DRN-6275880

Financial Ombudsman Service

The Complaint

Mr D's complaint is, in essence, that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) ('BPF') acted unfairly and unreasonably by being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

Background to the Complaint

Mr D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 14 June 2016 (the 'Time of Sale') – paying £13,175 for it (the 'Purchase Agreement').

The membership in question was asset backed – which meant it gave Mr D more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (which was referred to as unit 167) (the 'Allocated Property') after his membership term was due to end.

Mr D paid for his membership by taking finance from BPF (the 'Credit Agreement').

Mr D – using a professional representative (the 'PR') – wrote to BPF on 21 April 2020 (the 'Letter of Complaint') to make a complaint about BPF being party to a credit relationship with him that was unfair to him. The reasons for the complaint at that time are likely to be familiar to both sides, so I don't intend to repeat them here in detail. But, in summary and in no particular order, the PR said the following on Mr D's behalf:

(1) Fractional Club membership was misrepresented to Mr D by the Supplier for several reasons.
(2) The decision to lend to Mr D was irresponsible.
(3) The Supplier pressured Mr D into the purchase at the Time of Sale.
(4) The terms and conditions to the Purchase Agreement included unfair terms.
(5) BPF paid the Supplier commission for arranging the Credit Agreement that Mr D wasn't told about.

It doesn't look like BPF responded to the Letter of Complaint other than to send a series of holding letters.

The complaint was then referred to the Financial Ombudsman Service in April 2022. And the contents of the accompanying Complaint Form simply referred to the Letter of Complaint for details on why Mr D remained unhappy.

The complaint was then looked at by an Investigator who, having considered the information on file, rejected it on its merits.

The PR 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 ('PD') on 23 March 2026 rejecting the complaint and I gave both sides until 6 April 2026 to provide new evidence and/or arguments. As neither side has done that, and as the deadline I set has now passed, the complaint was passed back to me to consider for Final Decision.

The Legal and Regulatory Context

As I said in my PD, in considering what is fair and reasonable in all the circumstances of the complaint, I'm required under Rule 3.6.4 of the Dispute Resolution Rules (which can be found in the Financial Conduct Authority's Handbook of Rules and Guidance) to 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.

The legal and regulatory context that I still think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And as both BPF and the PR are likely to be familiar with that context, it isn't necessary to set it out here.

My Findings

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

And having done that, I still don't think this complaint should be upheld.

However, before I explain why, I want to repeat the point that my role as an Ombudsman isn't to address every single point that has been made to date. Instead, it's to decide what's 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.

I also want to repeat 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, as I said in my PD, while the PR argued in the Letter of Complaint that it is for BPF to prove that its credit relationship with Mr D wasn't unfair simply because he alleges that it was, that doesn't reflect the fact 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 BPF 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."[1]

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

Having reconsidered the entirety of the credit relationship between Mr D and BPF along with all of the circumstances of the complaint, I still don't think the credit relationship between them was likely to have been rendered unfair to him for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, 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;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation;
3. The commission arrangements between BPF and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
5. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the relevant credit relationship between Mr D and BPF.

The PR argued in the Letter of Complaint that Fractional Club membership was misrepresented to Mr D by the Supplier – saying the following:

"The Fractional Points scheme can only be brought to an end if a purchaser is found. Given that no sale can be guaranteed, it is entirely possible that the scheme could continue for far longer than anticipated. Either [the Supplier] knew those representations to be false or were reckless as to whether they were true. In any event, my client is entitled to rescind the contract on the basis of those misrepresentations."

But as I said in my PD, there is little to nothing from either the PR or Mr D on who, on the Supplier's behalf, said what and in what circumstances. And I can't see anything in the paperwork on file that suggests the sale of the Allocated Property would take place on a specific date. After all, to have given Mr D such a guarantee would have been at odds with common sense (and obviously so) given the fact that the sale was always going to be contingent on supply and demand in light of the state of the property market some way into the future.

So, I'm not persuaded that Fractional Club membership was misrepresented by the Supplier at the Time of Sale for the reasons the PR suggests it was.

I acknowledge, as I did in my PD, that Mr D may have felt weary after a sales process that went on for hours. But he still hasn't said enough about what was said and/or done by the Supplier during his sales presentation to make him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. And as he was also given a 14-day cooling off period, in relation to which there still isn't a credible explanation for why he did not cancel his membership during that time, I'm not persuaded that Mr D made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR suggested in the Letter of Complaint that BPF lent to Mr D irresponsibly. I still haven't seen anything to persuade me that was the case in this complaint given its

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

circumstances. But as I've said before, even if I were to find that BPF 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 D was actually unaffordable and that he lost out as a result before then considering whether the credit relationship with BPF was unfair to him for this reason. And from the information before me, it remains my view that the lending wasn't unaffordable for Mr D.

With all of that being the case, therefore, I don't think that Mr D's credit relationship with BPF was rendered unfair to him under Section 140A for the reasons above. But it was suggested in the Letter of Complaint that Fractional Club membership had been marketed and sold to Mr D as an investment. So, that's what I've reconsidered below.

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

BPF does not dispute, and I am satisfied, that Mr D's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

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

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

But the PR suggests in the Letter of Complaint that the Supplier did exactly that at the Time of Sale.

The term "investment" is not defined in the Timeshare Regulations. But it was agreed by the parties 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*') 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).

A share in the Allocated Property clearly constituted an investment as it offered Mr D 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 membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3) of the Timeshare Regulations. 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 one purchased by Mr D. They just regulated how such products were marketed and sold.

To conclude, therefore, that Mr D's Fractional Club membership was marketed or sold to him 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 membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

As I said in my PD, there is very limited evidence in this complaint as to whether Mr D's 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. But I accept that it's *possible* that it was.

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

Would the Credit Relationship between BPF and Mr D have been rendered unfair to him had the Supplier breached Regulation 14(3)?

As the Supreme Court's judgment in *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61 makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I'm also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say on causation in *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*') and *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*') (respectively).

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 D and BPF 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 most compelling of which is Mr D's own written recollections that he shared with the PR in the lead up to this complaint, it remains my view that 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 say that because it was in those recollections that he said the following in relation to the purchase in question – which, in my view, makes it clear that, while he found the prospect of getting *some* money back appealing, it wasn't the possibility of a profit that played an important part in his purchasing decision:

"In June 216 we went on holiday [...]. Once again we were asked to attend a meeting […]. This time […] offered an agreement which would last 10 years at which time one of the suites […] would be sold and we would receive a portion of the sale proceeds."

I'm not persuaded, therefore, that Mr D would have made a different purchasing decision to the one he did at the Time of Sale whether or not there had been a breach of Regulation 14(3). And for that reason, I don't think the credit relationship between him and BPF was unfair to him even if the Supplier had breached that provision.

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

The PR suggested in the Letter of Complaint that some of the contractual terms of Fractional Club membership were unfair contract terms.

As I've already indicated, the case law on Section 140A of the CCA 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.

The PR still hasn't set out the terms in the Purchase Agreement that it thinks were unfair nor has it explained why such terms were either operated unfairly against Mr D in practice or led him to behave in a certain way to his detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

The PR also argued that a payment of commission from BPF 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 as I said in my PD, I don't think the judgment in *Hopcraft, Johnson and Wrench* assists Mr D in arguing that his credit relationship with BPF was unfair to him for reasons relating to commission given the facts and circumstances of this complaint.

I still haven't seen anything to suggest that BPF and the Supplier were *tied* to one another contractually or commercially in a way that wasn't properly disclosed to Mr D, 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 D into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge, once again, that it's possible that BPF and the Supplier failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commercial (including 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.

And with that being the case, it isn't necessary to make a formal finding on that because, even if BPF and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it is for the reasons set out below that I don't think any such failure is itself a reason to find the credit relationship in question unfair to Mr D.

In stark contrast to the facts of Mr Johnson's case, as I understand it, BPF didn't pay the Supplier any commission at the Time of Sale for arranging the Credit Agreement. Instead, it was the Supplier who paid BPF a subsidy equal to roughly 4.3% of the amount Mr D borrowed – or £566.53. In practice, that meant that the Supplier got just under 96% of the purchase price from BPF once the cooling off period had ended. There still isn't any evidence that the Supplier artificially inflated the price of Mr D's Fractional Club membership at the Time of Sale to recoup its loss in light of that arrangement. After all, the Credit Agreement looks like it was arranged after the purchase price had been agreed with Mr D. And as he wanted Fractional Club membership and had no obvious means of his own

to pay for it at the Time of Sale, I think he would still have taken out the loan to fund his purchase had that aspect of the relevant arrangement been disclosed.

What's more, as I said in my PD, 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 D 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 still not persuaded that the commission arrangements between the Supplier and BPF were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr D.

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 D and BPF under the Credit Agreement and related Purchase Agreement was unfair to him. And I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Ground of Complaint

While I've found that Mr D's credit relationship with BPF wasn't unfair to him for reasons relating to the commission arrangements between it and the Supplier, one of the grounds on which that aspect of this complaint was pursued constitutes a separate and freestanding complaint to Mr D's complaint about an unfair credit relationship. So, for completeness, I've considered that ground on that basis here.

The ground in question relates to whether BPF 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 D (i.e., secretly).

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr D 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 against BPF in this complaint.

My Final Decision

For the reasons set out above, I don't uphold this complaint.

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

Morgan Rees
Ombudsman