

The complaint

Mr H complains that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance (“Novuna”), declined his claim about a defective hot tub under section 75 of the Consumer Credit Act 1974.

What happened

In late 2020 Mr H bought a hot tub from a third party (“the merchant”) for £6,499. He paid a £500 deposit, and the balance was financed with a 24-month loan with Novuna. Novuna accepts that it is liable under section 75 for any breach of contract by the merchant at the point of sale.

The hot tub was delivered in or around November 2020. It has two built-in speakers, which Mr H describes as being an important feature to him as a music-lover. In January 2021 he told the merchant that one of the speakers was making a cracking or crackling sound in time to the bass. He asked for a replacement under warranty; meanwhile he continued to use the hot tub daily. The merchant says it ordered a new speaker that same day, but that due to a global shortage of parts the replacement was not available until April. Meanwhile, it advised him to play music quietly to reduce the crackling sound.

Later in April, Mr H reported that the second speaker had failed completely. So he says that the speakers were not durable. He also says that the lid of the hot tub was fragile and that it broke easily. He says that these defects meant that the hot tub was defective and that the merchant was therefore in breach of the implied term of their contract to sell him a hot tub that was of satisfactory quality. He asked Novuna to end his loan agreement with nothing further to pay, to refund his payments and deposit, and to let him reject the hot tub and return it.

Novuna did not agree to do that. It said that the merchant had agreed to replace the speakers under warranty, and that Mr H was not entitled to reject the hot tub unless and until this repair was carried out and proved to be unsuccessful. It said that the delay in getting the replacement parts had not been unreasonable, due to a global shortage which was not just limited to the merchant. It said that the merchant had told it that the lid must have been broken by Mr H’s carelessness, but it was willing to replace the lid for free as a gesture of good will.

Being dissatisfied with that answer, Mr H brought this complaint to our service in February 2022. (He is represented in this complaint by his partner, but for the sake of simplicity I will describe everything that he has told us on Mr H’s behalf as if it came from Mr H himself.)

In December 2022, one of our investigators upheld this complaint. He accepted that the speakers were not durable enough, and that this was a defect which had been present at the point of sale. He said that a repair of the speakers would have been a fair remedy, except that it had taken too long to do. Although the Consumer Rights Act 2015 normally says that the supplier of defective goods is allowed one attempt to repair them before the consumer is entitled to reject them, this does not apply if the repair takes an unreasonable amount of time to arrange. The investigator thought that this exception applied, so he recommended that

Novuna collect the hot tub at no cost to Mr H, end the loan agreement with nothing else to pay, refund all payments made and the deposit, pay interest on the refunds at 8% a year, and pay another £200 for Mr H's trouble. He said that Novuna could keep 10% of the contract price of the hot tub to allow for Mr H's use of it to date.

Novuna did not accept that opinion. It said the proposed compensation was disproportionate, because the problems with the speakers had not prevented Mr H from using the hot tub. Ten percent off a full refund did not adequately reflect the fact that Mr H had had an operational hot tub for two years. The speakers would only cost £22 to replace. Keeping in mind the reason for the delay – the global shortage of relevant parts – the merchant had not yet had a fair opportunity to repair the speakers, since Mr H had stopped engaging with the merchant from April 2021. The hot tub was now second hand and so could not be re-sold as new. The lid was going to be replaced for free. The hot tub was still useable and was still being used. Novuna offered to pay £500 for the delays and inconvenience, but otherwise insisted that the repairs would be a fair way to resolve this complaint.

Mr H rejected that offer and asked for the full redress proposed by the investigator. Because agreement between the parties could not be reached, this case was referred for an ombudsman's decision. I wrote a provisional decision which read as follows.

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.

I would like to take this opportunity to apologise to both parties for how long it has taken for this case to be assigned to an ombudsman. (However, the passage of time since December 2022 has not made a difference to my view of the case.)

I regret to disappoint Mr H, but I am afraid that I agree with Novuna that to allow him to reject the hot tub for a refund of 90% of the price would not be a proportionate or fair remedy. I will explain why.

First things first: I accept that the speakers were not durable, because they both failed so soon after the hot tub was delivered. I agree that this amounts to a breach of contract by the merchant at the point of sale. This is not in dispute, so I do not need to elaborate further.

I have not considered the fragility of the lid as a separate issue, because I think the offer to replace it for free is enough to resolve that issue. So in this decision I have focused on the speakers, and on what would be a fair remedy for that defect.

The first speaker was reported to have stopped working properly on 18 January 2021. The merchant ordered a replacement the same day; it arrived in stock on 8 April. It was on the basis of this delay, a little under three months, that my colleague decided that the repair had not been done within a reasonable time. However, I do not agree. I think that a global shortage of parts, which the merchant had to obtain from another third party, is a factor which should be taken into account when deciding how long is a reasonable time. And section 23(5) of the Consumer Rights Act says:

*“(5) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—
(a) the nature of the goods, and
(b) the purpose for which the goods were acquired.”*

The nature of the goods is that they are a hot tub with two speakers in it, and the primary purpose of a hot tub is to sit in it; the speakers are secondary. So I would probably have reached a different conclusion if the hot tub had ceased to be usable as such, and could not be repaired for eleven or twelve weeks. But given that the hot tub still worked, I don't think that this is an unreasonable delay to fix the first speaker.

Meanwhile, Mr H was able to use his own speakers while he was waiting for the hot tub's speakers to be repaired. He says that his own speakers were better, except that they were not waterproof. I think this mitigates the inconvenience of not being able to use the hot tub's speakers while he was waiting. I'm sure it was possible to keep his own speakers away from the water while he was using them.

The second speaker failed on 20 April, so another replacement was needed. On 11 May (three weeks later), the merchant told Novuna that both replacement speakers were ready. (The last communication directly between the merchant and Mr H had been on 20 April; after that, the merchant only dealt with Novuna.)

For some reason which has not been explained, Novuna waited until 2 June to tell Mr H; an avoidable delay of three weeks. On receiving no response from Mr H, Novuna sent him a chasing email on 17 June. For this reason, I do not propose to award compensation for the three weeks' delay, as it appears that Mr H was no longer interested in having the speakers replaced.

The speakers have never been repaired, but I am satisfied that this was not because the merchant was unable or unwilling to repair them. I am not persuaded that the repair of the speakers – if Mr H had accepted this when it was offered to him – would have taken an unreasonable time. For that reason, I think that repairing or replacing the speakers free of charge under warranty, together with £500 compensation for the inconvenience of having defective speakers for a few weeks, would have been a fair resolution of the problem at the time. For the same reason, I am satisfied that Novuna did not have to offer to do more than it has to resolve Mr H's section 75 claim.

But even if I took a different view about that, I still would not think that rejecting the entire hot tub for a 90% refund would be a proportionate response. The hot tub still works and is still useable as such, and Mr H has continued to use it regularly (with his own speakers). So even if I decided that he should be able to reject the hot tub, the deduction for using it would be much higher than ten percent – more like 90% – and he probably would not think it worthwhile to return the hot tub in exchange for that.

The merchant is still able and willing to repair or replace the speakers, and to replace the lid. I think that is a more proportionate and fair remedy.

(I have noted that from April 2021 the merchant stopped communicating directly with Mr H, and began using Novuna as an intermediary instead. I think that was not necessarily helpful, but it is not something for which section 75 makes Novuna liable.)

So I am currently minded to uphold this complaint, but only to award £500 compensation, and to require that the speakers and lid are replaced at no cost to Mr H.

Responses to my provisional findings

Mr H wrote 22 pages of representations in reply to my provisional decision. Summarising this as succinctly as I can, he said:

- There was no evidence, other than hearsay, about a global shortage of relevant parts;

- But if there really had been a global shortage of parts at the time, then I should not have factored this in when considering how long is a reasonable time to supply replacement speakers;
- There had also been a third speaker that failed, and the Bluetooth sound system had also stopped working;
- He disagreed that not having music does not affect the ability to use the hot tub, and he compared this to a discotheque without music;
- The lid had broken too easily and had not been fit for purpose;
- But for the covid pandemic he would have returned the hot tub within 30 days of delivery, because of the lid;
- Any unfairness to Novuna should be regarded as a good lesson learned by them;
- The merchant could have just replaced the speakers with the ones that were in their display model in their showroom;
- In my provisional decision I had overlooked some important matters (but he didn't list what these were, so I cannot comment on this point¹);
- The speakers and integrated Bluetooth sound system were fundamental to the experience and were the main reason why he had chosen that particular model of hot tub;
- The entire hot tub, including the lid and speakers, should be regarded as one indivisible entity, and not divided into its components as I had done;
- He and his partner had started to suffer skin conditions caused by the chemicals in the hot tub (and he offered to show me photos of this on request);
- When the tub was delivered it was not installed level (on gravel);
- I had said that it was acceptable to listen to the hot tub speakers with the cracking noise, but he disagreed with me (in fact I had never said that; I had said he could use his own speakers);
- Using his own speaker had been inconvenient;
- The final decision should come from another ombudsman, preferably either a woman or a gay man;
- The whole experience had affected his mental health.

My final decision

I have not found it necessary to ask another ombudsman to write the final decision.

Some of the above points are new ones which were not included in the complaint previously, such as the failure of a third speaker, and so I won't be commenting on them.

I appreciate that the speakers were integrated into the hot tub and were part of one unit, but I'm afraid that I still remain of the view that it would be disproportionate to allow the rejection of a £6,500 hot tub without first attempting to replace or repair some serviceable parts that only cost £22. I also take into account that the right to reject goods under the Consumer Rights Act is conditional on allowing one attempt to repair them, as long as this is done within a reasonable time. How long a time is reasonable will depend on the facts of each case. And I cannot accept the argument that a global shortage of relevant parts is an irrelevant fact. It has to be taken into account.

I asked Novuna for evidence to support the merchant's claim that there was a shortage. In response, it sent me four emails from three of the merchant's suppliers, including two contemporaneous emails from November and December 2020, together with a leaflet

¹ Unless of course he meant the other matters I have listed above and below this bullet-point.

published by BISHTA.² These explained that because of the covid pandemic, global demand for hot tubs in 2020 had increased by 400 to 600 percent, there had been significant delays in delivering goods and parts from overseas in container ships, and some supply factories had closed or experienced staff shortages during lockdowns. It had taken the industry 18 months to get back to normal. Some of these emails also provided the following links to relevant online articles:

<https://www.whatspa.co.uk/why-is-it-difficult-to-find-hot-tubs-in-stock/>

<http://affordablehottubrepair.com/covid-19-delays-hot-tub-repairs.html>

<https://www.bbc.co.uk/news/business-54908129>

I accept all of this evidence, and I think that it adequately explains the delays Mr H experienced. And I don't think it is reasonable to expect the merchant to cannibalise its showroom display model for spare parts. (And even if it had done so, that would have solved the problem for only one customer, and that would not necessarily have been Mr H.)

Mr H says he was told to find a flat, level surface for the hot tub to stand on, but at delivery he chose to have it installed on gravel. I think that explains why it was not level, so I don't think it would be fair and reasonable of me to hold Novuna responsible for that.

I appreciate the point that the lid was broken within 30 days of delivery, but as Mr H did not ask to reject the hot tub within 30 days, his right to do so without first having to attempt a repair expired. It does not matter if he would have exercised that right but for the pandemic. So I remain of the view that Novuna's offer to replace the lid is enough to resolve that issue.

Overall, I have not been persuaded to change my mind about what would be a fair resolution of this case.

My final decision

My decision is that I uphold this complaint in part. I order Novuna Personal Finance to pay Mr H £500 and to arrange to replace the hot tub's speakers and lid at no cost to him. I do not require it to do anything else.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 8 September 2023. But this final decision is the end of our process, and so we will not be able to consider any further representations about the merits of this complaint.

Richard Wood
Ombudsman

² The British and Irish Spa and Hot Tub Association, the trade association for the industry. I will arrange for a copy of this leaflet to be sent to Mr H with this decision.