DRN-6106875

The complaint

Mr and Mrs C'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 claims under Section 75 of the CCA.

What happened

Mr and Mrs C were on a complimentary holiday at one of a timeshare provider's (the 'Supplier') resorts. On 18 February 2019 (the 'Time of Sale 1') Mr and Mrs C bought membership of a timeshare that I'll call the 'Fractional Club'. They entered into an agreement with the Supplier to buy 1,070 fractional points, paying £13,823 (the 'Purchase Agreement 1') for this membership.

Fractional memberships, such as their Fractional Club, were asset backed – which meant it gave Mr and Mrs C 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 1') after their membership term ends.

Mr and Mrs C paid for their Fractional Club membership by taking finance of £13,823 from the Lender (the 'Credit Agreement 1').

Then, on 23 October 2019 (the 'Time of Sale 2') Mr and Mrs C traded in their existing fractional points[1] towards the purchase of 1,540 bi-annual fractional points in a 'Signature Collection' membership (the 'Purchase Agreement 2'). After the trade in value given to their existing points, they ended up paying £10,482 for their Signature Collection membership. This, like their previous membership, was asset backed, meaning it also included a share in the net sale proceeds of a property named on the purchase agreement (the 'Allocated Property 2') after their membership term ends.

But their Signature Collection membership differed from the Fractional Club in certain ways. Unlike the Fractional Club (where accommodation was subject to availability) the Signature Collection had guaranteed availability for Mr and Mrs C to stay in their Allocated Property in a set week (every other year as theirs was a bi-annual membership). The Signature Collection properties were also marketed as being more luxurious and better appointed than the 'standard' accommodation.

Mr and Mrs C paid for their Signature Collection membership by taking further finance of £10,482 from the Lender (the 'Credit Agreement 2').

Mr and Mrs C – using a professional representative (the 'PR') – wrote two letters to the Lender on 19 April 2024 (hereon referred to as the 'Letters of Complaint') to raise a number of different concerns about their Fractional Club and Signature Collection memberships and the associated Credit Agreement(s). As those concerns haven't changed since they were

[1] By trading in this membership Mr and Mrs P forfeited their rights to the share in the Allocated Property 1. This was replaced by a new property with their new membership.

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 C's concerns as a single complaint and issued its final response letter on 22 May 2024, rejecting it on every ground.

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

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

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:

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

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

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

<u>The FCA's Principles</u>

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.

And having done that, I agree with the outcome reached by the Investigator, for broadly the same reasons. I do not 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(s) 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 those conditions here.

There have, in effect, been two claims under Section 75 of the CCA, as the alleged misrepresentations were said to have been made at both sales. But as the allegations and evidence submitted are the same (other than the dates of the sales) I shall deal with both at the same time.

It was said in the Letter of Complaint that the Fractional Club and Signature Collection memberships had been misrepresented by the Supplier at the Time(s) of Sale because Mr and Mrs C were:

1. Told that they had purchased an investment that would "appreciate in value".
2. Told they would have a share of a property and its value would increase during the term of the agreement.
3. Told they would have access to "the holiday apartment" at any time all year round.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for the third point, I don't think it's probable that the Fractional Club membership was misrepresented at the Time of Sale 1 in this way. It seems unlikely that the Supplier would have said Mr and Mrs C would be able to access their holiday apartment at any time all year round, because that is not the way this membership worked. They had 'points' that they could use to exchange for accommodation, and this accommodation was subject to availability. The membership did not grant Mr and Mrs C the right to use the Allocated Property 1 in any way during the membership term. And in relation to the Time of Sale 2, Mr and Mrs C's Signature Collection membership afforded them the right to stay in their Allocated Property 2 in a set week every other year, so again, I think it is unlikely that the Supplier told them they would have access to it at any time, all year round, as that is not how the membership worked. And as there isn't any other evidence on file to support the suggestion that Fractional Club and/or Signature Collection membership was misrepresented for these reasons, I don't think it was.

So, while I recognise that Mr and Mrs C - and the PR - have concerns about the way in which the Fractional Club and Signature Collection memberships were sold by the Supplier, when looking at the claims 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 these particular Section 75 claims.

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

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement(s), the Lender is also liable.

The Letters of Complaint say that Mr and Mrs C could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement(s).

In relation to the Fractional Club, availability of accommodation was not unlimited – given the higher demand at peak times, like school holidays for instance. Some of the sales paperwork likely to have been signed by Mr and Mrs C states that the availability of holidays was/is subject to demand, and Mr and Mrs C have not provided any evidence to show that they were unable to use their membership to take holidays in the way they wanted. And this contract was only in existence between February 2019 and October 2019, and I can see it was used to take a holiday. So, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement 1.

And as regards their Signature Collection, as I've said, Mr and Mrs C were entitled to stay in their Allocated Property 2 in a fixed week every other year if they wished. And no evidence has been adduced which suggests that they were unable to do this due to the contract being breached by the Supplier.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs C any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that the Fractional Club and Signature Collection memberships were actionably misrepresented by the Supplier at the Time(s) of Sale, or that their contracts were breached by the Supplier. But there are other aspects of the sales processes 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.

As Mr and Mrs C took out two finance agreements with the Lender, they had, in effect, two credit relationships. And having considered the entirety of the credit relationships between Mr and Mrs C and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were 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(s) of Sale along with any relevant training material;

2. The provision of information by the Supplier at the Time(s) of Sale in relation to the Fractional Club and Signature Collection memberships, 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(s) of Sale;
4. The inherent probabilities of the sales given their circumstances; and
5. The commission arrangements in place at the relevant times.

I have then considered the impact of these on the fairness of the credit relationships between Mr and Mrs C and the Lender given their circumstances at the Time(s) of Sale.

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

Mr and Mrs C's complaint about the Lender being party to unfair credit relationships was made for several reasons.

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mr and Mrs C on both occasions. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs C was actually unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationships with the Lender were unfair to them for this reason. I appreciate that Mr and Mrs C have said that the loan repayments, when taken in conjunction with the maintenance payments have stretched their finances, but no evidence has been provided to support this. So, from the information provided, like the Investigator in this case, I am not satisfied that the lending was unaffordable for Mr and Mrs C.

Connected to this is the suggestion by the PR that the Credit Agreement(s) were arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement(s). However, it looks to me like Mr and Mrs C knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for the memberships. And as the lending doesn't look like it was unaffordable for them, even if the Credit Agreement(s) were arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to a financial loss for Mr and Mrs C – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate them, even if one or both loans weren't arranged properly.

The PR also says that there were one or more unfair contract terms in the Purchase Agreement(s). But as I can't see that any such terms were operated unfairly against Mr and Mrs C in practice, nor that any such terms led them to behave in a certain way to their detriment, I'm not persuaded that any of the terms governing Fractional Club and/or the Signature Collection membership are likely to have led to an unfairness that warrants a remedy.

The Letters of Complaint say that the Supplier went into liquidation in December 2020, and this means that Mr and Mrs C would be unable to recover any monies which may be due to them from the Supplier.

I can see that certain parts of the Supplier's business were put into administration. Given when this occurred, this aspect of the complaint can only refer to the Signature Collection

membership. But neither Mr and Mrs C nor the PR have said, suggested or provided evidence to demonstrate that, as a result of this administration, they are no longer:

1. Members of the Signature Collection;
2. able to use their Signature Collection membership to holiday in the same way they could initially; and
3. entitled to a share in the net sales proceeds of the Allocated Property 2 when their Signature Collection membership ends.

So, I cannot see how this has rendered Mr and Mrs C's credit relationship with the Lender unfair to them.

Overall, therefore, I don't think that either of Mr and Mrs C's credit relationships with the Lender were 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 relationships with the Lender were unfair to them. And that's the suggestion that the Fractional Club and Signature Collection memberships were each marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs C's Fractional Club and Signature Collection memberships both met the definition of a "timeshare contract" and were both a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling a timeshare 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(s) of Sale – saying, in summary, that on each occasion Mr and Mrs C were told by the Supplier that the fractional membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this 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(s) clearly constituted an investment as it offered Mr and Mrs C 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 a fractional 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 and Signature Collection. They just regulated how such products were marketed and sold.

To conclude, therefore, that either or both of the Fractional Club and Signature Collection memberships were marketed or sold to Mr and Mrs C 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 the membership to them as an investment, i.e. told them or led them to believe that it offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

And there is competing evidence in this complaint as to whether Fractional Club and Signature Collection memberships were marketed and/or sold by the Supplier at the Time(s) of Sale as investments 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 either membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs C, the financial value of their share in the net sales proceeds of either of the Allocated Property(s) 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 the Fractional Club and Signature Collection memberships as an investment. So, I accept that it's equally possible that the Fractional Club and Signature Collection memberships were marketed and sold to Mr and Mrs C as investments in breach of Regulation 14(3) in the way it is alleged in the Letters of Complaint.

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.

Would the credit relationships between the Lender and Mr and Mrs C have been rendered unfair to them had there been a breach of Regulation 14(3) of the Timeshare Regulations at the Time(s) of Sale?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time(s) of Sale, I now need to consider what impact those breaches (if they occurred) would have had on the fairness of the credit relationships between Mr and Mrs C and the Lender under the Credit Agreement(s) and related Purchase Agreement(s), 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 C 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 relevant purchase agreement and credit agreement is an important consideration.

But on my reading of the evidence before me, I am not persuaded that the prospect of a financial gain from either Fractional Club or Signature Collection membership was an important and motivating factor when they decided to go ahead with their purchase. I'll explain.

When the PR referred Mr and Mrs C's complaint to this Service in November 2024, it sent in an unsigned and undated witness statement in their names.

This statement, when describing how they recalled the Fractional Club membership being sold to them by the Supplier, reads:

> *"The membership option they outlined was extremely enticing, and we were assured that availability in the school holidays would not be a problem, again this proved to be very difficult.*
>
> *We were also led to believe that we owned a fraction of the property, confirmed by their explanation that on eventual sale of the property we would receive 1/52 (later reduced to 1/104 when we transferred to biannual signature membership) of its sale. This sale date was 19 years from the contract date. This belief was important as we saw our outlay as an investment."*

This sets out very little about the Time of Sale 1. It seems that Mr and Mrs C bought the Fractional Club as they were assured availability in school holidays would not be a problem. They then go on to describe the way the Fractional Club worked - this says nothing about it being marketed to them as an investment that could lead to a profit – it just describes the membership as being a vehicle which would provide them with their fraction of the sale proceeds of the Allocated Property 1.

They then go on to set out how the Supplier presented the Signature Collection membership. They say:

> *"On my first holiday under this agreement was booked for standard accommodation, but on arrival we were upgraded to a signature suite on condition we attended another presentation. The accommodation was excellent and when we attended the presentation the carrot this accommodation was presented as permanent under a new contract. We had some doubts about the contract we had initially signed, and during this meeting we asked about the option of leaving. We were told this is NOT an option, but assurances were made that this new contract would resolve the issues.*
>
> *Feeling the initial agreement was unsatisfactory, we were persuaded that this could be the only solution to the concerns we had. The value of our first agreement was discounted from the cost of the new agreement…"*

This again says nothing about a potential profit being made at the end of the membership term. This, in my view, sets out that they were attracted to the upgraded property, which they described as *"excellent"* and this was *"presented as being permanent under a new contract"*. They set out that they felt their existing Fractional Club membership was unsatisfactory (they do not suggest why) and that the Signature Collection membership would resolve their issues. Given that Mr and Mrs C have made no mention of the investment element of the Signature Collection, and because the differences between their existing membership and the Signature Collection were the guaranteed availability and improved facilities afforded to them by the new membership, I think it is most likely that these improvements were the reason they decided to upgrade at the Time of Sale 2.

In response to the Investigator's view the PR has pointed to Clause 10 and Clause 11 in the Information Statement given to Mr and Mrs C at the Time(s) of Sale, setting the clauses out as evidence that both of the memberships were understood by them as having an inherent value and being an investment.

Clause 10 reads:

"Trade ins - New Owners are reminded that if in the future they should wish to buy one of the freehold / whole ownership properties developed and owned by [the Supplier] they will be entitled to trade in some of the Fractional Rights for a discount on the purchase price...."

And Clause 11 reads:

"Investment Advice - The Vendor, any sales or marketing agent and the Manager and their related business (a) are not licensed investment advisors authorized by the Financial Conduct Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended to for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of the Allocated Property".

But as I've already said, it is possible that the memberships were sold in a way that breached Regulation 14(3) of the Timeshare Regulations.

And just because I think they bought the Fractional Club for the holidays it could provide, and in relation to the Signature Collection for the guaranteed availability and improved facilities, that doesn't mean they weren't also interested in the share of either Allocated Property. After all, that wouldn't be surprising given the nature of the products at the centre of this complaint. But as Mr and Mrs C themselves don't persuade me that their purchases were motivated by their share in the associated 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 either of the purchasing decisions Mr and Mrs C ultimately made. I think it is likely, for the reasons set out above, that they would have bought the memberships anyway.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club and Signature Collection memberships as investments in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs C's decisions to purchase either membership at the Time(s) of Sale were 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 purchases for the holidays and facilities they could provide, whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think either of the credit relationships between Mr and Mrs C and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

The Provision of Information by the Supplier at the Time(s) of Sale

The PR says that Mr and Mrs C were not given adequate information at the Time(s) of Sale in relation to the requirement to pay an annual maintenance fee, and that this fee may increase. But I can see that the requirement to pay an annual maintenance fee was set out in both of the Member's Declaration(s) (these were signed by Mr and Mrs C as having been read) and also in both Information Statement(s) which were also signed. So, I think it is likely that Mr and Mrs C were given sufficient information about this charge at the Time(s) of Sale. It also seems unlikely that given they had had to pay an annual maintenance charge in relation to Fractional Club, they would have been unaware of this being a requirement of their Signature Collection membership.

And, other than making a bare allegation that the Supplier didn't give them enough information about how the annual management charges could rise, Mr and Mrs C did not and have not elaborated on the allegation to describe what they were told and what they

now think they should have been told. They also haven't provided a breakdown of the annual management charges they have had to pay. And while the PR said the annual management charges have risen exponentially, it has not provided any evidence to support that assertion.

It seems likely to me that Mr and Mrs C were told by the Supplier at the Time(s) of Sale that the annual management charges could go up each year. And while it's possible the Supplier didn't give them sufficient information, in good time, on the various charges they could have been subject to as members in order to satisfy its regulatory responsibilities at the Time(s) of Sale, I haven't seen enough to persuade me that this, alone, rendered Mr and Mrs C's credit relationships with the Lender unfair to them.

The PR says that a payment of commission from the Lender to the Supplier at both of the Time(s) of Sale should lead to this complaint being upheld because, simply put, information in relation to that payment went undisclosed at the Time(s) 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 and Mrs C in arguing that their credit relationships with the Lender were 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 C, nor have I seen anything that persuades me that the commission arrangement between them on either occasion gave the Supplier a choice over the interest rate that led Mr and Mrs C 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(s) 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(s) of Sale, it is for the reasons set out below that I don't think any such failure is itself a reason to find either of the credit relationships in question unfair to Mr and Mrs C.

In stark contrast to the facts of Mr Johnson's case, no commission was paid by the Lender to the Supplier for arranging Credit Agreement 1. And the amount of commission paid by the Lender to the Supplier for arranging Credit Agreement 2 that Mr and Mrs C entered into wasn't high. The commission paid was as follows:

Credit Agreement 2: £524.10 (5% of the advance and 4.63% of the charge for credit.)

So, had they known at either of the Time(s) of Sale that the Supplier was either paid no commission, or was going to be paid a flat rate of commission at that level, I'm not 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 C wanted the fractional memberships and had no obvious means of their own to pay for them. And at such a low level, the impact of commission on the cost of the credit they needed for timeshares they wanted doesn't strike me as disproportionate. So, I agree with the Investigator in that I think they would still have taken out the loans to fund their purchases at the Time(s) of Sale had the amount of commission been disclosed.

What's more, I don't think the Supplier's role as a credit broker was 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 either credit agreement. And as it wasn't acting as an agent of Mr and Mrs C but as the supplier of contractual rights they obtained under the Purchase Agreement(s), the transactions don't strike me as ones with features that suggest the Supplier had an obligation of 'loyalty' to them when arranging the Credit Agreement(s) 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 either of the credit relationships unfair to Mr and Mrs C.

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 relationships between Mr and Mrs C and the Lender under Credit Agreement 1 and 2 and related Purchase Agreement(s) were unfair to them. As a result, 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 C's credit relationships with the Lender weren'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 C's complaint about unfair credit relationships. 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 C (i.e., secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Time(s) 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 C 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 in relation to the Time of Sale 2, while it's possible that the Lender failed to follow the regulatory guidance in place at the time 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 2 had there been more adequate disclosure of the commission arrangements that applied at that time.

Overall Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs C's Section 75 claims. I am also not persuaded that the Lender was party to credit relationships with them under the Credit Agreement(s) and related Purchase Agreement(s) that were 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.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs C to accept or reject my decision before 24 March 2026.

Chris Riggs

Ombudsman