DRN-6026913

The complaint

Mr G's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

Background to the complaint

Mr G, together with his wife Mrs G, purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 25 July 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 810 fractional points at a cost of £15,648 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs G more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs G paid for their Fractional Club membership by taking finance of £15,648 from Novuna (the 'Credit Agreement').

As only Mr G was named on the Credit Agreement, only he is able to refer a complaint about it to our Service. For ease I will refer to Mr G only from here on, even where he and Mrs G may have been acting jointly or the matter might otherwise apply to Mrs G in some way.

Mr G – using a professional representative ('PR1') – wrote to Novuna on 21 March 2023 (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.

Novuna dealt with Mr G's concerns as a complaint and issued its final response letter on 18 April 2023, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. By this time, Mr G was assisted by a different professional representative ('PR2'). One of our Investigators reviewed the complaint and after considering all the information on file, recommended that it be upheld. In summary, he thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr G at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between Novuna and Mr G was rendered unfair to him for the purposes of section 140A of the CCA.

Novuna disagreed with the Investigator's assessment and asked for an Ombudsman's decision, so it was passed to me.

I considered the matter and reached a different view to that of our Investigator. I issued a provisional decision (the 'PD'), within which I said:

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. Novuna 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.

However, there are certain time limits that apply – and that I think mean Mr G's claim would've been time-barred.

The Limitation Act 1980 sets out limitation periods, or time limits, for bringing various types of legal claim. For a claim based on contract, it's not generally possible to start court action more than six years after the cause of action arose. If a claim is brought too late, the respondent is likely to have a complete defence to the claim on that basis. I think that is the case here, given that the alleged misrepresentations took place more than six years prior to the claim being lodged with Novuna.

In any event, I do not think Novuna acted unreasonably declining the claim on its merits. I'll explain why.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr G was:

1. Told that he had purchased an investment that would "considerably appreciate in value" when that was not true.
2. Told that he would own a share in a property that would increase in value during the membership term when that was not true.
3. Told that he could sell the timeshare back to the resort or easily sell it at a profit.
4. Made to believe that he would have access to "the holiday apartment" at any time all year round when that was not true.

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 enough 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 either or both of these reasons, I don't think it's *probable*. Neither allegation is given the colour or context I consider necessary to demonstrating that the Supplier made a false statement of existing fact and/or opinion. The documentation that Mr G was given (and signed) at the Time of Sale made it clear that the Supplier did not run a "resale" programme and that he was depositing his

Fractional Rights – the rights of exclusive use of the Allocated Property – in exchange for his Fractional Points, to exchange for the booking of other holiday resorts. I find it unlikely that the Supplier would've made promises of the type suggested in the Letter of Complaint, which would have been so starkly contradictory to the contractual paperwork and demonstrably false.

So, while I recognise that Mr G and his representatives 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 Novuna acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

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

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

Having considered the entirety of the credit relationship between Mr G and Novuna along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between Novuna and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr G and Novuna.

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

Mr G's complaint about Novuna being party to an unfair credit relationship was made for several reasons.

PR1 said, for instance, that the right checks weren't carried out before Novuna lent to Mr G. 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 Novuna 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 G was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with Novuna was unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr G.

Connected to this is the suggestion that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that Novuna wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr G 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 the lending doesn't look like it was unaffordable for him, 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 Mr G suffering a financial loss – such that I can say that the credit relationship in question was 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 Novuna to compensate him, even if the loan wasn't arranged properly.

Overall, therefore, I don't think that Mr G's credit relationship with Novuna was rendered unfair to him under Section 140A for either of the reasons above. But there is another reason, perhaps the main reason, why Mr G's representatives say the credit relationship with Novuna was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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

Novuna does not dispute, and I am satisfied, that Mr G's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr G's representatives say that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr G was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

A share in the Allocated Property clearly constituted an investment as it offered Mr G 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 G 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr G, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

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 G 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.

Would the credit relationship between Novuna and Mr G have been rendered unfair to him had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr G and Novuna under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr G and Novuna that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Mr G has said in the course of his complaint about how the membership was sold to him and his motivation for purchasing it.

I would note first of all that the evidence in this respect is quite limited. Within the Letter of Complaint, it is said that Mr G was told that he had purchased an investment that would increase in value. There was no further detail underpinning these statements within the Letter of Complaint, which are rather generic in nature. In fact, such assertions were made in an identical fashion by PR1 in a number of other complaints.

When referring the complaint to us, PR2 included a statement from Mr G with his recollections from the Time of Sale. Of particular relevance to the point at issue here, I note that Mr G says:

> "*We were shown expensive looking videos of the new sites around the world we could buy into, these included Florida & Turkey. [The Supplier] explained we would benefit from this investment & could leave it to our children in our wills.*"

And:

> "*We were repeatedly told our ownership would increase in value. We were told it was a valuable asset that had a large monetary value.*"

There is, then, some reference to the Supplier having marketed the membership as an investment opportunity. That said, I find the comments to be somewhat generic – lacking in detail and not providing a fulsome picture of what the Supplier actually said. In any case, as set out above I accept the possibility that the Supplier positioned the membership as an investment to Mr G. In order to uphold the complaint, I would need to find that such positioning was material to Mr G's decision to purchase the membership. And ultimately his comments do not persuade me that it was. He stops short of saying anything to that effect. Moreover, he sets out on a number of points throughout the statement how appealing the holiday options were. And weighing this up – along with the broader circumstances and other available evidence – I think it is more likely than not that the attraction of the holiday options meant Mr G would always have proceeded to purchase the membership, whether or not the investment element had been promoted to him by the Supplier.

I accept Mr G may well have been interested in a share in the Allocated Property, which would not be surprising given the nature of the product at the centre of this complaint. But as Mr G himself doesn't persuade me that his purchase was motivated by a share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision he 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 G's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with the purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr G and Novuna was unfair to him even if the Supplier had breached Regulation 14(3).

<u>The provision of information by the Supplier at the Time of Sale</u>

PR1 said that Mr G was not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. They also said that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit

relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr G sufficient information, in good time, on the various charges he could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr G nor his representatives have persuaded me that he would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

As for the argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mr G in practice, nor that any such terms led him to behave in a certain way to his detriment. And with that being the case, 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.

In conclusion, given the facts and circumstances of this complaint, I did not think that Novuna acted unfairly or unreasonably when it dealt with Mr G's Section 75 claim, and I was not persuaded that Novuna was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct Novuna to compensate him.

Novuna responded to the PD and accepted it.

PR2 also responded. It did not accept the PD and provided some further comments it wanted me to take into account.

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:

<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]

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.

On a related point, I note PR2 queries the manner in which my provisional findings were set out – believing that, as my initial conclusions differed from those of our Investigator, they should have been presented differently and/or with more explicit reference to the points raised by Novuna in response to our Investigator's assessment and PR2's own reply to what Novuna said. My PD set out the reasons for my conclusions in a manner required of us under our rules. It is not unusual that this did not simply engage with the arguments and counterarguments posited in light of our Investigator's review. I completed a full and independent review of the complaint as a whole and explained why I was minded to reject the complaint. The arguments raised by the parties following our Investigator's assessment were not integral to how I reached my decision so I did not specifically comment upon them, but as I confirmed in my PD I took everything both PR2 and Novuna had said and provided.

Beyond this, PR2's further comments in response to the PD in the main relate to the issue of whether the credit relationship between Mr G and Novuna was unfair. In particular, PR2 has provided further comments in relation to whether the membership was sold to Mr G as an investment at the Time of Sale. It has also now argued for the first time that the payment of a commission by Novuna to the Supplier led to an unfair credit relationship.

As outlined in my PD, PR2 originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in their response to my PD. Indeed, it hasn't said it disagrees 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 PR2's points raised in response.

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

PR2 has highlighted under Section 140B (9) of the CCA, the burden of proof falls on Novuna to disprove the allegation that its relationship with Mr G was unfair. I agree that this is correct, placing a burden on lenders during the process of litigation. That does not mean, though, that Novuna – or I – should take a claim at face value. There remains an onus on Mr G to provide some evidence for the claim he is making, despite the overall burden of proof resting with Novuna, as was set out in the judgment in *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34 at paragraph 40. I also remind both parties that it is my role to make findings on what I consider to be fair and reasonable in all the circumstances of any given complaint.

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

In its response to my PD, PR2 has reasserted its view that the Supplier marketed the Fractional Club membership to Mr G as an investment and that this was a motivating factor in his decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mr G in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it wasn't necessary for me to make a finding on this as it is not determinative of the outcome of the complaint. I explained that regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. PR2's response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mr G to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

In my PD I explained the reasons why I didn't think any breach of Regulation 14(3) had led Mr G to proceed with his purchase. In short, I was not persuaded that his decision was motivated by the prospect of a financial gain (i.e., a profit). In reaching that view, I took into account the testimony given by Mr G in the course of his complaint. I recognise PR2 has interpreted Mr G's testimony differently to how I have, and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion.

PR2 objects to the approach I've taken in assessing this aspect of the complaint, believing that I have detracted from the judgment in *Shawbrook & BPF v FOS*[1] and the case law that contributed to it, by requiring Mr G to have been "primarily or mainly motivated" by the investment element in order to uphold the complaint. But I did not make such a finding. I said that, in my view, Mr G was highly motivated by the holiday options offered by the Supplier – which was a factor in my overall conclusion in light of all the available evidence that he would, on balance, have pressed ahead with his purchase of the Fractional Club membership even if there had been a breach of Regulation 14(3).

I note PR2 queries what other available evidence I considered. On this specific point, sales notes made by the Supplier at the Time of Sale and a record of Mr G's holiday reservations made through the membership are amongst the more relevant – being as they do not dissuade me that the holiday options would have always led Mr G to purchase the membership.

[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').

So for the reasons given in my PD and above, I still do not think that any breach of Regulation 14(3), if there was one, was material to Mr G's decision to purchase the Fractional Club membership.

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

PR2 says that a payment of commission from Novuna to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

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

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

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

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

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

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

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

But I don't think *Hopcraft, Johnson and Wrench* assists Mr G in arguing that his credit relationship with Novuna 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 Novuna and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr G, 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 G into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge that it's possible that Novuna 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 Novuna 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 Mr G.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by Novuna to the Supplier for arranging the Credit Agreement that Mr G entered into wasn't high. At £388.07, it was only 2.48% of the amount borrowed and only 3.69% as a proportion of the charge for credit. So, had he known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr G wanted Fractional Club membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted doesn't strike me as disproportionate. So, I think he would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr G but as the supplier of contractual rights he obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to him when arranging the Credit Agreement and thus a fiduciary duty.

Overall, therefore, I'm not persuaded that the commission arrangements between the Supplier and Novuna were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mr G.

I will also address PR2's point regarding the apparent ambiguity in the proposed sale date of the Allocated Property. PR2 suggests that a delayed sale date could lead to an unfairness to Mr G in the future, as any delay could mean a delay in the realisation of his share in the Allocated Property.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2032. This same date is set out under point 1 of the Members Declaration, which has been initialled and signed as being read by Mr G. This date indicates that the membership has a term of 16 and a half years. The ambiguity

identified by PR2 is that in the Information Statement provided as part of the purchase documentation it says the following:

> "The Owning 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." (my emphasis)

It seems clear to me that the contractual commencement date for the start of the sales process is 31 December 2032. This actual date is repeated in the sales documentation as I've set out above. The Information Statement is, in my view, reflective of the fact that most fractional memberships were set up to run for nineteen years. But not all memberships attached to a given Allocated Property were sold at exactly the same time, so often the time left before the sale date was less than nineteen years at the actual time of sale. I accept that this could be confusing, however I do not think Mr G was misled by this at the Time of Sale. So, I can't see that this is a reason to find the credit relationship unfair and uphold this complaint.

Section 140A: 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 Mr G and Novuna under the Credit Agreement and related Purchase Agreement was 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

While I've found that Mr G's credit relationship with Novuna 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 G'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 Novuna is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from Novuna without telling Mr G (i.e., secretly). And the second relates to Novuna'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 Mr G 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 Novuna 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 Novuna's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think he would still have taken out the loan to fund his purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that Novuna acted unfairly or unreasonably when it dealt with Mr G's Section 75 claim(s), and I am not persuaded that Novuna was party to a credit relationship with him under the Credit Agreement that was 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 Novuna 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 G to accept or reject my decision before 16 January 2026.

Ben Jennings
Ombudsman