DRN-6026526

The complaint

Ms 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 a claim under Section 75 of the CCA.

The loan that is the subject of this complaint was taken out in Ms O's name only and she is therefore the only eligible complainant here. But as the timeshare purchased using the loan was bought in the joint names of Ms O and Mr O, I'll refer to them both throughout where appropriate.

What happened

Ms O and Mr O were members of a timeshare provider (the 'Supplier') – having purchased from it previously. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 19 July 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 910 fractional points at a cost of £16,816 (the 'Purchase Agreement'). But, after trading in their existing trial membership, they ended up paying £12,421 for their Fractional Club membership.

Fractional Club membership was asset backed – which meant it gave Ms and Mr 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.

Ms O paid for their Fractional Club membership by taking finance of £16,293 from the Lender (the 'Credit Agreement'). This loan also consolidated the outstanding balance of their existing loan, used to pay for their trial membership.

Ms O – using a professional representative (the 'PR') – wrote to the Lender on 17 March 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 Ms O's concerns as a complaint and issued its final response letter on 29 April 2022, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service.

The Investigator's view

Ms O's complaint was assessed by an Investigator at this Service who did not think it ought to be upheld. In summary:

- They firstly explained that even if there were regulatory breaches at the Time of Sale, it doesn't automatically follow that this created unfairness for the purposes of S140A of the CCA. Such mistakes and their consequences (if there were any) must be looked at in the round, rather in a narrow or technical way.

- They said that they hadn't been given any direct testimony in Ms O's own words to support any of the allegations made. So, they weren't persuaded that there were actionable misrepresentations at the Time of Sale or that Ms O was unduly pressured into making the purchase. For the same reason, they also weren't persuaded that the investment element of the Fractional Club membership was material to Ms O's purchasing decision. So, they said that even if the membership had been sold as an investment at the Time of Sale, they weren't persuaded Ms O's credit relationship was unfair to her for this reason.
- They acknowledged it was possible that some of the terms in the Purchase Agreement could have been unfair. But, they explained that the relevant case law on Section 140A makes it clear that the practical application of the relevant terms by the Supplier is relevant to an assessment of unfairness under that provision. And, they hadn't seen anything to suggest any of the terms were applied unfairly against Ms O.
- They also acknowledged it was possible that the Supplier didn't give Ms O sufficient information, in good time, on the various charges she could have been subject to in order to satisfy its regulatory responsibility under the relevant timeshare regulations. But, as they weren't persuaded that any failings in relation to the Supplier's cost disclosure at the Time of Sale were likely to have prejudiced Ms O's purchasing decision, they didn't think the credit relationship between her and the Lender was unfair under Section 140A for that reason either.
- They hadn't seen anything persuasive to suggest the lending was unaffordable for Ms O.
- In relation to the PR's assertion that the Purchase Agreement was unlawful under Spanish law and our Service should therefore treat it as rescinded, the Investigator noted that the Lender wasn't involved in the legal proceedings in Spain to which the PR had referred. So, they said it could be argued that the Purchase Agreement remains valid under English law. They also highlighted that the Purchase Agreement is governed by English law, so it's unclear whether Spanish law would be held relevant if its validity were litigated in an English court. Further, the Investigator highlighted a European Court of Justice case (*Diamond Resorts Europe and Others (Case C-632/21*) where it was held that English law applied where the claimant lived in England and the contract was governed by English law, even though Spanish law was more favorable to the claimant. So, in the absence of a successful English court ruling on a comparable case involving the sale of a timeshare involving a point-of-sale loan, they weren't persuaded it would be fair and reasonable to uphold the case on that basis.
- In relation to the concerns raised by the PR about the authorisation of the credit broker at the Time of Sale, specifically, the allegation that while the Supplier was technically authorised to carry out the activity of credit brokering, their sales representatives weren't as they were self-employed which they said made the loan unenforceable, the Investigator explained that the Financial Conduct Authority (FCA) requires firms carrying out such activities to be authorised, not individual persons acting on behalf of those firms. And, they said that (as the PR agreed) they could see the Supplier held the relevant authority to carry out this activity. So, they didn't think this was a reason to uphold the complaint either.
- The Investigator also considered what the PR had said in relation to the Supplier starting liquidation proceedings in 2020. They noted the PR hadn't explained how this caused any unfairness in the credit relationship. And, they couldn't see that this led to a breach of contract, as had been suggested, as ultimately, the services Ms O paid for under the Purchase Agreement remain available to her.

Ms O, and the PR, disagreed with the Investigator's assessment and asked for an Ombudsman's decision, providing some further comments they wished to be considered. At this stage, they also provided a witness statement from Ms O which was drafted in October 2025, following the Investigator's view.

The Investigator addressed these points in a further response. In summary:

- They explained they'd considered the additional points and witness statement that had now been provided but ultimately, for all the same reasons they'd already explained in their view, they didn't think the complaint should be upheld.
- Specifically in relation to Ms O's witness statement, they explained this still didn't persuade them that her purchasing decision at the Time of Sale was motivated by the prospect of a financial gain or profit i.e. that any breach of Regulation 14(3) led her into taking it out.
- They said this because while they acknowledged the investment element of the membership was mentioned, the allegation lacked the necessary detail and context to persuade them that any potential breach was material to Ms O's purchasing decision. They also noted that the majority of her testimony was focused on how she felt she was pressured into the purchase in question and that she was concerned about making the loan repayments.
- So, overall, they didn't think the prospect of a profit or financial gain from the membership was an important and motivating factor when Ms O made the purchase. So, they didn't think the credit relationship between Ms O and the Lender was unfair to her even if the Supplier had breached Regulation 14(3) of the Timeshare Regulations.

Ultimately, as no agreement could be reached, the matter has been passed to me to make a 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, 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:

<u>The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

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]

<u>The FCA's Principles</u>

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.

And having done so, I've reached the same outcome as the Investigator, for broadly the same reasons.

I'd like to firstly outline that 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 Investigator's view in the main relate to the issue of whether the credit relationship between Ms O and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Ms and Mr O as an investment at the Time of Sale. They also continued to argue that there were unfair terms in the Purchase Agreement and that it was unlawful under Spanish law and should therefore be treated as rescinded. Lastly, they've also now argued for the first time that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.

As outlined by the Investigator, the PR originally raised various other points of complaint, all of which they addressed. But the PR didn't make any further comments in relation to those in their response to the Investigator's view. Indeed, they haven't said they disagree with any of the Investigator's conclusions in relation to those other points. And since nothing more has been provided in relation to those other points by either party, I see no reason to reach a different conclusion to the Investigator on those other points. So, I'll focus here on the PR's points raised in response.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

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

The PR explained in their response that they hadn't shared the Investigator's view on this complaint with Ms O, saying "*this was done in order not to influence their recollections*".

The PR also said Ms O has confirmed in her witness statement that she hadn't heard about the judgement handed down in *Shawbrook and BPF v FOS*[1]. The PR said this means Ms O's recollections have not been influenced by either the Investigator's view or the aforementioned judgment.

[1] *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*').

But the Investigator didn't rely on the timing of Ms O's witness statement or the potential influence of these factors in reaching their conclusions here. Instead, they explained they weren't persuaded by the content of it i.e. what Ms O herself had to say. I think the PR has likely simply mis-read this and so in my view, their above comments in response are therefore of little relevance here.

The PR also says that as the Supplier's pricing sheet set out the "unit share" Ms O and Mr O acquired under their Fractional Club membership, this shows the investment element played "quite an important role" in convincing them to purchase it. 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 Ms O and Mr O's motivation for making their purchase.

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 of Sale and whether this was material to Ms O and Mr O's purchasing decision. And, they appear to be suggesting that if there was a breach of Regulation 14(3) at the Time of Sale, this is sufficient reason in and of itself to uphold this complaint. But I don't agree with that - as has already been explained, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision.

Like the Investigator, I acknowledge that in her testimony, Ms O has mentioned the investment element of the membership. But this only appears to represent what she was potentially told at the Time of Sale i.e. whether there was a breach of Regulation 14(3), rather than any suggestion this was material to her purchasing decision, or giving any insight into what her motivations were. As already explained, the majority of her testimony was focused on how she felt she was pressured into the purchase in question and that she was concerned about making the loan repayments.

This doesn't mean Ms O and Mr O weren'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, for the reasons already explained, I'm not persuaded from the testimony that Ms O has adequately demonstrated that the promise of profit was a motivating factor to their decision to move ahead with the purchase – principal or otherwise.

So, as before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I also make no finding on here), I'm not persuaded Ms O and Mr O's decision to make the purchase was motivated by the prospect of a financial gain. So, I don't think the credit relationship between Ms O and the Lender was unfair to her for this reason.

Unfair terms

As set out above, the Investigator in this case acknowledged it was possible that some of the terms in the Purchase Agreement could have been unfair to Ms O. But, they explained that the relevant case law on Section 140A makes it clear that the practical application of the relevant terms by the Supplier is relevant to an assessment of unfairness under that provision. And, they hadn't seen anything to suggest any of the terms were applied unfairly against Ms O.

In response, the PR has referred to a particular term in the Purchase Agreement which set out that the Supplier could terminate membership and keep any money paid towards it so far if Ms O and Mr O failed to make a payment due under the agreement. And, they said that

the Supplier had served notice to cancel Ms O and Mr O's membership. It appears that this was likely issued after the original complaint was made to the Lender where they complained about the relevant unfair term. And, I'm aware from such notices provided in other cases, that the membership was usually only suspended temporarily and the purpose of the aforementioned notice was only to make consumers like Ms O and Mr O aware of this, and that there was an outstanding balance of management fees. And, that the membership might be cancelled if the relevant fees remained unpaid, but that consumers could apply for reinstatement of their membership anytime within the next five years. And, I haven't seen any evidence that any such cancellation actually proceeded to happen. But, even if it did, I can't see that the term(s) the PR has highlighted led Ms O and Mr O to behave in a certain way to their detriment.

So again, 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.

The provision of information by the Supplier at the Time of Sale

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

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

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

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

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);
2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

The Supreme Court also confirmed that the following factors, in what was a non-exhaustive list, will normally be relevant when assessing whether a credit relationship was/is unfair under Section 140A of the CCA:

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as

Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

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

But I don't think *Hopcraft, Johnson and Wrench* assists Ms 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 Ms 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 Ms 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 think any such failure is itself a reason to find the credit relationship in question unfair to Ms 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 Ms O entered into wasn't high. At £651.72, 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 she 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 persuaded that she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Ms 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, 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 Ms 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 Ms O.

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 relationship between Ms O and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Ms O's 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 Ms 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 Ms 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 Ms 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.

Other points

Here, the PR has asked us to determine the rights and obligations of the Lender based on the outcome of a court case in Spain. The Investigator said that in the absence of a judgment in an English jurisdiction on this issue, they were not persuaded it was fair and reasonable to conclude the loan agreement was able to be set aside. I agree with this conclusion for the following reasons:

- The Lender wasn't a party to the proceedings the PR has referred to, so its' rights under the Credit Agreement have not been determined.
- I also think that the Purchase Agreement is governed by English law for the same reason as already set out by the Investigator. The PR has pointed to a different decision of the European Court of Justice that points the other way. But in the absence of any authorities under English law, I'm not persuaded that (1) the Purchase Agreement, properly governed by English law, could be avoided following the Spanish Judgment to which the PR refers and (2) that the Credit Agreement was also something that could be successfully avoided.

So again, I'm also not persuaded that it would be fair or reasonable to uphold the complaint for this reason.

Conclusion

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 Ms O's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

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 Ms O to accept or reject my decision before 5 March 2026.

Fiona Mallinson
Ombudsman