DRN-5988173

The complaint

Mrs B'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 them 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) Providing credit via an unauthorised broker.

(4) Overcharging interest on a loan.

(5) Paying undisclosed commission.

What happened

Mrs B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 3 April 2012 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 747 fractional points at a cost of £9,549 (the 'Purchase Agreement') after trading in their existing trial timeshare membership.

Fractional Club membership was asset backed – which meant it gave Mrs B 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 B paid for her Fractional Club membership by taking finance of £9,549 from the Lender (the 'Credit Agreement').

Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 31 January 2023 (the 'Letter of Complaint') to raise several 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 B's concerns as a complaint and issued its final response letter on 19 February 2024, 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, said the following aspects of the complaint were outside of our jurisdiction because they were referred too late:

- The complaint about an unfair credit relationship.
- The complaint about irresponsible lending

Our investigator considered that the remainder of the complaint but rejected it on its merits.

Mrs B 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, which explained that:

1. Mrs B's complaints about a credit relationship with the Lender that was unfair to her and about irresponsible lending are not within our jurisdiction because they weren't made within the relevant time limits.

2. The rest of Mrs B's complaint – about the Lender's decision to reject her concerns about the Supplier's alleged misrepresentations and breaches of contract under Section 75 of the CCA, the credit being provided by an unauthorised broker, interest overcharging and undisclosed commission – were made in time under the relevant time limits. But I didn't think these aspects of the complaint should succeed.

The Lender did not respond to my provisional decision.

The PR responded to say that it disagreed with my provisional decision. It provided some comments on why it thought the unfair relationship complaint was referred in time and I should consider its merits (and some additional comments about the merits of that complaint). It said the complaint about interest overcharging could be considered outside of the unfair relationship complaint and gave some further reasons why thinks it should be upheld. And it provided some comments on why it thinks I should uphold the complaint about the Lender's response to Mrs B's Section 75 claims.

I then issued a jurisdiction decision confirming that I could only consider the merits of the complaint about the Lender deciding against paying claims under Section 75 of the CCA, providing credit via an unauthorised broker, overcharging interest on a loan, and paying undisclosed commission. This final decision deals with those complaints.

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

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 so, including considering the PR's response to my provisional decision, I have decided not to uphold this complaint. However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

Generally, 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 investigate 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 Mrs B'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 Mrs B 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 Mrs B entered the purchase of his timeshare at that time based on the alleged misrepresentations of the Supplier – which she says were relied upon. And as the loan from the Lender was used to help finance the purchase, it was when she entered into the Credit Agreement that she suffered a loss.

Mrs B first notified the Lender of his Section 75 claim on 31 January 2023. 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 Mrs B's concerns about the Supplier's alleged misrepresentations.

In response to my provisional decision, the PR said, in summary, that:

1. I had not properly applied the principles of the Limitation Act 1980, since Section 32 (1) (b) 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 so the Lender should've investigated the claim rather than rejecting it.

3. I had failed to apply *"[Financial Ombudsman Service] technical guidance on linked lender liability, which requires that lenders make reasonable enquiries rather than summarily dismissing such claims."*

The PR's additional comments do not persuade me to depart from my findings set out above (and in my provisional decision).

The PR says that the Supplier concealed that "the timeshare's alleged "asset-backed" nature was false". But, as mentioned above, Mrs B's Fractional Club membership was asset-backed in that it was linked to the Allocated Property. That seems to have been made clear at the Time of Sale – both during the presentation Mrs B is likely to have been given, and in the documents provided to her at the time. So, I do not think this was *"false"*, as the PR alleges. And I can't see that Section 32 of the Limitation Act provides more time for Mrs B to make the claim to the Lender.

As for the PR's second point, 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 Mrs B's Section 75 claim.

As for the PR's third point, it has not specified what technical guidance it is referring to. In any case, I am satisfied that I have followed our usual approach to considering complaints about a creditor's response to a Section 75 claim.

As such, I do not think it was unfair or unreasonable of the Lender to reject Mrs B'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, Mrs B says that she could not holiday where and when she 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. It is not clear precisely when this was alleged to have happened, but if it happened within six years of the time the complaint was first made, such a claim would not have been made too late under the LA.

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 B states that the availability of holidays was/is subject to demand. I accept that she may not have been able to take certain holidays. 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 B 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 the Credit Agreement being arranged by an unauthorised broker

The PR says 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 B 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 B experiencing a financial loss – such that I can say that it would be fair or reasonable to tell the Lender to compensate her.

Complaint that the Lender overcharged interest on the Credit Agreement

It has been submitted by the PR that the Lender did not properly calculate the interest due to be paid by Mrs B, 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 B 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 B 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 B's decision to take out the loan. It follows, I can't say Mrs B has lost out or that the Lender needs to do anything further because of this issue.

Complaint that the Lender paid commission to the Supplier without disclosing this

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').

However, I don't think *Hopcraft, Johnson and Wrench* assists Mrs B in arguing that I should uphold this complaint 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 B, 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 B 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 any such failure is itself a reason to find the credit relationship in question unfair to Mrs B.

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 B entered wasn't high. At £978.77, it was only 8% of the amount borrowed and even less than that (6%) as a proportion of the charge for credit. So, had Mrs B 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 B 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 B but as the supplier of contractual rights that 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.

I've also considered 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 B (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 B 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 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.

Overall, therefore, I'm not currently 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 B.

My final decision

For the reasons above, I've decided not to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 30 December 2025.

Phillip Lai-Fang
Ombudsman