DRN-6073638

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 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 this decision

I recently issued my provisional decision setting out the events leading up to this complaint and my intended conclusions on how I considered the dispute best resolved. I've reproduced that provisional decision here and it is incorporated as part of my overall findings. I invited both parties to let me have any further comments they wished to make in response, and I will address their responses later in this decision.

My provisional decision

While on a promotional holiday Mr C and his wife attended a sales presentation by a timeshare provider (the 'Supplier'), which led to them purchasing membership of a timeshare (the 'Fractional Club').

On 11 February 2015 (the 'Time of Sale') Mr and Mrs C entered into an agreement (the 'Purchase Agreement') with the Supplier to buy 1,200 fractional points. Mr C paid for Fractional Club membership by taking finance of £12,494 from the Lender (the 'Credit Agreement'), over a 10-year repayment term.

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 Purchase Agreement (the 'Allocated Property') after the membership term ended.

On 10 November 2022, Mr C – using a professional representative (the 'PR') – wrote to the Lender to raise a number of different concerns (the 'Letter of Complaint'). 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 15 September 2022, rejecting on every ground. The PR referred matters to us. After considering the information on file, our investigator rejected the complaint on its merits. Mr C and the PR disagreed with the investigator's assessment and asked for this review.

The legal and regulatory context

I'm required under DISP 3.6.4R[1] 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')[2]

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3R
- CONC 4.5.2G[3]
- CONC 4.5.3R
- The Creditworthiness Assessment provisions in CONC 5.2A

The FCA's Principles

The CONC provisions 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 provisionally 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, I'm not minded to uphold Mr C's complaint.

Before I explain why, I want to make clear that my role as an ombudsman isn't to address every single point that has been made, but to review matters 'as a whole'. If I have not commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

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 to engage section 75, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. There's no dispute that the relevant conditions are met in this case.

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[1] 'R' denotes a rule.
[2] Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance.
[3] 'G' denotes guidance.

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 C was:

1. Told he'd purchased an investment that would "*considerably appreciate in value*"
2. Promised a considerable return on that investment because he was told he would own a share in a property that would considerably increase in value
3. Told he could sell the Fractional Club membership to the Supplier or easily to third parties at a profit
4. Led to believe he'd have access to "*the holiday apartment*" at any time all year round

Neither points 1 nor 2 strike me as misrepresentations even if the Supplier made such representations (and I make no such finding). Telling prospective members they were making an investment because they were buying a fraction or share of one of the Supplier's properties wasn't untrue. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, even considerably so, that sounds like nothing more than an honestly held opinion. There isn't any persuasive accompanying evidence that the relevant sales representative(s) said anything that amounts to a statement of fact in this respect.

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. The points offer little to none of the colour or context necessary to demonstrating that the Supplier made false statements of fact. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I can't properly conclude that it was.

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'm not persuaded they demonstrate a factual and material misrepresentation by the Supplier. It follows that I don't think the Lender acted unreasonably or unfairly when it dealt with Mr C's section 75 claim.

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

I've 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.

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

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
2. The information the Supplier provided at the Time of Sale in relation to Fractional Club membership, including the contractual documentation and the Supplier's disclaimers;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr C and the Lender given his circumstances at the Time of Sale.

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

Mr C's complaint about the Lender being party to an unfair credit relationship was made for several reasons. The PR says, for instance, that the right checks[4] 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. Indeed the Lender has provided documents and income verification evidence that suggests it made proportionate checks. Further, from the information provided, I'm not persuaded that the lending was unaffordable for Mr C.

I don't dispute that the loan repayments reduced the disposable household income, but of course that is the nature of taking on any additional financial commitment. I'm minded to say that the complaint falls some way short of establishing that Mr C's credit relationship with the Lender was unfair to him for this reason.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wouldn't be permitted to enforce the Credit Agreement. The Lender disputes this; it has submitted correspondence from the Supplier suggesting the necessary permissions were in place. But in any event it looks to me like Mr C knew, among 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 Mr C, 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 any financial loss to Mr C, such that I might conclude the credit relationship in question was unfair on him as a result. With that being the case, I'm not persuaded it would be fair or reasonable to tell the Lender to compensate him, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But I can't see that any such terms were operated unfairly against Mr C in practice, or 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 C has said he and his wife were subjected to pressure during the sales process and made to sign documents on the same day. Mr C describes his wife's medical condition and how it affects her ability to read all the information they were given. But I don't find what he describes as having been said and/or done by the Supplier during the sales presentation to offer persuasive reasons as to why he and Mrs C felt as if they had no choice but to purchase Fractional Club membership when they simply did not want to.

Mr C was also given a 14-day cooling off period. I've seen no explanation for why he didn't cancel membership during that time. Given all of this, there's insufficient evidence to persuade me that Mr C made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

[4] See CONC 5.2A.

Overall, therefore, I don't think that Mr C's credit relationship with the Lender was rendered unfair to him under section 140A for any of the reasons above. I now turn to 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

The Lender does not dispute, and I am satisfied, that Mr C'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. At the Time of Sale the provision said:

> *"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."*

The PR says in summary, that at the Time of Sale the Supplier told Mr C Fractional Club membership was the type of investment that would only increase in value.

The Timeshare Regulations don't define the term 'investment'. 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 constituted an investment as it offered Mr C the prospect of a financial return – whether or not, like all investments, he ended up with more than he put into it. But the fact that Fractional Club membership included an investment element didn't 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. Rather, they regulated how such products should be marketed and sold.

To find the Supplier was in breach of Regulation 14(3) it has to be more likely than not that the Supplier marketed and/or sold membership to Mr C as an investment. That is, it told him or led him to believe that Fractional Club membership offered the prospect of a financial gain (a profit) given the facts and circumstances of *this* complaint.

It's clear 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 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 could have positioned Fractional Club membership as an investment.

That doesn't mean that it's more likely than not that Fractional Club membership was marketed and sold to Mr C as an investment in breach of Regulation 14(3). And it's not necessary for me to make a formal finding on that particular issue for the purposes of this decision. That's because other factors in this complaint mean that whether the Supplier breached the relevant prohibition is not ultimately determinative of the outcome in this complaint. I say this for the following reasons.

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

Whether or not the Supplier breached Regulation 14(3), I have to consider what impact such a breach would have on the fairness of the credit relationship between Mr C and the Lender under the Credit Agreement and related Purchase Agreement. 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.

It seems to me that, if I am to conclude that a breach of Regulation 14(3) led to unfairness in the credit relationship between Mr C and the Lender that warrants relief as a result, it's important to consider whether a breach of Regulation 14(3) led Mr C to enter into the Purchase Agreement and the Credit Agreement.

I'm conscious that the original Letter of Complaint makes no specific assertion about why Mr C decided to purchase Fractional Club membership. The submissions at that point focused on the use of the term 'investment'. It was only after our investigator issued their initial assessment that the PR provided Mr C's witness statement. And there simply isn't anything in that statement that speaks to the prospect of a financial gain being a reason for his decision to purchase Fractional Club membership.

As Mr C himself doesn't persuade me that his purchase was motivated by his 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 and his wife ultimately made. I think the evidence suggests they would have pressed ahead with the purchase whether or not there had been a breach of Regulation 14(3). So I don't think it would be reasonable to conclude the credit relationship between Mr C and the Lender was unfair to him such that it warranted relief, even if the Supplier had breached Regulation 14(3).

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 C and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

The Supplier's alleged breach of Spanish Law and its implications on the Credit Agreement

The PR argues that, because the Purchase Agreement was unlawful under Spanish law in light of certain information failings by the Supplier, I should treat that Agreement and the Credit Agreement as rescinded by Mr C and award him compensation accordingly – in keeping with the judgment of the UK's Supreme Court in *Durkin v DSG Retail* [2014] UKSC 21 ('*Durkin*').

However, as the Lender hasn't been party to any court proceedings in Spain, and as I can't see that the Supplier (that is, the company that entered into the Purchase Agreement) is itself the subject of a Spanish court judgment in Mr C's favour, it seems to me that there is an argument for saying that the Purchase Agreement is valid under English law for the purposes of *Durkin*.

I also note that the Purchase Agreement is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in *Diamond Resorts Europe and Others* (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.

While Mr and Mrs C's use of their Fractional Club points was undoubtedly limited, they did go some way to taking advantage of the Purchase and Credit Agreements, in arranging for a family member to make use of the points. An English court might hesitate to uphold a claim for rescission of either agreement because there are equitable reasons to do so.

In the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint and, given the facts and circumstances of this complaint, I'm not persuaded it would be fair or reasonable to uphold it for this reason.

Overall 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 claim. I'm not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement and related Purchase Agreement that was unfair to Mr C 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.

Responses to my provisional decision

The Lender had nothing further to add to my intended conclusions. The PR, responding on Mr C's behalf, provided some further comments and arguments it wished me to consider. Having considered what's been said, I'm now finalising my decision.

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.

I've read the PR's submissions in response to my provisional decision. In the main these relate to the issue of whether the credit relationship between Mr C and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr C as an investment at the Time of Sale. The PR has 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.

The PR originally raised various other points of complaint, all of which I addressed in my provisional decision. But it didn't make any further comments in relation to those in its response to my provisional decision. 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 the conclusions in relation to them that I set out in my provisional decision. So, I'll focus here on the points the PR has raised in response. For ease of reading I will use the same sub-headings in my decision as the PR used in its submission.

Fractional ownership purchase and the witness statement

My provisional findings were that Mr C's Fractional Club membership did include an investment (a profit) element, that it was possible that it was marketed and sold to him in that way in breach of Regulation 14(3), but that there was no persuasive evidence that a profit motive had been a material factor in Mr C's decision to purchase membership.

The PR's latest submissions seek to make the point that Mr C's Witness Statement could not have been influenced by our investigator's assessment (which the PR says it didn't share with its client) or the judicial review judgment[5]. I should note that I neither made reference to any judgment in the relevant section of my provisional decision, nor express any opinion in relation to the point at which Mr C's Witness Statement was submitted. And I can't accept the PR's assertion that I have chosen to not place weight on the genuine recollections of Mr C. On the contrary, my findings specifically take into account Mr C's testimony, including the lack of any comment by Mr C on his purchase motivation.

The PR asserts that "*people expect appreciation because of factors like location, infrastructure development or amenities, improvements and renovations*", as well as "*the point that the properties would increase in value was implied by the overall behaviour of* [the Supplier's] *sales people…that these properties were in high demand, and that this purchase was a once in a lifetime deal, so that* [the] *clients had to make a decision quickly there and then*", and "[the] *clients clearly stated the benefits that obviously convinced them to purchase, which include the potential gains from selling the apartment at the end.*"

This leads the PR to the conclusion that all of this means the investment element played an important part during the sales process in convincing Mr and Mrs C to purchase Fractional Club membership. However, I don't find that a particularly persuasive line of argument. What Mr C said is an account of what he says he and his wife were told, rather than evidence of why they purchased. Within the testimony Mr C talks about feeling under pressure to buy membership, rather than being attracted to the prospect of making a profit from an investment.

I'm mindful here of what HHJ Waksman QC (as he then was) and HHJ Worster respectively had to say in *Carney*[6] (paragraph 51) and *Kerrigan*[7] (paragraphs 213 and 214) on causation. It seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr C and the Lender that was unfair to him and warranted relief as a result, whether any breach of Regulation 14(3) by the Supplier led Mr C to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

As I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I make no finding on here), I'm not persuaded there's enough to enable me to find that Mr and Mrs C's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr C and the Lender was unfair to him for this reason.

Undisclosed commissions

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[5] In this respect the PR refers to *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").

[6] *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ("*Carney*")

[7] *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ("*Kerrigan*")

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 the PR has now sought to make, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to take into account under DISP 3.6.4R.

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.

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. It wasn't acting as Mr C's agent but as the supplier of contractual rights they obtained under the Purchase

Agreement. So the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' (and thus a fiduciary duty) to Mr C when arranging the Credit Agreement.

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 any 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.

What's more, in contrast to the facts of Mr Johnson's case, I understand from information the Lender has supplied to us that in Mr C's case it did not pay the Supplier any commission at the Time of Sale. 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 currently persuaded that 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 such that he would be entitled to relief.

My final decision

Overall, there is nothing that the PR has said in response to my provisional decision that points me towards reaching a different set of conclusions, or gives me good reason not to adopt my provisional findings in full as part of this final decision.

Accordingly, for the reasons I've set out here and in my provisional decision, I remain of the opinion that the Lender did not act unfairly or unreasonably when it dealt with Mr C's section 75 claim, or that it was party to a credit relationship with him that was unfair for the purposes of section 140A of the CCA. It follows that my final decision is that 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 18 February 2026.

Niall Taylor
Ombudsman