DRN-4903383

The complaint

Mr F complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna 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 F was a member of a timeshare provider (the 'Supplier') – having purchased several products from it over time. But the products at the centre of this complaint are as follows:

- Time of Sale 1 – 11 July 2014 purchase of Fractional Club membership – 8,000 fractional points for £5,263 after trading in 8,000 European Collection points ('Purchase Agreement 1').

- Time of Sale 2 – 18 July 2016 purchase of European Collection membership – 6,000 European Collection points for £5,460 ('Purchase Agreement 2').

  (which, when appropriate, I'll simply refer to as the ''Purchase Agreements' and the 'Times of Sale')

Unlike European Collection membership, Fractional Club membership was asset backed – which meant it gave Mr F more than just holiday rights. It also included a share in the net sale proceeds of a property named on the relevant purchase agreement (which I'll refer to as the 'Allocated Property'.

Mr F paid for his fractional points by taking the following amounts of finance of from the Lender:

- £5,261 on 11 July 2014 ('Credit Agreement 1')

- £5,460 on 18 July 2016 ('Credit Agreement 2')

(which, when appropriate, I'll simply refer to as the ''Credit Agreements')

Mr F – using a professional representative (the 'PR') – wrote to the Lender on 28 February 2017 (the 'Letter of Complaint') to raise several 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 beyond the summary above.

The Lender dealt with Mr F's concerns as a complaint and issued its final response on 20 March 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 F disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

For Credit Agreement 1 – The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

For Credit Agreement 1 The OFT's Guidance for Credit Brokers and Intermediaries – 24 November 2011

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

For Credit Agreement 2 - The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

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

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

For Credit Agreement 2 - The FCA's Principles

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

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

Having done that, for broadly the same reasons as our Investigator, I have decided not to uphold this complaint.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

Section 75 of the CCA: the Supplier's misrepresentations at the Times 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") if there is an actionable misrepresentation and/or breach of contract by the supplier.

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

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Times of Sale because Mr F was told or led to believe by the Supplier that the timeshares purchased:

(1) Had a guaranteed end date when that was not true.

(2) Was the only way of releasing himself from his existing membership when that was not true.

(3) Was exclusive to him (and other members) when that was not true.

Purchase Agreement 2 was a standalone purchase, in that it did not affect Mr F's existing memberships – it was simply a purchase of European Collection points. So, point (2) is irrelevant to that sale.

As I understand it, the sale of the Allocated Properties could be postponed in certain circumstances according to the Fractional Club Rules. But Mr F says little to nothing to persuade me that he was given a guarantee by the Supplier that his share in the Allocated Property would be sold on a specific date when such a promise would have been impossible to stand by given the inevitable uncertainty of selling property some way into the future.

There isn't enough evidence on file to support the PR's allegation that Fractional Club membership had been misrepresented for reasons relating to points (2) and (3). So, I'm not persuaded that there were representations by the Supplier on the issues in question that constituted false statements of existing fact.

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

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 Mr F's behalf, that there was no guarantee the Allocated Property would be sold, and that this meant Purchase Agreement 1 was breached. But the PR is merely speculating about a potential future breach of contract. This allegation is irrelevant to Purchase Agreement 2.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr F 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 one or more unfair credit relationships?

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

The PR says, for instance, that:

1. The right checks weren't carried out before the Lender lent to Mr F.

2. Mr F was pressured by the Supplier into purchasing Fractional Club membership at the Times of Sale.

3. Fractional Club membership was marketed and sold as investment in breach of a prohibition on doing so (this allegation was not in the Letter of Complaint but first alluded to in Mr F's statement provided on 11 December 2023).

4. The Lender paid commission to the Supplier for arranging the Credit Agreements and either did not tell Mr F about it and/or did not obtain his informed consent for this.[1]

[1] I cover this in the below section entitled *"The provision of information by the Supplier at the Times of Sale"*.

However, having considered the entirety of the credit relationships between Mr F and the Lender along with all the circumstances of the complaint, I don't think the credit relationships between them were 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 Times of Sale along with any relevant training material.

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

3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.

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

5. The inherent probabilities of the sales given their circumstances.

6. When relevant, any existing unfairness from a related credit agreement.[2]

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

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

The PR says that the right affordability checks weren't carried out at the Times of Sale. But to uphold the complaint for this reason, 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 also have to be satisfied that the money lent to Mr F was actually unaffordable, that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr F on either occasion.

I acknowledge that Mr F may have felt weary after sales processes that went on for a long time. But he says little about what was said and/or done by the Supplier during the sales presentations that made him feel as if he had no choice but to enter the Purchase Agreements when he simply did not want to. Mr F was also given 14-day cooling off periods and he has not provided a credible explanation for why he did not cancel the memberships during those times. And with that being the case, there is insufficient evidence to demonstrate that Mr F made the decisions to enter the Purchase Agreements because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr F's credit relationships with the Lender were rendered unfair to him under Section 140A for any of the reasons above. But there are other reasons why the PR now says the credit relationships with the Lender were unfair to Mr F. And that's what I look at below.

<u>The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations[3] at Time of Sale 1</u>

A share in the Allocated Property clearly constituted an investment as it offered Mr F the

[2] There was no such credit agreement in this case.
[3] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

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

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

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

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

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

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr F as an investment in breach of Regulation 14(3).

However, whether 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 issue for the purposes of this decision.

Would Credit Relationship 1 have been rendered unfair to Mr F 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 Times of Sale 1, I now need to consider what impact such breaches had on the fairness of the credit relationship between Mr F and the Lender under Credit Agreement 1 and Purchase Agreement 1 (being a related agreement for the purposes of Section 140 of the CCA). This is because 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 credit relationships between Mr F and the Lender that were unfair to him and warranted relief as a result, it is important to consider whether the Supplier's breach of Regulation 14(3) led him to enter into Purchase Agreement 1 and Credit Agreement 1.

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 Mr F decided to go ahead with his purchase. I say this for the following reasons.

The Letter of Complaint does not allege that Fractional Club membership was sold as an investment (as defined above). While it uses the phrase "investing in" when referring to the Allocated Property, it gives the context that Mr F was told that when the Allocated Property was be sold, Mr F would not have to pay any more management fees, and Mr F would receive *"a share of the net sale proceeds"*. This is merely a description of how Fractional Club membership worked and does not suggest that Mr F was led to believe that he could profit from the purchase (that is, that what he would get back in the end could be more than he paid for it).

Indeed, the first time such an allegation was alluded to was in Mr F's statement provided on 11 December 2023. But this was over nine years after the sale took place. And 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. This confirmed it was open to an ombudsman to uphold a complaint like this if they are persuaded that a breach of Regulation 14(3) was material to a customer's decision to enter into a credit agreement.

Experience tells me that the more time that passes between a complaint and the event complained about, the more risk there is of recollections changing, being vague, inaccurate and/or influenced by discussion with others. In this case, I find it difficult to understand why the Financial Ombudsman Service was only given such evidence when it was, and why this was not mentioned in the Letter of Complaint nor provided to the Lender when the complaint was made. Particularly if I am being asked to accept that this was important to Mr F at the time he entered Purchase Agreement 1.

Indeed, as there isn't any other evidence on file to corroborate Mr F's recent evidence about his motivations, there seems to me to be a very real risk that Mr F's recollections were coloured by the judgment in *Shawbrook & BPF v FOS*. And with that being the case, I'm not persuaded that I can give Mr F's recent statement the weight necessary for me to find the credit relationship in question was unfair for reasons relating to a breach of Regulation 14(3).

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr F's decision enter Purchase Agreement 1 was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, the evidence is insufficient to persuade me that Mr F would not have pressed ahead with the 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 Mr F and the Lender under Credit Agreement 1 was unfair to him, even if the Supplier did breach Regulation 14(3).

There does not appear to be any evidence that European Collection membership was sold or marketed to Mr F as an investment at Time of Sale 2.

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

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

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')[4].

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

I haven't seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr F, nor have I seen anything that persuades me that the commission arrangements between them gave the Supplier a choice over the interest rate that led Mr F into a credit agreement that cost disproportionately more than it otherwise could have.

[4] See the Financial Conduct Authority Handbook.

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 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 Times of Sale, it is for the reasons set out below that I don't think any such failure is itself a reason to find the credit relationship in question unfair to Mr F.

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 Agreements that Mr F entered wasn't high.

For Credit Agreement 1, no commission was paid.

For Credit Agreement 2, at £218.40, it was only 4% of the amount borrowed and 5% as a proportion of the charge for credit. So, had Mr F known that the Supplier was going to be paid a flat rate of commission at that level, I'm not persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment before entering Credit Agreement 2. After all, Mr F wanted Fractional Club membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted doesn't strike me as disproportionate. So, I think he would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr F 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, 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 relationships unfair to Mr F.

Section 140A: Conclusion

Given all 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 relationships between Mr F and the Lender under the Credit Agreements and related Purchase Agreements were unfair to him. And I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Mr F's credit relationships with the Lender weren't unfair to him for reasons relating to the commission arrangements between the Lender and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding

complaints to Mr F's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

The first ground relates to whether 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 Mr F (i.e., secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Times of Sale insofar as it was relevant to disclosing the commission arrangements between them.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr F a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to him. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Times 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 Mr F would still have taken out the credit agreements to fund his purchases at the Times 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 Mr F's Section 75 claims. I am not persuaded that the Lender was party to credit relationships with him under the Credit Agreements and related Purchase Agreements that were 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 to direct the Lender to compensate him.

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 Mr F to accept or reject my decision before 16 January 2026.

Phillip Lai-Fang
Ombudsman