

## The complaint

Mr C'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 unfair credit relationships with him 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.

The loans in question were both taken out in Mr C's sole name and as such, he is the only eligible complainant here. However, the timeshare purchases the loans funded were both in the joint names of Mr and Mrs C. So, I'll refer to them both throughout where relevant.

## What happened

The product at the centre of this complaint is Mr and Mrs C's membership of a timeshare that I'll call the 'Fractional Club' – points in which Mr and Mrs C purchased on the dates below:

- 810 fractional points on 4 April 2016 for £13,529 ('Purchase Agreement 1')
- 1,050 fractional points on 5 April 2017 for £5,098 – having traded in the first lot of 810 fractional points. ('Purchase Agreement 2')
- 1,510 fractional points on 22 July 2019 for £7,986 – having traded in the second lot of 1,050 fractional points. This purchase is being dealt with separately and therefore is not the subject of this decision – it is included here for background information only.

(when appropriate, I'll simply refer to Purchase Agreement 1 and Purchase Agreement 2 as the "Purchase Agreements")

As this complaint is concerned with the purchases on 4 April 2016 and 5 April 2017, those are the 'Times of Sale' for the purposes of my decision.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs C more than just holiday rights. It also included a share in the net sale proceeds of a property named on the relevant purchase agreement (which I'll refer to as the 'Allocated Property 1 and 2' or, when appropriate, the 'Allocated Properties') after their membership term ends.

Mr C paid for their fractional points by taking the following amounts of finance of from the Lender:

- £13,529 on 4 April 2016 ('Credit Agreement 1')
- £18,226 on 5 April 2017 ('Credit Agreement 2') – this loan consolidated the outstanding balance of Credit Agreement 1

(which, when appropriate, I'll simply refer to as the "Credit Agreements")

Mr C – using a professional representative (the ‘PR’) – wrote to the Lender on 9 February 2022 (the ‘Letter of Complaint’) to raise a number of different concerns. As those concerns haven’t changed since they were first raised, and as both sides are familiar with them, it isn’t necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr C’s concerns as a complaint and issued its final response letter on 4 March 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.

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

I considered the matter and issued a provisional decision (the ‘PD’). In that decision, I said:

**“Section 75 of the CCA: the Supplier’s misrepresentations at the Times 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 Times of Sale because Mr and Mrs C were:*

- 1. Told that they had purchased an investment that would “considerably appreciate in value”.*
- 2. Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.*
- 3. Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.*
- 4. Made to believe that they would have access to “the holiday apartment” at any time all year round.*

*However, 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 a honestly held opinion as there isn’t any accompanying evidence to persuade me that the relevant sales representative(s) 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. They're given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. 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.*

*So, while I recognise that Mr C 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 140A of the CCA: did the Lender participate in one or more unfair credit relationships?**

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*I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Times of Sale. But there are other aspects of the sales processes 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 relationships between Mr C and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were 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 Times of Sale along with any relevant training material;*
- 2. The provision of information by the Supplier at the Times 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 Times of Sale;*
- 4. The inherent probabilities of the sale given its circumstances; and, when relevant*
- 5. Any existing unfairness from a related credit agreement.*

*I have then considered the impact of these on the fairness of the relevant credit relationships between Mr C and the Lender.*

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

*Mr C's complaint about the Lender being party to unfair credit relationships was made for several reasons.*

*The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mr C. 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 C was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationships with the Lender were unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr C.*

*Connected to this is the suggestion by the PR that the Credit Agreements 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 C 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 membership. And as none of the lending looks like it was unaffordable for him, even if the one or more of 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 C's financial loss – such that I can say that the credit relationships in question were unfair on him 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 him, even if the loans weren't arranged properly.*

*The PR also says that there was one or more unfair contract terms in the Purchase Agreements. But as I can't see that any such terms were operated unfairly against Mr C 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 an unfairness that warrants a remedy.*

*I acknowledge that Mr and Mrs C may have felt weary after sales processes that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentations that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to upgrade their membership – which I find difficult to understand if the reason they went ahead with the purchases in question was because they were pressured into them. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs C made the decisions to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.*

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

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

*The Lender does not dispute, and I am satisfied, that both of Mr and Mrs C's Fractional Club memberships met the definition of a "timeshare contract" and were 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 says that the Supplier did exactly that at the Times of Sale – saying, in summary, that Mr and Mrs C were 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.*

*Shares in the Allocated Properties clearly constituted investments as they offered Mr and Mrs C the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*

*In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.*

*To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs C 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 them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.*

*There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Times 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 and Mrs C, the financial value of their share in the net sales proceeds of the Allocated Properties along with the investment considerations, risks and rewards attached to them.*

*On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs C 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.*

### ***Were the credit relationships 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 Times of Sale, I now need to consider what impact such breaches had on the fairness of the credit relationships between Mr C and the Lender under the Credit Agreements and related Purchase Agreements 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 credit relationships between Mr C and the Lender that were unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him and Mrs C to*

*enter into the Purchase Agreements and Mr C to enter into the Credit Agreements is an important consideration.*

*I've considered the testimony which has been provided in this case. The PR didn't provide any evidence to support this particular allegation at the time of making the complaint or referring it to our Service. In December 2023, following the Investigator's view, the PR then did provide a witness statement from Mr and Mrs C. This is signed and dated 10 June 2021 and sets out in quite some detail Mr and Mrs C's recollections of their various purchases with the Supplier.*

*In their witness statement, Mr and Mrs C have described what happened at these Times of Sale. In their description of both of these sales presentations, they haven't mentioned or made any comment in relation to the Allocated Property or the investment element of the membership. The focus of their testimony here is the holidays the membership could provide to them.*

*And, following this description of the sales process at the Time of Sale 1, I note that they have said:*

*"We did have some doubts the day after signing the agreement, but after speaking [the salesperson] again, we convinced ourselves that we had somehow made the right choice considering the places we wanted to visit and they had accommodation in them [sic] places. Also the accommodation we had been shown on the complex we were staying it [sic] was lovely, so we thought the accommodation across all of [the Supplier] would be of this standard, and going off that we thought we will never experience a bad standard of holiday ever again."*

*And, in relation the Time of Sale 2, they have said:*

*"The presentation day was basically the same as the one the year before in Malaga, only this time we felt that we had no option but to upgrade our points from 810 to 1,050 in order to get more chance of getting a decent holiday because we found out that 810 points is not enough for anything around school holiday weeks..."*

*So, from what they've had to say here, it appears that the reason for making both of these purchases was ultimately the holidays that membership could provide. And, in relation to the Time of Sale 2 in particular, they were upgrading in order to have more points in order to take more holidays, when they wanted.*

*Following their description of the Time of Sale 2, Mr and Mrs C also say: "We did ask about the option of leaving [the Supplier] and were told we needed to contact the sales centre when we got home." And they've also described that around a year later, in 2018, they contacted the Supplier again to try and exit their membership and tried to sell it via another company. This is difficult to explain if, as the PR now alleges, Mr and Mrs C had bought either or both of their memberships on the basis of it being an investment which offered them the prospect of a financial gain or profit.*

*Mr and Mrs C have also explained the reasons they're unhappy with their membership(s) now, describing issues they had following their purchase(s) such as a lack of availability and exclusivity i.e. how the membership functioned as a holiday product.*

*So, on my reading of the evidence before me, the prospect of a financial gain from*

*Fractional Club membership was not an important and motivating factor when Mr and Mrs C decided to go ahead with their purchases. That doesn't mean they weren't interested in a share in the Allocated Properties. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs C themselves don't persuade me that their purchases were motivated by their shares in the Allocated Properties and the possibility of a profit, I don't think breaches of Regulation 14(3) by the Supplier were likely to have been material to the decisions Mr and Mrs C ultimately made.*

*On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs C's decisions to purchase Fractional Club membership at the Times of Sale were motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationships between Mr C and the Lender were unfair to him even if the Supplier had breached Regulation 14(3)."*

In conclusion, I did not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and I was not persuaded that the Lender was party to credit relationships with Mr C under the Credit Agreements that were unfair to him for the purposes of Section 140A of the CCA – nor could I see any other reason why it would be fair or reasonable to direct the Lender to compensate him.

The Lender did not respond to the PD. The PR did respond – they did not accept the PD and provided some further comments and evidence they wish to be considered.

Having received the relevant responses from both parties, I'm now finalising my 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, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail 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.

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 PD only relate to the issue of whether the credit relationships between Mr C and the Lender were unfair. In particular, the PR has provided further comments in relation to whether the memberships were sold to Mr C as an investment at the Times of Sale. They've also now argued for the first time that the payment of a commission by the Lender to the Supplier led to unfair credit relationships along with along with contradictions they say were present in the sales paperwork in relation to the sale date of the Allocated Property associated with Mr C's second purchase at the Time of Sale 2.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn't make any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagree 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 PD. So, I'll focus here on the PR's points raised in response.

## **Section 140A of the CCA: did the Lender participate in one or more unfair credit relationships?**

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

As I explained in my PD, a witness statement from Mr and Mrs C has been provided which is

signed and dated June 2021.

Having considered this, I noted that in their descriptions of what happened at both Times of Sale, Mr and Mrs C did not mention or make any comment in relation to the Allocated Properties or the investment element of the membership(s). The focus of their testimony was instead the holidays that the memberships could provide to them and from reading what they had had to say, in my view, the reason for making both of the purchases in question was ultimately exactly that – the holidays that membership could provide. In relation to the Time of Sale 2 in particular, they had indicated they were upgrading in order to have more points in order to take more holidays, when they wanted.

I also noted that Mr and Mrs C had described asking about exiting the membership shortly after their second purchase at the Time of Sale 2. And, they contacted the Supplier about this again around a year later and also tried to then sell it via another company. I explained I found this difficult to understand if they had bought either or both of their memberships on the basis of it being an investment which offered them the prospect of a financial gain (based on what the Supplier had told them).

Lastly, I also noted that Mr and Mrs C had explained the reasons why they're unhappy with the membership(s) now and these were a lack of exclusivity and availability i.e. how the membership functioned as a holiday product.

So, I wasn't persuaded that the evidence suggested that Mr (and Mrs) C purchased their Fractional Club memberships in whole or in part down to any breach of Regulation 14(3).

I have considered PR's submissions here, but I have not changed my mind from my provisional findings.

In my view, the PR's submissions seem to be conflating the issue of whether there was a breach of Regulation 14(3) at the Time(s) of Sale and whether these were material to Mr and Mrs C's purchasing decisions. And, they appear to be suggesting that if there was a breach of Regulation 14(3) at the Time(s) of Sale, this is sufficient reason in and of itself to uphold this complaint. But I don't agree with that - as I explained in my PD, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision.

And, for all of the reasons I already explained in my PD, I'm simply not persuaded that any such breach(es) by the Supplier at the Times of Sale were material to Mr and Mrs C's purchasing decisions.

I agree with PR that just because a purchaser was also interested in taking holidays with the Supplier, that does not preclude them also being motivated to take out Fractional Club membership by any investment element – indeed I would find it surprising if any members were not interested in taking holidays, given the nature of the product. However, for the reasons set out in this decision and in my PD, I do not find any such investment motivation.

The PR has argued that it was entirely reasonable for Mr and Mrs C to explore options to relinquish their membership following the purchase and attempt to recover some financial return given their personal circumstances at the time. However, there's no indication in what Mr and Mrs C have had to say that they were seeking to make a profit or financial gain from doing so, only that they wanted to exit the membership. And, to be clear, I was not (and am still not) making any kind of judgment on whether their decision to try and do so was reasonable. Rather, as I explained in my PD, I highlight it only to explain that it doesn't suggest to me that they bought either or both of the memberships as an investment from

which they'd make a financial gain, based on what they were told by the Supplier at the Time(s) of Sale.

The PR also says that as the Supplier's pricing sheet set out the "unit share" Mr (and Mrs) C acquired under their Fractional Club memberships, this shows the investment element played "quite an important role" in convincing them to purchase them. But I don't agree with that analysis. The pricing sheet was a proforma document that captured a number of details about the purchase in a standardised format. And the Supplier would have recorded that information irrespective of the customer's motivations for purchasing. So, I don't consider this document offers any insight into Mr and Mrs C's motivation for making their purchases.

Lastly, the PR said that in the judgment handed down in *Shawbrook & BPF v FOS*<sup>1</sup>, 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, just because the complaints that were subject to judicial review were upheld, it does not follow I must (or should) also uphold Mr C's complaint.

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

#### The provision of information by the Supplier at the Times of Sale

##### *Time of Sale 1*

The PR says that a payment of commission from the Lender to the Supplier at the Time of Sale 1 should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale 1.

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

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<sup>1</sup> *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) ('*Shawbrook & BPF v FOS*').

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 C in arguing that his credit relationship with the Lender was unfair to him for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr C, 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 C 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 1 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 1, 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 C.

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 1. And as it wasn't acting as an agent of Mr C but as the supplier of contractual rights he obtained under the Purchase Agreement 1, 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 1 and thus a fiduciary duty.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, the Lender didn't pay the Supplier any commission at the Time of Sale 1. And with that being the case, even if there were information failings at that time and regulatory failings as a result (which I make no formal finding on), 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 C.

### *Time of Sale 2*

The PR also says that a payment of commission from the Lender to the Supplier at the Time of Sale 2 should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale 2.

I've already summarised Hopcraft, Johnson and Wrench above and again, I don't think this judgment assists Mr C 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.

Again, 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 C, 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 C into a credit agreement at the Time of Sale 2 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 2 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 2, 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 C.

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 2 that Mr C entered into wasn't high. At £729.04, it was only 4% of the amount borrowed and even less than that (3.7%) as a proportion of the charge for credit. So, had he known at the Time of Sale 2 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 C 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 2 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 2. And as it wasn't acting as an agent of Mr C but as the supplier of contractual rights he obtained under

the Purchase Agreement 2, 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 2 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 C.

I will also address the PR's point regarding the apparent ambiguity in the proposed sale date of the Allocated Property 2. The PR suggests that a delayed sale date could lead to an unfairness to Mr C in the future, as any delay could mean a delay in the realisation of his share in the Allocated Property 2.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2033. This same date is set out under point 1 of the Members Declaration, which has been initialled and signed as being read by Mr C. This date indicates that the membership has a term of 16 years. The ambiguity identified by the PR is that in the Information Statement provided as part of the purchase documentation at the Time of Sale 2 it says the following:

*"The Owing Company will retain such Allocated Property until the automatic sale date in **19 years time** or such later date as is specified in the Rules or the Fractional Rights Certificate."* (bold my emphasis).

It seems clear to me that the commencement date for the start of the sales process is 31 December 2033. This actual date is repeated in the sales documentation as I've set out above.

So, I can't see that this is a reason to find the credit relationship unfair and uphold this complaint.

### **S140A conclusion**

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationships between Mr C and the Lender under the Credit Agreements and related Purchase Agreements were unfair to him. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

### **Commission: The Alternative Grounds of Complaint (Time of Sale 2)**

While I've found that Mr C's 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 C'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 C (i.e., secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale 2 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 C 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 2 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 Mr C would still have taken out the loan to fund his purchase at the Time of Sale 2 had there been more adequate disclosure of the commission arrangements that applied at that time.

## **Conclusion**

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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 C's Section 75 claims, and I am not persuaded that the Lender was party to credit relationships 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 him.

## **My final decision**

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 19 February 2026.

Fiona Mallinson  
**Ombudsman**