

The complaint

Mrs B'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 a claim under Section 75 of the CCA.

What happened

Mr and Mrs B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 5 February 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 3,105 fractional points (the 'Purchase Agreement'), which they ended up paying £7,443 for the membership of the Fractional Club after trading in their existing timeshare.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs B 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 B paid for their Fractional Club membership by taking finance of £6,757 from the Lender in Mrs B's name only (the 'Credit Agreement') – so only Mrs B can bring this complaint. Mrs B settled the Credit Agreement in full on 23 December 2013.

Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 7 January 2021¹ (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her 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.

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

- i. Mr and Mrs B were pressured into purchasing Fractional Club membership by the Supplier.
- ii. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.
- iii. Mrs B also says that they found it difficult to book the holidays they wanted, when they wanted.

The Lender dealt with Mrs B's concerns as a complaint and issued its final response letter on 24 June 2021, rejecting it on every ground. It also considered the claim under Section 75

¹ The PR wrote to the Lender on 27 March 2020 to complain about other matters related to Mrs B entering the Credit Agreement with Lender which was referred separately to this service and resolved under its own case reference.

of the CCA was time barred under the Limitation Act 1980 as it had been made more than six years after the Time of Sale.

Mrs B then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file considered the complaint but did not think the Lender needed to do anything further. He thought that any complaint that the Lender was a party to an unfair debtor-creditor relationship, as defined by s.140A CCA, had been made too late for our service to consider. And although the investigator thought Mrs B's complaint about the Lender deciding against paying a claim under Section 75 of the CCA had been made within the time limits, he didn't think it was unfair for the Lender to rely on the Limitation Act 1980 to defend the claim.

Mrs B disagreed with the Investigator's assessment and asked for an Ombudsman's decision. In doing so, she introduced a further allegation to her complaint that her relationship with the Lender was unfair. She said Fractional Club membership was marketed and sold to her as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

As the Investigator was unable to reach a resolution, the matter has come to me to decide.

What I've decided – and why

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

I've started by considering whether the Financial Ombudsman Service's jurisdiction permits me to consider the entire subject matter of this complaint. It seems to me that in addition to the allegations of misrepresentation by the Supplier, Mrs B also has concerns about the unfairness of the relationship between her and the Lender. So, in the first instance, I've considered whether I can look at Mrs B's concerns about the unfairness of the lending relationship. And having done so, I've concluded that:

- I. Mrs B's complaint about a credit relationship with the Lender that was unfair to her is not within our jurisdiction because it wasn't made within the time limits set out in DISP 2.8.2 R (2).
- II. The rest of Mrs B's complaint – about the Lender's decision to reject her concerns about the Supplier's alleged misrepresentations under Section 75 of the CCA – was made in time under DISP 2.8.2 R (2). But for the reasons I give below, I don't think these aspects of the complaint should succeed.

I'll explain my reasons for my conclusions below.

Mrs B's complaint that the credit relationship between her and the Lender was unfair under Section 140A of the CCA

The Financial Ombudsman Service is not free to deal with every complaint it receives. DISP sets out what complaints I can and cannot consider.

DISP 2.8 sets out the time limits within which complaints need to be made to respondent firms and/or referred to our service. In particular, DISP 2.8.2 R says:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

...

(2) more than:

- (a) six years after the event complained of; or (if later)
- (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that she had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R [...] was as a result of exceptional circumstances; or

*...
(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2R [...] have expired..."*

Here the Lender has not consented to us looking at the merits of Mrs B's complaint, so I have considered what this rule means for her complaint.

DISP 2.8.2(2) R sets out two periods of time within which a complaint must be brought – six years from the date the event happened that is being complained about or, if later, three years from when the person complaining became aware (or ought reasonably to have become aware) that they had cause to complain.

Mrs B has alleged that there was an unfair debtor-creditor relationship, as defined by s.140A CCA. Under that provision, the relationship can be found to be unfair for a number of reasons, including the terms of the loan agreement or the timeshare agreement funded by the loan and due to things done (or not done) by the Lender or on its behalf.

The law in this area has been clarified in a number of court judgments. The judgment in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v. Financial Ombudsman Service* [2023] EWHC 1069 (Admin) clarified that in cases such as this, where restricted-use credit is advanced, s.56 CCA creates a statutory agency between a supplier and a creditor. Here that means that the Supplier was acting on behalf of the Lender when selling timeshare membership to Mrs B and what the Supplier said and did in relation to Mrs B's sale was said or done on behalf of the Lender. In other words, what the Supplier said and did is relevant to the question of whether there was an unfair debtor-creditor relationship as defined by s.140A CCA.

However, any assessment on the fairness of the relationship is not only concerned with what happened at the time at which the credit agreement, and here the related timeshare agreement, were entered. The judgment in *Patel v. Patel* [2009] EWHC 3264 (QB) (recently approved by the Supreme Court in *Smith v. Royal Bank of Scotland Plc* [2023] UKSC 34) makes plain that the determination on whether or not the relationship was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination". In both cases, that was held to be either the trial date or the date the credit relationship ended, if earlier. It follows that as long as the credit agreement remained live, the Lender was responsible for the things that may have made the relationship unfair and for taking steps to remove that unfairness, or to mitigate its consequences so that the relationship was no longer unfair.

In light of that, Mrs B's complaint that she was a party to an unfair debtor-creditor relationship with the Lender necessarily extended to the Lender's acts and omissions in being party to such a relationship and perpetuating its unfairness up until when the

relationship ended.

Here, Mrs B needed to make a complaint about the unfair relationship within the timescales set out in DISP 2.8.2. The loan was repaid on 23 December 2013, which was when the debtor-creditor relationship ended. But that was more than six years before a complaint was made to the Lender in January 2021, so it is clear that she complained more than six years after the events complained about, which was too late under DISP 2.8.2(2)(a) R.

But DISP 2.8.2(2)(b) R meant that Mrs B would have longer to complain if it was shown that she first did so within three years of when she became aware (or ought reasonably to have become aware) that she had cause to complain. This rule is written in such a way that it is not just Mrs B's actual knowledge that triggers the start of the three years, but her constructive knowledge. In practice, this meant Mrs B did not need to know about everything that might have gone wrong for the time limit to start, rather she needed to be put on a path to discovery that something had, or might have, gone wrong and that caused her financial harm. Mrs B then had three years to establish whether something had gone wrong, who was responsible and then make her complaint. I thought about all the available information to decide when her reasonable awareness to make this complaint could be said to have started.

To answer this question, I need to consider whether and when Mrs B was aware or ought reasonably to have been aware that:

1. There was a problem with the lending or with the timeshare.
2. The problem(s) caused her a loss.
3. Another party's actions (or its failure to act) may have caused the loss.
4. The other party may have been the Lender.

In the letter of complaint, PR set out a number of reasons why there was an unfair relationship between the Lender and Mrs B. Those included problems with the lending at the time it was advanced and problems Mr and Mrs B had with the timeshare.

These included Mrs B complaining that they found it difficult to book the holidays they wanted, when they wanted. In a sworn statement, Mrs B said: "*We feel we have not received the holidays which were promised and could only book what they offered*" and that: "*We were told it would be five-star accommodation but felt it was not*". Mrs B also complained that they were pressured into purchasing Fractional Club membership by the Supplier.

It seems likely to me that it wasn't long after the Time of Sale, that Mrs B knew that there were significant problems with the sale causing them financial losses, because it is suggested they only agreed to the purchase because they were pressured to do so, and that they were struggling to book the holidays they wanted despite paying for the privilege of being able to do so.

So, when it looked like that was the case, Mrs B knew or ought reasonably to have known at that time that something had gone wrong, and that another party was responsible for the losses that they say followed. One of those parties was, quite obviously, the Supplier. But Mrs B also knew that the Lender had financed the purchase of the timeshare and that the Supplier had brokered the finance.

Given the size of the financial commitment that Mrs B found herself with because of the timeshare and the associated loan, and the long-term financial consequences of both of those commitments, I think it's reasonable to have expected her to carry out enquiries when the concerns about the loan and timeshare first arose, in order to establish what her rights were.

What's more, Mr and Mrs B's timeshare was a complicated contract that included (amongst other things) an interest in overseas property. As such, it was, by its very nature, fraught with complexities. And with that being the case, if Mrs B wasn't already aware of the implications of her concerns and the possible complaints that she might make in light of them, the obvious course to take was to make further enquiries and seek advice. Such enquiries seem to me to have been a step they ought reasonably to have taken shortly after they acquired the timeshare when they began to have concerns about how it had been sold, and the difficulties she says she was having with booking accommodation. And had Mrs B carried out such enquiries, I think it would have led her to discover that the Lender, as the connected lender that financed the transaction, may well have borne responsibility for the problems Mrs B says she had with the timeshare.

With that being the case, I think that Mrs B ought reasonably to have been aware that she had cause to complain about the Lender holding her in an unfair credit relationship shortly after she enter the Credit Agreement. And certainly, more than three years before she complained. To be clear, it's not necessary for Mrs B to have known *everything* that might have gone wrong for the time limit to start – it's sufficient that she was put on the path to discovery that *something* had, or might have, gone wrong, which caused her financial harm. So, I'm not persuaded that the three-year part of the relevant time limit extends the six-year part of it for the purpose of Mrs B's complaint about an unfair credit relationship under Section 140A of the CCA. And as she didn't complain until 7 January 2021, this part of the complaint was made late under the rules I have to apply.

Exceptional Circumstances

I can consider the merits of a complaint referred to the Financial Ombudsman Service after the expiry of the relevant time limit if there are exceptional circumstances that justify why it was referred late. But, based on what I've seen, I can't say that there are exceptional circumstances that apply to Mrs B's complaint about an unfair credit relationship with the Lender.

Mrs B's complaint about the Lender declining to accept and pay her claim under Section 75 of the CCA

Section 75 of the CCA operates quite differently to Section 140A and, when it applies, it can give borrowers a very different ground for complaint against their lender. Whereas, as I've explained, Section 140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, Section 75 simply creates a financial liability that the creditor is bound to pay. Liability under Section 75 isn't based on anything the lender does wrong, but upon the misrepresentations and breaches of contract by the supplier, for which Section 75 imposes on the lender a "like claim" to that which the borrower enjoys against the Supplier. If the lender is notified of a valid Section 75 claim, it should pay its liability. And if it fails or refuses to do so, that failure or refusal can give rise to a complaint to the Financial Ombudsman Service.

So, when a complaint is referred to the Financial Ombudsman Service on the back of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages the Service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

As a result, the six and three-year time limit (under DISP 2.8.2 (2) R) to complain about an unsuccessful attempt to initiate a Section 75 claim doesn't usually start until the respondent firm answers and refuses the claim.

In this case, as the Lender refused to accept and pay Mrs B's claim on 24 June 2021, the primary time limit (of six years) only started at that time. And the complaint about the Lender's handling of this claim was referred to the Financial Ombudsman Service in time for the purpose of the rules on our jurisdiction.

As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 (the 'LA') as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Mrs B's Section 75 claim for misrepresentation was time-barred under the LA before she put it to the Lender.

As I mentioned above, a claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim Mrs B could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim, like the one in question here, under Section 75 is also 'an action to recover any sum by virtue of any enactment' under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because Mr and Mrs B entered into the purchase of their timeshare at that time based on the alleged misrepresentations of the Supplier – which they say were relied upon. And as the loan from the Lender was used to help finance the purchase, it was when Mrs B entered into the Credit Agreement that she suffered a loss.

Mrs B first notified the Lender of her Section 75 claim on 7 January 2021. And as more than six years had passed between the Time of Sale and when that claim was first put to the Lender, I don't think it was unfair or unreasonable of the Lender to raise the LA as reason to defend Mrs B's concerns about the Supplier's alleged misrepresentations.

The PR says section 32(1) of the LA gives Mrs B more time to make her claim. Again, I disagree. Section 32(1) of the LA has the potential to postpone the relevant limitation period in cases of fraud, concealment, or mistake. I have thought about that here. But in this case the PR has simply referenced section 32(1), but it hasn't explained what acts the Supplier carried out, that would make it a relevant consideration that might extend time. So, I find it very difficult to see taking into account the brief submissions provided by the PR in this case, how section 32(1) could extend the time limit for Mrs B.

In the complaint referral to this service, the PR referred to a number of concerns that Mr and Mrs B became aware of shortly after purchasing their Timeshare. And in particular, they refer to not being able to go on the holidays they wanted at the times they wanted. So, my understanding is that they believed the Timeshare was misrepresented because they couldn't holiday in the way they say they were led to believe by the Supplier. But that would have been clear to them soon after the Time of Sale.

So, even if it could be said that section 32(1) is likely to have postponed the limitation period until they first discovered that the availability of holidays was not what they thought it would be (and I make no such finding that it would), I'm not persuaded that would make a difference here.

My final decision

For the reasons set out above, I don't think the Financial Ombudsman Service has the jurisdiction to Mrs B's complaint about the Lender's participation in and/or perpetuation of an unfair credit relationship under Section 140A of the CCA.

Insofar as Mrs B's complaint about the Lender's decision to decline her Section 75 claim for misrepresentation is concerned, I think that this part of the complaint is in jurisdiction. But I do not think that the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 19 January 2026.

Stefan Riedel
Ombudsman