

The complaint

Mrs G'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 her 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.

What happened

Mr and Mrs G purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 12 January 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 400 fractional points at a cost of £8,161 (the 'Purchase Agreement').

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

Mr and Mrs G paid for their Fractional Club membership by taking finance of £8,161 from the Lender (the 'Credit Agreement') in Mrs G's name only. As such only she is eligible to complain about the Lender. I will refer mainly to Mrs G in this decision, but this can be taken to mean Mr and Mrs G where appropriate, such as when I am referring to their Fractional Club membership.

Mrs G – using a professional representative (the 'PR') – wrote to the Lender on 22 November 2019 (the 'Letter of Complaint') to raise several concerns. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mrs G's concerns as a complaint and issued its final response letter on 20 August 2020, rejecting it on every ground.

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

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

I issued a provisional decision explaining that I was not planning to uphold the complaint.

The Lender did not respond to the provisional decision.

The PR responded to the provisional decision on Mrs G's behalf, to say that it disagreed. In summary it said that:

- The Supplier sold Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

- The call notes and Mrs G's Statement of Truth both describe Fractional Club membership as being an investment and a product which provides access to accommodation for holidays. This is how the Supplier presented it, and Mrs G's purchase was motivated by both the investment and holiday aspects.
- It would be "*economically irrational*" to purchase Fractional Club membership at the Time of Sale if Mrs G's sole motivation was to increase her holiday entitlement, because:
 - She could have purchased additional Fractional Points through Signature Collection membership (by purchasing an additional week), which was the "*top tier Fractional*", and would only have marginally increased her maintenance fees.
 - Instead, she purchased a "*lower tier Fractional*" and incurred additional maintenance fees.
 - On a per Fractional Point basis, Mrs G's purchase of Fractional Club membership was 22% more expensive than her previous Signature Collection membership. It is inconceivable that Mrs G would pay this premium just to improve her holiday access when she could have achieved the same aim for less by making an additional Signature Collection purchase.
- The Supplier made Mrs G believe (during the sales presentation) that her Fractional Club purchase had investment value such that it would increase her investment returns. It is reasonable that Mrs G would have understood that she was making an investment-type purchase that would retain or appreciate in value over time, and to assume that at the end of the term its value would be sufficient to cover all her loan repayments and ideally a profit.
- The Supplier promised a safe investment that removed the normal risk of financial loss. This was an important and motivating factor when Mrs G decided to purchase Fractional Club membership.
- Mrs G's 2016 Signature Collection purchase forms part of a coherent and continuous pattern of misrepresentation, and the presence of investment-related terminology in adjacent years is directly relevant to her understanding and expectations at the Time of Sale.

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, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

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

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

Having done so, including considering the PR's response to the provisional decision, I have decided not to uphold this complaint – for the same reasons given in my provisional decision.

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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") if there is an actionable misrepresentation and/or breach of contract by the supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It has been said by the PR that Fractional Club membership was misrepresented by the Supplier at the Time of Sale because Mrs G was:

- (1) Told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.
- (2) Told by the Supplier that the guaranteed end date was in 180 months, or 15 years from the Time of Sale, when that was not true.

- (3) Not told by the Supplier that it could postpone the sale of the Allocated Property at its discretion for up to two years.
- (4) Not told by the Supplier that her children would inherit the liability to pay management charges if Mr and Mrs G both died before the end of the membership term.

Neither the PR nor Mrs G have set out in any detail what words and/or phrases were allegedly used by the Supplier to misrepresent Fractional Club for the reason given in point 1. The PR says that the representation was also untrue because the Allocated Property was legally owned by a trustee and there was no indication of what duty of care it had to actively market and sell the property. Further, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why what's said at point 1 above would have been untrue at the Time of Sale even if it was said. It seems to me to reflect the main thrust of the contract Mrs G entered. And while, under the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor'¹, longer than that if there were problems selling and the 'Owners'² agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

The allegation at point 2 is implausible, since the membership term was not 15 years, it was approximately 18 years, and I can see no reason for the Supplier to misrepresent this.

It seems to me that points 3 and 4 are not allegations of the Supplier saying something that was untrue. Rather, that Mrs G wasn't told things about the way the membership worked. It seems to me that these are allegations that Mrs G wasn't given all the information she needed at the Time of Sale, and I will deal with this further below.

So, while I recognise that Mrs G - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this Section 75 claim.

Section 75 of the CCA: the Supplier's Breach of Contract

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mrs G said that she could not holiday where and when she wanted to, and that the standard of accommodation was not always as she expected. This was not mentioned in the Letter of Complaint. However, on my reading of what Mrs G has said, this suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.

¹ Defined in the Fractional Club Rules as a company in the same group of companies as the Supplier.

² Defined in the Fractional Club Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mrs G states that the availability of holidays was subject to demand. It also looks like Mrs G made use of her fractional points to holiday. I accept that she may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement.

In terms of the standard of accommodation, Mrs G says she expected it to be to the same standard as provided on her allocated week under a Signature Collection membership. This allowed Mr and Mrs G to holiday in one specified week each year in a specific Signature Collection apartment. That is a separate membership agreement to the Fractional Club membership I am considering here. In any case, I am not persuaded that the Supplier was contractually obliged to provide accommodation to a certain standard as part of Mrs G's Fractional Club membership.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mrs G any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

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

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material.
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier.
3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale.
5. The inherent probabilities of the sale given its circumstances.
6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mrs G and the Lender.

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

Mrs G's complaint about the Lender being party to an unfair credit relationship was and is made for several reasons.

They include allegations that:

1. Fractional Club membership was a Collective Investment Scheme, and the Supplier was not authorised to sell such an investment.
2. The interest rate of the Credit Agreement was an unfair term because it was much higher than base rate.

However, as things currently stand, none of this strikes me as a reason why this complaint should succeed.

The PR says that Fractional Club membership was a Collective Investment Scheme as defined by the Financial Services and Markets Act 2000 (as amended). However, the Financial Services and Markets Act (Collective Investment Schemes) Order 2001/1062 included Schedule 001 Arrangements Not Amounting to a Collective Investment Scheme, Paragraph 13 of which states that arrangements do not amount to a Collective Investment Scheme *"if the rights or interests of the participants are rights under a timeshare contract or a long-term holiday product contract"*.

Bearing in mind that Fractional Club membership was a timeshare contract, it does not appear that it can also have been a Collective Investment Scheme.³

The Credit Agreement clearly stated the interest rate of the loan (7.2% per annum or 11.9% APR, which is mis-stated in the Letter of Complaint as being 17.6%). So, I am satisfied that Mrs G was aware of it at the time of entering the agreement. The Credit Agreement also set out how much she was borrowing, the total charge for credit, the total amount payable and the monthly repayments. So, although the interest rate of the loan was higher than base rate, I do not see why this would cause unfairness in the relationship when Mrs G was aware of this and agreed to it.

Overall, therefore, I don't think that Mrs G's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, why the credit relationship with the Lender may have been unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to Mrs G as an investment in breach of the prohibition against selling timeshares in that way.

³ This was considered and rejected in the judgment in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin).

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

The Lender does not dispute, and I am satisfied, that Mrs G'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 the PR and Mrs G say that the Supplier did exactly that at the Time of Sale.

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.

A share in the Allocated Property could constitute an investment as it offered Mrs G the prospect of a financial return – whether, like all investments, that was more than what she 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*.⁴

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 Mrs G 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 Fractional Club membership to her as an investment at the Time of Sale, i.e. told Mrs G or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs G, 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.

⁴ The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd* and *R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin).

On the other hand, I think the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mrs G as an investment in breach of Regulation 14(3).

However, whether there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that issue for the purposes of this decision.

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

Having found that it was possible 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 Mrs G and the Lender under the Credit Agreement and related Purchase Agreement. This is because 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 that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs G and the Lender that was unfair to her and warranted relief as a result, it is important for me to consider whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement.

On my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mrs G decided to go ahead with her purchase. I say this because neither the PR's notes of a call it said it had with Mr and Mrs G in September 2019, nor the 'statement of truth' it provided from Mr and Mrs G in July 2023, stated nor suggested that Mr and Mrs G purchased Fractional Club membership at the Time of Sale because it was an investment or because they hoped or expected to make a profit from it.

In fact, neither document clearly states why they bought it. They do say that Mr G saw their 2016 purchase of Signature Collection membership as an *"investment for our family, with high quality accommodation for future holidays"*. But that is not enough for me to conclude that the prospect of a profit motivated the purchase of 400 Fractional Points at the Time of Sale. It seems likely from the 'statement of truth' that the additional holiday rights this would give Mrs G were a factor in the decision (since they could be used alongside their existing Signature Collection points). But at no point has Mrs G said she purchased Fractional Club membership at the Time of Sale because she was motivated by the hope or expectation of a profit. So, it does not appear to me that any breach of Regulation 14(3) by the Supplier influenced her decision to purchase.

The PR's response to my provisional decision argues that it made no economic sense for Mrs G to purchase 400 Fractional Points via Fractional Club membership at the Time of Sale when they could have obtained the same number of additional points for less by upgrading their Signature Collection membership. But this appears to be no more than speculation. I have seen no evidence that shows such a Signature Collection membership was available or offered to Mrs G at the Time of Sale, nor what the purchase price of such a membership might have been.

I acknowledge that it is possible that Mr and Mrs G's purchase of Fractional Club membership at the Time of Sale was partly motivated by the hope or expectation of a profit. But the evidence in this case is insufficient for me to conclude that, on the balance of probabilities, this was most likely the case. As such I do not think upholding this complaint would be a fair and reasonable outcome.

This doesn't mean Mrs G wasn't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mrs G doesn't persuade me that her purchase was motivated by her share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision she ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs G's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests she would have pressed ahead with the purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs G and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

The PR says that Mrs G was not given sufficient information at the Time of Sale by the Supplier about membership, including about the ongoing costs of Fractional Club membership and the fact that Mrs G's heirs could inherit these costs.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mrs G sufficient information, in good time, on the various charges she could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mrs G nor the PR have persuaded me that she would not have pressed ahead with the purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

As for the PR's argument that Mrs G's heirs would inherit the on-going management charges, I fail to see how that could be the case or that it could have led to an unfairness that warrants a remedy.

Overall Conclusion

In conclusion, given the facts and circumstances of this complaint, I am not persuaded that the Lender was party to a credit relationship with Mrs G under the Credit Agreement and related Purchase Agreement that was unfair to her for the purposes of Section 140A of the CCA. And I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs G's Section 75 claims. Having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mrs G.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Phillip Lai-Fang
Ombudsman