

## The complaint

Mrs R's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying her claims under Section 75 of the CCA.

As the credit agreement which is the subject of this complaint was in Mrs R's sole name, she is the only eligible complainant here. However, as the timeshare in question was purchased in the joint names of Mrs R and Mr M, I shall refer to them both where applicable.

## What happened

Mrs R and Mr M purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier') after attending a sales presentation in London in July 2014. This purchase, costing £3,995 was financed by a loan from the Lender, for the full amount, in Mrs R's sole name.

As part of this trial membership, Mrs R and Mr M were given a free 'Prelude' holiday in one of the Supplier's resorts, and during this holiday they attended a further sales presentation by the Supplier.

At this presentation, Mrs R and Mr M purchased membership of a timeshare (the 'Fractional Club') from the Supplier on 11 March 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,220 fractional points at a cost of £23,170 (the 'Purchase Agreement'), but after trading in their trial membership, they ended up paying £19,175 for membership of the Fractional Club.

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

Mrs R paid for their Fractional Club membership by taking finance of £20,840 from the Lender in her sole name (the 'Credit Agreement'). This consolidated the outstanding balance of the loan she took with the Lender for the purchase of the trial membership.

On 22 September 2016 Mrs R and Mr M traded in<sup>1</sup> their membership of Fractional Club for a new membership with an additional 440 fractional points, and a different allocated property. This purchase was paid for by finance from the Lender in Mr M's sole name. This purchase, and the associated credit agreement is the subject of a separate complaint and is included here for background purposes only.

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<sup>1</sup> By trading in, Mrs R and Mr M relinquished all rights to the future sales proceeds of their previous Allocated Property.

Mrs R – using a professional representative (the ‘PR’) – wrote to the Lender on 5 May 2022 (the ‘Letter of Complaint’) to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA (which the Lender failed to accept and pay).
2. A breach of contract by the Supplier giving her a claim against the Lender under Section 75 of the CCA (which the Lender failed to accept and pay).
3. 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.

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

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

- Told them that Fractional Club membership had a guaranteed end date, specifically after 19 years, after which they would have no further legal liability to the Supplier under or in respect of the Scheme, when that was not true.
- Told them that membership of the Fractional Club meant that they were buying an interest in a specific parcel of "real property" when that was not true.
- Told them that Fractional Club membership was an “investment” when that was not true.

Mrs R says that she 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to her.

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

Although not set out in these exact terms, Mrs R says that the Supplier breached the Purchase Agreement because they found it difficult to book the holidays they wanted, when they wanted, and the accommodation they did manage to book was of poor standard. The resorts were also not exclusive to members.

Mrs R also says that the management fees associated with the membership have gone up by more than they ought to have.

As a result of the above, Mrs R says that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to her.

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

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

- The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the ‘UTCCR’).
- They were pressured into purchasing Fractional Club membership by the Supplier.
- 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 decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- No adequate or transparent explanation was given to them of the features which may have made the Credit Agreement unsuitable for them.

The Lender, other than acknowledging Mrs R's complaint, did not send her its final response, so the PR, on Mrs R's behalf, referred her complaint to the Financial Ombudsman Service where it was assessed by an Investigator. The PR also submitted a statement from Mr M, signed and dated 5 April 2022, which set out his recollections of the Time of Sale.

Having considered all of the information on file, the Investigator rejected the complaint on its merits. Mrs R 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 agreed with the outcome reached by the Investigator, in that I didn't think the complaint ought to be upheld, but I had expanded somewhat on the reasons they had given. As such I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments that they wished me to consider.

In my 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.*

*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 Mrs R could make against the Supplier.*

*The Limitation Act 1980 (the 'LA') imposes time limits for people to start legal proceedings – and there are different time limits for different types of claims. Essentially, this means that if someone waits too long to make a claim, the court will usually say it's 'time-barred'. For this*

reason, if a consumer makes a claim after the relevant time-limit has expired, we'd usually say it would be fair for the creditor to rely on the LA to decline the claim.

As I've said, a claim under Section 75 essentially mirrors the claim a consumer could make against the Supplier. The limitation period to make such a claim against the Lender for alleged misrepresentations by the Supplier expires six years from the date on which Mrs R had everything she needed to make such a claim.

As the letter of complaint to the Lender makes clear, Mr R and Mr M entered into the purchase of the Fractional Club on 11 March 2015 based on the alleged misrepresentations of the Supplier, which they say they relied on. And as the Credit Agreement from the Lender was used to finance the purchase, it was when Mrs R entered into the Credit Agreement that she suffered a loss – which means it was at that time that she had everything she needed to make a claim.

Mrs R first notified the Lender of her claim for alleged misrepresentations by the Supplier on 5 May 2022. As that was more than 6 years after they entered into the Credit Agreement and related Purchase Agreement, even though the Lender didn't respond to Mrs R's claim, I don't think it would have been unfair or unreasonable for the Lender to reject Mrs R's concerns about the Supplier's alleged misrepresentations.

As a result, given the facts and circumstances of this complaint, I don't think there is anything that the Lender needs to do to put things right in this regard.

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

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

It is unclear when the alleged breach(es) occurred in this case, and this is necessary information to have when considering whether the Lender might have a defence under the LA, just as it did against Mrs R's concerns of misrepresentation. The contract in question here was in existence until 22 September 2016, so for a breach to have occurred it must have been before this date. So, it is possible that any of the alleged breach(es) occurred within six years of the date Mrs R notified the Lender of the claim, but from the evidence provided, I cannot say that with any degree of certainty.

However, I don't find it necessary to make a finding on this point because, as I go on to explain, I don't think the Lender acted unfairly or unreasonably in not accepting Mrs R's claim anyway. I'll explain.

Mrs R says that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that she considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays for instance. Some of the sales paperwork signed by Mrs R and Mr M states that the availability of holidays was/is subject to demand. It is also important to note that this contract was in place for about 18 months, and there is simply no evidence of when Mrs R and Mr M tried to book a holiday and were unsuccessful in doing so. And Mr M says in his statement that they did go on holiday as part of the membership. In any event, even if I were to accept that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

*Mrs R also says that the quality of the accommodation was not what they were led to believe it would be, and that the resorts were not exclusive to members. But I have not seen any evidence to say that the Supplier has breached the contract in this regard. From what I can see, whenever Mrs R and Mr M had concerns about the standard of the accommodation relating to this Fractional Club membership, the Supplier addressed those concerns. And I've seen no evidence which suggests that any lack of exclusivity has prevented Mrs R and Mr M from receiving or doing anything under the terms of their contract that they would otherwise have been entitled to.*

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

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

*I have already explained why I am not persuaded that the contract entered into by Mrs R and Mr M was breached by the Supplier, nor that Mrs R ought to have had a successful claim for misrepresentation under Section 75 of the CCA. But Mrs R also says that the credit relationship between her 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 she 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 Mrs R 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 Mrs R and Mr M'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.”<sup>2</sup>*

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

*However, an assessment of unfairness under Section 140A isn’t limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made “having regard to the entirety of the relationship and all potentially relevant 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*

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<sup>2</sup> The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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

- 1. The Supplier’s sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
- 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 Mrs R and the Lender.*

#### *The Supplier’s sales & marketing practices at the Time of Sale*

*Mrs R’s complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision.*

*They include the allegation that the Supplier misled Mrs R and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons she gave for her Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.*

*The PR says that the right checks weren’t carried out before the Lender lent to Mrs R. 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 Mrs R was actually unaffordable, before also concluding that she lost out as a result, and then consider whether the credit relationship with the Lender was unfair to her for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mrs R. If there is any further information on this (or any other points raised in this provisional decision) that Mrs R wishes to provide, I would invite her to do so in response to this provisional decision.*

*Mrs R says that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But having considered Mr M’s statement, he says 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, if, as is set out in the Letter of Complaint, they only made the purchase due to pressure. It also seems that they took the paperwork away with them prior to signing so they could read it, and it was collected later. Moreover, they did go on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs R and Mr M made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.*

*I'm not persuaded, therefore, that Mrs R's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says her credit relationship with the Lender was unfair to her. 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.*

*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 Mrs R and Mr M'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 Mr M in his statement, and the PR in the Letter of Complaint, say 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.*

*Mrs R and Mr M's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they 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 Mrs R and Mr M in a way that breached 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 Mrs R and Mr M, 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 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 Mrs R and Mr M, 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mrs R and Mr M 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. So, I accept that it's possible that Fractional Club membership was indeed marketed and sold to Mrs R and Mr M 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.*

*So, I have taken all of that into account. However, on my reading of the evidence provided and Mr M's initial recollections of the sales process at the Time of Sale, I don't think I need to make a finding on whether there was a breach of Regulation 14(3). This is because I am not currently persuaded that would make a difference to the outcome in this complaint anyway.*

*Was the credit relationship between the Lender and Mrs R 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 Mrs R and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)<sup>3</sup> led them to enter into the Purchase Agreement, and Mrs R into the Credit Agreement is an important consideration.*

*As I've said, Mr M completed a written statement setting out his recollections of the Time of Sale. He describes what he remembered the Supplier saying about how the Fractional Club worked:*

*"We were told all about [the Supplier's] fractional property owners club, which we were told involved purchasing shares in a property, which will be sold after 19 years, and the proceeds split between all the owners.*

*In the meantime, we could have luxury holidays every year, either in our apartment or in exchange apartments for holidays somewhere else..."*

*This, on the face of it, is a description of the way Fractional Club worked. But it doesn't assist me a great deal in understanding Mrs R and Mr M's motivation to make the purchase. But I think the next paragraph does:*

*"Our understanding of fractional points, as informed by the [Supplier] sales team, was that the fractional system offered a flexible system for taking luxury holidays, without being tied to a specific apartment in a specific location on specific dates. This is what we were seeking from a holiday membership."*

*From my reading of this, I can see that Mrs R and Mr M were motivated to make the purchase because of its flexible nature and the prospect of taking luxury holidays suited their needs. And I note they've said, "This is what we were seeking from a holiday membership." This does not indicate that they bought it because it was something that offered them the prospect of a profit.*

*I acknowledge that Mr M then went on to say:*

*"Fractional Property Ownership was stated as being a benefit and an investment. At the presentation, this was promoted as "Own it, Rent it, Will it, Sell it, Get money back for it" as can be seen on one of the documents provided. It [sic] was also informed that family members could also invest in the timeshare and that fractional points could be transferred through a will within the family."*

*But nowhere in Mr M's statement does it say that the Supplier said or implied to them that they would make a profit when the Allocated Property was sold, and that was what motivated them to make the purchase. And if this was their motivation, I would have expected to see that mentioned in the statement.*

*And my view on this is strengthened by what is said later in the statement, when Mr M sets out what they considered to be the problems with the membership, and why they wanted to cancel it:*

*"We are seeking cancellation now because we feel that we have been misled and misinformed about the cost, accommodation and location availability of our timeshare membership, and in addition, due to recent medical and financial circumstances."*

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<sup>3</sup> which, having taken place during its antecedent negotiations with Mrs R, 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)

*There is no mention of the investment element or prospect of a financial gain here, nor that this was something that they were concerned about. Their concerns were based on the holidays they wanted and were seemingly unable to get and due to more recent changes in their circumstances following the Time of Sale. This is, in my view, a strong indication of their motivation to purchase Fractional Club membership.*

*So, there was no suggestion in Mr M's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis.*

*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 Mrs R and Mr M'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 whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs R and the Lender was unfair to her 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 Mrs R and Mr M when they purchased membership of the Fractional Club at the Time of Sale. But Mrs R and the PR said that the Supplier failed to provide them with all of the information she and Mr M needed to make an informed decision.*

*The PR also says that the contractual terms governing the duration of Fractional Club membership and the obligation to pay management charges for that duration were unfair contract terms under the CRA.*

*One of the main aims of the Timeshare Regulations and the CRA 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 CRA 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.*

#### *Unfair term(s)*

*Mrs R said that the Purchase Agreement contains unfair contract terms (under the CRA) in relation to the duration of membership and the obligation to pay management charges for that duration.*

*To conclude that a term in the Purchase Agreement rendered the credit relationship between Mrs R and the Lender unfair to her, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mrs R and Mr M in practice.*

*In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs R and Mr M, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial attached importance to the question of how an unfair term had been operated in practice: see [46].*

*As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.*

*Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mrs R have led to any unfairness in the credit relationship between her and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against Mrs R and Mr M, let alone unfairly. The PR hasn't explained why exactly it feels these term(s) cause an unfairness and as I've said, I can't see that these term(s) have been operated in an unfair way against Mrs R and Mr M in any event.*

#### *The provision of information at the Time of Sale*

*The letter of complaint also says Mrs R wasn't given a transparent explanation as to the features of the loan agreement which may have made it unsuitable for her, or have a significant adverse effect which she would be unlikely to foresee, especially given the length of the term, her age, and high interest and total charge for the credit that was provided.*

*But the PR hasn't explained what the particular risks or features are that it is referring to here, or why these would have had an adverse effect on Mrs R. It also hasn't described what it feels should have been explained or what information should have been given that wasn't. The length of the loan, Mrs R's age, and the interest rate and charges have been mentioned. But no reason has been given as to why these are unfair in this particular case, or why these cause the credit relationship between Mrs R and the Lender to be unfair.*

*So, while it's possible the Supplier didn't give Mrs R and Mr M sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't currently seen enough to persuade me that this, alone, rendered Mrs R's credit relationship with the Lender unfair to her.*

*Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mrs R was unfair to her 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 Mrs R was unfair to her for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.*

#### *Conclusion*

*In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs R's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with Mrs R under the Credit Agreement that was unfair to her 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 her."*

## The responses to the Provisional Decision

The Lender responded to accept what I had said in the PD and had nothing further to add.

The PR also responded but did not accept it. It provided a lengthy response, but this only related to the allegation that the Supplier had breached Regulation 14(3) at the Time of Sale which rendered the credit relationships unfair to Mrs R. It also raised an allegation that there had been undisclosed payments of commission by the Lender to the Supplier for its arranging of the Credit Agreement.

I then wrote to both sides setting out my initial thoughts on the commission arrangements between the Lender and the Supplier which were in place when the credit agreement was arranged.

Applying the principles and factors set out in the Supreme Court judgment<sup>4</sup> handed down on 1 August 2025, I found nothing to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mrs R. 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 Mrs R 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 Mrs R had a material impact on her decision to enter into the Credit Agreement. At £521, it was only 2.5% of the amount borrowed and even less than that (2.32%) 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 Mrs R such that the Lender needed to take any action in redress. After all, Mrs R wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the impact of commission on the cost of the credit she needed for a timeshare she wanted didn't strike me as disproportionate. So, I thought she would still have taken out the loan to fund her purchase at the Time of Sale had the amount of commission been disclosed.

I also set out that I was not persuaded that the Lender was 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 Mrs R (i.e. secretly) because I didn't think the Supplier, when acting as a credit broker, owed Mrs R a fiduciary duty. And neither did I think that any breach(es) of the regulatory guidance in place at the Time of Sale was in itself a reason to uphold the complaint because, for the reasons I had stated, I thought Mrs R would still have taken the loan out had there been a more adequate disclosure of the commission arrangements that applied at the time.

The Lender accepted my thoughts on the commission arrangement with no further comment. The PR also responded but did not accept what I had said in this regard. It made further submissions in support of Mrs R's position. Having received and reviewed everything that has been said in response to the PD and my thoughts on the commission arrangements, I am 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

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<sup>4</sup> *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench*")

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<sup>5</sup> 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. But I would add that the following regulatory rules/guidance are also relevant:

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

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

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

### The FCA's Principles

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

- Principle 6
- Principle 7
- Principle 8

### **What I've decided – and why**

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

After considering the case afresh, and having regard for what's been said in response to my provisional decision and my subsequent correspondence, I find the responses offer 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 Mrs R's Section 75 claims, which I addressed in my provisional decision. In its response, it hasn't made any further comments in relation to most of its original points, or said anything that leads me to think it disagrees with my provisional conclusions in relation to those points. So, I'll focus here on the points the PR *has* made in response.

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<sup>5</sup> Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

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

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mrs R and the Lender was unfair under Section 140A of the CCA. In particular, the PR has provided more comment in relation to whether the membership was sold to Mrs R as an investment at the Time of Sale. It has also made further submissions in support of its position that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship between the Lender and Mrs R.

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

The PR has questioned whether my provisional conclusions run contrary to precedent decisions issued by my ombudsman colleagues and the judgment handed down in *Shawbrook and BPF v FOS*<sup>6</sup>. I don't believe they do. However, for the avoidance of doubt, other decisions issued by other ombudsmen do not have a precedent effect like some court judgments might, and each ombudsman must determine each case on its own specific facts. Further, the judgment referred to did not make a blanket finding that all products of the type Mr M and Mrs R purchased were mis-sold in the way the PR appears to be suggesting.

I remind the PR that in my provisional decision I accepted the possibility that the Fractional Club membership was marketed and/or sold to Mrs R and Mr M as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law<sup>7</sup> indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Mrs R's decision whether to enter into the Purchase and Credit Agreements. It doesn't strike me that doing so flies in the face of either the handed down judgment or previous decisions the PR has mentioned.

While the PR has referred me to Mr M's<sup>8</sup> recollections and the Supplier's training materials, I have already considered these and what was said. And I set out in my provisional decision the reasons why I didn't find that evidence sufficiently persuasive that Mr M and Mrs R's purchase decision would have been any different, given the other motivational factors Mr M had described. Having re-examined Mr M's statement that remains my view, for the reasons previously given.

So, as I said before, whether or not the Supplier marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3), I'm not persuaded Mr M and Mrs R's decision to make the purchase was materially impacted by the prospect of a financial gain. It follows that I find the associated credit relationship between Mrs R and the Lender was not rendered unfair to her for this reason.

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

The PR has asked for the documents the Lender has provided to us 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 has been informed, 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

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<sup>6</sup> *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)

<sup>7</sup> *Carney and Kerrigan*

<sup>8</sup> In its response the PR referred to the statement as having been written by Mrs R and not Mr M, but it is clearly mistaken in this regard.

disclosed to the other party). That is what I have done when I wrote to both sides following my provisional decision. I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive, and that the summary information on commission arrangements which has already been shared with the PR is appropriate in this case.

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

As I've noted, the PR has disagreed with my provisional conclusions on whether the Lender should pay redress because of an unfair credit relationship arising in connection with commission arrangements between the Lender and the Supplier. The PR says, in summary, that when the overall circumstances of those arrangements are considered in the round, the credit relationship was plainly unfair. In support of this position the PR has expressed, among other things, that:

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

Notwithstanding the time the PR has taken to put together its submissions on behalf of Mrs R, I don't find what it has said offers persuasive grounds for me to reach a different conclusion on this issue.

I've previously set out my thoughts on any impact the Supreme Court's conclusions in *Hopcraft, Johnson and Wrench* has on Mrs R's arguments that her credit relationship with the Lender was unfair to her for reasons relating to commission given the facts and circumstances of this complaint.

The PR's response doesn't offer anything that leads me to think that, for the most part, any of the factors it has referenced were in fact at play in Mrs R's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mrs R, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mrs R, or to show that any other conflict of interest arose from the roles the Supplier did perform.

For such a claim to be successful would require more than the bare assertions that have been made in this case. 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<sup>9</sup> 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*

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<sup>9</sup> In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.

*creditor and debtor. This onus on the claimant does not however mean, in my judgement...that where Mr Samra<sup>10</sup> 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.”<sup>11</sup>*

I'm satisfied the Lender has provided sufficient information in response to my enquiries to enable me to reach a conclusion about its commission arrangements with the Supplier. I've seen nothing in this case that leads me to think what the Lender has said about the commission arrangements is inaccurate. So, there is no reason for me to reach a different finding over those commission arrangements.

In its correspondence the PR has emphasised the regulatory breaches connected with a failure to disclose commission payment. I have already set out why, in my view, this doesn't automatically lead to an unfair credit relationship for which the Lender needs to offer redress. While I've considered all that the PR has submitted, I remain of that view.

### **Section 140A conclusion**

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Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I remain unpersuaded that the credit relationship between Mrs R and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her such that it warrants the Lender offering any redress.

### **Commission: The Alternative Grounds of Complaint**

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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 Mrs R (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 arrangement between them.

For the reasons I set out previously, I'm not persuaded that the Supplier – when acting as credit broker – owed Mrs R a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to her. 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 she would still have taken out the loans to fund their purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

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<sup>10</sup> In this case the borrower making an allegation that there was an unfair credit relationship.

<sup>11</sup> I further note that in *Wilson v Clydesdale Financial Services Ltd t/a Barclays Partner Finance* [2021] (Unreported), the court also took the view that the burden is on the debtor to prove on the balance of probabilities *the facts* that purportedly create the unfairness. It is then that the lender's burden of proof that requires it to prove *the relationship* was not unfair kicks in. While I do not suggest this offers legal precedent, the subject matter of that case was a fractional timeshare sale, and given the similarities seems to me an appropriate approach when considering the facts in this case.

## **Conclusion**

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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 don't think the Lender acted unfairly or unreasonably when it dealt with Mrs R's Section 75 claims;
- I'm not persuaded that the Lender was party to a credit relationship with Mrs R that was unfair to her 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 Mrs R.

### **My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 9 March 2026.

Chris Riggs  
**Ombudsman**