

The complaint

Mr A complains that Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance¹ (the 'Lender') is liable to pay him compensation following a complaint made about a timeshare bought using credit provided by it.

The timeshare in question was bought in the joint names of Mr and Mrs A. However, as the credit agreement used to make the purchase was in Mr A's name only, he is the only eligible complainant here, but I will refer to both Mr and Mrs A where it is appropriate to do so.

What happened

Mr and Mrs A were existing members of a points-based timeshare from a timeshare provider (the 'Supplier').

On 25 February 2013 (the 'Time of Sale 1') Mr and Mrs A traded in their existing timeshare towards the purchase of a new membership (the 'Fractional Club 1') purchasing 1,888 fractional points for £27,699. But after the trade-in value given to their existing points, they ended up paying £7,656 for their Fractional Club 1 membership.

Mr A paid for their Fractional Club 1 membership by taking finance of £7,656 from the Lender in his sole name (the 'Credit Agreement 1'). The balance of this loan was cleared by Mr A on 30 September 2013.

On 15 July 2014 (the 'Time of Sale 2') Mr and Mrs A traded in Fractional Club 1 towards the purchase of 2,110 fractional points (the 'Fractional Club 2') which cost £29,471 (the 'Purchase Agreement'). But after the trade-in value, they ended up paying £4,927.

Mr A paid for their Fractional Club 2 membership by taking finance from the Lender for £4,927 in his sole name (the 'Credit Agreement 2'). The balance of this loan was cleared by Mr A on 29 June 2015.

Fractional Club membership was asset-backed, which meant it gave Mr and Mrs A more than just holiday rights². It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr A engaged a professional representative (the 'PR') and on 26 November 2018, the PR wrote a letter of complaint (the 'LOC') addressed to the Lender. I have seen a copy of this letter, and it makes the following complaints:

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

¹ At the time the lender was trading as Hitachi Personal Finance.

² Upon trading in Fractional Club 1, Mr and Mrs A no longer had any rights connected to the sale of the allocated property associated with that membership.

2. The Lender being party to unfair credit relationships under the Credit Agreement(s) and related Purchase Agreement(s) for the purposes of Section 140A of the CCA.
3. A breach of fiduciary duty by the Lender, as the payment of commission by it to the Supplier was not disclosed to Mr and Mrs A.

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

Mr A says that the Supplier made a number of pre-contractual misrepresentations at both of the Time(s) of Sale – namely that the Supplier:

- Told them that Fractional Club membership involved investing in a fraction of a property, when that was not true.
- Told them that their previous points-based timeshare was held in perpetuity, and Fractional Club³ was a way out of the agreement. This is untrue as there is no guaranteed exit and no guaranteed sale date.
- Told them that Fractional Club 1 and 2 were investments that would increase in value, that the property would be sold and they would receive back the cost of the product plus a profit. This cannot be guaranteed and so is untrue.
- Told them that Fractional Club would provide excellent availability of holidays in exclusive resorts and a high standard of accommodation. This is untrue.

Mr A says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr A.

2) Section 140A of the CCA: The Lender's participation in an unfair credit relationship

The LOC set out several reasons why Mr A says that the credit relationships between him and the Lender were unfair to him under Section 140A of the CCA. In summary, they include the following:

- They were pressured into purchasing both Fractional Club memberships and into taking the Credit Agreement(s) by the Supplier.
- The decisions to lend were irresponsible because the Lender didn't carry out the right creditworthiness assessments, and no alternative finance options were discussed.

3) The Lender's breach of its fiduciary duty

Mr A says that it was not disclosed to him that the Lender would pay commission to the Supplier as a result of it brokering the Credit Agreement(s), and this was a breach of the Lender's fiduciary duty.

As I will go into further later in this decision, the Lender did not respond to this LOC.

On 13 March 2023, the PR referred Mr A's complaint to the Financial Ombudsman Service. An Investigator at this Service asked the Lender to submit its response to the complaint, and it sent its final response letter on 19 April 2023, rejecting it on all counts. It said it had a defence under the Limitation Act 1980 (the 'LA') to the claims under Section 75 and complaints under Section 140A of the CCA.

³ This complaint can only relate to the purchase of Fractional Club 1

The Investigator thought that the LOC had most likely been sent to the Lender when it was dated, so didn't agree that the complaint had been made more than six years after the events complained about. As such she didn't think that the Lender was right to say it had a defence under the LA. And having considered the merits of the complaints regarding the Time(s) of Sale, she thought the complaint about Time of Sale 1 should be upheld. She thought the Supplier had probably breached Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), and the impact of that breach meant the associated credit relationship between Mr A and the Lender was rendered unfair to him under Section 140A of the CCA.

The Lender did not agree, and said it had never received the LOC. The PR, on Mr A's behalf also did not agree that the complaint about Time of Sale 2 should not be upheld. As no agreement could be reached, both sides asked for an Ombudsman's decision.

As part of a wider review of complaints which were awaiting allocation to an Ombudsman, a second Investigator considered everything that had been submitted. The second Investigator asked the PR if it had any evidence to show that the LOC had been sent by it to the Lender. In response the PR provided a screenshot of its systems which showed the letter had been created at 16:36hrs on 27 November 2018 and said it would have been printed and sent via 1st class post following its standard postal process.

The second Investigator then set out that he didn't think this Service had jurisdiction to consider either of the complaints of unfair credit relationships under Section 140A of the CCA relating to Credit Agreement 1 and 2. This was because he thought that the complaints had been made too late under the rules by which we must operate (DISP 2.8.2) because the PR was unable to show that it had made the complaint within six years of the events complained about, and it didn't have a written acknowledgement or some other record of the complaint having been received as required by DISP 2.8.2.

But as regards the alleged misrepresentations by the Supplier at the Time(s) of Sale, and Mr A's complaint regarding how the Lender had dealt with his Section 75 claims, the Investigator thought this had been made in time so could be considered. But having done so, he didn't think it should be upheld. He thought that the Lender had not been unfair or unreasonable in its reliance on the LA to reject his claims.

So overall, the second Investigator didn't think the Lender needed to do anything further in respect of Mr A's complaints.

The PR, on Mr A's behalf, did not agree, so the matter came to me for a decision.

Having considered everything that had been submitted, I set out in a separate decision that Mr A's complaint of unfair credit relationships with the Lender under Section 140A of the CCA had been made too late. I thought that although the PR said it has sent the LOC to the Lender in September 2018, it had received no acknowledgement, nor any evidence that it had been received by the Lender. So, the referral of Mr A's complaint to the Financial Ombudsman Service was more than six years after the event they were complaining about, and more than three years after they were aware, or ought reasonably to have been aware they had cause to complain, and there were no exceptional circumstances to take into account when considering the delay.

The provisional decision (the 'PD')

It is not in dispute that our Service has jurisdiction to consider Mr A's complaints about the Lender's handling of his claims under Section 75 of the CCA, along with his complaint about

the Lender's alleged breach of its fiduciary duty. So, I considered the merits of those complaints, and sent both parties my initial thoughts in a PD. I said:

"Mr A's claim of misrepresentation by the Supplier"

As set out above, Mr A alleges that the Supplier made a number of misrepresentations at the Time(s) of Sale, and he and Mrs A were induced into their purchase of the Fractional Club memberships due to these misrepresentations. As such, they made claims to the Lender under Section 75 of the CCA, which it rejected. Mr A's complaint to this Service is about how the Lender handled his claims.

The LA imposes time limits for people to start legal proceedings – and there are different time limits for different types of claims. Essentially, this means that if someone waits too long to make a claim, the court will usually say it's 'time-barred'. For this reason, if a consumer makes a claim after the relevant time-limit has expired, we'd usually say it was fair for the creditor to rely on the LA to decline the claim.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim a consumer could make against the Supplier. The limitation period to make such a claim against the Lender for alleged misrepresentations by the Supplier expires six years from the date on which Mr A had everything he needed to make such a claim.

As the LOC to the Lender makes clear, Mr and Mrs A entered into the purchase of the timeshares on 25 February 2013 and 15 July 2014 based on the alleged misrepresentations of the Supplier, which they say they relied on. And as the credit agreements from the Lender were used to finance the purchases, it was when Mr A entered into the Credit Agreement(s) that he suffered a loss – which means it was at that time that he had everything he needed to make a claim.

As set out above, although the PR says it sent a LOC to the Lender in September 2018 which included Mr A's claim for alleged misrepresentations by the Supplier, there is no evidence to say this was received. It appears that the first notification that the Lender had of the claim was when the LOC was forwarded on to it by this Service after the complaint was referred to us by the PR in March 2023. As that was more than 6 years after Mr A entered into the Credit Agreement(s) and related timeshare agreements, I don't think it was unfair or unreasonable of the Lender to reject Mr A's concerns about the Supplier's alleged misrepresentations.

As such, given the facts and circumstances of this complaint, I don't think there's anything more that the Lender needs to do to put things right in respect of Mr A's Section 75 claims.

Mr A's complaint of a breach of fiduciary duty

As set out above, one of Mr A's other concerns about the sales of Fractional Club 1 and 2 membership relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreement(s). Mr A has said the non-disclosure of these alleged commission payments was a breach of Shawbrook's fiduciary duty.

The Court of Appeal's recent judgment in Johnson and Wrench -v- FirstRand Bank, and Hopcroft -v- Close Brothers [2024] EWCA Civ 1282 ('Johnson, Wrench and Hopcroft') sought to clarify the law on secret and partially disclosed commission – albeit in the context of car dealers acting as credit brokers. In my view, the Court of Appeal's judgment sets out principles which appear capable of applying to credit brokers other than car dealer-credit brokers. But as it was recently appealed to the Supreme Court, whose judgment is still

pending, I don't intend on finalising my thoughts on this complaint until it is handed down and its implications on this complaint, if there are any, can be considered.

Conclusion

In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mr A in this regard.

But, as I've already suggested, the Supreme Court's pending judgment on Johnson, Wrench and Hopcroft may prove important to this complaint. And with that being the case, it is necessary to wait and consider the possible implications of that judgment before finalising my thoughts on the merits of this complaint."

Further correspondence

Having considered the remaining complaint regarding the allegation of a breach of fiduciary duty, I wrote to the PR and said the following:

"Having considered the matter further, I remain satisfied that the complaint relating to his Section 75 CCA claims ought not to be upheld for the reasons set out in the PD. But I am now in a position to give my initial thoughts on the remaining complaint relating to the breach of fiduciary duty.

The Supplier's role as a credit broker was not a separate service (as it was in Hurstanger for instance) 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 [A] but as the supplier of contractual rights obtained under the Purchase Agreement, the transactions don't strike me as ones with features that suggest the Supplier had an obligation of 'loyalty' to him when arranging the Credit Agreement(s).

As such, and taking into account the recent Supreme Court ruling in Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd [2025] UKSC 33 ('Johnson, Wrench and Hopcraft') I do not think the Supplier, as the credit broker in these instances, had a fiduciary duty to Mr [A].

For this reason, I currently do not think this part of Mr [A]'s complaint should be upheld either."

Neither party said anything in response to either the PD or the further correspondence outlined above. As the deadline for responses has now passed, the matter has come back to me for a final decision.

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.

As neither party has submitted any new evidence or arguments, or disagreed with what I have said, I see no reason to depart from my provisional findings as set out in the PD and in the further correspondence as set out above. I think this having reconsidered everything afresh.

My final decision

I do not uphold Mr A's complaint against Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 13 October 2025.

Chris Riggs
Ombudsman