DRN-6061473

## The complaint

Mrs D's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance[1] (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.

The purchase in question was bought in the joint names of Mr and Mrs D, but as the finance agreement was in Mrs D's sole name, she is the only eligible complainant here. I will, however, refer to both Mr and Mrs D where appropriate.

## What happened

Mr and Mrs D were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time.

On 23 November 2011 they changed their membership from a points-based arrangement to a different type of membership – the Fractional Property Owners Club - from the Supplier. They bought 2,580 fractional points, and after trading in their existing membership they paid £13,415 with a loan for the full amount from the Lender. This purchase and credit agreement was the subject of a separate complaint which has been considered by this Service.

Whilst on holiday, on 2 December 2013 (the 'Time of Sale') Mr and Mrs D traded in their membership towards the purchase of 3,020 fractional points (hereon referred to as the 'Fractional Club') and after the trade-in value, they paid £9,725 for this Fractional Club membership (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 the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mrs D paid for their Fractional Club membership by taking finance of £9,725 from the Lender (the 'Credit Agreement').

Mrs D wrote to the Lender on 22 December 2017 (the 'Letter of Complaint 1') to raise a number of different concerns. In summary, that:

- They were forced to continually upgrade their membership in order to receive the agreed services and products they had paid for.
- They were told they would be able to sell their membership with no problem when this was not true.
- They were not happy with the services they had received.
- They were subjected to high pressure sales techniques.
- When they tried to complain to the Supplier they were subsequently asked to purchase

[1] At the time the finance was agreed the Lender was trading as Hitachi Personal Finance

more products.

- Every time they tried to book using their points they were never enough and they were asked to pay more money towards the booking.
- They were convinced to make purchases on their credit card.
- They were not expressly told about their 14-day rescission period.

The Lender dealt with Mrs D's concerns as a complaint and issued its final response letter on 19 January 2018, rejecting it on every ground.

Mrs D referred her complaint to the Financial Ombudsman Service where it was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

In 2021 Mrs D engaged the services of a professional representative (the 'PR'), and on 21 December 2021, the PR wrote a further complaint (the 'Letter of Complaint 2'). This raised several concerns about the Fractional Club membership and the associated Credit Agreement, and made a claim for misrepresentation and breach of contract by the Supplier under Section 75 of the CCA, and a complaint of an unfair credit relationship under Section 140A of the CCA.

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

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

- Told them Fractional Club membership had a guaranteed end date when that was not true.
- Told them that Fractional Club membership was an "investment" when that was not true.

Mrs D says that she has a claim against the Supplier in respect of one or both of the misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs D.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mrs D also says that they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, Mrs D says that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs D.

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

The Letter of Complaint set out several reasons why Mrs D 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:

- The right checks weren't carried out before the Lender lent to Mrs D.
- Mr and Mrs D were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

- Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- Mr and Mrs D were not given sufficient information at the Time of Sale by the Supplier in order to make an informed choice.
- Commission was paid to the Supplier by the Lender, and this was not disclosed to Mrs D.

The Lender confirmed that it did not uphold this new complaint, so it was assessed by an Investigator at this Service who, having considered the information on file, rejected the complaint on its merits.

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

**The provisional decision**

I considered the matter and issued a provisional decision (the 'PD') setting out my initial thoughts on the merits of Mrs D's complaint.

In the 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 do not currently think this complaint should be upheld.*

*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") in the event that 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 was said in the Letter of Complaint 1 and 2 that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr and Mrs D were:*

(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 Fractional Club membership was an "investment" when that was not true.*

(3) *Told by the Supplier that Fractional Club membership would be easy to sell, when that was not true.*

*However, telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. After all, a share in an allocated property was, by its very nature, an investment. And while, as I understand it, the sale of the Allocated Property could be postponed in certain circumstances according to the Fractional Club Rules, Mrs D says little to nothing to persuade me that they were given a guarantee by the Supplier that the Allocated Property would be sold on a specific date when such a promise would have been impossible to stand by given the inevitable uncertainty of selling property some way into the future. And as there's nothing else on file to support the PR's allegation, I'm not persuaded that there was a representation by the Supplier on the issue in question that constituted a false statement of fact.*

*I am also not persuaded that Mr and Mrs D were likely to have been told that their membership would be easy to sell. I think this as there is no evidence to support that this was said, other than the bare allegation in Mrs D's Letter of Complaint 1. And this has not been mentioned at all in Mrs D's statement.*

*So, while I recognise that Mrs D 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 particular 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 D says that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.*

*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 Mr and Mrs D states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on a number of occasions. So while I accept that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.*

*So, from the evidence I have seen, I do not think the Lender is liable to pay Mrs D 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 D and the Lender along with all of 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. *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 Mrs D and the Lender.*

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

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

*The PR says, for instance that:*

1. *The right checks weren't carried out before the Lender lent to Mrs D; and*
2. *Mr and Mrs D were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.*

*However, as things currently stand, none of these strike me as reasons why this complaint should succeed.*

*I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mrs D was actually unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mrs D.*

*I acknowledge that Mr and Mrs D may have felt weary after a sales process that went on for a long time. But Mrs D says little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. Indeed, when describing what happened at the Time of Sale in her statement she has not mentioned feeling under pressure for any reason.*

*And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs D made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.*

*Overall, therefore, I don't think that Mrs D's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR now says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed*

*and sold to them as an investment in breach of prohibition against selling timeshares in that way.*

*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 the PR says 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 clearly constituted an investment as it offered Mr and Mrs D 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 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, it is clear 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.*

*On the other hand, I acknowledge that 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 Mr and Mrs D as an investment in breach of Regulation 14(3).*

*However, whether or not 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 particular 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 D 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 D and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Mrs D into the Credit Agreement is an important consideration.*

*But 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 D decided to go ahead with their purchase. I'll explain.*

*As I've said, Mrs D first complained to the Lender in December 2017, which was about four years after the purchase in question. And this Letter of Complaint 1 made no mention at all of the Fractional Club membership being sold to her and Mr D as an investment, let alone that this was a motivating factor when they decided to make the purchase. I find this hard to understand if, as she now attests, this was the reason they made the purchase.*

*The first time that it is suggested that Fractional Club was marketed to her and Mr D as an investment is in a statement from Mrs D, completed in September 2020, and taken by their PR. This statement sets out her recollections of their entire relationship with the Supplier, from their first purchase in October 2006.*

*As regards their first fractional purchase in November 2011, she says:*

> *"We were on holiday again in November 2011, this time in Malaga, when we met with the representatives. They told us that if we bought into a fractional ownership, we'd be buying and investing into actual property. They also said that this would shorten the term and we would get all of our money back (plus possibly extra) once the property had been sold."*

*Then, as regards their purchase of the Fractional Club membership at the centre of this complaint she says:*

> *"Finally, in December 2013, we were on holiday again when they convinced us to buy more fractions. They told us that if we bought more, our maintenance would not cost as much. Our children also no longer wanted involved and so we had to take them off at this point. They showed us properties in Tenerife and they told us that it would be better if we transferred our fractions into a property there as we holidayed there more often. We changed to a Tenerife apartment and bought more, this meant we no longer had the fractions in the Malaga property."*

*So although Mrs D sets out that the salesperson at the November 2011 sale presented the membership as an investment, that is not mentioned at all when she is describing the sale being considered here. It seems that their motivation to make this purchase was an apparent reduction in the annual maintenance fee, that their children would no longer be part of the membership and the Allocated Property would be more appropriate as it was where they normally holidayed.*

*With that said, it doesn't mean they weren'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 D herself doesn't persuade me that their purchase was motivated by their 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 they 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 Mr and Mrs D'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 they would have pressed ahead with their 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 D and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).*

*<u>The provision of information by the Supplier at the Time of Sale</u>*

*The PR says that Mr and Mrs D were not given sufficient information at the Time of Sale by the Supplier in order to make an informed choice.*

*In the Letter of Complaint 1 Mrs D says they were not expressly told about their 14-day recission period. This relates to the 14-day period of time following the purchase, during which Mrs D would have been able to withdraw from the Purchase Agreement and associated Credit Agreement without penalty. But, from the evidence provided, I think it likely that they were informed of this withdrawal period. I say this because I have seen a copy of the contemporaneous sales documentation from the Time of Sale. And within this is one titled:*

*"SEPARATE STANDARD WITHDRAWAL FORM TO FACILITATE THE RIGHT OF WITHDRAWAL"*

*This sets out that the consumer has the right to withdraw from the contract within 14 days without giving any reason. And Mr and Mrs D have signed this form to acknowledge receipt of this information, so I think it is likely they were told about this provision.*

*And it also isn't clear what information the PR thinks the Supplier failed to provide at the*

*Time of Sale. But 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.*

*So, while I acknowledge that it is also possible that the Supplier did not give Mr and Mrs D sufficient information, in good time, in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'), even if that was the case, neither Mrs D nor the PR have persuaded me that she and Mr D were deprived of information that would have led them to make a different purchasing decision at the Time of Sale. And with that being the case, even if there were information failings (which I make no formal finding on), I can't see why they led to a financial loss.*

*Mrs D's Commission Complaint*

*I note that one of Mrs D's other concerns about the sale of Fractional Club membership relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreement. The Supreme Court's recent judgment in Johnson and Wrench -v- FirstRand Bank, and Hopcroft -v- Close Brothers [2025] UKSC 33 ('Johnson, Wrench and Hopcroft') clarified the law on commission payments – albeit in the context of car dealers acting as credit brokers. In my view, the Supreme Court's judgment sets out principles which appear capable of applying to credit brokers other than car dealer–credit brokers. At present, I do not know what, if any, commission was paid by the Lender in respect of Mrs D's loan. Once I find out more information about this, I will finalise my findings on this complaint.*

*Conclusion*

*In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claim(s), and if I put the issue of commission to one side for the time being, I am not persuaded that the Lender was party to a credit relationship with Mrs D under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate her.*

*But, as I've already suggested, the Supreme Court's judgment on Johnson, Wrench and Hopcroft may prove important to this complaint. And with that being the case, it is necessary to wait and consider the possible implications of that judgment and ascertain what, if any, commission was paid here before finalising my thoughts on the merits of this complaint."*

**The responses to the provisional decision**

Neither the Lender nor the PR responded to the PD.

Following this I also communicated to both sides how I was not persuaded that Mrs D's credit relationship with the Lender was unfair to her for reasons relating to the commission arrangements between it and the Supplier.

The PR responded to say it had nothing further to add.

Having received the relevant responses from both sides, I am now finalising my 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, 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 Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

## 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.

Following the responses from both sides, I've considered the case afresh. And having done so, and because no new evidence has been submitted or arguments made in response to my initial findings, I see no reason to depart from the outcome as set out in the provisional decision above.

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

## My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 4 February 2026.

Chris Riggs
**Ombudsman**