

## The complaint

Mr B has complained that Mitsubishi HC Capital UK PLC trading as Novuna (“Novuna”) acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under s.140A of the Consumer Credit Act 1974 (“CCA”) and (2) deciding against paying a claim under s.75 CCA.

## What happened

On 2 December 2012, Mr B (alongside another, Mrs W) took out a timeshare membership from a timeshare provider (“the Supplier”) called Fractional Property Owners Club (“FPOC”) Membership. This type of membership, as well as allowing members to book holiday accommodation, provided them an interest in the sale proceeds of a timeshare apartment. The cost of the membership was £8,416 (including the first year’s maintenance fees) and Mr B and Mrs W signed a Purchase Agreement to take out FPOC Membership. It was paid for by Mr B taking a loan for the full amount in his sole name from Novuna.<sup>1</sup> The loan was set to run for fifteen years, but it was paid off in full on 25 February 2013.

In 2018, Mr B used a professional representative (“PR”) to make a complaint on his behalf about FPOC Membership. On 27 November 2018, PR wrote a ‘pre-action’ letter to the Supplier to say it planned on issuing proceedings against the Supplier for actionable misrepresentations and other matters and that Mr B was purporting to rescind the Purchase Agreement.

On 30 November 2018, PR referred Mr B’s complaint to our service (this was received on 3 December 2018). Included with that referral was a letter addressed to Novuna (“the Letter of Complaint”) dated 27 November 2018 – the same day as the letter to the Supplier – stating that Mr B had a number of complaints for which Novuna was answerable. Specifically, it was said that under s.75 CCA, Mr B had a claim for the Supplier’s alleged misrepresentations at the Time of Sale and that there was an unfair debtor-creditor relationship as defined by s.140A CCA, caused by both failings by the Supplier when selling FPOC Membership and Novuna when deciding to lend. Novuna has said that it did not receive the Letter of Complaint.

On 5 December 2018, we received a signed form from Mr B saying that he wished for his complaint to be considered by the Financial Ombudsman Service – this was signed on 30 November 2018, the date of PR’s letter to our service.

On 17 December 2018, somebody at our service wrote to PR to note that the referral showed PR had written to Novuna on Mr B’s behalf on 27 November 2018. Under the rules that we must apply, a business has eight weeks to respond to any complaint, and so it was explained that if Mr B was not happy with Novuna’s response, PR could let us know and send a copy of any correspondence, or, if Novuna did not respond within eight weeks, PR could let us know that too. It was explained that no further action would be taken until we heard from PR.

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<sup>1</sup> As only Mr B was a party to the credit agreement, only he can bring a complaint to this service.

On 1 September 2020, PR wrote to our service to say it had not heard anything further from our service on Mr B's complaint and asked for an update. So, on 11 September 2020, we wrote to Novuna to say we were considering the complaint. Novuna received this, but did not give its formal response until we asked for it again, some time later. On 17 October 2022, Novuna wrote to Mr B to explain that it was not upholding his complaint. It explained that it had not received the Letter of Complaint until 11 September 2020 when it was forwarded by the Financial Ombudsman Service. In short, it said that the complaint had been made too late as more than six years had passed since both the Time of Sale and from when the loan had been repaid. Novuna contacted the Supplier, which said it was not aware of the complaint made in 2018 either. On 1 November 2022, PR said Mr B was not happy with Novuna's response and wished for his complaint to be considered by the Financial Ombudsman Service.

One of our investigators considered the complaint, but did not think Novuna needed to do anything further. He thought that there was not enough to show that the claims made under ss.75 and 140A CCA had been made out, and so he did not recommend Novuna pay any compensation. PR, on Mr B's behalf, disagreed and asked for the matter to be considered again by an ombudsman.

I considered the complaint and issued a provisional decision, setting out my provisional findings and inviting both parties to provide any further evidence and arguments they wanted to me to consider.

Having considered everything, I did not think the Financial Ombudsman Service has the power to consider the complaint that Novuna was a party to an unfair debtor-creditor relationship. I did think I had the power to consider Mr B's complaint that Novuna unfairly dealt with a claim under s.75 CCA, but I did not think Novuna needed to do anything further to answer it.<sup>2</sup>

An extract of my provisional decision reads:

*"Mr B said that the Supplier misrepresented the nature of the membership to him when he and Mrs W bought it and that he has a claim for misrepresentation against the Supplier.*

*Under s.75 CCA, Novuna could be jointly liable for the alleged misrepresentations made by the Supplier. But Novuna argued that any claim brought by Mr B for any alleged misrepresentations was made too late. I have considered that argument and, having done so, I agree with what Novuna has said. For the avoidance of doubt, I have not decided whether the limitation period has expired as that would be a matter for the courts should a legal claim be litigated. Rather, I have considered whether Novuna acted fairly in turning down the claim.*

*Our service normally thinks it would be fair and reasonable for a creditor to rely on the Limitation Act 1980 ("LA") as an answer to a claim under s.75 CCA. This is because it would not normally be fair to expect lenders to look into a claim that has been made outside of the limitation periods, so long after the liability arose and after a limitation defence would have become available in court.*

*So I think it is relevant to consider whether Novuna has a limitation defence under the LA when thinking about a fair answer to Mr B's complaint.*

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<sup>2</sup> This decision will only deal with the complaint that Novuna did not properly deal with the s.75 CCA claim. I have dealt with the question of whether I can consider the rest of Mr B's complaint in a separate decision.

*It was held in Green v. Eadie & Ors [2011] EWHC B24 (Ch) that a claim under s.2(1) of the Misrepresentation Act 1967 is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s.2 LA).*

*Here Mr B brought a like claim against Novuna under s.75 CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim. As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which would be open to the supplier, including that of limitation:*

*“There is no difficulty in treating the debtor's rights under sub-s (1) as a “like claim” against the creditor. Since the creditor's liability mirrors the supplier's it follows that, to the extent that the supplier has successfully excluded or limited her liability, the creditor may shelter behind that exclusion or limitation. Conversely, the creditor's right to repayment is so closely connected with the supply contract, and the debtor's statutory rights under sub-s (1), that the debtor may assert a right of set-off in diminution or extinguishment of her liability to the creditor, and as a defence in proceedings brought by the creditor (with or without a counter-claim). Any attempt to exclude the right of set-off will fall foul of CCA 1974, s 173(1) (and would in any case fall within [section 13(1)(b) of the Unfair Contract Terms Act 1977])”*

*Therefore, the limitation period for the s.75 CCA claim expires six years from the date on which the cause of action accrued.*

*The date on which a ‘cause of action’ accrued is the point at which Mr B entered into the Purchase Agreement. It was at that time that he entered into an agreement based, he says, on the misrepresentations of the Supplier and suffered a loss. He says, had the misrepresentations not been made, he would not have bought the timeshare. And it was on that day that he suffered a loss, as he took out the loan agreement with Novuna that he was bound to and would have never taken out but for the misrepresentations. It follows, therefore, that the cause of action accrued in December 2012, so Mr B had six years from then to bring a claim. But he did not make a claim against Novuna until September 2020, which was outside of the time limits set out in the LA. So I think Novuna acted fairly in turning down this misrepresentation claim.”*

Novuna did not provide anything further in response to my provisional decision.

PR, on behalf of Mr B, asked for an extension of time to provide a response. I granted an extension until 18 October 2024. However, PR did not then provide anything further.

### **What I have 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.

Under DISP 3.5.13 R, I may fix time limits to aspects of the consideration of complaints. Here, in my provisional decision, I initially gave PR a deadline of 4 October 2024 to provide further information and explained that unless any new evidence or arguments changed my mind, my final decision was likely to reflect what I said in my provisional decision. On PR's request, I extended that to 18 October 2024, but nothing has been provided. I am satisfied that PR and Mr B have had the opportunity to provide further information and, under DISP 3.5.15 R, I have decided to proceed with the consideration of the complaint in the absence of

any further evidence or arguments.

As neither party has provided me anything further to consider, I see no reason to depart from my provisional findings. So, for the reasons set out above, I find that Novuna acted fairly in dealing with Mr B's s.75 CCA claim.

### **My final decision**

I do not uphold Mr B's complaint that Mitsubishi HC Capital UK PLC trading as Novuna acted unfairly or unreasonably in deciding against paying a claim under s.75 of the Consumer Credit Act 1974.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 22 November 2024.

Mark Hutchings  
**Ombudsman**