

The complaint

Mrs J complains that Mitsubishi HC Capital UK PLC trading as Novuna¹ (the 'Lender') is liable to pay her compensation following a complaint made about a timeshare bought using credit provided by it.

Although the purchase in question was made in the joint names of Mr and Mrs J, as the finance agreement was in Mrs J's sole name, she is the only eligible complainant here. I will however, refer to both Mr and Mrs J where appropriate in this decision.

What happened

On 19 August 2014, whilst on a holiday, Mr and Mrs J attended a sales presentation from a timeshare provider (the 'Supplier'). As a result of this presentation, Mr and Mrs J purchased membership of an asset-backed timeshare called the Fractional Property Owners Club ('FPOC') from the Supplier (the 'Time of Sale'). This membership cost £12,984.

Mrs J paid for this FPOC membership with finance provided by the Lender. She entered into a 10-year Fixed Sum Loan Agreement (the 'Credit Agreement') for £12,984. The total repayable including interest (APR 18.9%) was £27,511.20. This agreement required a minimum monthly repayment of £229.26. At the Time of Sale, the Supplier agreed to give Mr and Mrs J a 'Travel Savings Bonus' which was a payment of £150 per month for the first 10 months of their FPOC membership.

Mrs J was in contact with both the Supplier and the Lender after the £150 monthly payments ceased as they felt the loan was unaffordable now these payments had stopped. This contact culminated in Mrs J complaining to the Lender on 24 September 2017 (the 'Letter of Complaint').

Her complaint was, in essence, that the Lender had been irresponsible in agreeing to provide her the loan under the Credit Agreement as the details entered onto the loan application form were incorrect, and her gross annual income had been entered at £36,000 whereas it was really £3,600. And had the Lender made adequate checks it would not have lent her the money meaning she would not have made the purchase. She also said that the Supplier had told them it would be easy to refinance the agreement to an affordable rate when they were home, but she had been unable to do so. And she and Mr J had been pressured into signing the purchase and loan documentation, and had not been offered any alternative finance providers so that they could make a choice.

On 22 November 2017 the Lender sent Mrs J its final response, rejecting her complaint. It said:

- The monthly costs associated with the Credit Agreement were clearly set out in the documentation.
- The documentation signed by Mr and Mrs J states that they, and not the Supplier, would be responsible for arranging any refinancing if required.

¹ At the time the lending was agreed, the Lender was trading as Hitachi

- The details entered by hand on the credit application were entered by Mrs J herself, and she self-declared a gross annual income of “£36000 approx” and this figure was entered onto the Credit Agreement which Mrs J signed as being correct.
- There was no obligation to make the purchase and she and Mr J were free to leave at the conclusion of the multi-media presentation. They also had a 14 day rescission period in which they could cancel their agreements if they were unsuitable.
- Mrs J had completed an application with another finance company prior to the one agreed with the Lender, so it did not agree that no other options had been provided. Mr and Mrs J could also have paid for their purchase in another way they had chosen to.
- The Lender confirmed it had carried out all the necessary checks on her credit application and had used a third-party. No issues had arisen and her application was accepted.

Mrs J did not agree with this outcome so referred her complaint to the Financial Ombudsman Service. It was assessed by an Investigator, who thought her complaint ought to be upheld. He thought that had the Lender carried out reasonable and proportionate checks into the affordability of the proposed lending, these would have demonstrated that Mrs J would not have been able to make her repayments sustainably.

The Lender did not agree with this. It said it had carried out reasonable and proportionate checks following the application for credit. And Mrs J had stated in the application form that her income was £36,000 and although she now says this was incorrect, it had validated this level of income using credit reference agencies at the time of the application. And having reviewed the bank statements Mrs J had provided to this Service, it thought these supported that the loan was affordable and sustainable.

No agreement could be reached so the complaint came to me for a decision.

And having considered everything that had been said and submitted, I didn't agree with the finding of the Investigator. I thought that the Lender had not been unreasonable in the circumstances, nor that it caused an unfairness that requires a remedy in this case.

My provisional decision

I set out my thoughts in the form of a provisional decision and sent this to both Mrs J and the Lender, inviting them to respond with any new evidence or arguments that they wished me to consider. In my provisional decision I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And when doing that, the Financial Conduct Authority ('FCA') Handbook of Rules and Guidance requires that I take into account the following under Rule 3.6.4 of the Dispute Resolution Rules ('DISP'): relevant law and regulations; the regulator's rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

Where I have found evidence is incomplete, inconclusive or contradictory, I have made my decision on the balance of probabilities – what I think is more likely than not to have happened – given the available evidence and wider circumstances.

When bringing her complaint, Mrs J didn't set out on what regulatory or legal basis she felt

the Lender needed to do something to put right what she said went wrong – I make no criticism of her in not doing so as I wouldn't expect her to necessarily know these things. Our Investigator considered the complaint and thought parts of it amounted to complaints that the Lender should have considered under the Consumer Credit Act 1974 (the 'CCA'), and having considered everything, I agree. So, I've reflected that in my approach to this complaint.

Mrs J's complaint is, in essence that the decision made by the Lender to provide her finance to purchase the FPOC was irresponsible as the loan was unaffordable for her. She has also said that she and Mr J were put under pressure to make the purchase and take the credit which she wouldn't have otherwise done. This is a complaint of unfairness, and that the actions of the Supplier and/or the Lender at the Time of Sale led to Mrs J being party to a credit relationship with the Lender that was unfair to her, for the purposes of Section 140A of the CCA.

Was Mrs J's credit relationship with the Lender unfair to her?

When looking at the Supplier's sales process, I've considered:

- *The Supplier's sales and marketing practices at the Time of Sale; and*
- *The provision of information by the Supplier at the Time of Sale.*

And in considering these aspects of the sale, I've considered the impact that one or both had on Mrs J and her credit relationship with the Lender.

Was Mrs J pressured into making the purchase?

Mrs J has set out how she was put under undue pressure by the Supplier, and only made the FPOC purchase because of this pressure. She has said the sales process lasted many hours, and thought she had to agree to the purchase there and then as the deal was only available on that day.

I'm required to take into account, when appropriate, what I consider was good industry practice at the time – which, in this complaint, is the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code'). The RDO Code sets out, amongst other things, the Sales and Marketing Principles. And those Principles state that selling members (like the Supplier) had to ensure that it used "appropriate selling methods that treat the consumer with respect and allow the consumer choice between purchasing and reflection."

From what I know of the Supplier's general sales practices at the time, I don't doubt that the sales process Mrs and Mr J attended was lengthy. But Mrs J hasn't described what happened during the time she was there, nor has she described what was said to her, by whom and in what circumstances, that led her and Mr J to agree to a purchase that they didn't actually want. And she says she was rushed into signing the Credit Agreement. But I can see it was signed, and the allegation that they only made the purchase and she only took the associated Credit Agreement as a result of the pressure she was put under, has very little evidence to support it.

And Mrs J has not said the Supplier had prevented her from leaving at any point. I understand that she has said that the accommodation they were staying in was a car drive away, so they needed a lift back, and she thought it would have been awkward to ask the sales person to do that, but I can't see why that meant they had to make the purchase when they didn't want to. It seems to me that the reason they stayed was because they were actually interested in making the purchase, not because they were unable to leave.

Although I accept that the particular timeshare that was being presented to Mrs and Mr J was fairly complex, I also cannot see that it wasn't explained clearly enough to be unfair to her. I can see that she was in the presentation and sales process for quite some time, and she had the opportunity to seek clarification on any point when they spoke to the compliance officer when signing. What's more, I have seen that Mrs and Mr J were also given a 14-day 'cooling off' period following the sale, during which time they could cancel the purchase and she the associated Credit Agreement without penalty.

But in any event, Mrs J has said herself that they were not unhappy with the purchase or the associated Credit Agreement until 10 months after the agreement was signed, and that was because they began to doubt its affordability.

So, I haven't seen sufficient evidence to persuade me that, on balance, the Principle I've referred to above was not adhered to for reasons relating to pressure, nor that she wasn't given sufficient information on which to base her purchasing decision. So, I do not think Mrs J's credit relationship with the Lender was unfair to her for these reasons.

Was the finance provided by the Lender affordable to Mrs J?

Mrs J purchased the FPOC membership with a point-of-sale loan from the Lender. This was a 10-year Fixed Sum Loan Agreement for £12,984 with monthly repayments of £229.26.

I think it may be helpful to explain how a point-of-sale loan works. In order for Mrs J to make the FPOC membership purchase, she needed to be able to pay £12,984 to the Supplier to buy it. She applied to the Lender (using the Supplier as the credit broker) for a point-of-sale loan for this amount – in effect she asked the Lender to pay the £12,984 to the Supplier, whilst agreeing with the Lender that she would pay that amount back to it, plus interest, over a 10-year period, by making monthly payments of £229.26.

In order to apply for the loan, a hand-written application was completed, documenting Mrs J's personal and financial circumstances. This appears to have been completed by Mrs J and the writing appears consistent throughout when documenting all her personal details. I think it unlikely that these would have been completed by someone other than Mrs J. The hand-completed form sets out that Mrs J had an approximate gross annual income of £36,000 and was retired. This information was then transferred onto the Credit Agreement, which Mrs J signed as being correct.

The Lender has said that at the point of the loan application, it carried out appropriate checks with the credit reference agencies, and no adverse information was reported. It had considered the loan application, which had been completed with Mrs J's input, and which had confirmed that she was a homeowner without a mortgage. Her self-declared income had been verified by the credit reference agency checks it had completed, and having completed these checks it considered that the finance Mrs J was applying for was affordable and sustainable for her.

The legal and regulatory context

At the time of the lending, the Lender had to comply with the rules and guidance set down by the FCA and published in the FCA Handbook. Part of that was titled 'Principles of Business' (the 'PRIN') – the most relevant of which was PRIN 2.1.1R(6) which says "[a] firm must pay due regard to the interests of its customers and treat them fairly."

The FCA also set out more specific business guidance for different regulated activities, including when providing consumer credit, in CONC. The relevant part is CONC 5, which deals with responsible lending. At the time of Mrs J's borrowing, some of the specific rules

and guidance included:

- *Before entering into a regulated credit agreement, the Lender needed to undertake an assessment of Mrs J's creditworthiness (CONC 5.2.1R(1)).*
- *Any assessment needed to consider the potential for any commitments under the agreement to adversely impact Mrs J's financial situation, taking into account the information of which The Lender was aware at the time of lending, and Mrs J's ability to make repayments over the life of the loan (CONC 5.2.1R(2)).*
- *Any assessment needed to be based on sufficient information obtained from Mrs J and a credit reference agency, where necessary (CONC 5.2.1R(3)).*
- *Any assessment was dependent upon and proportionate to factors that included the type of credit, the amount borrowed, the cost of credit, Mrs J's financial position at the time of lending, Mrs J's credit history and existing financial commitments, any future financial commitments or changes in circumstances and any vulnerability; but this list wasn't exhaustive (CONC 5.2.3G).*
- *It may have been disproportionate to consider every factor in every case, but that was dependent on the particular circumstances (CONC 5.2.4G(2)).*
- *The Lender should have considered the type of information it needed to use in its assessment, which could have included evidence of income and expenditure, a credit score, a credit reference agency report and information provided by Mrs J (CONC 5.2.4G(3)).*
- *A creditworthiness assessment was more than just assessing Mrs J's ability to repay the credit (CONC 5.3.1G(1)) and any such assessment should have included The Lender taking reasonable steps to assess Mrs J's ability to meet the repayments in a sustainable manner and without incurring financial difficulties or experiencing significant adverse consequences (CONC 5.3.1G(2)).*
- *If The Lender took Mrs J's income into account in the creditworthiness assessment (which it said it did), it wasn't generally sufficient to rely solely on a statement of income from Mrs J (CONC 5.3.1G(4)(b)).²*

Also relevant (and referred to in CONC 5.2) was the Office of Fair Trading's ('OFT') Irresponsible Lending Guidance. This guidance helped set out good industry practice prior to the FCA taking over the regulation of consumer credit in April 2014. At para 4.1 it was said:

"Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences."

"Sustainable" is defined in CONC 5.3.1[G] (6):

"For the purposes of CONC "sustainable" means the repayments under the regulated credit agreement can be made by the customer:

a) Without undue difficulties, in particular:

- i. The customer should be able to make repayments on time, while meeting other reasonable commitments; and*

² Although if the information provided was false *and* reasonable and proportionate checks wouldn't have shown to the Lender that was the case, the Lender wouldn't have contravened this guidance.

- ii. Without having to borrow to meet the repayments.
- b) Over the life of the agreement [...]
- c) Out of income and savings without having to realise security or assets”

And the FCA guidance went on to say:

“A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of the credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer’s financial situation.”

In summary, the Lender’s assessment of Mrs J’s circumstances before agreeing to lend to her had to be borrower-focused. In practice, that meant that as well as the Lender deciding for itself its own level of acceptable risk, it also had to assess the risk of lending to Mrs J as a borrower. In doing that, it needed to assess whether he could afford the repayments in a sustainable way over the term of the loan.

The Financial Ombudsman Service has set out its approach to lending complaints on its website, so in keeping with that and what I’ve set out above, when deciding a fair and reasonable outcome to this complaint, I need to consider:

1. *Did the Lender carry out reasonable and proportionate checks to satisfy itself that Mrs J was likely to have been able to repay the borrowing in a sustainable way?*
 - i. *If the Lender carried out such checks, did it lend to Mrs J responsibly using the information it had? Or*
 - ii. *If the Lender didn’t carry out such checks, would reasonable and proportionate checks have shown that Mrs J was unlikely to have been able to repay the borrowing in a sustainable way?*
2. *And if the answer to either or both of those is no - did Mrs J lose out as a result of the Lender’s decision to lend to her?*

And having considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint, I currently do not think it ought to be upheld. I am not currently persuaded that the Lender entered into the Credit Agreement in a way which was contrary to the requirements of CONC.

Did The Lender carry out reasonable and proportionate checks?

The FCA acknowledged in CONC that what constituted reasonable and proportionate checks when the Lender lent to Mrs J depended on several factors, and what these checks looked like in practice wasn’t an exact science.

But CONC 5.2.3[G] indicated that the factors relevant to determining what such checks looked like included the type of credit being applied for, along with the size and cost of the borrowing. Other relevant factors related to the borrower’s financial circumstances, which included their financial history and outlook, along with their situation as it was, including any signs of vulnerability and/or financial difficulty.

The Lender had to carry out checks that were proportionate to a number of factors like those in CONC 5.2.3[G], and I think reasonable and proportionate checks ought to have been more thorough:

- The lower an applicant's income - because it could be more difficult to make the repayments as a result;
- The higher the amount repayable - because it could be more difficult to meet a higher repayment, especially from a lower level of income; and
- The longer the loan term – because the total cost of the credit was likely to have been greater given the longer time over which repayments have to be made.

What's more, as the FCA said in CONC 5.3.1[G] (4)(b), it didn't consider self-certification of income to be generally sufficient. It went on to say that firms, like the Lender, had to take account of the fact that the risk of credit being unsustainable was directly related to the amount of the credit granted (along with associated interest/charges etc) relative to the borrower's financial situation.

So, it seems that the circumstances in which it was reasonable to conclude that a less detailed affordability assessment was proportionate, is more likely to be limited to applicants whose financial situation was stable, and whose borrowing was relatively insignificant and short-lived. And as I go on to explain below, I do not think Mrs J's circumstances fitted that description.

The Lender has not described in any detail the checks it did carry out, other than to say it used external sources and the credit reference agencies, and Mrs J's self-declared income was verified by these checks. But in the circumstances, and given the relatively long term of the credit agreement, I don't think the evidence provided suggests that the checks carried out by the Lender were reasonable and proportionate.

What would reasonable and proportionate checks have shown?

As I've already explained, there weren't specific checks that the Lender needed to carry out, so it's not possible to say with certainty what reasonable and proportionate checks would have shown. But what I am considering, is the likelihood that reasonable and proportionate checks would have shown that either Mrs J would or wouldn't have been able to sustainably repay her loan.

This is difficult as I am making this decision several years after the date that the loan was granted. So, I've used evidence of the checks the Lender says it relied upon at the time, and also other available evidence provided by Mrs J to get a picture of her circumstances at the time. This includes copies of her bank statements from the months preceding the Time of Sale, and her pension income³ following her retirement three weeks after the lending was agreed.

The Lender said that the checks it carried out showed Mrs J had existing credit commitments at the time of the credit application with a total balance of £3,194 with monthly payments towards that of approximately £184.64 per month. And the loan agreed under the Credit Agreement was going to increase this debt to a little over £16,000 with monthly payments of approximately £414.

Mrs J has said that her gross annual income was not £36,000 as written on the application form, and it was in fact £3,600. The most likely explanation for this anomaly was that there was a mistake made when this was completed, but in any event, the Lender was asked to assess Mrs J's application on the information it was provided, along with its own checks.

³ I am not making a finding that The Lender needed to see these documents at the time of lending in order to carry out reasonable and proportionate checks, just that these are the sorts of documents that might go towards providing evidence of income/expenditure as suggested in CONC 5.2.4G(3).

Mrs J has said that she was retiring three weeks after the credit application was completed, which is why she stated 'Retired' as her employment status. But in doing that, the information the Lender had to rely on was that Mrs J was already retired, and in receipt of an annual income of £36,000. I accept it would be unusual for that level of income to be achieved from a pension, but it is certainly possible, especially with the final salary pensions schemes which were in existence at the time. So this would not necessarily have been an anomalous income for someone who was retired. And in any event, the checks the Lender did carry out included verification of her income from credit reference agencies.

So had the Lender carried out reasonable and proportionate checks at the time Mrs J made the credit application, I think it likely that the answers to those checks would have indicated that the loan was affordable and sustainable.

Did the Lender make a fair lending decision?

So what would the Lender have discovered if it had asked for evidence of income and expenditure? Had it asked to see proof of income, the only evidence that Mrs J could have provided at the time was income from her employment. And had the Lender asked to see copies of bank statements, it would have seen monthly income payments to the account which were roughly equivalent to the salary that Mrs J declared on the application. So I cannot see that either of these would have reasonably caused the Lender any concern about her level of income.

And it also needs to be noted that Mrs J had declared that she had already retired. And retirement income is generally from a personal or occupational pension (and at the time of the application Mrs J would not have been in receipt of the state pension). And pension income tends to be either fixed or increasing with the cost of living. So it would not have been unreasonable for the Lender to have expected this level of declared income to be maintained.

So, had the Lender carried out additional checks to verify Mrs J's income, I don't think this would have led it to reasonably think that Mrs J did not have the level of income that was declared, and would not have been able to reasonably sustain the repayments over the term of the agreement.

So, given the evidence I have seen to date, I think the decision that the Lender made to agree to provide Mrs J £12,984 credit was not unreasonable in the circumstances, nor that it caused an unfairness that requires a remedy in this case.

Neither Mrs J nor the lender responded to my provisional 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 have also reconsidered my findings in my provisional decision. As neither Mrs J nor the Lender made any further arguments or submissions, and having reconsidered everything afresh, I see no reason to depart from my provisional findings.

My final decision

I do not uphold Mrs J's complaint against Mitsubishi HC Capital UK PLC trading as Novuna.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J to accept or

reject my decision before 14 December 2024.

Chris Riggs
Ombudsman