DRN-5968683

## The complaint

Mr M's complaint is, in essence, that Mitsubishi HC Capital UK PLC (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 a claim under section 75 of the CCA.

## Background to the complaint

Mr M and his wife, Mrs M, purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 12 June 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,988 fractional points at a cost of £38,209 (the 'Purchase Agreement'). But after trading in their existing (non-fractional) timeshare, they ended up paying £10,698 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for their Fractional Club membership by taking finance of £10,698 from the Lender[1] in his sole name (the 'Credit Agreement').

Later that year, on 19 September 2013, Mr and Mrs M upgraded their Fractional Club membership by buying more fractional points. They financed that purchase with a loan from another lender. That loan consolidated the Hitachi loan.

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 3 September 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA.

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

Mr M says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told him and his wife that Fractional Club membership had a guaranteed end date when that was not true;
2. told them that they were buying an interest in a specific piece of "real property" when that was not true;
3. told them that Fractional Club membership was an investment when that was not true because (according to the PR) it cannot be an investment because regulations prohibit selling or marketing a timeshare as an investment;

[1] Then trading as Hitachi Capital, and now trading as Novuna.

4. told them that buying a fractional timeshare was their only way to get out of their existing timeshare when that was not true.

Mr M says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr M.

Later on, Mr M added that the Supplier had told them that its holiday resorts were exclusive to its members, when that was not true. He asked for this to be considered too.

(2) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr M says that the credit relationship between him and the Lender was unfair to him under section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to him and Mrs M as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The Credit Agreement was executed on the same day as the Purchase Agreement, in contravention of regulation 25 of the Timeshare Regulations which prohibits taking any consideration from a consumer within the 14-day withdrawal period.
3. The contractual terms setting out the duration of their Fractional Club membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') – due to, in particular, the contract's duration (because it allegedly had no guaranteed end date) and the liability to pay annual management charges.
4. They were pressured into purchasing Fractional Club membership by the Supplier's use of aggressive sales practices.
5. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
6. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs, in particular the fact that the management charges would increase over time.
7. There were too many documents given to Mr and Mrs M at the Time of Sale, these were not written in clear language (in breach of the UTCCR), and Mr and Mrs M had no opportunity to familiarise themselves with them.
8. No affordability checks were carried out.

The Lender dealt with Mr M's concerns as a complaint and issued its final response letter on 12 December 2019, rejecting it on every ground.

Mr M 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 the ground that there had been a breach of regulation 14(3) of the Timeshare Regulations.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. Meanwhile, the PR accepted the Investigator's opinion, but later added a further argument about section 140A – namely, that the Lender had secretly paid commission to the Supplier, and this had unfairly increased the interest which Mr M had had to pay.

I wrote a provisional decision which read as follows.[2]

**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.

**What I've provisionally decided – and why**

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

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 M as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him 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 Mr M's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations of misrepresentation, undisclosed commission, unfair contract terms, failing to provide information about ongoing costs, and most of the other issues raised, because even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr M in the same or a better position than he would be if the redress was limited to those aspects.

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

Having considered the entirety of the credit relationship between Mr M 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 M and the Lender.

**Irresponsible lending**

The PR says that no affordability checks were carried out at the Time of Sale. The Lender

[2] That decision included an Appendix, which set out in detail the legal and regulatory context that I think is relevant to this complaint, and which formed part of my provisional decision. I have omitted it from this decision, because it is familiar to the parties. All case citations are listed there.

disputes this, and says that it did carry out checks with a credit reference agency to verify what Mr M had told it about his income and outgoings, and to check that he had no other significant debts or other indications of financial difficulty. It had calculated that Mr M's disposable income *after* paying the monthly loan repayments would be £1,300 a month, and so it had concluded that the loan was affordable. I have no reason to doubt this, and so I accept it.

(In coming to that conclusion, I have taken into account that at the Time of Sale Mr M was old enough to have paid off his mortgage, and so his statement to the Supplier that he was a homeowner with no mortgage was plausible.)

**The Supplier's breach of regulation 14(3) of the Timeshare Regulations**

The Lender does not dispute, and I am satisfied, that Mr M'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 and Mrs M say that the Supplier did exactly that at the Time of Sale – saying the following in their joint witness statement (which is dated 20 February 2019):

*"The Fractional Ownership deal was explained to us as an investment, and at the end of 19 years the property would be sold and we would get our money back with profits."*

*"We understood the Fractional purchase to be … a way to have our money back with profits from the sale when the 19 years was up."*

*"We were told that we would get our money back plus profits."*

Mr M alleges, therefore, that the Supplier breached regulation 14(3) at the Time of Sale because:

(1) There were two aspects to his Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property; and
(2) he was told by the Supplier that he would get his money back and more during the sale of Fractional Club membership.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, 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*" at [56]. I will use the same definition.

Mr M's share in the Allocated Property clearly constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But 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 M 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 him as an investment, *i.e.* told him or led him to believe that Fractional Club membership offered him 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 M, the financial value of his 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 M as an investment. For example, the Member's Declaration, which Mr and Mrs M both signed, says in paragraph 5:

*"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that* [the Supplier] *makes no representation as to the future price or value of the Fraction."*

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr M's allegation that the Supplier breached regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (2) that membership of the Fractional Club could make him a financial gain and/or would retain or increase in value.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, *i.e.* told Mr M or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (*i.e.,* a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

**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 a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mr and Mrs M would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling Mr and Mrs M Fractional Club membership in October 2012; and
(2) how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs M at that time.

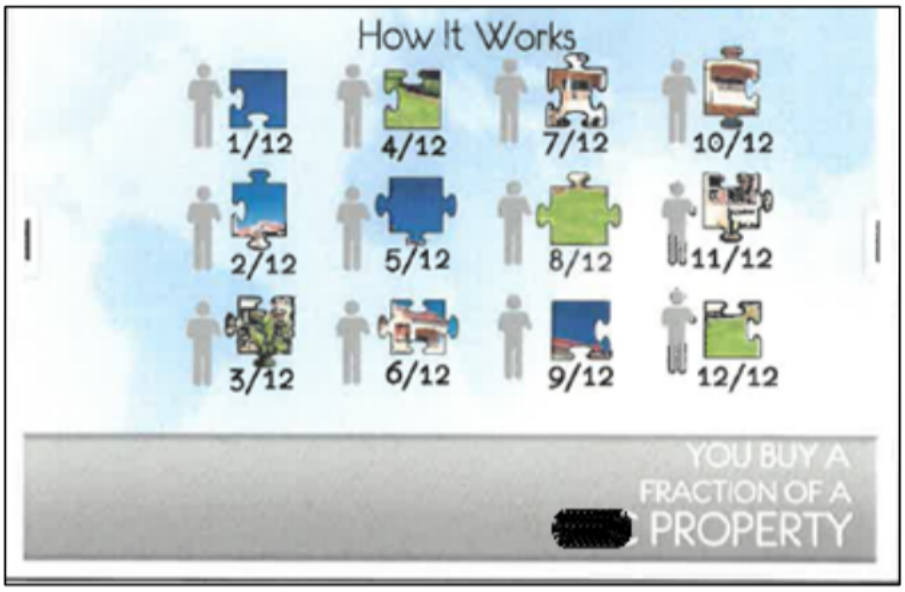
Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:


This slide titled "Why Fractional?" indicates that sales representatives would have taken Mr and Mrs M through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*
(2) *"Buy a Holiday Home"*
(3) *"The Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs M that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:





I'm aware that the Supplier says that 90 to 95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, since the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional?" expressly described it as), I can't see why the Supplier wouldn't have been in breach of regulation 14(3) in those circumstances.

I acknowledge that there was no comparison 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 M 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).

Mr and Mrs M say that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr and Mrs M. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find Mr and Mrs M's account to be implausible.

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs M were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached regulation 14(3) of the Timeshare Regulations.

The Lender has argued that the lack of detail in Mr and Mrs M's witness statement about precisely what was said to them that led them to think they would make a profit when the Allocated Property was sold means that their account lacks credibility. But I reject that argument for two reasons. Firstly, because Mr and Mrs M's account is supported by the content of the training manual I have considered above. And secondly, since their statement was written six years after the Time of Sale, I would not expect them to be able to recall word for word what had been said to them six years earlier, but that does not mean they cannot reliably recall the gist of it.

**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 M and the Lender under the Credit Agreement and the related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

It also it seems to me in light of *Carney* and *Kerrigan* that, if I am to conclude that a breach of regulation 14(3) led to a credit relationship between Mr M and the Lender that was unfair to him and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement.

On my reading of Mr and Mrs M's statement as a whole, and in particular the parts which I've quoted above, 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 demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs M say (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 with that being the case, I think the Supplier's breach of regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs M have 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 Mr M faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that he would have pressed ahead with his purchase regardless.

## Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr M 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.

## Fair Compensation

Having found that Mr M would not have agreed to purchase Fractional Club membership ('FC Membership 1') 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 the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased FC Membership 1 (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided that both Mr and Mrs M agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs M were existing Vacation Club members and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had 2,501 Vacation Club Points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs M not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr M from the Time of Sale as part of his Fractional Club membership should amount only to the difference between those charges and the annual management charges he (or his wife) would have paid as an ongoing Vacation Club member.

On 19 Sept 2013 (the 'Time of Upgrade'), Mr and Mrs M upgraded their FC Membership 1 by trading in their existing Fractional Points, paying an additional £3,101 and entering a new purchase agreement for a total of 3,040 Fractional Points ('FC Membership 2'). And the Credit Agreement was refinanced using a new loan taken from a different lender at the time of the upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented Mr and Mrs M's FC Membership 1, rolling over their existing Fractional Points into the new membership. I don't think the upgrade ended the unfairness under the Credit Agreement and related Purchase Agreement that stemmed from the acts and/or omissions of the Supplier at the Time of Sale given the facts and circumstances of this complaint. So, I

think that after the upgrade there were still ongoing effects of unfairness from Mr M's original purchase of FC Membership 1 and the Credit Agreement for which the Lender is answerable.

However, I recognise that the upgrade in question was paid for by funding from a new lender who is likely to bear some responsibility for any acts and/or omissions in the upgrade sales presentation. And for that reason, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the 52 additional Fractional Points Mr M purchased on 19 September 2013.

So, in my view, the Lender needs to refund a proportion of the management charges payable after the Time of Upgrade that relate to the 2,988 Fractional Points Mr and Mrs M held originally – which, in this occasion, equates to 98% of the annual management charges paid after the Time of Upgrade.

So, here's what I think needs to be done to compensate Mr M with that being the case – whether or not a court would award such compensation:

(1) The Lender must refund Mr M's repayments to it under the Credit Agreement, including any sums paid to settle the debt (i.e. the outstanding balance of £6,898:19 which was paid when the loan was consolidated).

(2) In addition to (1), the Lender must also refund the difference between Mr and Mrs M's Fractional Club annual management charges paid, between the Time of Sale and the Time of Upgrade, and what their Vacation Club annual management charges would have been had they not purchased Fractional Club membership. The Lender must also refund the difference between 98% of the FC Membership 2 annual management charges they paid after the Time of Upgrade and the annual management charges they would have paid had they not purchased FC Membership 1.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr M used or took advantage of at the Time of Sale;

ii. Before the Time of Upgrade, the market value of the holidays* Mr and Mrs M took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr M took a holiday worth 2,550 Fractional Points and he would have been entitled to use a total of 2,500 Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if he would have been entitled to use 2,600 Vacation Club Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

And:

iii. After the Time of Upgrade, the market value of the holidays* Mr and Mrs M took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club members.

However, this deduction must relate only to 98% of the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr M took a holiday worth 2,550 Fractional Points and he would have been entitled to use a total of 2,500 Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to 98% of the 50 additional Fractional Points that were required to take it. But if he would have been entitled to use 2,600 Vacation Club Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(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 must remove any adverse information recorded on Mr M's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs M's FC Membership 2 is still in place at the time of this decision, the Lender must ask the Supplier to reduce the number of Fractional Points they hold by 2,988 Fractional Points. If the Supplier agrees to do that, then Mr and Mrs M must *both* agree to hold the remaining Fractional Points for the benefit of the Lender (or assign them to the Lender if that can be achieved). What's more, the Lender must indemnify Mr M against 98% of all ongoing liabilities as a result of his Fractional Club membership.

However, if in response to this provisional decision the Supplier doesn't agree to reduce the number of Fractional Points Mr and Mrs M hold, the Lender must let me know so that I can consider the most appropriate remedy with that being the case.

*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 Mrs M took using their Fractional Points, then 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 M a certificate showing how much tax it's taken off if they ask for one.

**My provisional decision**

So my provisional decision is that I am minded to uphold this complaint and to order Mitsubishi HC Capital UK PLC to put things right in the way I have set out above.

**Responses to my provisional decision**

Mr M accepted my provisional findings. The Lender did not. It made the following objections.

Firstly, it said that Mr M had given evidence in writing on three occasions. Two of those were letters written by Mr M alone in June 2017 and June 2020, and the third was the joint witness statement of Mr and Mrs M dated 20 February 2019 (to which I've already referred). The Lender pointed out that the witness statement appeared to have been prepared with the

professional assistance of the PR, while the two letters seemed to have been written by Mr M in his own words. It observed that of these three documents, only the witness statement mentioned profit. The Lender argued that (1) the absence of any mention of a profit in Mr M's own letters suggest that this was not important to him, and (2) the fact that a mention of profit only appears in the professionally prepared statement is indicative of a potential influence by the PR over the statement's content, rendering it unreliable. The Lender concluded that I should place greater weight on Mr M's direct and unfiltered testimony than on a statement which had been drafted for him by the PR.

Secondly, the Lender also argued that the mention of "investment" in the second letter, properly understood, does not amount to a meaning of profit, but just a more general way of saying that he would own part of a property. It said *"His use of the term 'investment' cannot be interpreted as evidence of a profit motive or financial gain expectation."*

Thirdly, that same letter also says that another motive for entering into the Purchase Agreement was because Mr and Mrs M believed their liability under their existing timeshare contract was in perpetuity, and that a way to get out of that was to replace it with a fractional timeshare because that was limited in duration to 19 years.[3] The letter said they had subsequently discovered that the Spanish courts had ruled perpetuity to be illegal and had set aside all such contracts, and that if Mr and Mrs M had known that at the Time of Sale they would not have bought a fractional timeshare. Consequently, the investment element (whether that included an expectation of profit or not) had not been a material factor in their decision to purchase.

The Lender asked me to reconsider upholding this complaint.

**My findings**

I have reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. But I remain of the view that this complaint should be upheld. I will explain why. I will deal with the Lender's points in the same order as above.

Firstly, Mr M's letter of 2017 is clearly not about anything that happened at the Time of Sale; it's about an occasion in 2017 when he chose not to purchase a timeshare. (This is the incident described in paragraph 37 of the joint witness statement.) So it isn't relevant that this letter doesn't mention profit.

The 2020 letter doesn't use the word profit, but it does say that one of Mr and Mrs M's reasons for buying a fractional timeshare at the Time of Sale was because *"it was an investment."* More than one dictionary definition of "investment" refers to profit, and I can see nothing in Mr D's letter which suggests that he meant something other than an expectation of profit, and it's hard to see what other motive he could have meant by using that word. So I take him to be using a synonym for profit. For that reason, I do not accept either of the Lender's first two arguments.

I thought that the Lender's third argument (about the perpetuity reason) was a stronger point, and I asked the PR to consider it and to make further submissions, which it did. I am grateful to both parties for their helpful supplementary submissions.

I will set out what Mr D wrote in his 2020 letter:

*"After buying into fractional ownership we found out perpetuity was made illegal in the*

[3] I will call this "the perpetuity reason".

*Spanish courts and all contracts should be set aside* [the Supplier] *did not tell us this, it was kept from us and if we had been told this we would not have purchased into Fractional."*

So it's quite clear that having an investment was not the sole or even the primary motivation for Mr and Mrs M's decision to buy. But it doesn't necessarily have to be. In *Shawbrook & BPF v FOS,* the High Court held that a credit relationship can still be found to be unfair because of a breach of regulation 14(3) even if another factor was *"a, if not the, major attraction"* of the deal.[4]

The test is whether the breach of the regulation *caused* unfairness.[5] That is an easy test to satisfy when the investment element is the only reason or the main reason for the decision to purchase. It is a harder test to satisfy when that is not so, as was the case in *Shawbrook & BPF v FOS* and as is the case in this complaint, but it is not insurmountable. Sometimes multiple incentives can operate cumulatively. Therefore each case has to be individually evaluated on its own facts.

Logically, just because Mr and Mrs M would not have bought Fractional Club membership just for the investment alone, it does not necessarily follow that they would have bought it just for the perpetuity reason alone.

As I've said before, Mr and Mrs M paid £10,698 for membership of the Fractional Club. That is a lot to pay just for peace of mind. I cannot absolutely rule out the possibility that obtaining a new contract of definite duration might have been enough incentive for them, but I don't have to decide the issue to that degree of certainty. On the balance of probabilities, I think that the prospect of (eventually) making a profit must have sweetened what would otherwise have been a very bitter pill to swallow, and that this must have played a significant part in their decision – even if it was not a sufficient incentive by itself. So I find that it is more likely than not that the investment reason did contribute in a meaningful way to Mr and Mrs M's decision to buy their membership, and that this resulted in unfairness in the resulting relationship with the Lender.

**My final decision**

My decision is that I uphold this complaint.

I order Mitsubishi HC Capital UK PLC (trading as Novuna) to put things right in the way I have set out above (under the heading "fair compensation" on pages 9 to 11).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 3 February 2026.
Richard Wood
**Ombudsman**

[4] See paragraph 75 of the judgement. In that instance, the other factor was also a reduced term of the contract.
[5] See paragraph 185 of *Shawbrook & BPF v FOS,* and see also *Carney* and *Kerrigan*.