DRN-6279967

The complaint

Mr K and Mrs L's complaint is, in essence, that First Holiday Finance Ltd ('the Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

Mr K and Mrs L upgraded their membership of a timeshare (the 'Fractional Club') on 9 July 2017 (the 'Time of Sale'). After trading in their previous membership, they paid a timeshare provider (the 'Supplier') £16,182 for 860 fractional points (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr K and Mrs L 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 the end of their membership term.

Mr K and Mrs L paid for the majority of their Fractional Club upgrade by taking finance of £15,682 from the Lender (the 'Credit Agreement'). This included the consolidation of the finance taken to fund their initial purchase of Fractional Club membership. They also paid a deposit of £500 separately.

Mr K and Mrs L – using a professional representative (the 'PR') – wrote to the Lender on 27 September 2024 (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 K and Mrs L's concerns as a complaint and issued its final response letter on 10 October 2024. It did not uphold the complaint.

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

In the Letter of Complaint, Mr K and Mrs L also complained about their original purchase of Fractional Club membership. I recently issued a jurisdiction decision explaining why we're unable to consider a complaint about this earlier sale. So, it does not form part of this 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 3.6.4 R 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:

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

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

- CONC 3.7.3 R
- CONC 4.5.3 R
- CONC 4.5.2 G

The FCA's Principles

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

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

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

Having considered the entirety of the credit relationship between Mr K and Mrs L and the Lender along with all 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. The commission arrangements between the Lender 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;

5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr K and Mrs L and the Lender.

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

Mr K and Mrs L's complaint about the Lender being party to an unfair credit relationship was made for several reasons.

The PR suggests 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 K and Mrs L knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for the Fractional Club upgrade. And as the lending doesn't look like it was unaffordable for them, 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 Mr K and Mrs L experiencing a financial loss – such that I can say that the credit relationship in question was unfair on them 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 them, even if the loan wasn't arranged properly.

I acknowledge that Mr K and Mrs L may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase the Fractional Club upgrade when they simply did not want to. They were also given a 14-day cooling-off period and have not provided a credible explanation for why they did not cancel their purchase during that time. And with all that being the case, there is insufficient evidence to demonstrate that Mr K and Mrs L made the decision to purchase the Fractional Club upgrade because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also says that there were 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 K and Mrs L in practice, nor that any such terms led them to behave in a certain way to their 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.

Overall, therefore, I don't think that Mr K and Mrs L's credit relationship with the Lender was rendered unfair to them 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 them. And that's the suggestion that the Fractional Club upgrade was marketed and sold to them as an investment in breach of a 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 K and Mrs L's Fractional Club upgrade 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 the Fractional Club upgrade 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 final 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 K and Mrs L the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it's important to note at this stage that the fact that the Fractional Club upgrade 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 the Fractional Club upgrade was marketed or sold to Mr K and Mrs L 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 the upgrade to them as an investment, i.e. told them or led them to believe that the Fractional Club upgrade offered them 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 the Fractional Club upgrade 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's 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 K and Mrs L, the financial value of their share in the net sales proceeds of their allocated property along with the investment considerations, risks and rewards attached to it.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned the Fractional Club upgrade as an investment. So, I accept that it's also possible that the Fractional Club upgrade was marketed and sold to Mr K and Mrs L 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 Mr K and Mrs L 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 K and Mrs L 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 K and Mrs L and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them 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 the Fractional Club upgrade was not an important and motivating factor when Mr K and Mrs L decided to go ahead with their purchase.

Included in the PR's initial submissions was a statement from Mr K and Mrs L dated 25 September 2024 containing their recollections of their various interactions with the Supplier: Amongst other things, this says the following about the Time of Sale:

> "22. The sales representative told us that upgrading was definitely worth it because we would benefit from much more. Everything from the first membership applied, we would just be paying to have something of more value.
>
> […]
>
> 24. We were told the difference between this membership and our previous one was that we would be paying to part-own a better, more luxurious property at a different resort.
>
> 25. Also, we would also be able to go on holiday once a year, instead of every other year.
>
> 26. We were told that by upgrading, we would enhance our membership by putting more money in, thereby getting more value out, at the end of our membership. Again, it wasn't specified exactly how much we would get back when the property was sold, but it was implied that we would receive at least the total amount we had put in, if not more. The sales representative mentioned that this was likely because property prices generally increase in value, and we would have a share of nicer and more valuable property to sell at the end of the membership.
>
> […]
>
> 32. If we had thought we would get no money back once the membership ended by selling our share of the property, we would not have purchased the membership."

Following the Investigator's view that the complaint should not be upheld, the PR provided a further statement from Mr K and Mrs L which says:

> "The investment element was most definitely a crucial part in the purchasing decision […] [The sales representative] talked about how much we could gain in the end. They didn't guarantee a specific amount but they did promise there would be some funds for us that came out of this. At the time, we had no experience of investment and the whole idea sounded quite promising. The presentation did mention "fraction" a lot and their presentation was centred around what we would get from this opportunity if we said yes (a payout at the end)."

So, Mr K and Mrs L say that the investment element of the upgrade was the motivation for their purchase at the Time of Sale.

In determining how much weight to place on Mr K and Mrs L's statements, I am mindful that they were both provided 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) was handed down. The judge in that case found that the marketing of a fractional points club membership as an investment and whether this was a motivating factor in the subsequent purchase was a key issue in deciding whether the credit agreement was unfair or not.

Mr K and Mrs L's account of their motivation is also at odds with the other available evidence. The Supplier's contact notes show that Mrs L requested to cancel the membership in August 2022 as she was dissatisfied with the apartment she was offered for a holiday booking. She wanted a certain type of apartment which was fully booked and was unhappy with the alternative offered by the Supplier. She also raised broader concerns about availability.

And that is consistent with Mr K and Mrs L's statement which says:

> "33. We both started to realise there was a problem and that we had been mis-sold around the time lockdown ended in 2021. It became apparent that we could not go on holiday anywhere in the world as we had been informed.
>
> 34. We feel like we have no value for money and no flexibility. It has caused us as a lot of stress and financial difficulty. We have been left feeling really frustrated. We have tried to get value for money but have not been able to book for the last two years."

Given Mr K and Mrs L's dissatisfaction with Fractional Club membership appears to stem from a lack of availability which has led them to conclude that it is not good "value for money", that suggests to me that the motivation for their purchase at the Time of Sale was holiday rather than investment based. There is no indication, from either the Supplier's contact notes or indeed Mr K and Mrs L's own account, that they queried what would happen to their "investment" if they cancelled their membership.

Further, Mr K and Mrs L switched from a biannual to an annual membership at the Time of Sale. And, having carefully considered the available evidence, I think it's very possible that the additional holidays they would be entitled to as a result was the motivation for their purchase at the Time of Sale.

That doesn't mean they weren'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 K and Mrs L don't persuade me that their purchase was motivated by their 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 they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club upgrade as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr K and Mrs L's decision to purchase this at the Time of Sale was motivated by the prospect of a financial gain (i.e. a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit

relationship between Mr K and Mrs L and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

The PR says that Mr K and Mrs L were not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such failures render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr K and Mrs L sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the 2010 Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr K and Mrs L nor the PR have persuaded me in this particular case that they would not have pressed ahead with their purchase had those details been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

It does not appear that the PR originally complained about the commission arrangements in place at the Time of Sale. But as the Investigator considered them in their assessment, I shall address them here for completeness.

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 FCA's Dispute Resolution rules ('DISP').

But I don't think *Hopcraft, Johnson and Wrench* assists Mr K and Mrs L in arguing that their credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

Based on what I've seen, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr K and Mrs L but as the supplier of contractual rights they 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 them when arranging the Credit Agreement and thus a fiduciary duty.

I recognise that the Lender was and is part of the same group of companies as the Supplier. And I acknowledge that tie may not have been adequately disclosed at the Time of Sale. But I can't currently see why that renders the credit relationship between Mr K and Mrs L and the Lender unfair to them – such that I should uphold the complaint. I say that because the Lender has explained that the Supplier would share finance proposals among its approved external finance partners; the Supplier couldn't write all its finance business "in-house" through the Lender; and the Lender largely provided loans to customers whose circumstances fell outside of its external finance partners' lending terms. So, I'm not persuaded that Mr K and Mrs L were led into a credit agreement with the Lender because it was tied in some way to the Supplier.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, no payment between the Lender and the Supplier, such as a commission, was payable when the Credit Agreement was arranged at the Time of Sale. And with that being the case, even if there were information failings at that time and regulatory failings as a result (which I make no formal finding on), I'm not currently persuaded that the commercial 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 K and Mrs L.

Conclusion

In summary, I am not persuaded that the Lender was party to a credit relationship with Mr K and Mrs L under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

My final decision is to not uphold Mr K and Mrs L's complaint about First Holiday Finance Ltd for the reasons provided.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K and Mrs L to accept or reject my decision before 7 May 2026.

Alex Salton
Ombudsman