

The complaint

Mr B's complaint is, in essence, that Shawbrook Bank Limited ('the Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

Background to the complaint

Mr B was the member of a timeshare provider (the 'Supplier'), having purchased a number of products from it over time. But the product at the centre of this complaint is his membership of a timeshare that I'll call the 'Fractional Club' – which he bought on 10 December 2014 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 7,000 fractional points, exchanging 7,000 points held under an existing timeshare membership and paying an additional £8,750 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr B 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 B paid for his Fractional Club membership by taking finance of £8,750 from the Lender (the 'Credit Agreement').

Mr B – using a professional representative (the 'PR') – wrote to the Lender on 15 March 2017 (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 dealt with Mr B's concerns as a complaint and issued its final response letter on 18 May 2017, rejecting it on every ground.

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

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

I issued a provisional decision, setting out why I didn't intend to uphold the complaint. I said:

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I do not currently think this complaint should be upheld.

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 if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

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 B was told or led to believe by the Supplier that Fractional Club membership:

- (1) had a guaranteed end date when that was not true.
- (2) was the only way of releasing himself from his existing membership when that was not true.

As I understand it, the sale of the Allocated Property could be postponed in certain circumstances according to the Fractional Club Rules. But Mr B 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.

There isn't enough evidence on file to support the PR's allegation that Fractional Club membership was misrepresented as the *only* way for Mr B to release himself from his existing membership.

So I'm not persuaded that there were representations by the Supplier on the issues in question that constituted false statements of existing fact.

So, while I recognise that Mr B and the PR have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

Section 75 of the CCA: the Supplier's Breach of Contract

The PR says on Mr B's behalf that the Supplier breached the terms of the Purchase Agreement because there can be no guarantee that Mr B will receive his share in the net sale proceeds of the Allocated Property. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr B any compensation for a breach of contract by the Supplier. And with that being the case, I

do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other 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.

The PR says, for instance, that:

1. the right checks weren't carried out before the Lender lent to Mr B;
2. Mr B was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale; and
3. Fractional Club membership was marketed and sold as investment in breach of a prohibition on doing so.

However, having considered the entirety of the credit relationship between Mr B 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 B and the Lender.

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

While the PR says that the right affordability checks weren't carried out at the Time of Sale, 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 B 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 B.

I acknowledge that Mr B may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or done by the Supplier during his sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. He was also given a 14-day cooling off period and he has not provided a credible explanation for why he did

not cancel his membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr B 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 B'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.

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

The Lender does not dispute, and I am satisfied, that Mr B'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.

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 B 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 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 B 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 B, 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 was marketed and sold to Mr B 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 B 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 B 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.

To help me decide this point, I've carefully considered what Mr B has said in the course of his complaint about how the membership was sold to him and his motivation for taking it out.

Within the Letter of Complaint, the PR said that:

"[Mr B] decided to buy into the Fractional Ownership, mainly because they were informed that their membership would then last for 15 years from the date of purchase ... rather than the length of their current membership."

The significantly shorter term offered by the Fractional Club membership compared to Mr B's existing 'non-fractional' membership with the Supplier is repeatedly noted as a motivating factor for his purchase in the Letter of Complaint – given the "*significant sum of money*" he would save in management fees that would fall due yearly.

By contrast, little more than passing reference is made to the investment element of the Fractional Club membership insofar as Mr B's motivation for purchasing it is concerned. It is noted that this aspect "*appealed*" to him. But it is given little significance beyond that, unlike the shortening of the term that was important as Mr B "*did not wish to burden [his] family with paying management fees up to 2054*" and

provided Mr B with “*an opportunity to rid [himself] of their membership with the [Supplier]*”.

While the complaint was awaiting review by one of our Investigators, the PR provided a statement from Mr B with his recollections from the Time of Sale. Of relevance to the point under consideration here, I’ve noted that Mr B said within this statement that:

“[The Supplier’s sales representative] informed us that as we had taken out the deal in Tenerife, we were entitled to get a bigger percentage of ownership on the property ... it was stressed to us that we were investing in our children’s future with a property abroad where they could holiday free of charge ... The guarantee of a share in the ownership of a property in Tenerife was promised to us multiple times ...”

Mr B’s statement wasn’t provided to us until November 2023, nine years after the Time of Sale and six years after the complaint was originally raised (and referred to us).

I note that, in this statement, Mr B has made no reference to any of the other matters of complaint raised in the Letter of Complaint, save for the “*extreme pressure*” he considered the Supplier to have applied. So this statement does not corroborate the basis of the complaint as originally made.

It is difficult to reconcile this statement – which focuses on the investment element of the membership – with the Letter of Complaint, which was explicit in asserting that it was the shorter membership term he was concerned with. I find the comments made in the Letter of Complaint to be more reliable recollections for Mr B’s motivations at the Time of Sale. The Letter of Complaint was raised nearer to the Time of Sale – with Mr B’s recollections likely to have been clearer. The subsequent statement does not, in my view, set out in sufficient detail any meaningful recollections of the sale or of Mr B’s motivations behind the purchase. It mentions the investment element in somewhat vague terms –and rather than setting out what Mr B hoped to gain from taking out the membership, it is largely a factual recollection of how the membership operated. In that Mr B already held a fractional membership with the Supplier, so could exchange his remaining ‘non-fractional’ membership points to increase his fractional points and therefore his share in the net sale proceeds of the Allocated Property. And this share was ‘guaranteed’ under the terms of the Purchase Agreement.

Moreover, Mr B’s subsequent statement was only provided to us following the judgment in *Shawbrook & BPF v FOS*. So I cannot discount the possibility that Mr B’s comments were influenced by this. I find it difficult to explain why Mr B didn’t, at the outset, just say that he had been told he would make more money than he put in and this is why he purchased Fractional Club membership if this is what happened. In the circumstances, and on balance, I think there’s a high risk that Mr B’s statement was influenced by discussions he had with others or the widespread publicity following the outcome of the judicial review.

Taking all of this into account, 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 Mr B decided to go ahead with his purchase. That doesn’t mean he 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 as Mr B himself doesn’t persuade 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 he 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 B'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 B and the Lender was unfair to him even if the Supplier breached Regulation 14(3).

I also indicated that I would provide my findings on the issue of commission once I knew more about that given the circumstances of Mr B's complaint. I subsequently did that by email, saying:

Mr B's professional representative ('PR') says that a payment of commission from Shawbrook 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 – the aforementioned *Hopcraft, Johnson and Wrench* judgment.

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 B in arguing that his credit relationship with Shawbrook 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 Shawbrook and the Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr B, 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 B into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge that it's possible that Shawbrook 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 above, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. And with that being the case, it isn't necessary to make a formal finding on that because, even if Shawbrook 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 B.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by Shawbrook to the Supplier for arranging the Credit Agreement that Mr B entered into wasn't high. At £87.50, it was only 1% of the amount borrowed and 1.36% as a proportion of the charge for credit. 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 B 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 the 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 B 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 currently persuaded that the commission arrangements between the Supplier and Shawbrook were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr B.

Commission: The Alternative Grounds of Complaint

While I've found that Mr B's credit relationship with Shawbrook 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 B'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 Shawbrook is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from Shawbrook without telling Mr B (i.e., secretly). And the second relates to Shawbrook'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 B 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 Shawbrook 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 Shawbrook's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think Mr B 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.

So, in summary, I wasn't persuaded by any of the arguments put forward for why the credit relationship between Mr B and the Lender was unfair to him under Section 140A of the CCA. And I couldn't see any other reason why it would be fair or reasonable to direct the Lender to compensate Mr B – all of which led me to provisionally conclude that there was no basis on which to uphold the complaint.

The Lender accepted my provisional decision. The PR disagreed with my overall conclusion. When doing that, it provided significant submissions at first but it went on to withdraw them and replace them with more concise submissions – which, while primarily concerned with the suggestion that Mr B's Fractional Club membership had been marketed and sold as an investment in contravention of a prohibition on selling timeshares in that way, included allegations of fraudulent misrepresentation on the basis that he was told by the Supplier at the Time of Sale that:

- (1) He was buying part ownership of a physical property;
- (2) Fractional Club membership was an investment;
- (3) The Allocated Property would be sold; and
- (4) He would receive a share of the net sales proceeds of sale when the Allocated Property is sold.

The PR also repeated its concerns about the pressure Mr B was put under by the Supplier at the Time of Sale, the Lender's decision to lend being irresponsible and payment of commission to the Supplier by the Lender – albeit with a focus on the Supreme Court's judgment in *Hopcraft v Close Brothers Limited; Johnson v FirstRand Bank Limited; Wrench v FirstRand Bank Limited* [2025] UKSC 33 ('*Johnson*').

As a result, the complaint was passed back to me for further thought and my Final Decision.

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 rules¹ 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 (when appropriate), what I consider to have been good industry practice at the relevant time.

What I've decided – and why

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

And having done that afresh, I'm not persuaded to depart from my provisional decision for reasons I'll now explain.

As I said in my provisional decision, my role as an Ombudsman is to decide what's fair and reasonable in the circumstances of this complaint – rather than address every single point that's been made. And with that being the case, while I have read all of the PR's submissions in full, 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's more, it is important to make the point that, in contrast to what might happen in court, neither side to this complaint has a burden of proof that it must discharge. After all, the jurisdiction under which I'm deciding this complaint is inquisitorial rather than adversarial – which means that my findings are made, on the balance of probabilities, in light of the evidence and/or arguments from both sides.

So, while the PR argues in response to my provisional decision that, under Section 140B(9) of the CCA, it is for the Lender to prove that its credit relationship with Mr B wasn't unfair simply because he alleges that it was, that fails to understand that the Financial Ombudsman Service deals with complaints rather than causes of action. And, in any event, to suggest that unsubstantiated allegations of fact must be disproved by the Lender if the credit relationship isn't to be deemed unfair also oversimplifies if not misunderstands the legal position. As HHJ David Cooke said in paragraph 26 of his judgment on *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch):

“...the onus is on [the creditor] 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 creditor and debtor. This onus on the claimant does not however mean, in my judgement...that where [the borrower alleging an unfair credit relationship] 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.”²

¹ Specifically Rule 3.6.4 in the Dispute Resolution Rules found in the Financial Conduct Authority's Handbook for Rules and Guidance.

² As approved by the Supreme Court in *Smith v. The Royal Bank of Scotland plc* [2023] UKSC 34 – see paragraph 40.

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

It was argued by the PR, when this complaint was first made, that the Supplier misrepresented Fractional Club membership at the Time of the Sale. The reasons for this aspect of this complaint at that time were addressed in my provisional decision. And I see no reason to change or add to those. But in response to my provisional decision, the PR argues that Fractional Club membership wasn't worth enough to make Mr B a profit and, as such, the following representations by the Supplier were fraudulent:

- (1) He was buying part ownership of a physical property;
- (2) Fractional Club membership was an investment;
- (3) The Allocated Property would be sold; and
- (4) He would receive a share of the net sales proceeds of sale when the Allocated Property is sold.

The PR takes that view because it says the evidence suggests that (1) any rights in the Allocated Property are personal rights rather than the rights of ownership, (2) the Lender hasn't provided any evidence that the Allocated Property exists or that it will sell in the future (making it unlikely that Mr B will receive anything from his share in it) and, (3) by the PR's own calculations, given the initial and ongoing costs of Fractional Club membership, it was never possible to make a profit from the sale of the Allocated Property.

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. Summarising the relevant pages in *Chitty on Contracts*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it did not hold it or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

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 – nor was it untrue to tell prospective members that they would receive *some* money when the allocated property is sold.

After all, Mr B's share in the Allocated Property clearly 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 as the PR knows, while the term "investment" is not defined in the Timeshare Regulations, it was agreed by the parties in *Shawbrook & BPF v FOS* 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*" (see paragraph 56).

As I said in my provisional decision, 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 marketed and sold to Mr B as an investment orally.

Mr B says little about what was said, by whom and in what circumstances for the purposes

of determining whether representations by the Supplier amounted to false statements of existing fact rather than expressions of honestly held opinions about the likely value of the Allocated Property in the future. And while the PR's own calculations might cast some doubt over the likelihood of the Allocated Property being sold at a profit given the initial and ongoing costs of it to Mr B, there isn't enough evidence to persuade me that the relevant sales representative(s) would have carried out that sort of calculation at the Time of Sale or would otherwise have had information that would indicate that he knew or ought reasonably to have known at the time that any such representations weren't true.

And while the PR might question the exact legal mechanism used to give prospective members an interest in allocated properties, that does not change the fact that the shares of members (like Mr B) were clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort.

I'm not persuaded, therefore, by the allegations of fraudulent misrepresentation from the PR. And with that being the case, they too aren't reasons to uphold this complaint and direct the Lender to compensate Mr B.

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

I've already explained why, in light of the PR's latest allegations of fraudulent misrepresentation, I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. And it is for those reasons that I don't think the credit relationship between Mr B and the Lender was rendered unfair to him on the basis that membership had been misrepresented.

However, there are, of course, other reasons why the PR argues that the credit relationship in question was unfair. But having reconsidered the entirety of that relationship along with everything that has now been said and/or provided by both sides, I still don't think the credit relationship between Mr B and the Lender was likely to have been rendered unfair to him for the purposes of Section 140A. When coming to that conclusion, I have looked again 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 also reconsidered any commercial (including commission) arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.

The PR continues to argue that:

1. The Lender's decision to lend to Mr B was, in essence, irresponsible; and
2. Mr B was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

However, as neither the PR nor Mr B have submitted any new evidence to further either of the arguments above, it is for the same reasons I gave in my provisional decision that I don't think either of them render his credit relationship with the Lender unfair to him for the purposes of Section 140A.

But I'll turn now to what continues to be the main reason for the PR's assertion that the credit relationship in question was unfair.

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

As I said in my provisional decision, there is competing evidence in this complaint as to whether the 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.

I acknowledged that it was possible that Fractional Club membership was marketed and sold to Mr B as an investment in breach of Regulation 14(3). A view I still hold.

But I also thought and still think that it isn't necessary to make a formal finding on that particular issue for the purposes of my determination on this complaint because a breach of Regulation 14(3) by the Supplier is not itself determinative of the outcome in this complaint unless the impact of such a breach suggested otherwise.

What's more, the Supreme Court's judgment in *Plevin* makes it clear that regulatory breaches do not automatically 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 v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*') and *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*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 still seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr B 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.

Indeed, doing that accords with common sense, for if events would have unfolded in the

same way whether or not such a pre-contractual breach had occurred, it would be difficult to attribute any particular importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

If there had been a breach of Regulation 14(3), would it have rendered the credit relationship between Mr B and the Lender unfair to him?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I have considered (as I did in my provisional decision) what impact that breach (if there was one) had on the fairness of the credit relationship between Mr B and the Lender under the Credit Agreement and related Purchase Agreement.

And on my re-reading of the evidence before me, I'm still not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr B decided to go ahead with his purchase, such that he would have made an entirely different purchasing decision had there not been a breach of Regulation 14(3).

I said in my PD, in summary, that I thought Mr B would always have gone ahead with his purchase as he was motivated to do so by the prospect of the significantly shorter term offered by the Fractional Club membership compared to his existing 'non-fractional' membership with the Supplier. This was repeatedly noted as a motivating factor for his purchase in the Letter of Complaint – given the “*significant sum of money*” he would save in management fees that would fall due yearly. While the investment element of the membership was mentioned in the Letter of Complaint, I thought his was only something of a passing reference in contrast. And while it was also cited in a statement he subsequently submitted to us setting out his recollections from the Time of Sale, I found it hard to place much weight upon this – given it was submitted so long after both the sale and the complaint originally being made, and coming as it did after the influential judgment in *Shawbrook & BPF v FOS*.

I've considered the PR's comments on the analysis of my evidence. It notes that correspondence from 2016 – ahead of the complaint originally being made – makes reference to Mr B being sold on the promise of a financial return. The correspondence does not, as far as I can see, contain anything from Mr B directly. And there is notably little by way of detail underpinning this allegation.

The PR also disagrees with my interpretation of the Letter of Complaint, noting that the “investment aspect” was pleaded from the very beginning. I did not say otherwise – in fact I noted that this had been mentioned within the Letter of Complaint. The point I have made – and ultimately the finding I am making – is that the *weight* accorded to it across the various correspondence suggests to me that it was of relative unimportance compared to the shorter term. And that is significant, as it leads me to think that Mr B would always have gone ahead with the purchase, whether or not the Supplier led him to believe he could make a profit from the membership.

That Mr B did not provide a statement to us earlier – which the PR says was the result of our own instructions to them previously – becomes immaterial. Evidently Mr B had discussed matters with the PR ahead of the complaint being raised, and the Letter of Complaint that was then formulated evidences to me that he was primarily motivated to purchase Fractional Club membership in order to avail himself of the shorter term it offered (and the savings it would generate). And I think that motivation would likely have been so strong as to lead him to the same decision, irrespective of any marketing of the membership as an investment opportunity by the Supplier.

On balance, therefore, for the reasons I've set out above, I don't think the credit relationship between Mr B and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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

As I've already said, I set out my thoughts in relation to the implications of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench* for this complaint. I remain satisfied that the Lender has provided me with sufficient information to reach a conclusion about its commercial (including commission) arrangements with the Supplier. I've seen nothing in this case that leads me to think that the information in question is inaccurate. And while I recognise that the PR might disagree with my thoughts on this aspect of the complaint, it hasn't offered any evidence and/or arguments that lead me to think that (1) the factors referenced by the Supreme Court have a bearing on the outcome of this complaint given its circumstances or (2) there are any other reasons why the commercial (including commission) arrangements between the Supplier and the Lender rendered the credit relationship between the latter and Mr B under the Credit Agreement and related Purchase Agreement unfair for the purposes of Section 140A.

In response to my provisional decision, the PR also argues that the Supplier breached Regulation 12 of the Timeshare Regulations (which is concerned with the provision of key information) because it failed to provide Mr B with information on the market value of the Allocated Property, title deeds and a proper legal description beyond a basic unit number. However, it isn't clear what the PR means by "proper legal description" and has provided no authority for the suggestion the Supplier had to provide Mr B with information on the title deeds of the Allocated Property. What's more, when it comes to the market value of the Allocated Property, I would draw the PR's attention to what Mrs Justice Collins Rice said in paragraphs 106 and 110 of her judgment in *Shawbrook & BPF v FOS*:

"Both ombudsmen rely on the reference in Sch.1 to 'exact nature and content of the rights' as being the basis for perceiving a legal obligation to provide 'value' information. But first, having regard to the high level of specificity in the Schedule, it is obvious that 'value' information is nowhere specified as such. And second, 'exact nature and content of the rights' is clearly intended, in context, to be a fair and objective identification and description of those rights. 'Value' information may possibly be context for, or commentary on, those rights, but the 'exact nature and content of rights' is something different from information which may (or may not) be relevant to how much they might be worth, now or in the future."

"I do not, and do not need to, go so far as to infer from the Regulations a legal prohibition on the provision of valuation information. My conclusion is that there is no legal obligation, derivable from Reg.12 of the Timeshare Regulations, to provide it, and that the ombudsmen's solution is, in its own terms, distinctly problematic for the regulatory framework. It remains my view that the principal legal consumer-protection control over buying and selling fractional ownership timeshares is the Reg.14(3) prohibition. That provision alone makes it hard enough to market a timeshare product containing a bare interest in the proceeds of the deferred sale of real property lawfully, without inviting the fleshing out of the law as positively demanding investor-protection information obligations at the same time."

(My emphasis)

In any event, 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.

So, even if it could be said that the Supplier failed to give Mr B sufficient information, in good time, in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations for some of the reasons the PR gives, neither he nor the PR have persuaded me that he was deprived of information that would have led him to make a different purchasing decision at the Time of Sale when I've already found that the prospect of a financial gain from the Allocated Property was not an important and motivating factor behind his purchase. And with that being the case, even if there were information failings (which I make no formal finding on), I can't see why that could be said to have rendered the credit relationship in question unfair to him.

Conclusion

Having adopted my provisional findings, and reconsidered the facts and circumstances of this complaint, I still I don't think the Lender acted unfairly or unreasonably when it dealt with Mr B's Section 75 claim. I'm still not persuaded that the Lender was party to a credit relationship with Mr B 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 for me to direct the Lender to compensate Mr B.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 13 May 2026.

Ben Jennings
Ombudsman