DRN-6222630

Financial Ombudsman Service

The complaint

Mr N's complaint is, in essence, that Tandem Bank Limited trading as Tandem (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) not responding to his claim under Section 75 of the CCA.

What happened

Mr N had purchased a membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') in July 2015. On 10 January 2019 (the 'Time of Sale'), while on a subsequent holiday, he entered into an agreement (the 'Purchase Agreement') with the Supplier to buy a total of 1760 annual fractional points. This was by way of an upgrade to his existing membership, which he relinquished as part of the transaction.

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

Mr N paid for his Fractional Club membership by taking finance of £30,838 from the Lender (the 'Credit Agreement'). Mr N used part of this loan to repay the outstanding finance on his original membership of £12,132 before he relinquished it to the Supplier. The remaining £18,706 was used to finance the rest of the purchase price of the new membership.

Mr N – using a professional representative (the 'PR') – wrote to the Lender on 20 January 2022 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender responded to the complaint on 10 October 2022, rejecting it on all grounds, so Mr N brought his complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, did not uphold the complaint on its merits. The investigator also formed the view that as the price of the membership was in excess of the £30,000 limit that applies to section 75 of the Consumer Credit Act (the 'CCA'), that did not apply to the circumstances of this complaint. They also formed the view that Section 75A of the CCA also did not apply as the credit agreement was for an amount in excess of the limit for that section.

The PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I reviewed all the evidence, including that made by the PR in response to our Investigator's view.
Having done so, I issued a provisional decision (the 'PD') dated 23 October 2025. In that decision, 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 think this complaint should be upheld.

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

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

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

Certain conditions must be met for section 75 to be engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. In this case, there is a dispute over whether the transaction is within the financial limits for section 75, so I will set out my thoughts on that matter.

Section 75(3)(b) has the effect of disapplying the ability to bring a claim against the creditor under section 75(1) where that claim "...relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000...". Mr N's claim in misrepresentation relates to his purchase of Fractional Club membership in July 2019. That membership is the 'single item' for the purposes of section 75.

I agree with our Investigator that the cash price the Supplier attached to that membership was more than the £30,000 limit on section 75. I note that the PR disagrees with this, as the price listed on the Purchase Agreement is £18,706. They go on to say:

"In the pricing sheet it is stated the amount £30,536 from which it is discounted the price of another fraction £11,830, which my clients no longer own, and the result is £18,706."

While I can appreciate the view the PR has stated, it is clear that the value of Mr N's existing membership of £11,830 was used as part payment towards a greater whole. For the purposes of section 75 it is the price attached to the new membership that is material, and the value given against that price for trade-in does not change that the Supplier attached to that membership a cash price of £30,536. While I appreciate that the Purchase Agreement shows the sum after the trade-in value, the pricing sheet is sufficiently persuasive of the true cash price the Supplier attached. Consequently, I must conclude that Mr N is unable to bring a section 75 claim in relation to his purchase.

I should add, for the sake of completeness, that I don't share our Investigator's conclusion that the transaction also falls outside the financial limits of section 75A. The linked credit agreement was for credit (which doesn't include the cost of credit) of £30,838, so not exceeding the £60,260 limit in section 75A. However, Mr N's stated claim is in misrepresentation rather than a claim in breach of contract, and section 75A does not provide for a claim in misrepresentation to be brought against the creditor.

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

While I have found that section 75 does not apply in the circumstances of this complaint, there are still aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

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

1. *The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
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;*
4. *The inherent probabilities of the sale given its circumstances; and, when relevant*
5. *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 N and the Lender.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

Mr N's complaint about the Lender being party to an unfair credit relationship was made for several reasons. For example, it was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr N was:

1. *Told that he had purchased an investment that would "considerably appreciate in value".*
2. *Promised a considerable return on his investment because he was told that he would own a share in a property that would considerably increase in value.*
3. *Told that he could sell his Fractional Club membership to the Supplier or easily to third parties at a profit.*
4. *Made to believe that he would have access to "the holiday apartment" at any time all year round.*

While I have already concluded that section 75 does not apply in the circumstances of this complaint, I have considered whether these points could still give rise to an unfair credit relationship between Mr N and the Lender. But in relation to the complaint points outlined, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's possible that Fractional Club membership was misrepresented at the Time of Sale for one or both of those reasons, I don't think it's probable. Mr N has given little to none of the colour or context necessary to demonstrating 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 these reasons, I don't think it was.

Another point the PR has raised is that the right checks weren't carried out before the Lender lent to Mr N. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr N 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 Mr N.

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

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr N in practice, nor that any such terms led them to behave in a certain way to his detriment, 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.

I acknowledge that Mr N 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 the sales presentation that made him feel as if he was not allowed to leave until he purchased 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 any credible explanation for why he did not cancel his membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr N made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr N'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 the PR says the 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.

<u>The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations</u>

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

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

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

But the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr N was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

A share in the Allocated Property clearly constituted an investment as it offered Mr N the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract <u>as an investment</u>. 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 N 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 N the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

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

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

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

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr N and the Lender under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when he decided to go ahead with his purchase. I'll explain my reasoning here:

Mr N provided an email statement to PR, which was then forwarded to us. This was undated but provided to us on 26 February 2024, after our Investigator had issued their view. It outlined Mr N's recollections of the process by which he came to purchase the Fractional Membership as well as his unhappiness and causes for complaint.

The majority of these recollections dealt with the intensity and duration of the sales process and he felt at the time. There was very little mention of the role that the investment element of the membership played in his decision to take out the membership, only that he was told that membership "was very profitable".

Mr N purchased the fractional membership in January 2019, but did not complain until January 2022, around three years after the purchase. But he didn't provide this service with any of his own memories of the sale until February 2024, so around five years after the sale.

The courts have long taken the position that memories fade and change over time, and I must recognise that being a part of a complaints process can also affect one's memories.

I have also considered that neither Mr N nor his PR provided any evidence about what took place at the sales presentation prior to this witness statement, and it was only after the investigator issued their view, and after the judgment in R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS') was handed down, that Mr N recalled that the Supplier led him to believe that Fractional Club membership offered him the prospect of a financial gain. As I mentioned above, I consider that the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and/or influenced by discussion with others. I find it difficult to understand why the Financial Ombudsman Service was only given such evidence when it was.

Indeed, as there isn't any other evidence on file to corroborate Mr N's recent evidence about his motivations at the Time of Sale, there seems to me to be a very real risk that Mr N's recollections were coloured by the judgment in Shawbrook & BPF v FOS. And with that *being the case, I'm not persuaded that I can give his written recollections the weight necessary to finding that the credit relationship in question was unfair for reasons relating to a breach of the relevant prohibition*

That doesn't mean Mr N wasn't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But to me, Mr N's evidence points to any mention of the investment element during the sales process more of an aside rather than a reason he went ahead with the purchase. So, as Mr N himself hasn't persuaded me that his purchase was motivated by his share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision Mr N ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr N'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 N and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

The Supplier's liquidation procedure and the applicability of Spanish Law on the Credit Agreement

The PR has indicated that any amounts that may be awarded in compensation against the Supplier as a result of action in a Spanish Court may not be recoverable owing to the liquidation of the Supplier's sales companies. I am unconvinced that the liquidation of these companies has any bearing on the merits of the complaint against the Lender.

Furthermore, I can't see that the Lender has been party to any court proceedings in Spain. Given that, and also noting that the Purchase Agreement is governed by English law, it isn't at all clear to me that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in Diamond Resorts Europe and Others (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract governed by English law, it was English law that applied, not Spanish.

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, and given the facts and circumstances of this complaint, I'm not persuaded that it would be fair or reasonable to consider the liquidation of any of the Supplier's sales companies is relevant to this complaint.

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 N's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit 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."

The Lender responded to the provisional decision and accepted it. The PR disagreed and asked for a final decision to be made.

Having received the relevant responses from both parties, I'm now finalising my decision.

The legal and regulatory context

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

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

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

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

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

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

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

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD in the main relate to the issue of whether the credit relationship between Mr N and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr N as an

investment at the Time of Sale. They also argued for the first time the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.
Firstly, in my PD, I explained why I didn't think Mr N's purchase met the relevant criteria to be considered under Section 75 of the CCA. Nothing the PR has said has changed my mind on this point. As I don't think section 75 applies, it follows that I don't think it was unfair for the Lender to reject Mr N's claim under section 75.

The PR has also continued to argue that the Purchase Agreement is unlawful under Spanish law and therefore it should be treated as rescinded.

As outlined in my provisional decision, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn’t make any further comments in relation to those in their response to my provisional decision. Indeed, they haven’t said they disagree with any of my provisional conclusions in relation to those other points. And since I haven’t been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my provisional decision. So, I’ll focus here on the PR’s points raised in response.

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

<u>The Supplier’s alleged breach of Regulation 14(3) of the Timeshare regulations</u>

In their response to my PD, the PR said:

> *“My clients clearly stated the benefits that obviously convinced them to purchase, which include the potential gains from selling the apartment at the end. This means that the investment element did play an important part during the sales process in convincing my clients to purchase and was a motivating factor in their decision making.”*

As I explained in my PD, Mr N’s statement did not convince me that the investment element played a role in his decision to purchase the membership, as the statement made little mention of the investment element or how that influenced his decision to purchase the fractional membership. Having reviewed the statement once again, I continue to consider that the statement does not provide me with the necessary information to say that Mr N expected to receive a profit as a result of the purchase.

The PR also explained in their response to my PD that they hadn’t shared the Investigator’s view on this complaint with Mr N saying “*this was done in order not to influence their recollections*”.

The PR said this means Mr N’s recollections were not been influenced by either the Investigator’s view or the judgment handed down in *Shawbrook and BPF v FOS*[1].

Part of my assessment of the testimony was to consider *when* the statement was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*.

I have thought about what the PR has said, but on balance, I don’t find it a credible explanation of the contents of Mr N’s evidence. Here, the PR responded to our Investigator’s view to say that Mr N alleged that Fractional Club membership had been sold to him as an investment and it provided evidence from Mr N to that effect. I fail to understand how Mr N

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[1] *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) (‘*Shawbrook & BPF v FOS*’).

disagreed with the view and PD on the basis that the timeshare was sold as an investment if he didn't know our Investigator's conclusions. It follows, I think it more likely than not, that Mr N did know about our Investigator's view before the evidence was provided.

So, I maintain that there is a risk that Mr N's testimony was coloured by the Investigator's view and/or the outcome in *Shawbrook & BPF v FOS*. And, on balance, the way in which the evidence has been provided makes me conclude that I can place little weight on it. So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr N's purchasing decision.

The PR also said that in the judgment handed down in *Shawbrook & BPF v FOS*, it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my provisional decision, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold. And the judgment referred to did not make a blanket finding that all such products were mis-sold in the way the PR appears to be suggesting. Any complaint needs to be considered in the light of its specific circumstances.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr N's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr N and the Lender was unfair to him for this reason.

<u>The provision of information by the Supplier at the Time of Sale</u>

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

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);

2. The failure to disclose the commission; and

3. The concealment of the commercial tie between the car dealer and the lender.

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

1. The size of the commission as a proportion of the charge for credit;

2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);

3. The characteristics of the consumer;

4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and

5. Compliance with the regulatory rules.

From my reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, it sets out principles which apply to credit brokers other than car dealer–credit brokers. So, when considering allegations of undisclosed payments of commission like the one in this complaint, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules ('DISP').

But I don't think *Hopcraft, Johnson and Wrench* assists Mr N 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 N 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 N into a credit agreement that cost disproportionately more than it otherwise could have.

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

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

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr N entered into wasn't high. At £770.95, it was only 2.5% of the amount borrowed. So, had he known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr N wanted Fractional Club membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted doesn't strike me as disproportionate. So, I think he would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr N 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.

Overall, therefore, I'm not persuaded that the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr N.

Section 140A: Conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mr N and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Mr N's credit relationship with the Lender wasn't unfair to him for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr N's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

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

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr N 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 because, for the reasons I also set out above, I think Mr N 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.

Other points

Here, the PR has asked us to determine the rights and obligations of the Lender based on the outcome of a court case in Spain. In my provisional decision, I said that in the absence of a judgment in an English jurisdiction on this issue, I was not persuaded it was fair and reasonable to conclude the loan agreement was able to be set aside. I remain of this view for the following reasons:

- The Lender wasn't a party to the proceedings the PR has referred to, so its' rights under the Credit Agreement have not been determined.
- I still think that the Purchase Agreement are governed by English law for the reasons already set out in my provisional decision. The PR has pointed to a different decision of the European Court of Justice that points the other way. But in the absence of any authorities under English law, I'm still not persuaded that (1) the Purchase Agreement, properly governed by English law, could be avoided following the Spanish Judgment to which the PR refers and (2) that the Credit Agreement were also something that could be successfully avoided.

So again, I'm still not persuaded that it would be fair or reasonable to uphold the complaint for this reason.

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 N's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit 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, I do not uphold this complaint.

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

Bill Catchpole
Ombudsman