DRN-6312269

The complaint

Mrs C 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 her 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

Mrs C was a member of a timeshare provider (the 'Supplier') – having purchased a two products from it over time. But the product at the centre of this complaint is her membership of a timeshare that I'll call the 'Fractional Club' – which she bought on 6 August 2012 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 2,766 fractional points at a cost of £14,799 (the 'Purchase Agreement') after trading in her existing membership (which was also in the Fractional Club).

Fractional Club membership was asset backed – which meant it gave Mrs C 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 her membership term ends.

Mrs C paid for her Fractional Club membership by taking finance of £14,799 from the Lender (the 'Credit Agreement').

Mrs C – using a professional representative (the 'PR') – wrote to the Lender on 17 January 2020 (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 Mrs C's concerns as a complaint and issued its final response letter on 8 July 2020, 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.

Mrs C disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I issued my provisional decision on 9 April 2026. And, in summary, I made the following provisional findings (which form part of this final decision):

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

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

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction.

It appears that the provisions of the Limitation Act 1980 mean that Mrs C made her misrepresentation claim too late. The PR disagreed with this when responding to the Investigator's assessment. But given I can consider possible misrepresentations as a potential reason why Mrs C's relationship with the Lender was unfair to her, I have done so in the relevant section below.

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

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

The PR says, on Mrs C behalf, that because some of the Supplier's group companies have gone into administration the Purchase Agreement has been breached. But my understanding is that the Fractional Club is still running and members can receive the benefits set out in the contract, including using their Fractional Points to take holidays. And I have no compelling reason to conclude that the Allocated Property won't be sold and the sale proceeds distributed by the Trustee at the relevant time.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mrs C any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

The PR says, for instance, that:

1. Misrepresentation by the Supplier at the time of sale, who told Mrs C that:

    a. *"the product itself was of some substance"*, whereas the PR says it is *"worthless and has no merit"*

    b. *"the purchase would be an investment."*

2. The right checks weren't carried out before the Lender lent to Mrs C.

3. Mrs C was not given a choice of lenders.

4. Mrs C was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

5. Fractional Club membership was marketed and sold as investment in breach of a prohibition on doing so.

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

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material.

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier.

3. The commercial (including 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.

6. Where relevant, any existing unfairness from a related credit agreement.

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

Alleged misrepresentations

The product was of some substance

It appears Fractional Club membership is of some substance, given it can be used to take holidays and provides a right to a share in the net sale proceeds of the Allocated Property at the end of the membership term (among other benefits). So, if the Supplier did make this representation, I do not think it was untrue.

Fractional Club membership was an investment

Telling prospective members that Fractional Club membership was an investment was not untrue. After all, a share in the Allocated Property is, by its very nature, an investment given it is possible that it will be sold at a profit in the future. So, if the Supplier said this (which I make no finding on) I do not think it was a misrepresentation.

In summary, I do not think the Supplier misrepresented Fractional Club membership such that it created or contributed to an unfair relationship between Mrs C and the Lender.

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

While the PR says that the right affordability checks weren't carried out at the Time of Sale, even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mrs C was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship with the Lender was unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for the Mrs C.

Similarly, the PR has not explained how, if it were true, Mrs C not being offered a different lender to pay for Fractional Club membership caused her any unfairness or financial loss. Mrs C was aware of the interest rate, which was set out on the face of the Credit Agreement, as well as the term of the loan and the monthly repayments, so she understood what it was she was taking out. Further, I don't think the rate of interest was excessive, compared either to other rates available from other point-of-sale lenders or on the open market, so I can't say it would be fair or reasonable to tell the Lender to do anything because of this.

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

Overall, therefore, I don't think that Mrs C credit relationship with the Lender was rendered unfair to her 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 Fractional Club membership was marketed and sold to her as an investment in breach of prohibition against selling timeshares in that way.

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

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

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

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

But the PR says that the Supplier did exactly that at the Time of Sale.

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

A share in the Allocated Property clearly constituted an investment as it offered Mrs C the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs C 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs C, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mrs C 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.

Would the credit relationship between the Lender and Mrs C have been rendered unfair to her had there been a breach of Regulation 14(3) of the Timeshare Regulations?

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 Mrs C 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 Mrs C and the Lender that was unfair to her and

warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mrs C decided to go ahead with her purchase. I say this for the following reasons:

- The PR provided an unsigned and undated statement from Mrs C on 28 July 2023. This had not been provided previously to the Lender or the Financial Ombudsman Service. This was 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) ('*Shawbrook & BPF v FOS*') was handed down.

- In my experience, the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and/or influenced by discussion with others, I find it difficult to understand why the Financial Ombudsman Service was only given such evidence when it was – particularly given the PR said when referring the complaint to us on 18 August 2020 that it was providing *"our clients completed complaint form along with supporting evidence."* That suggests that all relevant evidence was provided at that time. And given that included the Letter of Complaint, Letter of Authority, Credit Agreement, Purchase Agreement, Pre-Contract Credit Information, Member's Declaration, Fractional Rights Certificate and over a dozen emails and letters between the Lender and the PR, I cannot understand why the statement was not provided at that time if it had already been written. And I do not accept that it was left out on the instruction of the Financial Ombudsman Service, as the PR has argued in other cases. Afterall, the letter from us that the PR referred to in those cases said we only required a completed Complaint Form to register a complaint – and the PR provided much more than that in this case.

- The statement describes the 2011 purchase as being one that must be held for 19 years, and that with the purchase at the Time of Sale this requirement no longer applied and she could sell at any time. But both purchases were of the original version of the Fractional Club. They worked the same way, in that the Allocated Property would be sold at the end of the membership term of approximately 19 years, but members could sell their membership privately in the interim if they could find a buyer. So, it appears that Mrs C's recollection of what happened at the Time of Sale is unlikely to be accurate. I do not think the Fractional Club membership would've been described in this way.
- While Mrs C alleges Fractional Club membership was described as an investment at the Time of Sale, because the Allocated Property would be more profitable due to its location, given the issues with her other recollections and the timing of the statement being provided, I do not find it sufficiently persuasive to conclude that her purchase was motivated by the hope or expectation of making a profit.

- I also note that Mrs C's actions in surrendering her membership to avoid paying future management charges is inconsistent with the idea that she purchased Fractional Club membership at the Time of Sale because she hoped or expected to make a profit. I say this because by surrendering her membership she was giving up any possibility of getting some money back, let alone of making a profit.

- The Letter of Complaint says that Mrs C was advised he could *"make a profit on the investment"* when referring to the purchase. But it also makes allegations that Mrs C has never mentioned herself, such as being told *"the package would enable them to make significant savings on everyday purchases. Over the length of the contract, Our Clients would save an amount in excess of the sum paid."* This was not a benefit of Fractional Club membership. It also says that the lending was unaffordable. So, it is not clear to me that the Letter of Complaint is based on Mrs C's recollections, rather than being a generic letter or template that has not been personalised to match Mrs C's circumstances. So, I do not think I can rely on the Letter of Complaint as being reliable evidence of what happened at the Time of Sale.

Overall, I am not persuaded that Mrs C's purchase was motivated by her share in the Allocated Property and the possibility of a profit. So, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision she ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs C's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I have no compelling reason to conclude that she would not have pressed ahead with her purchase regardless of whether there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs C and the Lender was unfair to her 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 Mrs C was not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that, because some of the terms of the Purchase Agreement weren't individually negotiated, they were unfair contract terms as were the terms governing the ongoing costs of membership and consequences of non-payment.

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

I acknowledge that it is also possible that the Supplier did not give Mrs C sufficient information, in good time, on the various charges she 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 Mrs C nor the PR have

persuaded me that she would not have pressed ahead with her purchase had the finer details of the Fractional Club's ongoing costs 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 fact and circumstances.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mrs C in practice, nor that any such terms led her to behave in a certain way to her 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 even if they could be said to be unfair contract terms, which I make no formal finding on.

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

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

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

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

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

2. The failure to disclose the commission.

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).

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 Mrs C in arguing that her credit relationship with the Lender was unfair to her for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mrs C, 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 Mrs C 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 think any such failure is itself a reason to find the credit relationship in question unfair to Mrs C.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mrs C entered into wasn't high. At £1,516.90, it was only 10.25% of the amount borrowed and even less than that (5.16%) as a proportion of the charge for credit. So, had she known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not persuaded that she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mrs C wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the impact of commission on the cost of the credit she needed for a timeshare she wanted doesn't strike me as disproportionate. So, I think she would still have taken out the loan to fund her purchase at the Time of Sale had the amount of commission been disclosed.

What's more, 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 Mrs C but as the supplier of contractual rights she 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 her when arranging the Credit Agreement and thus a fiduciary duty.

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

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

Commission: The Alternative Grounds of Complaint

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

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

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mrs C 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 her. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think she would still have taken out the loan to fund her purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Overall Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs C Section 75 claims. I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement and related Purchase Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate her.

So, in summary, I wasn't persuaded by any of the arguments put forward for why the credit relationship between Mrs C and the Lender was unfair to her under Section 140A of the CCA. And I couldn't see any other reason why it would be fair or reasonable to direct the

Lender to compensate Mrs C – all of which led me to provisionally conclude that there was no basis on which to uphold the complaint.

The Lender accepted my provisional decision.

The PR disagreed with my overall conclusion. In summary, the PR said:

- The PR does not think the Allocated Property will ever be sold and the sale proceeds distributed to the fractional owners, and the Supplier knew this at the Time of Sale.

- There was a charge or charges over the Allocated Property which meant the Trustee may have been forced to sell it to repay a debt instead of selling it at the end of the membership term for Mrs C's benefit.

- I was wrong to infer that the PR provided all supporting evidence on referral to the Financial Ombudsman Service. It pointed to a letter from an Ombudsman Leader in April 2018 to explain why Mrs C's statement was not provided then.

- A breach of Regulation 14(3) itself is enough to make the relationship between Mrs C and the Lender unfair to her.

- The overall cost of Fractional Club membership over its term means it was not a viable financial investment or a way to save on everyday purchases.

- The commercial arrangements between the Lender and the Supplier should be considered more broadly than just looking at the amount of commission.

- The lending was irresponsible, and the sale pressured with no alternative finance options offered, which all contributed to the relationship being unfair.

- Fractional Club membership being an investment was based on the following guarantees:

  (1) Mrs C was buying part ownership of a physical property;

  (2) Fractional Club membership was an investment;

  (3) The Allocated Property would be sold at the end of the term; and

  (4) Mrs C would receive a share of the net sales proceeds of sale when the Allocated Property is sold.

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

The legal and regulatory context

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So, there's no need for me to set this out again in detail here. I simply remind the parties that our rules[1] 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

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

(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.

Before I do, I want to make it clear that I recognise that this complaint, when originally made, was wide ranging and made on a number of different grounds - including:

(1) Misrepresentations by the Supplier at the Time of Sale giving Mrs C a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

(2) A breach of contract by the Supplier giving Mrs C a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

(3) The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

However, as the PR's more concise response to my provisional decision relates, in the main, to (3), if I haven't been provided with new arguments and/or evidence to consider in relation to (1) or (2), I see no reason to change or add to my conclusions (as set out in the summary of my provisional decision above) in relation to them.

Indeed, as I said in my provisional decision, my role as an Ombudsman is to decide what's fair and reasonable in the circumstances of this complaint – rather than address every single point that's been made. And with that being the case, while I have read all of the PR's submissions in full, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

The Supplier's alleged misrepresentations at the Time of Sale

It was argued by the PR, when this complaint was first made, that the Supplier misrepresented Fractional Club membership at the Time of the Sale. As I said in my provisional decision, Mrs C was out of time to make a claim for misrepresentation against the Supplier, so the Lender had a defence to such a claim under the provisions of the Limitation Act 1980. The PR disagreed with me on that point, but I considered the misrepresentations under the unfair relationship complaint anyway. So, I will consider the PR's further comments here, since they could contribute to there being an unfair relationship.

The original reasons for Mrs C's complaint about misrepresentations were addressed in my provisional decision. And I see no reason to change or add to those. But in in response to my provisional decision, the PR argues that Fractional Club membership wasn't worth enough to make Mrs C a profit and, as such, the following representations by the Supplier were essentially fraudulent:

(1) Mrs C was buying part ownership of a physical property;

(2) Fractional Club membership was an investment;

(3) The Allocated Property would be sold at the end of the term; and

(4) Mrs C would receive a share of the net sales proceeds of sale when the Allocated Property is sold.

The PR takes that view because it says the evidence suggests that the Lender hasn't provided any evidence that the Allocated Property exists or that it will sell in the future (making it unlikely that Mrs C will receive anything from her share in it) and, by the PR's own calculations, given the initial and ongoing costs of Fractional Club membership, it was never possible to make a profit from the sale of the Allocated Property.

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

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

Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue – nor was it untrue to tell prospective members that they would receive *some* money when the allocated property is sold.

After all, Mrs C's share in the Allocated Property clearly constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it.

But as the PR knows, while the term "investment" is not defined in the Timeshare Regulations, it was agreed by the parties in *Shawbrook & BPF v FOS* that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" (see paragraph 56). Yet none of the contractual paperwork made any promises that a profit might be made.

As I said in my provisional decision, the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's possible that Fractional Club membership was marketed and sold to Mrs C as an investment orally.

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

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

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

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

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

However, there are, of course, other reasons for 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 Mrs C and the Lender was likely to have been rendered unfair to her for the purposes of Section 140A. When coming to that conclusion, I have looked again at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;

3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;

4. The inherent probabilities of the sale given its circumstances; and, when relevant

5. Any existing unfairness from a related credit agreement.

I have also reconsidered any commercial (including commission) arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.

The PR continues to argue that:

1. The Lender's decision to lend to Mrs C was, in essence, irresponsible; and

2. Mrs C was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

3. Mrs C was not given a choice of lender or alternative finance.

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

Charge on the Allocated Property and whether it will be sold

The PR has provided a copy of a charge registered at Companies House in October 2024 which it says means the Trustee may have been forced to sell the Allocated Property to settle a debt. But I can see that the charge was not in place at the Time of Sale, the Allocated Property is not one of the apartments affected by the charge, and the charge has been satisfied. So, I cannot see that this charge is relevant to Mrs C's complaint.

The PR provided a copy of another charge created in February 2015. But this explicitly says that no real property was covered by the charge, which only applied to the share capital of two of the Trustee's companies. This charge was also not in place at the Time of Sale and has been satisfied. So, again, I cannot see that this is relevant to Mrs C's complaint.

Overall, I am not persuaded that there is reason to conclude the Trustee will not sell the Allocated Property and distribute the net sale proceeds as set out in the relevant Fractional Club documents.

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

As I said in my provisional decision, there is competing evidence in this complaint as to whether the Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations. I acknowledged that it was possible that Fractional Club membership was marketed and sold to Mrs C as an investment in breach of Regulation 14(3). A view I still hold.

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

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.

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 Mrs C and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her 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 Mrs C and the Lender unfair to her?

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

And on my re-reading of the evidence before me, I'm still not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mrs C decided to go ahead with their purchase, such that she would have made an entirely different purchasing decision had there not been a breach of Regulation 14(3). And I say that for the same reasons set out in my provisional decision. As I said there, the PR has not adequately explained why it did not provide Mrs C's statement when it referred the complaint to the Financial Ombudsman Service when it seems to have provided all the other evidence and documents it held at that time. And given this, alongside other issues with Mrs C's recollections, which I set out in my provisional decision, I still do not find it sufficiently persuasive to conclude that her purchase was motivated by the hope or expectation of making a profit.

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

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

I set out my thoughts in relation to the implications of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench* for this complaint in my provisional decision. I remain satisfied that the Lender has provided me with sufficient information to reach a conclusion about its commercial (including commission) arrangements with the Supplier. I've seen nothing in this case that leads me to think that the information in question is inaccurate. And while I recognise that the PR might disagree with the thoughts I shared in my provisional decision, 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 Mrs C under the Credit Agreement and related Purchase Agreement unfair for the purposes of Section 140A.

So, I remain of the view that the commercial (including commission) arrangements between the Lender and the Supplier do not provide a compelling reason for me to uphold this complaint.

Conclusion

Having adopted my provisional findings, and reconsidered the facts and circumstances of this complaint, I still I don't think the Lender acted unfairly or unreasonably when it dealt with Mrs C's section 75 claims. I'm still not persuaded that the Lender was party to a credit relationship with Mrs C that was unfair to her 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 Mrs C.

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 Mrs C to accept or reject my decision before 21 May 2026.

Phillip Lai-Fang
Ombudsman