DRN-6301458

The complaint

The Estate[1] of Mr S's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mr S was a member of a timeshare provider (the 'Supplier') – having purchased several products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 27 August 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 22,000 fractional points at a cost of £14,850 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr S 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 their membership term ends.

Mr S paid for their Fractional Club membership by taking finance of £14,850 from the Lender (the 'Credit Agreement').

Mr S – using a professional representative (the 'PR') – wrote to the Lender on 5 February 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 S's concerns as a complaint and issued its final response letter on 27 February 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 S disagreed with the Investigator's assessment and asked for an Ombudsman's decision. My colleague issued a provisional decision on 2 July 2024. My colleague's provisional decision said:

> <u>The Estate of Mr S's Complaint about Mitsubishi's Handling of its Section 75 Claim for Misrepresentation</u>
>
> Misrepresentation is, in very broad terms, a statement of law or of existing fact, made by one party to a contract to the other, which is untrue, and which materially influenced the other party to enter into the contract.

[1] Mr S passed away in February 2018.

When Mr S first complained to Mitsubishi, he said that he and Mrs S were induced into the Purchase Agreement on the back of a misrepresentation by the Supplier at the time of sale because they were told that the only way they could exit their existing timeshare membership was to purchase Fractional membership. However, Mr and Mrs S had made two purchases of Fractional membership by the time they made the purchase in question.

So, I don't think Mitsubishi were unreasonable to suggest it couldn't have been during the purchase in question that the alleged misrepresentation occurred because Mr S and Mrs S had already given up their 'non-fractional' membership in return for Fractional.

Mr S also said that he and Mrs S were induced into the Purchase Agreement on the back of a misrepresentation by the Supplier at the time of sale because they were given a guarantee that they would be able to relinquish their Fractional membership after a "finite number of years". However, he said that was untrue as the Purchase Agreement only ends when a purchaser is found.

The Information Statement from the time of sale explains that the Purchase Agreement will expire when the Property is sold, and that the Property will be put up for sale in December 2029. I acknowledge that the sale of the Property looks like it could be postponed. But it could only be postponed with unanimous consent from the owners (like Mr and Mrs S) or if the Trustee thought it benefitted the Owners. And as there's little evidence that D gave Mr S a guarantee that the Property would be sold at an exact date, ending his membership there and then, I don't think membership was misrepresented by D at the time of the sale for this reason either.

I'm not persuaded that Mitsubishi were, therefore, unreasonable to reject Mr S's Section 75 claim.

The Estate of Mr S's Complaint about Mitsubishi's Handling of its Section 75 Claim for Breach of Contract

When Mr S complained, he also said that, while the Purchase Agreement states they will receive a share of the net sale proceeds of the Property, "There is nothing within the documentation to confirm that they own any part of any property and, as such, there can be no guarantee that any proceeds of sale would ever be received". He suggested that is a breach of contract. But it's not possible to make a claim for a breach of contract in relation to an event that hasn't yet happened. And for that reason, I don't think Mitsubishi did anything wrong when it rejected this claim either.

The Estate of Mr S's Complaint about Mitsubishi's Participation in an Unfair Credit Relationship

I've explained above why I'm not persuaded that the Purchase Agreement entered into by Mr S and Mrs S was misrepresented by D in a way that makes for a successful claim by Mr S under Section 75 of the CCA. But, as Mr S had a number of other concerns about the sale of his and Mrs S's Fractional membership, I've considered those in this part of my decision.

In Mr S and Mrs S's written recollections, which were given to this Service after the judgment in Shawbrook & BPF v FOS was handed down, they also explained that they hadn't been able to book holidays on cruise ships, that they had entered into this agreement to secure.

They were also disappointed at the lack of availability of holidays in certain countries. I've considered whether there is evidence that created an unfair relationship on that basis, but I don't think there has been sufficient evidence of that. The Purchase Agreement explained that holidays were subject to availability, and I think it's likely that Mr S would have been aware of that as this was the ninth timeshare agreement he had entered into in the last thirteen years and by then I would think it likely he would have known how the schemes operated.

Mitsubishi have explained that they didn't pay a commission and D have explained they didn't receive one. And I have no reason to doubt or disbelieve either of them when they say that. So, in the absence of any evidence to the contrary, I don't think Mr S's credit relationship with Mitsubishi was rendered unfair because of undisclosed commission.

When Mr S initially made his complaint, he suggested that D should have considered other "financial offerings". He didn't enlarge upon that, but I assume he meant that D should have provided him and Mrs S with alternative providers of credit. D wasn't acting as an agent of Mr S and Mrs S but as the supplier of contractual rights they obtained under the Purchase Agreement. And, in relation to the loan, it doesn't look like it was D's role to make an impartial or disinterested recommendation or to give Mr S and Mrs S advice or information on that basis. It's clear that Mr S and Mrs S would have been aware they could use other lenders. I say that because they had entered several other timeshare agreements since 2002 and they had used an array of lenders to finance those deals. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship between Mr S and Mitsubishi on this occasion given the facts and circumstances of this complaint.

Regulation 14(3) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') 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."*

Mr and Mrs S's share in the Property clearly constituted an investment. But the fact that Fractional 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 the marketing and selling of such a product.

To conclude, therefore, that Fractional membership was likely to have been sold to Mr S and Mrs S as an investment in breach of Regulation 14(3), I have to be persuaded that D led them to believe that Fractional membership offered them the prospect of a financial gain and used that fact to induce them into the purchase. On my reading of Mr and Mrs S's testimony, that is not what they said or suggested had happened at the time of sale. They explained that they were led to believe their fractions would generate a "nest egg" but at no point did they say that D led them to believe that their Fractional membership would lead to a financial gain.

So, while Mr S's representative might now say that D represented Fractional membership to him and Mrs S as an investment, I don't recognise or agree with that assertion. What's more, if membership had been marketed and sold in that way at the time of sale, I find it difficult to understand why Mr S and Mrs S did not mention that in their written recollections and, in turn, why Mr S's representative made no

mention of it in the letter of complaint either. And with that being the case, as the written recollections of Mr and Mrs S and the initial letter of complaint are the best evidence I have of what they remember of the sales process at the time of sale, I am not currently persuaded that D was likely to have led them to believe that membership offered them the prospect of a financial gain, thus inducing them into the purchase on that basis.

However, even if I am wrong about that, and D did breach Regulation 14(3), I am not currently persuaded that makes a difference to the outcome in this complaint anyway.

As the Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 makes clear, it does not 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 am also mindful of what HHJ Waksman QC (as he was) and HHJ Worster had to say in Carney and 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 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 seems to me that, if I am to conclude that a breach of Regulation14(3) led to a credit relationship between Mr S and Mitsubishi that was unfair to him and warranted relief as a result, whether or not such a breach caused Mr S and Mrs S to enter into the Purchase Agreement and/or Credit Agreement is an important consideration.

In Mr S and Mrs S's written recollections, they explained that "We originally bought more points (and became Platinum members) so that we could go on one of their cruise ships […]." And while they also explained that they were led to believe "that the Fractions we bought would provide us with a nest egg of a considerable sum

[…]", there was no suggestion that D had led them to believe that they would make a financial gain. So, on balance, I'm not persuaded that Mr and Mrs S's decision to purchase Fractional membership at the time of sale was motivated by the prospect of a profit.

I think the evidence suggests Mr S and Mrs S would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3), and for that reason, I don't currently think the credit relationship between Mr S and Mitsubishi was unfair to him or that any unfairness warrants a remedy even if D had breached Regulation 14(3).

In addition to the concerns I've addressed above, Mr S also said that he and Mrs S were pressured to enter into the Purchase Agreement and the related Credit Agreement. He and Mrs S explained in their written recollections that they weren't given much time to read the paperwork and that the sales representative of D was rushed. However, by the time Mr S and Mrs S entered into the Purchase Agreement, they had been to many sales presentations by D. So, I think they would have been very familiar with the sales practices it employed. And as I haven't seen enough evidence to persuade me that, in light of Mr and Mrs S experience to date, they didn't understand that they didn't have to say yes to the purchase or that they didn't understand they could walk away, I don't think they went ahead with the purchase simply because they felt like they had no choice but to – especially when they were provided with a 14 day cooling off period in which to reflect and, if necessary, withdraw from the Purchase Agreement and the loan.

Was the loan granted to Mr S irresponsibly?

Mr S says that Mitsubishi was in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan he took to pay for his and Mrs S Fractional membership.

When considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. The Estate of Mr S hasn't provided any evidence to demonstrate that was the case. I am not, therefore, persuaded that Mitsubishi were unreasonable to reject that element of Mr S and Mrs S's complaint.

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

The Lender didn't respond to my colleague's provisional decision.

The PR disagreed with my colleague's 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 were primarily concerned with the suggestion that Mr S Fractional Club membership had been marketed and sold as an investment in contravention of a prohibition on selling timeshares in that way. The PR also repeated its concerns about the pressure Mr S was put under by the Supplier at the Time of Sale and about the commercial (including commission) arrangements between the Supplier by the Lender – 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’*).

My ombudsman colleague was unable to issue a final decision on this complaint so it was passed to me. I issued a provisional decision explaining why, which said:

> I have reviewed all the evidence and submissions in this complaint. And I have reached the same conclusion as my colleague did in his provisional decision – that is, that I do not uphold this complaint. And I have reached that conclusion for broadly the same reasons.
>
> 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.
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> 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 S 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):
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> > *“…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]
>
> **Section 75 of the CCA: the Supplier’s misrepresentations at the Time of Sale**
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> While I recognise that the Estate of Mr S and the PR have concerns about the way

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

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 my colleague explained, 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

From the evidence I have seen, and for the same reasons explained by my colleague, I do not think the Lender is liable to pay the Estate of Mr S any compensation for a breach of contract by the Supplier.

In addition to this, the PR's suspicions about the existence of the Allocated Property and the Fractional Rights Mr S purchased do not make me think there has been a breach of contract by the Supplier. I understand that Mr S used his Fractional Rights to take holidays. And I have no compelling reason to think the Allocated Property will not be sold by the Trustee at the appropriate time and the sale proceeds distributed to the Fractional Owners as set out in the Fractional Club documentation. 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, in light of the PR's allegations of 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 S and the Lender was rendered unfair to him on the basis that membership had been misrepresented.

However, there are 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 S 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. Mr S was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

However, as neither the PR nor Mr S have submitted any new evidence to further the argument above, it is for the same reasons my colleague gave in his provisional decision that I don't think this renders 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 my colleague said in his 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. He acknowledged that it was possible that Fractional Club membership was marketed and sold to Mr S as an investment in breach of Regulation 14(3). A view I agree with and think still holds.

But my colleague also thought and I also 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.

The PR disagrees with that and cites the judgment of Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* in support – saying that she found that the selling of a timeshare as an investment (i.e. in a breach of Regulation 14(3) of the Timeshare Regulations) was, itself, sufficient to create an unfair credit relationship.

However, on my reading of *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice didn't find that a breach of Regulation14(3) of the Timeshare Regulations was *"causative of the legal relations entered into".* She recognised that such a breach was *"conduct that knocks away the central consumer protection safeguard"*, but she went on to say that it was the ombudsmen behind the two reviewed decisions who found that such a breach was, given the facts and circumstances of the relevant complaints, causative of the consumers in question purchasing their timeshares and taking out loans to do so.

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 as set out above in my colleague's provisional decision.

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr S 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 S 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 my colleague did in his provisional decision) what impact that breach (if there was one) had on the fairness of the credit relationship between Mr S and the Lender under the Credit Agreement and related Purchase Agreement.

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

I disagree with the PR, which says the Letter of Complaint did not set out Mr S's claim in detail, and this is why it did not mention Fractional Club membership being sold as an investment to Mr S or that this was an important and motivating factor in his decision to enter the Purchase Agreement. The PR says this was because one of our Ombudsman Leaders had written to the PR on 30 April 2018 setting out that we only required a completed complaint form to register a complaint – so a comprehensive information pack was not required. On this point, I note the following:

1. The Letter of Complaint is eight pages long and, in my opinion, sets out Mr S's points of complaint in some detail.
2. The Letter of Complaint is dated 5 February 2017. That is some considerable time prior to the Ombudsman Leader's letter of 30 April 2018. So, it is inconceivable that this influenced the Letter of Complaint in any way.
3. The Ombudsman Leader's letter, as I summarised above, advised the PR on what was required for the Financial Ombudsman Service to register a complaint – not what must be included in a letter of claim or complaint to a financial services provider.
4. When the PR referred Mr S's complaint to the Financial Ombudsman Service it provided a large amount of information alongside the complaint form, including:
    a. A covering letter, which raised some new points of complaint about undisclosed commission.
    b. The Letter of Complaint.
    c. A Letter of Authority.
    d. The Purchase Agreement.
    e. The Credit Agreement.
    f. The Lender's welcome letter.
    g. Bank statements.
    h. A purchase agreement and credit agreement from a previous purchase of a non-fractional timeshare from the Supplier in 2011.
    i. A purchase agreement and credit agreement from a previous purchase of a non-fractional timeshare from the Supplier in 2013.
    j. A credit card receipt from a previous timeshare purchase.
    k. The Lender's final response to the complaint.

I. A letter to the Lender requesting a copy of a document referred to in its final response to the complaint.

In light of this, I think it is fair to consider the Letter of Complaint to set out in detail all the reasons Mr S and the PR at that time felt the complaint should be upheld. While adding to those reasons when referring the complaint to the Financial Ombudsman Service, the PR again did not mention that Fractional Club membership was sold or marketed to Mr S as an investment or that this was an important and motivating factor in his decision to purchase. That is hard to understand if, as the PR now argues, it was important to Mr S at the Time of Sale and when making the complaint.

Given the timing of the Letter of Complaint and the Ombudsman Leader's letter, it is impossible for the latter to have informed or affected the content of the former. And it seems to me that the PR sent a comprehensive submission to the Financial Ombudsman Service, rather than just the complaint form, and this did not include Mr S's statement or anything that claimed or persuasively pointed to him having purchased Fractional Club membership at the Time of Sale because it was sold or marketed to him as an investment.

Regardless of when Mr S's statement was written (it is undated) or provided to the Financial Ombudsman Service, it nevertheless does not persuade me that Mr S purchased Fractional Club membership because it was marketed or sold to him as an investment. The reasons it gives for the purchase are:

> *"We originally bought more points (and became Platinum members) so that we could go on one of their cruise ships… and just use points only as we couldn't have afforded it otherwise."*

It goes on to say that:

> *"We were told that the Fractions we bought would provide us with a nest egg of a considerable [sum] after 15 years was up (2027/8) and we would be free of [the Supplier]. Also we could earn by putting in enough Wish to rent weeks in each year to pay our maintenance and earn some money…"*

This does not persuade me that Mr S was motivated by the hope or expectation of making a profit from the purchase. While he may have had some interest in getting some money back at the end of the membership term and earning some money from renting out his points, in my opinion this is not persuasive evidence of him purchasing in the hope or expectation of making a profit or that this was an important and motivating factor in his decision to purchase. Rather it seems to me that getting some money back or earning from renting out his points were additional benefits on top of what he was looking to get, which was primarily an additional 22,000 Fractional Points to spend on holidays.

On balance, therefore, for the reasons I've set out above, I don't think the credit relationship between Mr S 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

In his provisional decision, my colleague explained that the Lender paid no commission to the Supplier for arranging the Credit Agreement. And so, this did not render Mr S's relationship with the Lender unfair to him. However, the PR says its concerns went further than just the commission paid by the Lender to the Supplier

and included any commercial arrangements between them that Mr S was not made aware of. So, I deal with that below.

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

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

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

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

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

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

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

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

But I don't think *Hopcraft, Johnson and Wrench* assists Mr S in arguing that his credit relationship with the Lender was unfair to him for reasons relating to the commercial

(including commission) arrangements, given the facts and circumstances of this complaint.

I am not persuaded that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr S, 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 S into a credit agreement that cost disproportionately more than it otherwise could have.

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

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

I'm satisfied that 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 S but as the supplier of contractual rights that he obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to him when arranging the Credit Agreement and thus a fiduciary duty.

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

I am 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 findings above, 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 S under the Credit Agreement and related Purchase Agreement unfair for the purposes of Section 140A.

Conclusion

Having adopted my colleague's provisional findings, and reconsidered the facts and circumstances of this complaint, I don't think the Lender acted unfairly or

unreasonably when it dealt with Mr S's section 75 claims. And I'm not persuaded that the Lender was party to a credit relationship with Mr S 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 S.

The Lender didn't respond to my provisional decision.

The PR responded to say it disagreed. It withdrew its concerns about commission but in summary said:

1. The brevity of the Letter of Complaint, "*the absence of granular detail regarding the investment representations in the initial correspondence"*, and lack of a personal statement from Mr S when referring the complaint to the Financial Ombudsman Service was in strict adherence to guidance issued to the PR by an ombudsman leader in a letter dated 30 April 2018.

2. Mr S clearly says in his statement that he was promised a nest egg of a considerable sum, and this demonstrates the Fractional Club membership was *"presented as an investment holding future financial value"*.

3. The financial reality is that the product was so expensive when including the loan interest and annual management charges that no reasonable consumer would enter the transaction without the cast iron assurance of a substantial financial return at the end. It is irrational to suggest Mr S paid so much just to get holiday accommodation and cruises.

4. The Supplier only used a restricted panel of lenders which prevented Mr S from seeking competitive finance options.

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 rules[3] 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. In relation to the parts of the complaint that the PR has not provided any further comment on, I have no reason to depart from my provisional findings. So, I will focus here on the points the PR made in response to my provisional decision, as summarised above.

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

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 considering the evidence and/or arguments from both sides.

The PR's suggestion that the ombudsman leader's letter of 30 April 2018 somehow influenced its actions on making the complaint on 5 February 2017 and referring the complaint to the Financial Ombudsman Service on 20 April 2017 is illogical. The ombudsman leader's letter was sent to the PR sometime after those dates – a point I made in my provisional decision. And I remain of the opinion that that the PR sent a comprehensive submission to the Financial Ombudsman Service, rather than just the complaint form, and this did not include Mr S's statement or anything that claimed or persuasively pointed to him having purchased Fractional Club membership at the Time of Sale because it was sold or marketed to him as an investment.

Despite this, I analysed Mr S's statement in my provisional decision, and it did not persuade me I should uphold the complaint – regardless of when it was written or submitted to the Financial Ombudsman Service. The PR disagreed with my analysis and my conclusion that the statement is insufficient for me to conclude that Mr S was motivated by the hope or expectation of making a profit from the purchase and that getting some money back or earning from renting out his points were additional benefits on top of what he was looking to get, which was primarily an additional 22,000 Fractional Points to spend on holidays.

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 S 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.

The PR says no reasonable consumer would have entered the transaction without a guarantee of a financial return at the end. And that it is irrational to suggest Mr S paid so much just to get holiday accommodation and cruises. But my conclusion was based on Mr S's own statement, in which he said that:

> *"We originally bought more points (and became Platinum members) so that we could go on one of their cruise ships… and just use points only as we couldn't have afforded it otherwise."*

This was Mr S's own explanation of why he entered into the purchase in question. While another consumer may have viewed it differently, Mr S appears to have considered the transaction to be worthwhile primarily for the purpose of obtaining more points to spend on holidays.

The PR says that The Supplier only used a restricted panel of lenders which prevented Mr S from seeking competitive finance options. However, Mr S had purchased from the Supplier on multiple occasions previously, and had used various payment methods, including loans from various credit providers and payment in whole or in part via credit card. So, he knew he was not obliged to use a loan arranged by the Supplier. Mr S also signed documents at the time of sale specifically acknowledging that while the Supplier can recommend credit facilities to fund the purchase it is not independent. As I said in my provisional decision:

> *"I'm satisfied that 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 S but as the supplier of contractual rights that 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, I am not persuaded that more information about the relationship between the Lender and the Supplier would've led Mr S to make a different decision about funding the purchase. And I am not persuaded that he would've been prevented from looking for a different credit provider himself – had he wanted to do so.

Finally, I acknowledge that the PR has suspicions about the existence and future sale of the Allocated Property and Mr S's right to a share of the net sale proceeds of that sale. But the documents provided at the Time of Sale set out what Mr S purchased, including the rights he obtained and the Trustee's obligation to sell the Allocated Property and distribute the net sale proceeds. I have no compelling reason to doubt that the Trustee will carry out its duties as set out in the relevant documents. And I do not think that any further information or investigation is necessary for me to reach a fair and reasonable decision on this complaint.

In conclusion, having considered the PR's response to my provisional decision, I remain of the opinion that I should not uphold this complaint.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr S to accept or reject my decision before 18 May 2026.

Phillip Lai-Fang
Ombudsman