DRN-5935069

The complaint

Mrs O'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 her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mrs O purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 11 September 2016 (the 'Time of Sale'). she entered into an agreement with the Supplier to buy 780 fractional points at a cost of £14,065 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mrs O 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.

Mrs O paid for their Fractional Club membership by taking finance of £14,065 from the Lender (the 'Credit Agreement').

Mrs O – using a professional representative (the 'PR') – wrote to the Lender on 2 February 2022 (the 'Letter of Complaint') to raise a number of different concerns. Since then, the PR has raised some further matters it says are relevant to this outcome of the complaint. 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 Mrs O's concerns as a complaint and issued its final response letter on 25 April 2022, 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.

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

I issued a provisional decision (and a follow-up email dealing with Mrs O's concerns about undisclosed commission) explaining that I was not planning to uphold this complaint.

The Lender did not respond to my provisional decision.

The PR responded on behalf of Mrs O. It disagreed with my provisional decision and provided some additional comments for me to consider when making my final decision.

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:

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

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, including considering the PR's additional comments in response to my provisional decision, and for the same reasons set out in my provisional findings (reproduced below), I have decided not to uphold this complaint.

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.

START OF COPY OF PROVISIONAL FINDINGS

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 Mrs O was:

(1) Told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.

(2) Told by the Supplier that she owned a 'fraction' of the Allocated Property when that was not true as it was owned by a trustee.

(3) Told by the Supplier that Fractional Club membership was an "investment" when that was not true.

Neither the PR nor Mrs O have set out in any detail what words and/or phrases where allegedly used by the Supplier to misrepresent Fractional Club for the reason given in points 1 or 2. However, the PR says that such representations were untrue because the Allocated Property was legally owned by a trustee and there was no indication of what duty of care it had to actively market and sell the property. Further, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrases in points 1 or 2 above would have been untrue at the Time of Sale even if they were said. They seem to me to reflect the main thrust of the contract Mrs O entered into. And while, under the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor'[1], longer than that if there were problems selling and the 'Owners'[2] agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

As for point 3, it does not strike me as a misrepresentation even if such a representation had been made by the Supplier (which I make no formal finding on). Telling prospective members that she was investing their money because she was 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 she acquired such an interest.

[1] Defined in the FPOC Rules as one of the Supplier's group companies.
[2] Defined in the FPOC Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

The PR has raised other matters as potential misrepresentations, but it seems to me that they are not allegations of the Supplier saying something that was untrue. Rather, it is that Mrs O wasn't told things about the way the membership worked, for example, that the obligation to pay management fees could be passed on to their beneficiaries. It seems to me that these are allegations that Mrs O wasn't given all the information she needed at the Time of Sale, and I will deal with this further below.

So, while I recognise that Mrs O - 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.

Mrs O says that she could not holiday where and when she wanted to. That was framed, in the Letter of Complaint, as an alleged 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 Mrs O states that the availability of holidays was/is subject to demand. It also looks like she made use of their fractional points to holiday on occasions. I accept that she may not have been able to take certain holidays and have found booking holidays outside of Fractional Club membership to be better value. 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 Mrs O 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?

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

Having considered the entirety of the credit relationship between Mrs O 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.

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

5. Any existing unfairness from a related credit agreement.

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

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

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

They include allegations that:

1. Mrs O was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

2. The right checks weren't carried out before the Lender lent to Mrs O.

3. The loan interest was excessive.

4. The Credit Agreement was arranged by a broker acting outside of its authorisation.

5. Mrs O were not given a choice of lender by the Supplier.

6. The Lender failed to correctly calculate the interest due on the loan as set out in the Credit Agreement.

7. The Lender failed to set out everything required by the CCA on the face of the Credit Agreement

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

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

I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's 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 Mrs O was actually unaffordable before also

concluding that she lost out as a result and then consider whether the credit relationship with the Lender was unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for the Mrs O.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mrs O knew, amongst other things, how much she was borrowing and repaying each month, who she was borrowing from and that she was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for her, even if the Credit Agreement was 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 Mrs O financial loss – such that I can say that the credit relationship in question was unfair to her as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate her.

Similarly, the PR has not explained how, if it were true, Mrs O not being offered a different lender to pay for Fractional Club membership caused her any unfairness or financial loss. The Supplier says she completed applications for two Lender's before taking the loan with the Lender. In any case, Mrs O was aware of the interest rate, which was set out on the face of the Credit Agreement, as well as the term of the loan and the monthly repayments, so she understood what it was she was taking out. Further, I don't think the rate of interest was excessive, compared either to other rates available from other point-of-sale lenders or on the open market, so I can't say it would be fair or reasonable to tell the Lender to do anything because of this.

It has been submitted by the PR that the Lender did not properly calculate the interest due to be paid by Mrs O, meaning she 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 say apply to all its complaints. 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 Mrs O in that agreement setting out the total interest payable if the loan ran to term as well as the monthly repayment. But even the Lender wasn't as clear as it ought to have been about the interest charged or that it gave incorrect information on the interest rate that applied, I can't see Mrs O lost out as a result. she knew how much she was repaying each month and for how long, and there is no evidence that she was unhappy with those figures. So even if the Lender presented information differently, I can't see how that would have made any difference to Mrs O's decision to take out the loan. So, I can't say Mrs O has lost out or that the Lender needs to do anything further because of this issue.

Overall, therefore, I don't think that Mrs O credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR now says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mrs O'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 and Mrs O say that the Supplier did exactly that at the Time of Sale – saying, in summary, that she 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.

A share in the Allocated Property clearly constituted an investment as it offered Mrs O the prospect of a financial return – whether or not, like all investments, that was more than what she 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*.[3]

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 Mrs O 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 them as an investment, i.e. told her or led her to believe that Fractional Club membership offered her 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 Mrs O, 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.

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[3] The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin).

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 Mrs O 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 the Consumer 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 Mrs O 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 Mrs O and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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 Mrs O decided to go ahead with their purchase. I say this because:

- Mrs O's statement of truth, provided on 6 December 2023, appears to be the only evidence provided directly by her. In relation to what she was told about Fractional Club membership and the Allocated Property being sold, she said, *"They informed us that at the end of the agreement, we would have to sell the Timeshare, if we had not sold prior to the end of the term. They went into detail that sale of the Timeshare created a value that reduced the overall costs of the Timeshare we have paid out over the years. This calculation made the overall cost very small for what we thought might be a great place to holiday."*

- Assuming that accurately reflects what Mrs O was told by the Supplier at the Time of Sale, it does not suggest to me that Mrs O had the hope or expectation of making a profit as a result of what she was told – only that she expected to get some money back which would reduce the cost of the timeshare.

- The PR has provided other evidence, including:

    - A webform submission to a timeshare advice company on 6 June 2018, which was completed by Mrs O's son and said, *"they were told they would receive a profit when the timeshare was sold…"*

    - A questionnaire completed by the timeshare advice company during a phone call with Mrs O's son, which said, *"Purchased 2016 – Get hols & money back at the end. Don't think will get promised return – bad investment…"*

    - Handwritten notes of a phone call with the PR on 5 January 2022, which said, *"They compared the costs of different types of holidays – travel agents, booking*

yourselves. Had to sell in future. Make a profit and this reduced the overall costs – so very attractive over the long term, as profits reduced the cost considerably…"

- While this refers to a profit, it is clear that the contact with the timeshare advice company was not with Mrs O directly, but her son. The first refers to receiving a profit, the second says Mrs O would get money back (not specifying this would be a profit). The second describes it as a bad investment, but in context of getting money back I am not persuaded this shows that Mrs O hoped or expected to make a profit on the sale of the Allocated Property.

- It's unclear if the handwritten note was from a call with Mrs O or her son. While it says *"make a profit"* it clarifies this by talking about this reducing the overall cost of the timeshare (as the statement of truth also does) – rather than exceeding the amount paid for it. So again, it is not clear that it speaks of Mrs O hoping or expecting a financial gain from purchasing Fractional Club membership.

- I think the statement of truth from Mrs O is likely to be the most reliable evidence of what she recalls happening at the Time of Sale. It is the only document that appears to have been written or checked by her. And this does not make clear that Mrs O hoped or expected to make a profit from the purchase of Fractional Club membership.

- Further to this, the Letter of Complaint, when setting out what Mrs O was told at the Time of Sale, says, *"[the Supplier] claimed they would own a part of a CLC asset which would grow in value like normal property and which they could sell in 17 years times as per Fractional Rights Certificate and recoup some of their total investment."* This matches what Mrs O has said in her statement of truth – which seems to me to say that she hoped or expected only to get back some of what she had paid for Fractional Club membership. While the word invested is used, in the context of the rest of the sentence, this appears to mean what Mrs O paid for Fractional Club membership – rather than being an indication that she saw Fractional Club membership as being something that she hoped or expected to provide a financial gain or profit.

That doesn't mean Mrs O wasn't 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 Mrs O herself doesn't persuade me that her purchase was motivated by her share in the Allocated Property and the possibility of a financial gain or profit, I don't think I can fairly and reasonably conclude a breach of Regulation 14(3) by the Supplier was material to the decision she 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 Mrs O'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 she would have pressed ahead with their 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 Mrs O and the Lender was unfair to her 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 Mrs O were not given sufficient information at the Time of Sale by the Supplier about membership, including about the ongoing costs of Fractional Club membership and the fact that Mrs O's heirs could inherit these costs.

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 Mrs O sufficient information, in good time, on the various charges she 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 Mrs O nor the PR have persuaded me that she 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 fact and circumstances.

As for the PR's argument that Mrs O's heirs would inherit the on-going management charges, I fail to see how that could be the case or that it could have led to an unfairness that warrants a remedy.

Complaint about undisclosed 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 mentioned above, the Supreme Court handed down an important judgment on 1 August 2025 in a series of cases concerned with the issue of commission: 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 Mrs O in arguing that her credit relationship with the Lender was unfair to her for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mrs O, 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 Mrs O 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 currently think any such failure is itself a reason to find the credit relationship in question unfair to Mrs O.

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 Mrs O entered into wasn't high. At £348.81, it was only 2.5% of the amount borrowed and only slightly more (3.7%) as a proportion of the charge for credit. So, had Mrs O 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 she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mrs O wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the

impact of commission on the cost of the credit she needed for a timeshare she wanted doesn't strike me as disproportionate. So, I think she would still have taken out the loan to fund her 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 Mrs O but as the supplier of contractual rights she 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 her 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 Mrs O.

Commission: The Alternative Grounds of Complaint

While I've found that Mrs O credit relationship with the Lender wasn't unfair to her 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 Mrs O'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 Mrs O (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 Mrs O 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 her. 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 she would still have taken out the loan to fund her 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

The PR's comments in response to my provisional decision

The PR has said, in summary, that:

- The Supplier sold Fractional Club membership as an investment.

- Anything said or stated by Mrs O's son should be taken as having been said by her, since she took the sensible action of asking her son to act on their behalf due to her poor English. As such Mrs O has described Fractional Club membership as an investment and that she would receive a profit (timeshare advice company webform) and said it was a bad investment that would not provide the promised return (timeshare advice company questionnaire) prior to the PR's involvement.

- When speaking to the PR (as per its call note), Mr O said he expected to make a profit from the purchase.

- The Letter of Complaint mentioned that Fractional Club membership was an investment.

- While Mrs O's statement mentioned reducing overall costs, this was based on the Supplier's explanation that profits from the sale of the allocated property would offset costs. This was presented as a financial benefit and an attractive long-term investment.

- Mrs O's purchase of Fractional Club membership was motivated by the prospect of making a profit.

The PR also provided some further comments on the complaint about interest overcharging, which largely reiterated its original complaint points (that the Lender did not calculate the interest as stated on the Credit Agreement and charged Mrs O too much interest).

Having considered the PR's additional comments, I am not persuaded to depart from my provisional findings.

I do not have anything to add to my provisional findings in relation to the complaint about interest overcharging.

In respect of the Fractional Club membership being sold as an investment, it was not my intention to suggest that I have dismissed all the statements provided by Mrs O's son. I was simply highlighting that Mrs O had not provided this information directly – and this fed into my conclusion that her statement was likely to be the most reliable evidence of what she recalled of the sale. I remain of that opinion.

I accept that this is a finely balanced case, and that the PR disagrees with my interpretation of the evidence. But overall, I remain of the opinion that the evidence is not consistent (in that Mrs O's statement does not make clear that she was motivated by the prospect of making a profit from the purchase) or persuasive enough to convince me that any breach of Regulation 14(3) by the Supplier at the Time of Sale was material to Mrs O's decision to enter the Purchase Agreement. In short, I am not persuaded that she purchased Fractional Club membership because the Supplier led her to believe it was an investment in the sense that it could lead to her making a profit. And while I am not persuaded of that, it would not be fair and reasonable for me to conclude that the relationship between Mrs O and the Lender was unfair to her and uphold the complaint on that basis.

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 Mrs O to accept or reject my decision before 30 December 2025.

Phillip Lai-Fang
Ombudsman