DRN-6135206

The complaint

Mr G's complaint is, in essence, that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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.

Background to the complaint

Mr G first purchased a trial timeshare membership with the timeshare provider (the 'Supplier') on 29 June 2011 with his partner Mrs G. Mr and Mrs G subsequently entered into another agreement with the Supplier (the 'First Fractional Agreement') on 4 October 2011, giving them 747 fractional points. After trading in this existing membership, Mr and Mrs G entered into another agreement on 21 June 2012 (the 'Time of Sale'), with the Supplier to increase their overall points to 1,494, at a cost of £11,053 (the 'Fractional Club'). Additionally, the agreement included a membership/dues payment of £499, bringing the total cost to £11,552 (the 'Purchase Agreement').

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

Mr G paid for the Fractional Club membership by taking finance of £25,416 from the Lender in Mr G's name (the 'Credit Agreement'). This included the consolidation of the outstanding balance from the existing loan, which was taken to pay for the First Fractional Agreement, at a value of £13,864. The Fractional Club membership was taken out in Mr and Mrs G's names, but I will refer to only Mr G throughout this decision as he is the named party on the Credit Agreement and is therefore the eligible complainant.

Mr G – using a professional representative (the 'PR') – wrote to the Lender on 4 October 2017 (the 'Letter of Complaint') to complain about:

- Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
- The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

<u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

Mr G's Letter of Complaint details a number of misrepresentations, some of which are specific to his other purchases, so I will focus on the allegations he's made about the Purchase Agreement in question, as I see it. Where the allegations are not specific to any one purchase, I have considered these to be relevant to the sale in question.

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

- told him that Fractional Club membership had a guaranteed end date, specifically in 2031, when that was not true.
- told him that they were buying an interest in a specific piece of "real property" when that was not true.
- told him that Fractional Club membership was an "investment" when that was not true because it might, or might not, be sold for an unknown price in the future.
- told him that the Supplier's holiday resorts were exclusive to its members when that was not true.

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

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

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

- The contractual terms setting out (i) the duration of his Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of his membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- He was pressured into purchasing Fractional Club membership by the Supplier and was impaired as he was served alcohol during the sale.
- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.

The Lender dealt with Mr G's concerns as a complaint and issued its final response letter on 16 November 2017, rejecting it on every ground.

Mr G then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, thought that the Supplier more likely than not marketed and sold the First Fractional Agreement as an investment to Mr G at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr G was rendered unfair to him for the purposes of section 140A of the CCA. The Investigator rejected the complaints about the Trial Membership and the upgraded 2012 Fractional Club purchase.

The Lender agreed with the Investigator's assessment. After PR initially agreed, it then disagreed with the Investigator's assessment on the Fractional Club and asked for an Ombudsman's decision – which is why it was passed to me. As there is no ongoing dispute involving the Trial Membership, or the First Fractional Sale, I don't need to determine the outcomes of these complaints. Instead, I will focus on the allegations about the sale of the Purchase Agreement and associated Credit Agreement.

In August 2023, PR provided a copy of a draft Witness Statement from Mr and Mrs G which is unsigned and undated, but which PR says was prepared in May 2017 ('the First Statement').

I issued my provisional decision (the 'PD') to the parties on 11 October 2024. In my PD, I said:

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

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

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

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

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

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr G could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr G at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr G was told he was buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr G share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that he acquired such an interest.

I recognise that Mr G has concerns about the way in which his Fractional Club membership was sold, but he has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons he alleges. And I say this because I can see the contract does provide an end date, though this is not in 2031 as alleged in PR's letter. Instead, there is a "sale date" on the fractional certificate of 31 December 2030. The document set out that the sales process begins after this sale date, which makes it difficult for me to understand why Mr G thought the contract ended on this date. Further to this, I've considered the twelve-page document provided to me from the Time of Sale named the "Fractional Property Owners Club Information Statement", which is signed by Mr G and his partner. Here, it's explained that:

"Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when your Allocated Property is sold. There is a provision for distribution of funds or assets to Owners at a future Sale Date after the payment of any taxes and all costs related to that Allocated Property as described in the Rules."

To me, this document is sufficiently clear in that it explains the holiday rights will continue until the Allocated Property is sold. While I can't be certain Mr G read and understood the document in full, I find it unlikely that such a misrepresentation would have been made when this information was made readily available to him.

I've considered whether Mr G might have been told something different during the sales process. I have seen a copy of some slides that were in use by the Supplier about one year before the Time of Sale. While I can't be sure Mr G was shown these slides, and he makes no mention of them in his testimony, I think it's more likely than not that he was shown these at the time, based on what I know about the sales process. It was said:

"16 years later the property is sold. You receive your share of the sale of the property"

In another set of slides I've seen, which were in use about two years after Mr G's sale, it was said:

"19 years later the property is sold. You receive your share of the sale of the property"

From these slides, I could not see that customers were told there was a guaranteed end date to when membership benefits and liabilities would cease. Rather, the slides indicate that customers were given factual information about how the membership worked. So, I don't think the alleged misrepresentation that there was a "guaranteed" end date is consistent with the accompanying paperwork and evidence I've seen.

In addition, I've considered Mr G's own recollections. In his Witness Statement, he says:

"…on the 21st June 2012, we appear to have upgraded our Fractional Ownership, from 1 week fractional rights to 2 weeks…"

I find this statement to indicate an uncertainty from Mr G as to what happened at the Time of Sale, which is not surprising as memories naturally fade over time. But I find it noteworthy that he does not mention any such allegation in his witness statement that he was told there was a guaranteed end date on which his membership would end. Further, he says:

"The reason that we bought the Fractional is because we thought at the end of 25 years, that would be the end of the payments, and it would pass on to the family, and there would be nothing left to pay. It sounded like a great deal at the time."

It's not clear to me why Mr G thought the membership would last 25 years – he's not explained why he thought it would last that long – and this is at odds with the information provided to him at the Time of Sale. Given this uncertainty, I'm not persuaded that Mr G relied on any such alleged misrepresentation about the guarantee of an end date in deciding whether or not to upgrade his membership, as his recollections do not align with the information he was given.

Further, in Mr G's statement, he has not set out what he was told about the Supplier's resorts being exclusive to its members, whether that was said in respect of the first, second or third sale (or all three) and why he believed it to be untrue. So I can't say there was a misrepresentation in respect of that issue for which the Lender could be responsible.

Finally, Mr G says that the Lender told him that Fractional Club membership was an investment. For the reasons I'll come on to explain, even if he was told that (and I make no such finding here), I can't say that would be untrue.

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

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

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr G and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr G's membership of the Fractional Club were conducted in relation to a transaction financed or

proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

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

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

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

What's more, 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 Section 56. And as Section 56(3)(b) says that an applicable agreement can't 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 Section 56.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered

---

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

into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

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

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

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

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

Mr G's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr G and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations. I have also considered Mr G's Witness Statement as the best evidence that I have to decide this complaint. I say that as, although it was unsigned, PR has explained that it was prepared before the Letter of Complaint and was, therefore, prepared closer in time to the Time of Sale and is his own words and memories of what happened.

PR says that Mr G was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. In the Witness Statement, he does not give much detail of any pressure applied on him at the Time of Sale, other than to say: "we felt pressurised to sign just to get out of the room". The only mention of pressure comes in reference to events leading up to the sale of the Trial Membership. In any case, I acknowledge that Mr G may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or done by the Supplier during his sales presentation that made him feel

as if he had no choice but to purchase Fractional Club membership when he simply did not want to. He was also given a 14-day cooling off period and he has not provided a credible explanation for why he did not cancel his membership during that time. Moreover, he was upgrading an existing Fractional Club membership – which I find difficult to understand if the reason he went ahead with the purchase in question was because he was pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr G made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr G's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he says his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr G'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 membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

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

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

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

Here, Mr G's Witness Statement is silent on what he was specifically told at the Time of Sale. More generally, he says:

"13. Subsequently, on the 21st June 2012, we appear to have upgraded our Fractional Ownership, from 1 week Fractional Rights to 2 weeks, in property MDS 299, Marina del Sol. The purchase price was £11,552.00 by way of a further loan, again with Hitachi Capital. As the loan was for £25,416.00, it would appear that this was a consolidating loan, and the total payments per calendar month are £399.04. CLC did advise us, at the time, to get a loan from another lender, when we got home, to pay off the Hitachi Capital finance.

14. We were told at the time that the kids club was free and we had later been advised that it is not free and also is not cheap either.

15. While in Tenerife, in 2014, and because of the fact that [the Supplier] had told us we could sell our Fractional at any time, and make a profit, we enquired about selling the product back to them. We were told that this was not possible, as they do no longer offered this. It's also proved impossible to do privately, so we have had no cash pay-out and no profit."

So Mr G does not specifically state in his Witness Statement that the Supplier sold or marketed Fractional Club membership as an investment. This is in contrast to his memories of the First Fractional Agreement, when he said that did happen.

In the Letter of Complaint, PR says:

"They also said that, by buying twice as many Fractions, our clients would expect to make twice as much profit, at the end of the term. So, it would be a better "investment"."

But that (or words to that effect) weren't in Mr G's Witness Statement at all. Mr G says he was told he could make a profit by selling the membership back to the Supplier at any time, but PR says he was told he could expect to receive a profit at the end of the term. I've thought about these two different versions of events and what I think is more likely to have happened. Having done so, I don't think it's likely Mr G would have been told he could sell the membership back with the expectation that he would also be able to profit from such a transaction. I don't think it's plausible that Mr G could have expected to make a profit in this way, or why he would have believed the Supplier offered him such a promise whereby it would be all but impossible for him to lose any money, or for it to avoid losing money. So I have thought about the scenario presented by PR.

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

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. I accept that it's possible that Fractional Club membership was marketed and sold to Mr G as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition. After all, our Investigator came to that conclusion with respect of the sale of the First Fractional Agreement. However, even if I were to find that the Supplier breached Regulation

14(3) at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway. That is because Mr G's evidence does not indicate that he was motivated by the prospect of seeing a potential profit at the end of the term. So, I don't think I need to make a finding on whether the Supplier may have breached Regulation 14(3) as I don't think any such breach caused Mr G to enter the agreement, or subsequently, that it was the cause of an unfair relationship between him and the Lender.

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

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

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

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

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

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

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

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr G and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr G, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.[2]

[2] The operation of Section 56 means that it is only the things said or done by the Supplier at the Time of Sale that are relevant to this decision. So, if Mr G was motived by something said by the Supplier at an earlier sale, that was not something said or done on behalf of the Lender at the relevant time.

But as I've already said, there was no suggestion in Mr G's initial recollections of the sales process at the Time of Sale in his Witness Statement that the Supplier led him to believe that the Fractional Club membership was an investment from which he would make a financial gain nor was there any indication that he were induced into the purchase on that basis. And I think, had that been the case, he would have mentioned it in his Witness Statement. In fact, Mr G appears to remember very little of what happened at the Time of Sale in his Witness Statement (as set out above) and I find it unlikely his memory would have improved afterwards.

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, and I repeat that I have made no such finding, I am not persuaded that Mr G's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr G and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr G when he purchased membership of the Fractional Club at the Time of Sale. But he and PR say that the Supplier failed to provide him with all of the information he needed to make an informed decision. In particular, he says he wasn't given a copy of the Information Statement prior to entering the Purchase Agreement, or if he was given this, he wasn't given adequate time to review the information.

PR also says that the contractual terms governing the ongoing costs of Fractional Club membership were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Here, PR says:

"[We] take the view that the duration [of] both the Full Points Membership Scheme and the Fractional Property Ownership Scheme and/or the obligation to pay Management Charges for the duration of the Schemes was and is unfair within the meaning of regulation 5 of the [UTCCR]".

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the UTCCR was likely to have prejudiced Mr G's purchasing decision at the Time of Sale and rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA. And I say this because PR's allegations do not include

specific details about how, if at all, the alleged breaches form the basis for an unfair relationship in Mr G's case. PR does not elaborate on why it feels the duration of the membership was unfair – and Mr G's own testimony indicates that he thought the membership was due to last 25 years when this was not true. Further, PR has not explained why the mere existence of maintenance fees, or other charges payable by Mr G under the terms of the membership, would render the relationship to be unfair. And PR has not explained how Mr G was prevented from reviewing the Information Statement he was given at the Time of Sale within the 14-day cooling off period, particularly as he was an existing customer of the Supplier at the time, and would have had some knowledge of how the product worked and the benefits and costs associated with being a member. So, given the facts and information provided to me, I don't find Mr G was unfairly prejudiced by the actions, or inactions, of the Supplier at the Time of Sale.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr G was unfair to him because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr G was unfair to him for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis."

In summary, I wasn't minded to think that the Lender acted unfairly or unreasonably when it dealt with Mr G's section 75 claims.

After I issued my PD, the PR raised a new reason it thought the relationship between the Lender and Mr G was unfair which involved the allegation that the Lender received a payment of commission. I deferred my conclusions on the matter of commission disclosure in order to review that issue further. I've since written to the parties setting out my thoughts on why I wasn't persuaded to uphold this aspect of the complaint.

Applying the principles and factors set out in the Supreme Court judgment[3] handed down on 1 August 2025, I found nothing to suggest 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 G. Nor did I see anything that persuaded me that the commission arrangements between them gave the Supplier a choice over the interest rate which led Mr G into a credit agreement that cost disproportionately more than it otherwise could have.

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Mr G had a material impact on his decision to enter into the Credit Agreement. At £2,605.14, it was only 10.25% of the amount borrowed and even less than that (5.6%) as a proportion of the charge for credit. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Mr G such that the Lender needed to take any action in redress.

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

---

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

Responses to my provisional findings

The Lender accepted my PD. Having received and reviewed what the PR sent in response to my PD, I'm now proceeding with my final decision.

In doing so, I'm conscious that the PR has made a series of assertions surrounding the provision of information relating to commission arrangements. These include, among other things, expressing doubt that the Lender has provided key information, requesting that the information we have received be shared with it in full, and asking that we do not proceed with a decision before this is done and it has had an opportunity to make further submissions.

The PR's requests have been addressed by us under separate correspondence. For reasons I will explain in the course of this decision, I've concluded that it's appropriate for me to proceed with my determination.

The legal and regulatory context

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So there's no need for me to set this out again in detail here. I simply remind the parties that our rules[4] say that in considering what is fair and reasonable in all the circumstances of the complaint, I will take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

What I've decided – and why

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

After considering the case afresh and having regard for what's been said in response to my PD and in my subsequent correspondence, I find it offers no persuasive reason to depart from the conclusions I've previously set out. I'll explain why.

The PR originally raised various points of complaint, such as those giving rise to Mr G's section 75 claim, and the alleged breach of Regulation 14(3) of the Timeshare Regulations, which I addressed in my PD. In its response, it hasn't made any further comments in relation to most of its original points or said anything that leads me to think it disagrees with my provisional conclusions in relation to those points. So I'll focus here on the points the PR *has* made in response.

The PR's response to my PD relates mainly to the issue of the disclosure of documents to show the commission arrangements between the Lender to the Supplier, which it says led to an unfair credit relationship between the Lender and Mr G.

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

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

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

The PR has asked for the documents the Lender has provided to show the commission arrangements. While I appreciate the PR would like to have full disclosure of all of the documents and information the Lender has provided, our rules do not require me to provide this when dealing with a complaint.

As the PR will be aware, under DISP 3.5.9R I may, where I consider it appropriate, accept information in confidence (so that only an edited version, summary or description is disclosed to the other party). That is what I have done in my PD. I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive and that the summary information on commission arrangements we've already shared with the PR is appropriate in this case.

I see no reason to find that this prejudices any arguments the PR or Mr G is able to make in support of Mr G's position. The PR has demonstrated its ability to present Mr G's case and has had sufficient time to consider and make any further arguments.

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 find nothing in the PR's submissions that leads me to reach a different set of findings from those I set out in my PD. I remain unpersuaded that the credit relationship between Mr G and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him such that it warrants the Lender offering any redress.

Commission: The Alternative Grounds of Complaint

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

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mr G (that is, secretly). The second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

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

Conclusion

After careful reconsideration of the facts and circumstances of this complaint, I adopt my provisional conclusions as part of my final decision. For the reasons I've given above and in my earlier correspondence I've mentioned, I don't think the Lender acted unfairly or unreasonably when it dealt with Mr G's section 75 claims. And I'm not persuaded that the Lender was party to a credit relationship with Mr G that was unfair to him for the purposes of

section 140A of the CCA. Having taken everything into account, I see no other reason why it would be fair or reasonable for me to direct the Lender to compensate Mr G.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 6 March 2026.

Andrew Anderson
Ombudsman