DRN-5911135

The complaint

Mr R's 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 him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA'), (2) deciding against paying claims under Section 75 of the CCA, (3) overcharging interest on a loan, and (4) paying commission to a credit broker without telling him.

What happened

Mr R was a member of a timeshare provider (the 'Supplier') – having purchased several products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 28 March 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,898 fractional points at a cost of £11,264 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr R 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 R paid for their Fractional Club membership by taking finance of £11,762 from the Lender (the 'Credit Agreement'). Mr R paid off the Credit Agreement and his credit relationship with the Lender ended on 14 August 2012.

Mr R – using a professional representative (the 'PR') – wrote to the Lender on 28 October 2021 (the 'Letter of Complaint') to raise several different concerns. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr R's concerns as a complaint and issued its final response letter on 23 December 2021, 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 that the Lender hadn't properly considered a claim made under Section 75 of the CCA on its merits. The Investigator felt that the complaint that there was an unfair credit relationship under Section 140A hadn't been made in time as per the rules that this service must follow and that it couldn't be considered.

Mr R disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Since then, the PR has raised some further matters it says are relevant to this outcome of the complaint**,** most notably in relation to the overcharging of interest. The Lender rejected this part of the complaint. Our Investigator said it was an extension of the complaint that there was an unfair credit relationship under Section 140A – so could not be considered.

I issued a provisional decision saying that:

1. Mr R's complaint about a credit relationship with the Lender that was unfair to him is not within our jurisdiction because it wasn't made within the time limits set out in DISP 2.8.2 R (2)[1].

2. The complaint about the Lender's decision to reject Mr R's concerns about the Supplier's alleged misrepresentations and breaches of contract under Section 75 of the CCA – was made in time under DISP 2.8.2 R (2). But I don't think these aspects of the complaint should succeed.

3. The complaint about overcharging interest can partly be considered outside of point 1 above and was made in time for the purposes of our jurisdiction, but this part of the complaint should not succeed either.

I later sent an email to the Lender and the PR explaining that I felt Mr R's concerns about commission could be considered outside of point 1 above, and that such a complaint was made in time for the purposes of the jurisdiction of the Financial Ombudsman Service. And that I did not think such a complaint should be upheld in this case.

The Lender did not respond to my provisional decision or my provisional findings on commission.

The PR responded to say that it accepted my provisional findings on commission, but it disagreed with my provisional decision in relation to the merits of those remaining parts of the complaint I can consider. The PR provided some comments and documents it wanted me to consider when making my final decision on the merits of the complaint about the Lender deciding against paying claims under Section 75 of the CCA.

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 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. But I would add that the following regulatory rules/guidance are also relevant:

<u>The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010</u>

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

[1] See the Dispute Resolution (DISP) Rules in the Financial Conduct Authority Handbook.

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

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 have decided not to uphold this complaint – for the same reasons given in my provisional findings, a copy of which is below.

START OF COPY OF PROVISIONAL FINDINGS ON THE MERITS OF THOSE PARTS OF THE COMPLAINT I CAN CONSIDER

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

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 (the 'LA') 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 R's Section 75 claim for misrepresentation was time-barred under the LA before he put it to the Lender.

As I mentioned above, a claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim Mr R 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 LA).

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 LA. 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 Time of Sale. I say this because Mr R entered into the purchase of his timeshare at that time based on the alleged misrepresentations of the Supplier – which he says were relied upon. And as the loan from the Lender was used to help finance the purchase, it was when he entered into the Credit Agreement that he suffered a loss.

Mr R first notified the Lender of his Section 75 claim on 28 October 2021. And as more than six years had passed between the Time of Sale and when that claim was first put to the Lender, I don't think it was unfair or unreasonable of the Lender to reject Mr R's concerns about the Supplier's alleged misrepresentations.

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.

As noted above when looking at the claim there was an unfair credit relationship, Mr R says that he could not holiday where and when he wanted to. On my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, meaning it could be viewed as potentially breaching the Purchase Agreement. The Letter of Complaint suggests Mr R very quickly had problems in that he was not able to book the holiday apartments he wanted. That suggests the claim was made too late under the LA.

Even if it was not, much 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 R 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 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 R 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.

Complaint about being overcharged interest

It has been submitted by the PR that the Lender did not properly calculate the interest due to be paid by Mr R, meaning he has been overcharged. I am aware that the PR has raised this as a blanket point of complaint for every loan advanced by the Lender and other ombudsmen have issued detailed decisions rejecting the arguments that the PR says apply to all its complaints.

However, I think that the Lender has worked out the interest in the way it said it would in the Credit Agreement, not least because it gave figures to Mr R in that agreement setting out the total interest payable if the loan ran to term as well as the monthly repayment. But even if the Lender wasn't as clear as it ought to have been about the interest charged or if it gave Mr R incorrect information on the interest rate that applied, I can't see that Mr R lost out as a result. He knew how much he was repaying each month and for how long, the total charge for credit and the total amount payable. And there is no evidence that Mr R was unhappy with those figures at the Time of Sale.

So even if the Lender presented information differently, I can't see how that would have made any difference to Mr R's decision to take out the loan. So, I can't say Mr R has lost out or that the Lender needs to do anything further because of this issue.

Complaint about commission

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

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

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

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

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

2. The failure to disclose the commission; 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 Hopcraft, Johnson and Wrench, it sets out principles which apply to credit brokers other than car dealer–credit brokers. So, when considering allegations of undisclosed payments of commission like the one in this complaint, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules ('DISP').

But I don't think *Hopcraft, Johnson and Wrench* assists Mr R such that I should uphold this complaint for reasons relating to commission given the facts and circumstances of this complaint. Firstly, because the complaint about an unfair relationship is outside of my jurisdiction, and I cannot consider the merits of that complaint.

But secondly, considering the issue of commission outside of Section 140A of the CCA, 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 R, 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 R 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, regulatory breaches do not automatically create unfairness. 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 currently think this had consequences for Mr R that mean I should uphold this complaint.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr R entered into wasn't high. At £1,205.61, it was only 10% of the amount borrowed and even less than that (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 currently 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 R 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 R 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.

Overall, therefore, I'm not currently persuaded that the commission arrangements between the Supplier and the Lender mean that I should uphold this complaint insofar as it is within my jurisdiction as a standalone complaint outside of Mr R's complaint about an unfair relationship for the purposes of s140A of the CCA.

END OF COPY OF PROVISIONAL FINDINGS ON THE MERITS OF THOSE PARTS OF THE COMPLAINT I CAN CONSIDER

The PR's response to my provisional findings about the Lender deciding against paying claims under Section 75 of the CCA

The PR's further comments in response to the provisional decision only relate to the issue of the Lender deciding against paying claims under Section 75 of the CCA. In summary, it said that:

1. I had not properly applied the principles of the Limitation Act 1980, since Section 32 provides more time to make the claim where the Supplier has concealed the misrepresentation.

2. Rule CONC 7.3.4R in the Financial Conduct Authority Handbook means that the Lender has a duty to treat customers fairly and consider evidence or fraud or misrepresentation – and this means the Lender should've investigated the claim rather than rejecting it.

The PR's additional comments do not persuade me to depart from my provisional findings.

Section 32A of the Limitation Act can provide additional time to make a claim in cases of fraudulent misrepresentation. But I am not persuaded that the alleged misrepresentations in this case were fraudulent. So, this has no effect on the outcome of this complaint.

CONC 7.3.4R says:

> *"A firm must treat customers in or approaching arrears or in default with forbearance and due consideration."*

I cannot see that this means what the PR says, nor that it is relevant to Mr R's Section 75 claim. As such, for the reasons given in my provisional findings above, I do not uphold this complaint.

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 R to accept or reject my decision before 29 December 2025.

Phillip Lai-Fang
Ombudsman