above and in my earlier correspondence:

- I don't think the Lender acted unfairly or unreasonably when it did not accept Mr and Mrs H's Section 75 claim;
- I'm not persuaded that the Lender was party to a credit relationship with Mr and Mrs H that was unfair to them 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 Mr and Mrs H.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 10 April 2026.

Chris Riggs
Ombudsman