DRN-5706275

The complaint

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

What happened

On 11 May 2012 ('Time of Sale 1'), Mr D purchased a timeshare from a third party (the 'Supplier'). He used a loan from the Lender ('Credit Agreement 1') to help pay for the timeshare before repaying Credit Agreement 1 in full on 2 May 2013. I will refer to this timeshare as 'Timeshare 1').

On 31 March 2013 ('Time of Sale 2'), Mr D traded in Timeshare 1 towards the purchase of another timeshare ('Timeshare 2'). He paid for this using a loan from another credit provider (not The Lender). Timeshare 2 is not the subject of this decision.

On 4 May 2014 ('Time of Sale 3'), Mr D traded in Timeshare 2 towards the purchase of another timeshare ('Timeshare 3'). He paid for this using a loan from the Lender (Credit Agreement 2').

Mr D – using a professional representative ('PR') – wrote to the Lender on 8 October 2021 (the 'Letter of Complaint') to complain about the following in relation to Credit Agreement 1 and Credit Agreement 2:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim under Section 75 of the CCA.

2. The Lender's participation in an unfair credit relationship under the Credit Agreement and related timeshare agreement for the purposes of Section 140A of the CCA.

<u>Mr D's Section 75 Complaint</u>

Mr D says that the Supplier made misrepresentations at the Time of Sale – namely that:

1. He was told he had purchased an investment, and his timeshare would considerably appreciate in value.

2. He was told that he would have a share of a property and its value would considerably increase.

3. He was told that he could sell the timeshare back to the resort or easily sell it at a profit.

4. He was made to believe that he would have *"access to the holiday's apartments at any time all around the year"*.

Mr D's Section 140A Complaint

The Letter of Complaint set out several reasons for why Mr D says the credit relationship between him and the Lender was unfair to him. It isn't practical or necessary to set out those reasons in detail here. But in summary, they include the following:

1. The misrepresentations set out under the Section 75 Complaint above.

2. Fractional Club membership was marketed and sold to Mr D as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

3. The Lender didn't undertake proper checks to ensure the lending was affordable for Mr D.

4. The Spanish Courts have ruled the contracts for Timeshare 1 and Timeshare 3 to be null and void.

5. There are unfair terms in the timeshare contracts.

6. The credit intermediary that arranged Credit Agreement 1 and Credit Agreement 2 was not authorised to do so by the relevant UK authority (The Office of Fair Trading and the Financial Conduct Authority respectively).

7. The Supplier is in liquidation, so Mr D will not be able to recover the amounts awarded by the Spanish Court.

The Lender's response to the complaint

The Lender issued a final response rejecting the complaint on 18 November 2021. It said the Section 75 Claim was made outside the time limits set out in the Limitation Act 1980 (the 'Limitation Act'). It rejected the unfair relationship claim on its merits.

Referral to the Financial Ombudsman Service

The PR referred the complaint to the Financial Ombudsman Service on behalf of Mr D on 6 January 2022.

Our Investigator was unable to resolve the complaint informally, and so the complaint was passed to me to review afresh and make a decision.

I issued a decision explaining that:

Jurisdiction decision

- Mr D's complaint that the credit relationship with the Lender under Credit Relationship 1 was unfair to him is outside of the jurisdiction of the Financial Ombudsman Service (the complaint was made too late).

- Mr D's complaint that the credit relationship with the Lender under Credit Relationship 2 was unfair to him is within the jurisdiction of the Financial Ombudsman Service.

- Mr D's complaints about claims made under Section 75 in relation to Credit Agreement 1 and Credit Agreement 2 are within the jurisdiction of the Financial Ombudsman Service.

Provisional decision on the merits of the complaint

I provisionally did not uphold Mr D's complaints about:

- A credit relationship with the Lender under Credit Relationship 2 was unfair to Mr D.

- The Lender's refusal to pay claims made under Section 75 of the CCA in relation to Credit Agreement 1 and Credit Agreement 2.

I later sent an email to the Lender and the PR explaining my provisional findings on commission, which were that the commission arrangements between the Lender and Supplier did not create an unfair relationship between the Lender and Mr D or provide any other reason to uphold the complaint.

The PR disagreed with my provisional decision and provided some comments it wanted me to consider when making my final decision, but it did not respond to my email about commission.

The Lender did not respond to either my provisional decision or the email about commission.

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.

Following the responses from both parties, I've considered the case afresh. Having done so, I've reached the same decision as that which I outlined in my provisional findings – and for broadly the same reasons. A copy of my provisional findings is below. As such, I do not uphold this complaint.

START OF COPY OF PROVISIONAL FINDINGS[1]

Credit Agreement 2: Section 140A complaint

I've decided not to uphold Mr D's Section 140 complaint about Credit Agreement 2.

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 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.

[1] My provisional findings have been amended here to refer to Mr D only, rather than Mr and Mrs D, since Mr D took out the credit agreements and therefore only he can complain about them.

Mr D's allegations about why the relationship was unfair

Mr D alleges his relationship with the Lender is unfair for the following reasons:

1. The following misrepresentations of the Supplier:
    a. Mr D was told **he** had purchased an investment**,** and his timeshare would considerably appreciate in value.

    b. He was told that he would have a share of a property and its value would considerably increase.

    c. He was told that he could sell the timeshare back to the resort or easily sell it at a profit.

    d. He was made to believe that **he** would have *"access to the holiday's apartments at any time all around the year"*.

2. Timeshare 3 was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

3. The Lender didn't undertake proper checks to ensure the lending was affordable for Mr D.

4. The Spanish Courts have ruled the contract for Timeshare 3 to be null and void.
5. There are unfair terms in the timeshare contracts.

6. The credit intermediary that arranged Credit Agreement 2 was not authorised to do so by the relevant UK authority (The Office of Fair Trading and the Financial Conduct Authority respectively).

7. The Supplier is in liquidation, so Mr D will not be able to recover the amounts awarded by the Spanish Court.

I have considered the entirety of the credit relationship between Mr D and the Lender along with all of the circumstances of the complaint and I do not 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 Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale.

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

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

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

5. The inherent probabilities of the sale given its circumstances.

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

Alleged misrepresentations

Misrepresentations by the Supplier could lead to unfairness in the credit relationship between Mr D and the Lender. So, below I consider the Mr D's alleged misrepresentations, being:

> 1. Mr D was told he had purchased an investment, and his timeshare would considerably appreciate in value.
>
> 2. He was told that he would have a share of a property and its value would considerably increase.
>
> 3. He was told that he could sell the timeshare back to the resort or easily sell it at a profit.
>
> 4. He was made to believe that he would have *"access to the holiday's apartments at any time all around the year"*.

Neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (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. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than an honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representatives said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's possible that Fractional Club membership was misrepresented at the Time of Sale for one or both of those reasons, I don't think it's probable. Mr D's allegations are given little to none of the colour or context necessary to demonstrate that the Supplier made false statements of existing fact and/or opinion. For example, these alleged misrepresentations are not mentioned in Mr D's witness statement. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I don't think it was.

Allegation: Fractional Club membership was marketed and sold to Mr D as an investment in breach of regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr D'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 membership of the Fractional Club 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 PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term *"investment"* is not defined in the Timeshare Regulations. In *Shawbrook & BPF v*

FOS[2], the parties agreed 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"* at [56]. I will use the same definition.

Mr D's share in the Allocated Property, in my view, could be considered an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it.

But 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 Timeshare 3 was marketed or sold to Mr D 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 Mr D or led him to believe that Timeshare 3 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 Timeshare 3 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 D, 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr D as an investment. So, it's possible that Timeshare 3 wasn't marketed or sold to him as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that 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 equally possible that Timeshare 3 was marketed and sold to Mr D 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, because there is insufficient evidence to make me think that, on the balance of probabilities, if the Supplier did breach Regulation 14(3) at Time of Sale 2, this was material to Mr D's decision to purchase Timeshare 3. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

As the Supreme Court's judgment in Plevin[3] makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a

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[2] Shawbrook Bank Ltd, R (On the Application Of) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (Admin) (05 May 2023)

[3] Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 (12 November 2014)

narrow or technical way.

And in light of what the courts had to say in Carney[4] and Kerrigan[5], it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr D and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) – if there was one – led him to enter into Timeshare 3 and Credit Agreement 2 is an important consideration.

While Mr D's witness statement does say that all the timeshare sales presentations *"took the same format"*, but it does not explicitly say that Timeshare 3 was sold to Mr D as an investment. Nor does it say how this was described as an investment. Nor does it say that this was material to Mr D's decision to purchase Timeshare 3.

I am aware that between the sale of Timeshare 1 and Timeshare 3, the Supplier's sales process did change. Specifically, the presentation given to prospective customers (or those interested in trading in and upgrading their membership) was different. So, for Mr D's witness statement to be sufficiently persuasive for me to uphold this complaint, I think it would need to go further than simply describing the sale of Timeshare 1 and suggesting the same thing happened during the sale of Timeshare 3 as well.

But most importantly to my decision, the only reason Mr D give in his witness statement for why Timeshare 3 was attractive to him was because of what he described as the *"excessive cost of booking fees"* he had to pay under Timeshare 2. Timeshare 3 was a newer version of the Fractional Club, which did not require members to pay booking fees. And it appears from the witness statement that this is why Mr D decided to make the purchase, rather than anything the Supplier might have said about Timeshare 3 being an investment.

On balance, therefore, even if the Supplier marketed or sold Timeshare 3 as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr D's decision to purchase Timeshare 3 at Time of Sale 3 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 the purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think this allegation is made out or that any breach of Regulation 14(3) by the Supplier at Time of Sale 3 contributed to any unfairness in Mr D's relationship with the Lender.

Allegation: The Lender didn't undertake proper checks to ensure the lending was affordable for Mr D

The PR says that the right checks weren't carried out before the Lender lent to Mr D. I haven't seen anything to persuade me that was the case in this complaint given its circumstances.

But 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 Mr D was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. From the information provided, I am not satisfied that the lending was unaffordable for the Mr D.

[4] Carney v NM Rothschild & Sons Ltd [2018] EWHC 958
[5] Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)

Allegation: The Spanish Courts have ruled the contract for Timeshare 3 to be null and void

The PR argues that, because the purchase agreement for Timeshare 3 was unlawful under Spanish law, I should treat that agreement and Credit Agreement 2 as rescinded by Mr D and award him compensation accordingly – in keeping with the judgment of the UK's Supreme Court in Durkin v DSG Retail [2014] UKSC 21 ('Durkin').

However, the Purchase Agreement appears to be governed by English law. So, it isn't clear to me that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in Diamond Resorts Europe and Others (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract was governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.

What's more, as Mr D have gone some way to taking advantage of the Purchase and Credit Agreements, an English court might hesitate to uphold a claim for rescission of either Agreement because there are equitable reasons to do so.

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, I'm not persuaded that it would be fair or reasonable to uphold this complaint for this reason.

Allegation: The Supplier is in liquidation, so Mr D will not be able to recover the amounts awarded by the Spanish Court

As mentioned above, it is not clear that the Spanish Courts would have jurisdiction over the Timeshare 3 contract. The contract states that it is "subject to the exclusive jurisdiction of the English courts".

In addition, my understanding is that the Fractional Club is still in existence, and its members can still use their fractional points to take holidays and will receive their share in the net sale proceeds of their allocated property at the end of their membership term. So, it is not clear that the Supplier being in liquidation would cause Mr D's credit relationship with the Lender to be unfair to him, given he could still use Timeshare 3 (assuming he has not surrendered it).

Allegation: There are unfair terms in the timeshare contracts

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr D in practice, nor that any such terms led him to behave in a certain way to his detriment, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to any unfairness in the credit relationship.

Allegation: The credit intermediary that arranged Credit Agreement 1 and Credit Agreement 2 was not authorised to do so by the relevant UK authority (The Office of Fair Trading and the Financial Conduct Authority respectively)

The PR says that Credit Agreement 1 and Credit Agreement 2 were arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the credit agreements.

However, it looks to me like Mr D knew, amongst other things, how much he was borrowing and repaying each month, who he was borrowing from and that he was borrowing money to pay for Fractional Club memberships.

So, even if the credit agreements were arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mr D experiencing a financial loss – such that I can say that it would be fair or reasonable to tell the Lender to compensate him, even if the loan wasn't arranged properly.

Credit Agreement 1 and Credit Agreement 2: Mr D's Section 75 Complaints

As I've already indicated, I don't think it would be fair or reasonable to uphold this complaint for reasons relating to Mr D's Section 75 claims. As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Mr D's Section 75 claim was time-barred under the Limitation Act before he put it to the Lender.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the Limitation Act).

But a claim, like the one in question here, under Section 75 is also 'an action to recover any sum by virtue of any enactment' under Section 9 of the Limitation Act. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the 11 May 2012 for Credit Agreement 1, and 4 May 2014 for Credit Agreement 2. I say this because Mr D entered into the purchase of his timeshares at those times based on the alleged misrepresentations of the Supplier – which he says he relied on. And as the loans from the Lender were used to help finance the purchases, it was when Mr D entered into the credit agreements that he suffered a loss.

Mr D first notified the Lender of his Section 75 claims on 11 October 2021. And as more than six years had passed between 11 May 2012, 4 May 2014 and when Mr D first put his claim to the Lender, I don't think it was unfair or unreasonable of the Lender to reject Mr D's concerns about the Supplier's alleged misrepresentations.

Mr D's concerns about undisclosed commission

When responding to my previous decision, Mr D's professional representative (the 'PR') raised concerns about undisclosed commission paid by the Lender to the Supplier for arranging the loans.

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 ('*Johnson, Wrench and Hopcraft*').

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

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

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

2. The failure to disclose the commission; and

3. The concealment of the commercial tie between the car dealer and the lender.

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

1. The size of the commission as a proportion of the charge for credit;

2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);

3. The characteristics of the consumer;

4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and

5. Compliance with the regulatory rules.

From my reading of the Supreme Court's judgment in Johnson, Wrench and Hopcraft, 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, Johnson, Wrench and Hopcraft is relevant law that I'm required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules ('DISP') when making a decision on this complaint.

<u>Credit Agreement 1 – sale date 11 May 2012</u>

As you know from my previous decision, I am unable to consider concerns about undisclosed commission in terms of Mr D's allegations of the Lender being party to an unfair relationship with him under Section 140A of the Consumer Credit Act – since this complaint was made too late under the relevant rules.

However, it is possible that the commission complaint could be considered in a broader sense – the first relating to whether the Lender is liable for the dishonest assistance of a

breach of fiduciary duty by the timeshare provider (the 'Supplier') because it took a payment of commission from the Lender without telling Mr D (i.e., secretly). And the second relating 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.

The following regulatory rules/guidance are relevant to this:

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

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

I am not persuaded that the Supplier – when acting as credit broker – owed Mr D a fiduciary duty. In the Supreme Court judgment in the cases of Johnson Wrench and Hopcraft it was 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.

So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to Mr D. 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.

The amount of commission paid by the Lender to the Supplier for arranging Credit Agreement 1 wasn't high. At £1,445.15, it was only 10.25% of the amount borrowed and even less than that (5.6%) as a proportion of the charge for credit. So, had he 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 he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr D 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.

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

Credit Agreement 2 – sale date 4 May 2014

The following regulatory rules/guidance are relevant:

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

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

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

The FCA's Principles

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

- Principle 6
- Principle 7
- Principle 8

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

Mr D 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.

But I don't think Johnson, Wrench and Hopcraft assists Mr D 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'm not persuaded that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr D, nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mr D 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 Mr D.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging Credit Agreement 2 wasn't high. At £648.08, it was only 9.7% of the amount borrowed and even less than that (5.3%) as a proportion of the charge for credit. So, had Mr D 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 he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr D 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, 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 D 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 relationship unfair to Mr D.

The Alternative Grounds of Complaint

While I've found that Mr D credit relationship with the Lender wasn't unfair to him 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 Mr D'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 D (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 Mr D 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 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 he would still have taken out the loan to fund his purchase at the Time of Sale had there been more

adequate disclosure of the commission arrangements that applied at that time.

END OF COPY OF PROVISIONAL FINDINGS

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the provisional decision largely relate to the issue of whether the credit relationship between Mr D and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr D as an investment at the Time of Sale.

As outlined in my provisional decision, the PR originally raised various other points of complaint, all of which I addressed at that time. But the PR didn't make any further comments in relation to those in its response to my provisional decision. Indeed, the PR hasn't said it disagrees with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my provisional decision. So, I'll focus here on the PR's points raised in response.

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

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

As I explained in my provisional decision, Mr D's witness statement does not explicitly say that Timeshare 3 was sold to him as an investment, how this was described as an investment nor that this was material to Mr D's decision to purchase Timeshare 3. Given the sales process had changed from the time of Mr D's earlier purchases, I did not think it was sufficiently plausible and persuasive for Mr D to describe the sale of Timeshare 1 and suggest the same thing happened during the sale of Timeshare 3 as well. So, I wasn't persuaded that the evidence suggested that Mr D purchased Timeshare 3 in whole or in part down to any breach of Regulation 14(3).

And as I already said in my provisional decision, it seems from what Mr D has had to say that he was persuaded to purchase due to because of what he described as the *"excessive cost of booking fees"* under Timeshare 2, which would not be payable under Timeshare 3.

So, ultimately, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr D's purchasing decision.

The PR also said that in the judgment handed down in *Shawbrook & BPF v FOS*, it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my provisional decision, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold. And the judgment referred to did not make a blanket finding that all such products were mis-sold in the way the PR appears to be suggesting. Any complaint needs to be considered in the

light of its specific circumstances.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr D's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr D and the Lender was unfair to him for this reason.

Spanish Court Judgement

The PR has asked us to determine the rights and obligations of the Lender based on the outcome of a court case in Spain. In my provisional decision, I said that in the absence of a judgment in an English jurisdiction on this issue, I was not persuaded it was fair and reasonable to conclude the loan agreement was able to be set aside. I remain of this view for the following reasons:

- The Lender wasn't a party to the proceedings the PR has referred to, so its' rights under the Credit Agreement 2 have not been determined.

- I still think that the purchase agreement for Timeshare 3 is governed by English law for the reason already set out in my provisional decision. The PR has pointed to a different decision of the European Court of Justice that points the other way. But in the absence of any authorities under English law, I'm still not persuaded that:

    - The Purchase Agreement, properly governed by English law, could be avoided following the Spanish Judgment to which the PR refers.

    - The Credit Agreement was also something that could be successfully avoided.

- Lastly, in any event, the PR has not provided any arguments as to why the relevant agreements could be set aside given Mr C's use of the membership.

So again, I'm still not persuaded that it would be fair or reasonable to uphold the complaint for this reason.

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 D's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with him under the credit 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 Mr D.

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 D to accept or reject my decision before 13 April 2026.

Phillip Lai-Fang

Ombudsman