

## The complaint

Mr D'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 claims under Section 75 of the CCA.

Although the timeshare in question was bought jointly by Mr and Mrs D, the associated credit agreement was in Mr D's sole name, so he is the only eligible complainant here. I will, however, refer to both Mr and Mrs D where it is appropriate to do so.

## What happened

Mr and Mrs D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 13 January 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £11,294 (the 'Purchase Agreement').

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

Mr and Mrs D paid for their Fractional Club membership by taking finance of £11,294 from the Lender in Mr D's sole name (the 'Credit Agreement').

Mr D – using a professional representative (the 'PR') – wrote to the Lender on 24 November 2017 (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.

The Lender dealt with Mr D's concerns as a complaint and issued its final response letter on 28 November 2017. The Lender didn't address the merits of Mr D's complaint, but instead asked the Supplier to respond, which it did, rejecting the complaint on every ground.

Mr D then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs D at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr D was rendered unfair to him for the purposes of Section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

## **My provisional decision**

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator. But as I was expanding somewhat on the arguments used, I set out my initial thoughts in a provisional decision (the 'PD') and invited both parties to submit any new evidence or arguments that they wished me to consider before I made my final decision.

In my PD 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 having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs D as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr D and the Lender unfair to him for the purposes of Section 140A of the CCA.*

*However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am currently proposing puts Mr D in the same or a better position than he would otherwise be in.*

### Mr D's testimony

*As part of its submissions to this Service, the PR has provided a witness statement from Mr and Mrs D. Although it is not signed or dated, it was sent to this Service on 19 January 2018 so would have been provided at some time prior to this date. As far as is relevant to the sale, the statement reads as follows:*

*"In January 2014, we received a cold call from a company saying that we had been put forward on some kind of list for a cheap holiday. They said that we could go on this holiday for only £98. They didn't say anything at all about there being a condition about going to a sales presentation. We therefore went on the holiday and we were in Spain on 13 January 2014. On that holiday, we were told by the staff that we had to attend a presentation, it was mandatory and there was no option for it. We went along to breakfast thinking that would be the whole presentation. We were mistaken. In fact, the presentation lasted all day. They used really aggressive sales tactics and it was really high pressured and persistent. They just didn't stop going on and on and on at you.*

*They sold us a product called fractional points. They said that this was a 15 year product where we could have cheap luxurious holidays for 15 years and, at the end, we would be able to sell it on and that we would be guaranteed to get a 50% return on our investment. [The Supplier] said that they would sell for us.*

*They said that this would give us cheap holidays and that the accommodation would always be four star. It has never been four star when we have gone. There is a massive issue with the availability. They basically said that we could holiday anywhere, anytime for this and it would always be four stars. We have never been able to get exactly what we wanted. We actually tried to book 12 months in advance and we still couldn't get it, and I thought that it was absolutely ridiculous. When we have gone on holiday, we have just picked what was left over basically.*

*They also said it was an exclusive product and that is just not the case. We went on holiday in Spain and we met lots of non-members that had booked it through various different travel agents and websites.*

*The accommodation has never been up to the standard that they promised it would be. In particular, we were offered a holiday in Mexico one year and we went along, and the apartment was so bad that I actually cried. My husband and I had to contact reception and beg them to help us get out of there because it was so awful. They did move us but it was a massive hassle that we didn't need, especially after paying over £11,500 for these holidays.*

*The maintenance fees have gone up exponentially since we purchased. The first year was free and then the second year our maintenance was £750. We didn't pay last year because you're only meant to pay every second year and now our maintenance is £1,000. That's a huge increase, and we weren't told that it would increase so much at all."*

*I have thought about how much weight I can place on this statement when considering the merits of Mr D's complaint. And having done so, I feel able to place weight on, and rely on its contents. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there may be some inconsistencies between what Mr and Mrs D have said happened, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr and Mrs D, such that the inconsistencies have little to no bearing on whether their testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.*

*I don't, for example, find it in any way material that Mr and Mrs D have mistakenly said that the Fractional Club had a 15-year membership term, when the contractual documentation says it is 19 years. Misremembering the duration is not, in my view, material to whether the membership was sold as an investment or not or whether the testimony can be relied on. Whilst this appears to be a mistake, I don't think it fundamentally undermines the crux of the statement, which sets out how the Supplier sold and/or marketed the Fractional Club to them as an investment.*

*So overall, I am satisfied that I can place weight on Mr and Mrs D's testimony when considering what most likely happened at the Time of Sale.*

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

*Having considered the entirety of the credit relationship between Mr D and the Lender along with all of the circumstances of the complaint, I 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 Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
- 2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
- 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 D and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs D'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 D says that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Fractional Club membership was the type of investment that would provide them with a 50% return.

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.

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

There is evidence in this complaint 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 and Mrs D, 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs D as an investment.

However, weighing up what happened in practice is, in my view, rarely as simple as looking

at the contemporaneous paperwork. And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

1. a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');
2. screenshots of an Electronic Sales Aid (the 'ESA'); and
3. a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')

Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

- (1) the training the Supplier's sales representatives would have got before selling Fractional Club membership; and
- (2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr and Mrs D.

The "Game Plan" on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of the Fractional Club worked and what it was intended to achieve.

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:

• Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return

• Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for

• Ask: "if it cost a little more to own rather than rent would they be happy to pay the extra to own?" (increase amount of owning and continue to do this for a couple of times until they don't agree.

✎ **CLOSE:** So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

✎ **LINK:** Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

**CLOSE:**

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners "are building equity in their property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth over time.

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:

- You are currently spending £xxxx on your holidays each year... (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

**CLOSE:** So, looking at the two options which way makes more sense, to own or rent your holidays? (Get the answer "Owning") This is why so many people choose to holiday with ~~Franchise~~.

**LINK:** Before I show you how the product works, I am just going to tell you how ~~Franchise~~ started and where we are today.

**CLOSE:**

With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how Fractional Club membership worked. And, on pages 41 and 42 of the Fractional Club Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

"FPOC = small piece of [...] World apartment which equals **ownership of bricks and mortar** [...]"

Major benefit is the property is sold in nineteen years (**optimum period to cover peaks and troughs in the market**) when sold you will get your share of the proceeds of the sale

SUMMARISE LAST SLIDE:

FPOC equals a passport to fantastic holidays for 19 years **with a return at the end of that period**. When was the last time you went on holiday and **got some money back?** **How would you feel if there was an opportunity of doing that?**

[...]

LINK: Many people join us every day and one of the main questions they have is "**how can we be sure our interests are taken care of for the full 19 years?**" As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.

[...]

"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is.....**Would you mind explaining to them how their interest will be protected over the next 19 year[s]?**" (My emphasis added).

The Fractional Club Training Manual doesn't give any immediate context to what the manager would have said to prospective members in answer to the question posed by the sales representative at the handover. Page 43 of the manual has the word "script" on it but otherwise it's blank. However, after the Manual covered areas like the types of holiday and accommodation on offer to members, it went onto "resort management", at which point page 61 said this:

*"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.*

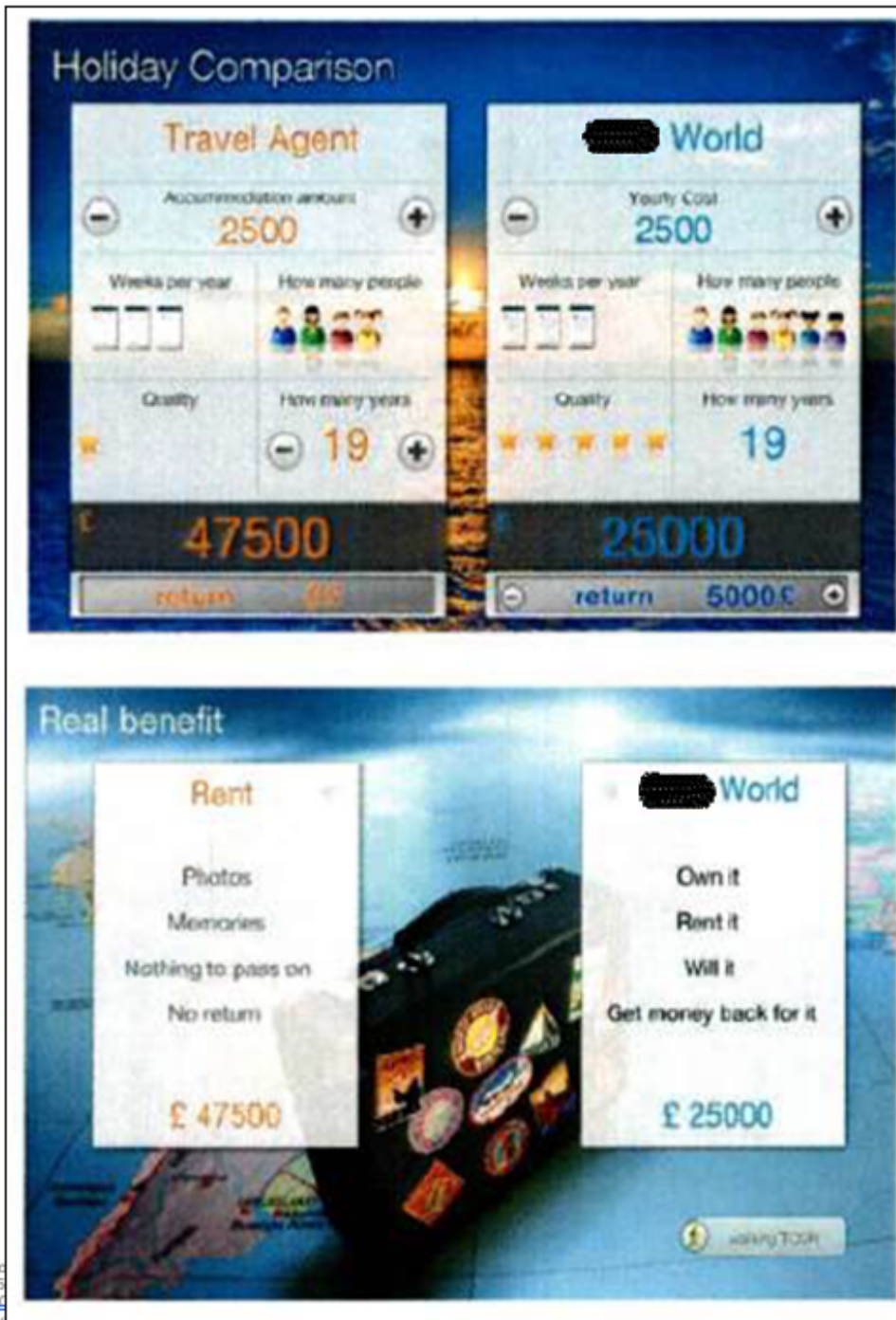
*[...]*

***CLOSE: I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return. So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."***

*(My emphasis added)*

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn't entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a "return".

For example, on page 69 of the Fractional Club Induction Training Manual, it included the following screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:



[..]

*“We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only got a small part of your initial outlay, say £5,000 it would still be more than you would get renting your holidays from a travel agent, wouldn't it?”*

*I acknowledge that the slides above set out a “return” that is less than the total cost of the holidays and the “initial outlay”. But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above*

represent Fractional Club membership as:

- (1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*
- (2) *A significant financial return at the end of the membership term.*

*And to consumers (like Mr and Mrs D) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit. And indeed, Mr D says they were told something more than that. He says:*

*“They said that this was a 15 year product where we could have cheap luxurious holidays for 15 years and, at the end, we would be able to sell it on and that we would be guaranteed to get a 50% return on our investment. [The Supplier] said that they would sell for us”.*

*I acknowledge that there may not have been a comparison in the slides themselves between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs D the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).*

*When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that ‘[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).’<sup>1</sup> And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

*So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.*

*Given what I’ve already said about the Supplier’s training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Mr and Mrs D), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Membership were a good reason to purchase it. But as I’ve said, Mr and Mrs D have said the Supplier went even further than that when selling the Fractional Club membership to them, and actually predicted the level of return they could expect from their investment.*

*So, overall, on the balance of probabilities, I think the Supplier’s sales representative was likely to have led Mr and Mrs D to believe that Fractional membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I do not find them either implausible or hard to believe when they say that they were told that they were buying shares in property that, being an investment, may well lead to a financial gain. On the contrary, given everything I have seen so far, I think that is likely to be what Mr*

---

<sup>1</sup> The Department for Business Innovation & Skills “Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)”. <https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf>

*and Mrs D were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.*

*Was the credit relationship between the Lender and the Consumer rendered unfair?*

*Having found 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 D and the Lender 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, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr D and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led Mr and Mrs D to enter into the Purchase Agreement and Mr D into the Credit Agreement is an important consideration.*

*On my reading of Mr D's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays - their own testimony and purchasing history demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint. But Mr and Mrs D were already members of an American-based timeshare which did not have a fractional element. So if it were just the holiday rights they were looking to achieve, I can't see why they would not have just bought a points-based membership from the Supplier – there must have been something specific about the Fractional Club membership which was attractive to them. And as Mr D says (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing membership, and the more 'standard' type of timeshare available to them*

*Mr D has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had he and Mrs D not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.*

*And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.*

*Conclusion*

---

*Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr D under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint."*

**The responses to the PD**

Mr D accepted the PD, but the Lender did not. It said, in summary:

- Fractional Club membership provided Mr D with the opportunity to visit and enjoy luxurious holidays at numerous resorts around the world, providing different locations to his existing American-based timeshare.
- It was the holidays that Fractional Club offered that attracted Mr D to the Fractional Club membership.
- There was no option for Mr D to purchase a non-fractional membership at the Time of Sale, as no other type of membership was offered.
- The sales presentation focused heavily on the holiday benefits associated with Fractional Club membership.
- Mr D, in his statement, directly compares his Disney timeshare experience with what the Supplier promised Fractional Club would offer. This makes it clear that Mr D bought Fractional Club membership based on specific assurances about the quality and nature of the holiday experience.
- Mr D's American timeshare does not include any fractional ownership rights, yet he still considers it to be the ideal model. This implies that he did not view fractional ownership as a key factor in his purchasing decision at the Time of Sale.
- Mr D understood and expected his Fractional Club membership to function primarily as a holiday product, similar to his Disney timeshare, and not as a property investment. This is further evidenced by his statement focusing on the Supplier's failure to deliver with respect to the availability and quality of accommodation, while not raising any concerns that the membership was not an investment.
- Mr D's statement is not plausible in its description of how the Fractional Club was sold. It only contains bare allegations and minimal detail, and lacks any real context and fails to provide any specific information as to who said what, where, when and in what circumstances.
- It is unlikely that the sales representatives would have guaranteed Mr D would get 50% return on his investment, especially when he would have been told he would receive a 1.21% share of the sale.

Overall, the Lender said that it did not believe the evidence presented suggests that a breach of Regulation 14(3) took place, or that such a breach directly influenced Mr D's decision to purchase the membership.

As the deadline for responses has now passed, the complaint has come back to me for a final 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 no different to that shared in several hundred ombudsman decisions on very similar complaints. In my PD I asked if either party wished me to set the context out in detail, and neither asked me to do that. And with that being the case, it is not necessary to set it out here.

### **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.

And having done so, and having reconsidered everything afresh in light of the Lender's response to my PD, I remain satisfied that it is fair and reasonable to uphold Mr D's complaint, for broadly the same reasons as set out above in the extract of my PD. I will, however, address the points made by the Lender in response.

But before I do, I want to repeat that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint.

I do not disagree that the Fractional Club membership offered Mr D the opportunity to take holidays in resorts which were not available to him when using his American timeshare membership. As I said in the PD, Mr D's own testimony and purchasing history demonstrates that they quite clearly were interested in the holidays it offered, which is not surprising given the nature of the product at the centre of this complaint.

But I do not agree with the Lender when it says that the fact that he viewed his American timeshare as the ideal model implies that he did not view fractional ownership as a key factor in his purchasing decision at the Time of Sale. I think this suggests that he knew how points-based timeshares, like his American membership, worked. And that he agreed to purchase a *different* model, with a fractional element, means it's likely that the fractional element was a motivating factor. And although the particular sales presentation given to Mr D at the Time of Sale was for the Fractional Club, the Supplier did sell non-fractional memberships. So given Mr D already owned a non-fractional membership (albeit a US-based one) I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why he should purchase this new type of membership in particular. In other words, some discussion of why Mr and Mrs D ought to purchase the Fractional Club in the way that they did.

The investment element of membership was plainly a major part of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the feature in the product without relying on it to promote sales, especially when the reality was that the principal benefits of the Fractional Club, over the more traditional type of points-based timeshare that Mr D already had, was its investment element i.e., the share in the net sale proceeds of the Allocated Property.

As regards Mr D's testimony, an extract of which was included in the PD, the Lender has said that it contains little detail, and that it lacks context and fails to provide any specific information as to who said what, where, when and in what circumstances.

But I don't agree. The statement was written some four years after the event being complained about, so it is unsurprising that there are some things, such as the names of the sales representatives and which of them carried out which roles, that are unclear. What I need to consider, is whether there is a core of acceptable evidence from Mr D such that the gaps in his recollection have little to no bearing on whether his testimony can be relied on, or whether such gaps are fundamental enough to undermine, if not contradict, what he says about what the Supplier said and did to market and sell Fractional Club membership as an investment.

And having considered the testimony, I am persuaded that it is likely to be a reliable recollection of events. I say this as it follows, in the main, what was said in the original Letter of Complaint (which was written around the same time) and contains a level of detail that

only Mr D, as a party to the events, could have known. And although it is a little generic, Mr D has described what they were told by the sales personnel at the Time of Sale.

So, whilst being mindful of the fact that the testimony was compiled some four years after the event, and having considered what the Lender has had to say on this issue, I remain satisfied, in this particular case, that I am able to place weight on what Mr D has said.

And Mr D, in both his statement and in the Letter of Complaint, has been specific in what he says about how the Fractional Club was sold to him and Mrs D. He has said that it was positioned as an investment in property from which they would get their money back plus a guaranteed 50% return upon the sale of the Allocated Property. The Lender has said that it is unlikely that the Supplier would have guaranteed this level of return. But given how I think Fractional Club was likely positioned, and given that it seems likely that the Supplier would have explained the difference (i.e. the investment element) between it and Mr D's existing membership, I remain satisfied that Mr D's recollections are plausible in this regard.

And given the circumstances, I am persuaded it is more likely than not that the Supplier's salesperson positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future. So, I am satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale. And I remain satisfied that this breach was material to the decision Mr and Mrs D ultimately made to purchase membership of the Fractional Club.

And with that being the case, I am satisfied that the Lender participated in and perpetuated an unfair credit relationship with Mr D under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

Taking everything into account, I think it is fair and reasonable that I uphold this complaint.

### **Putting things right**

In the PD I set out how I thought the Lender should calculate and pay fair compensation to Mr D. Neither Mr D nor the Lender made any submissions regarding this, and having reconsidered everything, I see no reason to depart from what I said in the PD in relation to it. For clarity, I have set this section out again here.

### **Fair Compensation**

---

Having found that Mr and Mrs D would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr D was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put Mr D back in the position he would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore had he not entered into the Credit Agreement. This is on the proviso that Mr and Mrs D agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I direct the Lender to do to compensate Mr D with that being the case – whether or not a court would award such compensation:

- (1) The Lender should refund Mr D's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

- (2) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs D paid as a result of Fractional Club membership.
- (3) The Lender can deduct:
  - i. The value of any promotional giveaways that Mr and/or Mrs D used or took advantage of; and
  - ii. The market value of the holidays\* Mr and/or Mrs D took using their Fractional Points.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)
- (4) Simple interest\*\* at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mr D's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr and Mrs D's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

\*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and/or Mrs D took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

\*\*HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr D a certificate showing how much tax it's taken off if he asks for one.

### **My final decision**

I uphold this complaint and direct Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance to calculate and pay fair compensation to Mr D as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 9 October 2025.

Chris Riggs  
**Ombudsman**