DRN-6148302

The complaint

Mr M says that Clydesdale Financial Services Limited, trading as Barclays Partner Finance – (the Lender), unfairly declined his claim under section 75 of the Consumer Credit Act 1974 ('CCA'). And he says his creditor- debtor relationship with the Lender was unfair to him under section 140A of the CCA.

What happened

In September 2015, Mr M and his wife purchased a timeshare membership – which I'll call 'Fractional Club' membership – from a timeshare provider (the 'Supplier'). It included 1,420 fractional points. The membership was asset backed – which means it gave Mr M more than just holiday rights. It included a share of the net sale proceeds of a property named on the purchase agreement (the 'Allocated Property') after the membership term ended.

The purchase price, as shown on the pricing summary which set out details of the Fractional purchase and how the cost was calculated, was £18,246. Mr M received a trade in value for his existing time share in the sum of £8,580. He paid an additional £9,666 and borrowed £30,625 from the Lender in his sole name to pay for it. This was because the loan also consolidated a loan he had taken out previously, in the sum of £20,959.15.

In August 2017, Mr M – using a professional representative ('PR1') – wrote to the Lender (the 'Letter of Claim'), to make a claim under section 140 of the CCA.

In summary, the Letter of Claim said that the Supplier made two misrepresentations. Firstly, it told Mr and Mrs M that the only way they could 'exit' their existing timeshare membership was to purchase Fractional Club membership, when they could have exited their membership in different circumstances. Secondly, it guaranteed that Mr and Mrs M would 'exit' the Fractional Club membership after a finite period, but this wasn't true as a purchaser must first be found. In addition:

- It went on to say that there had been a breach of contract in respect of Mr and Mrs M receiving the net proceeds from the sale of the property, as there was nothing within the documentation to confirm that Mr and Mrs M owned any part of the property and that they would receive any proceeds from the sale.
- It said specific terms in the management agreement that governed Fractional Club membership were unfair pursuant to the Unfair Terms in Consumer Contracts Regulations 1999.
- The Supplier didn't conduct a proper assessment of Mr M's financial position and his ability to repay the loan, which rendered the entire agreement unfair. The Supplier applied 'undue' pressure on Mr and Mrs M to procure their agreement to the loan.
- It argued that the Supplier was paid an undisclosed commission and that there was a fiduciary relationship between the Supplier and Mr M.

It subsequently wrote to the Lender and asked for the complaint to be considered under section 75 of the CCA. The Lender dealt with the Letter of Claim as a complaint and issued

its final response letter on 3 October 2017. It rejected the complaint on every ground. PR1 referred the complaint to this service which was received on 3 April 2018. The covering letter elaborated on the concerns raised with the Lender. And the letter referenced the account number in respect of the loan taken out in September 2015.

The Lender didn't consent to the complaint being considered by this service, as it believed it had been referred out of time. So, an investigator explained why they were satisfied that the complaint had been referred in time.

In February 2023, Mr M changed his professional representative to 'PR2'. In August 2023, PR2 made some further submissions. In summary, it said Mr M was told the Fractional Club membership would be a 'good investment', and that at the end of the term, they would 'get their money back with a profit'.

PR2 specifically referred to R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (Admin) ('Shawbrook v Financial Ombudsman Service'), which confirmed that a creditor-debtor relationship could be unfair under section 140A of the CCA if the timeshare membership was sold as an investment. And it said the contract should be void for illegality. It subsequently provided a witness statement from Mr and Mrs M in support of the complaint.

One of our investigators looked into the complaint but rejected it on its merits. PR2 asked that an ombudsman make a final decision. The case has been passed to me to review. I issued a provisional decision explaining why I didn't think the complaint should be upheld. In response the Lender said it agreed with my decision. No further submissions were received from PR2.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

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

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

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

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

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.

Although the Fractional Club membership was purchased in Mr and Mrs M's joint names, the finance was taken out in Mr M's sole name. So, I will refer to Mr M throughout the rest of my decision.

As I haven't received any further submissions in response to my provisional decision, I remain of the opinion that this complaint shouldn't be upheld. I've set out my reasons again below. Before I explain why, I want to make it clear that my role as an ombudsman isn't to address every single point that's been made to date – it's to decide what's fair and reasonable in the circumstances of this complaint. So, if I haven't commented on, or referred to, something that either party has said, it doesn't mean I haven't considered it.

Section 75 of the CCA

Section 75 of the CCA protects consumers who buy goods and services on credit. It says if certain conditions are met, that the finance provider is legally answerable for any misrepresentation or breach of contract by the supplier.

In the Letter of Claim, PR1 says the Supplier misrepresented the Fractional Club membership in two ways: Firstly, it told Mr M that the only way he could 'exit' his existing timeshare membership was to purchase Fractional Club membership, which wasn't true. Secondly, it guaranteed that Mr M would 'exit' the Fractional Club membership after a finite period, but this wasn't true as a purchaser must first be found.

While I accept it's *possible* that Fractional Club membership was misrepresented at the Time of Sale in the way Mr M have suggested, I don't think it's *probable*. He has given little to none of the colour or context necessary to demonstrate that the Supplier made false statements of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for this reason, I don't think it was.

And while, as I understand it, the sale of the Allocated Property could be postponed in certain circumstances according to the Fractional Club Rules, Mr M says little to nothing to persuade me that he was given a guarantee by the Supplier that the Allocated Property would be sold on a specific date when such a promise would have been impossible to stand by, given the inevitable uncertainty of selling property some way into the future. And as there's nothing else on file to support the PR's allegation, I'm not persuaded that there was a representation by the Supplier on the issue in question that constituted a false statement of fact.

PR1 also raised concerns about what Mr M was told in respect of the management charges he would have to pay. However, I've simply not seen sufficient evidence to safely conclude that the Supplier misrepresented the terms governing maintenance fees.

Mr M has said the availability of accommodation was bad and not what he was led to believe - which, on my reading of the complaint, suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.

But, 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 likely to have been signed by Mr M state that the availability of holidays was/is subject to demand. It also looks like he made use of his fractional points to holiday on a number of occasions. I accept that he may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr M has also said that they were told that the accommodation would be very exclusive. And my understanding from what he's said that the accommodation wasn't as exclusive as he was led to believe. However, the contemporaneous documents I've seen relating to the other accommodation available through the membership, do not say that the resorts in the Supplier's portfolio were exclusive to members. Resorts owned by the Supplier were described as "mixed use", while other resorts were described as resorts in which the Supplier had "secured accommodation…under its control" or which were "available through [our] partnerships with other resorts". None of this appears to state or imply that the resorts within the portfolio could only be booked by members. While I've no doubt the Supplier would have taken the opportunity to promote the quality of its resorts and services, I've not seen evidence that it made specific false statements about them.

Also, Mr M's recollections, have been provided a long time after the original claim, which made no mention of any problems with availability or exclusivity. In the circumstances, I've simply seen insufficient evidence to safely conclude that there were problems with availability and exclusivity, and they were such that there was an actionable misrepresentation or a breach of contract by the Supplier.

Based on what I've seen, I'm not persuaded that there was a misrepresentation or a breach of contract by the Supplier for which the Lender is legally answerable. It follows that I don't think it was unfair for the Lender to decline the claim under section 75.

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

Section 140A says a court may make an order if it thinks the relationship between a creditor and a debtor is unfair to the debtor. It's deliberately framed in wide terms, and a finding of unfairness can flow from something done on the creditor's behalf in connection with a 'related agreement'. Here, the purchase agreement is a 'related agreement'. And, by virtue of section 56 of the CCA, the Lender is legally answerable for the Supplier's actions.

Having considered the entirety of the relationship, I don't think it was unfair for the purposes of section 140A. In reaching this conclusion, I've considered:

(1) The standard of the Supplier's commercial conduct, which includes its sales and marketing practices at the time of sale, and any relevant training material.
(2) The information provided by the Supplier at the time of sale, including the contracts and any disclaimers made by the Supplier.
(3) The commission arrangements between the Lender and the Supplier at the time of sale and the disclosure of those arrangements.

(4) All the evidence provided by both parties on what was supposedly said and/or done at the time of sale.
(5) The inherent probabilities of what's likely to have happened given the circumstances of the sale; and when relevant
(6) Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr M and the Lender given their circumstances at the Time of Sale.

The Supplier's sales and marketing practices at the time of sale

There are several reasons why PR1 and PR2 say Mr M's creditor-debtor relationship with the Lender was unfair to him.

PR1 says that the right affordability checks weren't carried out. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr M was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for him.

PR1 said Mr M was subject to undue pressure during the sale. I appreciate that Mr M may have felt weary after a sales process that went on for a long time. But it's not clear to me from what Mr M has said, as to what was done by the Supplier during the sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership, when he simply didn't want to. And in his March 2024 witness statement, Mr M says that he upgraded a number of times into Fractional Club membership. And on one occasion he says he cancelled the purchase when he returned home. So, it seems to me that Mr M was aware that he didn't have to purchase the Fractional Club membership if he didn't want to, and that the purchase could be cancelled if he changed his mind.

I'm not persuaded, therefore, that Mr M'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 Mr M 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 the 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 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 PR2 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 M'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 M 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.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr 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 Mr M as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to him as an investment in breach of Regulation 14(3).

On the other hand, 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 equally possible that Fractional Club membership was marketed and sold to Mr M as an investment in breach of Regulation 14(3).
However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Would the credit relationship between the Lender and Mr M have been rendered unfair to him had there been a breach of Regulation 14(3) of the Timeshare Regulations?

As I think it's possible the Supplier breached Regulation 14(3) at the time of sale, I now need to decide what impact it might have had on the fairness of the relationship between Mr M and the Lender. I say this because in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin'), the Supreme Court said:

'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 the question whether the creditor's relationship with the debtor was unfair.'
What this means is that a breach of Regulation 14(3) doesn't automatically mean the credit relationship is unfair 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. For me to conclude that a breach of Regulation 14(3) led to an unfair relationship, I need to see sufficient evidence to conclude, on the balance of probabilities, that the prospect of a financial gain was an important and motivating factor for Mr M when he decided to purchase Fractional Club membership.

PR1 didn't provide any direct, first-hand testimony from Mr M. And I've noted that it didn't say anything in its Letter of Claim about the Supplier marketing or selling the Fractional Club membership as an investment, despite making several other detailed allegations. And if that had been an important and motivating factor which led Mr M into purchasing Fractional Club membership, I would have expected it to have specifically mentioned this when the complaint was originally made.

I've also noted that PR2's submissions in August 2023 are identical to the submissions it's made in other cases, so when it says, for example, 'Our Client [sic] was told that Fractional Ownership would be a 'good investment'…'. And the clearly generic nature of the submission provides me with very little insight from Mr M as to what he was told during the sales process.

Mr and Mrs M provided their recollections about the sale in the form of a witness statement, which is dated 25 March 2024, which I've considered. I've noted it was provided after the High Court had handed down its judgment in Shawbrook v Financial Ombudsman Service, and it had been nearly 9 years since the events complained about and nearly 7 years since the Letter of Claim.

In my experience, the more time that passes between a complaint and the events complained about, the greater the risk that the consumers' recollections will be vague and inaccurate and potentially influenced by discussions with others, and even the complaint process itself.

Also, as there's no evidence on file to corroborate the summary of Mr M's recent recollections, I think there's a real risk that his recollections were influenced by PR2's submissions and/or the judgment in Shawbrook v Financial Ombudsman Service. This means that I can't give them the weight necessary to conclude that the credit relationship in question was unfair because of a breach of Regulation 14(3).

The information provided by the Supplier at the time of sale

PR1 says that Mr M wasn't given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that, because some of the terms of the Purchase Agreement weren't individually negotiated, they were unfair contract terms as were the terms governing the ongoing costs of membership.
As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr M sufficient information, in good time, on the various charges he could have been subject to as a Fractional Club member in order to satisfy the requirements of Regulation 12 of the 2010 Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice.
And as neither Mr M or PR1 have persuaded me that Mr M would not have pressed ahead with the purchase had the finer details of the Fractional Club's ongoing costs been disclosed

by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

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

The PR says that a payment of commission from the Lender to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

As both sides already know, the Supreme Court handed down an important judgment on 1 August 2025 in a series of cases concerned with the issue of commission: *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ('*Hopcraft, Johnson and Wrench*').

The Supreme Court ruled that, in each of the three cases, the commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or the dishonest assistance of a breach of fiduciary duty, had to be predicated on the car dealer owing a fiduciary duty to the consumer, which the car dealers did not owe. A "disinterested duty", as described in *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471, is not enough.

However, the Supreme Cort held that the credit relationship between the lender and Mr Johnson was unfair under Section 140A of the CCA because of the commission paid by the lender to the car dealer. The main reasons for coming to that conclusion included, amongst other things, the following factors:

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);
2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

The Supreme Court also confirmed that the following factors, in what was a non-exhaustive list, will normally be relevant when assessing whether a credit relationship was/is unfair under Section 140A of the CCA:

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

From my reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, it sets out principles which apply to credit brokers other than car dealer–credit brokers. So, when

considering allegations of undisclosed payments of commission like the one in this complaint, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules ('DISP').
But I don't think *Hopcraft, Johnson and Wrench* assists Mr M in arguing that his credit relationship with the Lender was unfair to him for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr M, nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mr M into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge that it's possible that the Lender and the Supplier failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

But as I've said before, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. And with that being the case, it isn't necessary to make a formal finding on that because, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it is for the reasons set out below that I don't think any such failure is itself a reason to find the credit relationship in question unfair to Mr M.

Based on what I've seen, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr M but as the supplier of contractual rights he obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to him when arranging the Credit Agreement and thus a fiduciary duty.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, the Lender didn't pay the Supplier any commission at the Time of Sale. And with that being the case, even if there were information failings at that time and regulatory failings as a result (which I make no formal finding on), I'm not persuaded that the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr M.

Overall Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr M's Section 75 claims. I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement and related Purchase Agreement that was unfair to him 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 him.

My final decision

For the reasons set out above, my decision is to not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 12 March 2026.

Simon Dibble
Ombudsman