DRN-5517060

The complaint

Mr M's complaint is, in essence, that Mitsubishi HC Capital UK PLC (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under section 75 of the CCA.

Background to the complaint

Mr M and his wife ('Mrs M') purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 21 May 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,060 fractional points. After trading in their existing 910 points, they paid £3,821 for their upgrade (the 'Purchase Agreement'). This purchase increased their entitlement from one week to two weeks.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for their Fractional Club membership by taking finance of £19,461 from the Lender[1] in his sole name (the 'Credit Agreement'). This makes him the only eligible complainant under our rules. This loan consolidated an earlier loan which had financed their purchase of their original 910 points in 2018; that purchase and loan are the subject of a separate complaint.

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 14 January 2025 (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 M's concerns as a complaint and issued its final response letter on 21 January 2025, 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 M 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.

[1] Then trading as Hitachi Capital, but now as Novuna Personal Finance.

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

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, I do not think this complaint should be upheld.

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

Section 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. 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 Time of Sale because Mr M was told by the Supplier that Fractional Club membership was an "investment" when that was not true.

However, that does not strike me as a misrepresentation, even if it was said (which I make no formal finding on). 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, a share in an allocated property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give prospective members that interest, it did not change the fact that they acquired such an interest.

So, while I recognise that Mr M – 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 particular 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.

Mr M says that he could not holiday where and when he wanted to. That was framed, in the Letter of Complaint, as part of his complaint about misrepresentation. However, on my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mr M states that the availability of holidays was/is subject to demand. It also looks like he made use of his fractional points to holiday on a number of occasions. I accept that he may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr M 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?

Having considered the entirety of the credit relationship between Mr M 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. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
4. The inherent probabilities of the sales given their circumstances.

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

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

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

They include, for various reasons, the allegation that the Supplier misled Mr M and carried on unfair commercial practices under regulations 5 and 6 of the CPUT regulations.[2] However, as regulations 5 and 6 state, commercial practices only amount to misleading actions or omissions if, in addition to satisfying one or more of the specific matters set out in those provisions, they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. And as I haven't seen enough evidence to persuade me that, if there were any such actions or omissions at the Time of Sale (which I make no formal finding on), they led Mr M to make the purchasing decision he

[2] The Consumer Protection from Unfair Trading Regulations 2008.

did, I'm not persuaded that anything done or not done by the Supplier amounted to an unfair commercial practice for the purposes of those provisions.

The PR also alleges that the Supplier acted unfairly under regulation 7 Schedule 1 of the CPUT regulations. But given the limited evidence in this complaint, I am not persuaded that the Supplier did.

In addition, the PR also says that:

1. Mr M was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale;
2. the product was sold or marketed as an investment, contrary to a regulation;
3. there was one, or more, unfair contract terms in the Purchase Agreement.

However, as things currently stand, none of these strike me as reasons why this complaint should succeed.

Pressure

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

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

The Lender does not dispute, and I am satisfied, that Mr M'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 alleges that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr M was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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. I will use the same definition.

A share in the Allocated Property clearly constituted an investment as it offered Mr M the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But it is important to note at this stage that the fact that 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 M as an investment in breach of regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to him as an investment, i.e. told them or led him to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether 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 Mr M, 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 M as an investment in breach of regulation 14(3).

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

Was the credit relationship between the Lender and Mr M rendered unfair?

Having found that it was possible that the Supplier breached regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr M and the Lender under the Credit Agreement and related Purchase Agreement as the case law on section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of regulation 14(3) led to a credit relationship between Mr M and the Lender that was unfair to him and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement.

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 M decided to go ahead with his purchase. Mr and Mrs M have provided a lengthy and detailed joint witness statement in which they describe the 2018 and 2019 sales (I can take into account evidence of both sales). But they hardly mention investment in connection with the 2018 sale, and they don't mention it at all when describing the 2019 sale. That doesn't mean that it wasn't mentioned by the salesman, but it is a strong indication that it was not an important factor in Mr and Mrs M's decision to purchase. This is what they said:

> *"We went to their Tenerife resort and were talked into our third and final 'upgrade' this time improving the fractional property terms with the lure of more points and flexibility etc. I don't even remember the details but they kept us a very long time, the kids were tired with being left in the playgroup and now so far in we just thought if there's a slightly better deal or amendment let's do it."*

As I've said, this upgrade gave them an extra week of holiday.

That doesn't mean they weren't at all interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs M themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr M'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 think the evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of regulation 14(3). And for that reason, I do not think the credit relationship between Mr M 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

The PR says that Mr M 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 the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms.

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 Mr M sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr M nor the PR have persuaded me that they would not have pressed ahead with their 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 facts 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 Mr M in practice, nor that any such terms led him to behave in a certain way to his detriment. For example, the PR objects to a term which allows the Supplier to suspend or terminate a member's membership if they fail to pay their annual fees, but that has not happened to Mr M. 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.

Commission

The PR has argued on behalf of Mr M that the payment of commission made the financial arrangement unfair. The PR didn't give a level of commission at which it considered unfairness arose, but its arguments included the following:

- Despite requests, there had been no disclosure of the actual amount of commission paid by the Lender to the Supplier;
- per the Court of Appeal's judgment in *Johnson*[3], the percentage of commission should be based upon "*the sum borrowed"*;
- the amount of the annual percentage rate of interest ("APR") is key and was unusually high, substantially increasing the total charge for credit;
- commission paid by the Supplier to its self-employed sales representatives should also be disclosed and taken into account in the calculation used to determine unfairness.

My reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench* is that it sets out principles which can apply to credit brokers other than car dealer–credit brokers. So I've taken into account those principles when considering the allegations of undisclosed payments of commission in this complaint.

In *Hopcraft, Johnson and Wrench* the Supreme Court ruled that, in each of the three cases, commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or for 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 & others 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:

- 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";* [4]
- The failure to disclose the commission; and
- 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:

- The size of the commission as a proportion of the charge for credit;
- The way in which commission is calculated (a discretionary commission

[3] The PR's submission references the Court of Appeal judgment (*Johnson v FirstRand Bank Limited, Wrench v FirstRand Bank Limited and Hopcraft v Close Brothers* [2024] EWCA Civ 1106 *("Johnson"*)). The Supreme Court has since handed down its judgment clarifying the position in law.
[4] *Hopcraft, Johnson and Wrench* (paragraph 327).

arrangement, for example, may lead to higher interest rates);

- The characteristics of the consumer;
- 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
- Compliance with the regulatory rules.

After careful consideration, I don't think *Hopcraft, Johnson and Wrench* assists Mr M 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 the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr M. 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 M into a credit agreement that cost disproportionately more than it otherwise could have.

I recognise 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 him. But case law on section 140A makes clear that regulatory breaches do not automatically lead to an unfair credit relationship, and that such breaches and any consequences must be considered in the round rather than in a narrow or technical way.

With that being the case, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, I don't think any such failure is itself a reason to find the credit relationship in question unfair to Mr M. I say this for the following reasons.

In stark contrast to the facts in Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging Mr M's Credit Agreement wasn't high. At £778:44, it was only 4.00% of the amount borrowed and almost the same as that (4.02%) as a proportion of the total charge for credit, which is the calculation the Supreme Court used.

Had Mr M known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at this level, I'm not persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. 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. As it wasn't acting as an agent of Mr M but as the supplier of contractual rights he obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to him when arranging the Credit Agreement and thus a fiduciary duty.

I don't consider it necessary for me to take into account any commission the Supplier might have paid to its sales representatives, or that this should be disclosed or factored into any calculation used to determine unfairness. Even if any such arrangement was in place (and I

make no finding in this respect), its disclosure and/or payment would be further removed from any obligations the Supplier might have held, and even less likely to have an impact on Mr M's decision to enter into the Credit Agreement.

Overall, I don't agree 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 Mr M.

So, given all of the factors I've looked at both here and in my provisional decision, and having taken all of him into account, I'm still not persuaded that the credit relationship between Mr M and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: alternative grounds of complaint

Although the PR's submissions expressed the view that payment of commission made the financial arrangements unfair, I'm conscious that there might be some alternative grounds that could constitute separate and freestanding complaints to Mr M's allegation of an unfair credit relationship.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because the Supplier took a payment of commission from the Lender without telling Mr M (that is, secretly). But given that I'm not persuaded the Supplier – when acting as credit broker – owed Mr M a fiduciary duty, I can't see how I could properly uphold on this ground.

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 it and the Supplier. As I've said, it's possible that the Lender failed to follow the relevant regulatory guidance. But I don't think any such failure on the Lender's part leads to my awarding compensation to Mr M because, for the reasons I also set out above, I think Mr M would still have taken out the loan to fund his purchase at the Time of Sale had the commission arrangements been adequately disclosed at that time.

Conclusion

In conclusion, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with Mr M under the Credit Agreement that was unfair to him for the purposes of section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate him.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 20 March 2026.

Richard Wood
Ombudsman