DRN-6070035

The complaint

Ms H's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance 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.

Background to the complaint

Ms H, together with a third party who I'll refer to as "Mr R", was the member of a timeshare provider (the 'Supplier') – having purchased a trial membership previously. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 2 January 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 910 fractional points at a cost of £18,943 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Ms H 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.

Ms H and Mr R paid for their Fractional Club membership by taking finance of £18,951 from Novuna in Ms H's sole name (the 'Credit Agreement'). Some of the loan funds were used to settle an existing loan taken to fund the purchase of their trial membership.

As only Ms H was named on the Credit Agreement, only she is able to refer a complaint about it to our Service. For ease I will refer to Ms H only from here on, even where she and Mr R may have been acting jointly or the matter might otherwise apply to Mr R in some way.

Ms H – using a professional representative (the 'PR') – wrote to Novuna on 18 April 2024 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

Novuna dealt with Ms H's concerns as a complaint and issued its final response letter on 5 June 2024, 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.

Ms H disagreed with the Investigator's assessment and asked for an Ombudsman's decision, which is why it was passed to me.

I considered the matter and issued a provisional decision (the 'PD'). In that decision, 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 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

As both sides may already know, a claim against Novuna under Section 75 essentially mirrors the claim Ms H could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. Novuna does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

There are, though, certain time limits that apply – and I think these mean Ms H's claim would've been time-barred.

The Limitation Act 1980 sets out limitation periods, or time limits, for bringing various types of legal claim. For a claim based on contract, it's not generally possible to start court action more than six years after the cause of action arose. If a claim is brought too late, the respondent is likely to have a complete defence to the claim on that basis.

For claims relating to misrepresentation, the time limit would typically be six years from the date the claimant suffers damage as a result of the misrepresentation. For example, entering into a contract – and incurring liabilities – when they would otherwise not have done.

Ms H's claim under Section 75 is that but for the Supplier's various alleged misrepresentations, she wouldn't have entered into the Purchase Agreement (and, therefore, the Credit Agreement). So it is the date on which she entered into those agreements that her cause of action arose, meaning she had six years from that date within which to bring this claim.

Ms H entered into the Purchase Agreement and Credit Agreement on 2 January 2018. She raised her claim under Section 75 within the Letter of Complaint dated 18 April 2024 – more than six years later.

That being the case, I don't think Novuna acted unfairly or unreasonably in declining the claim. However, I have later considered whether these alleged misrepresentations could have been something that caused an unfair credit relationship.

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, Novuna is also liable.

I've gone on to consider whether there would be any additional time within which Ms H could raise a claim under Section 75 for breach of contract, given that her cause of action may have accrued in a different way and therefore at a different point in time.

While not explicitly referenced as such in the Letter of Complaint, some of Ms H's

points could reasonably be interpreted as an allegation of a breach of contract by the Supplier. Most notably, that she could not access the holidays that she was led to believe would be available through the membership. On my reading of the complaint, Ms H considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Her cause of action would therefore accrue when any such breach occurred, i.e. when she was unable to holiday when or where she wanted.

Ms H hasn't provided us with the dates of her attempts to book holidays that ended up falling short of her expectations. So it is hard for me to ascertain when her cause of action arose. But even accepting that this claim was made in time, which is highly likely given the relevant dates here, I don't think it would've been unreasonable for Novuna to decline it.

I say this because the evidence I've seen so far doesn't persuade me that the Supplier breached the terms of the Purchase Agreement. In addition to the vague nature of the allegations as I've described above, 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 signed by Ms H states that the availability of holidays was subject to demand. Even if I accept that she may not have been able to take certain holidays, I don't think this necessarily amounts to a breach of the terms of the Purchase Agreement.

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

Section 140A of the CCA: did Novuna 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 Ms H and Novuna 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;
4. The inherent probabilities of the sale given its circumstances; and, when relevant
5. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Ms H and Novuna.

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

Ms H's complaint about Novuna being party to an unfair credit relationship was made for several reasons.

I have firstly considered whether the misrepresentations she alleges were made by the Supplier in the context of her Section 75 claim could have caused any unfairness for the purposes of Section 140A.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Ms H was:

1. Told that she had purchased an investment that would "appreciate in value".
2. Told that she would have a share in a property that would increase in value.
3. Made to believe that she would have access to "the holiday apartment" at any time all year round.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). 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. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for point 3, while it's *possible* that Fractional Club membership was misrepresented at the Time of Sale for that reason, I don't think it's *probable*. It's given little to none of the colour or context necessary to demonstrating that the Supplier made a false statement of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for that reason, I don't think it was.

So, while I recognise that Ms H and the PR have concerns about the way in which Fractional Club membership was sold by the Supplier, I do not think this caused any unfairness in Ms H's credit relationship with Novuna such that it warrants a remedy.

Turning to the points specifically raised in relation to the potential unfairness of the relationship between Ms H and Novuna, the PR said in the Letter of Complaint that the right checks weren't carried out before Novuna lent to Ms H. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that Novuna 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 Ms H was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship with Novuna was unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Ms H.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that Novuna wasn't permitted to enforce the Credit Agreement. However, it looks to me like Ms H knew, amongst other things, how much she was borrowing and repaying each month, who

she was borrowing from and that she was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for her, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Ms H suffering a financial loss – such that I can say that the credit relationship in question was unfair on her as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell Novuna to compensate her, even if the loan wasn't arranged properly.

The PR also says that Ms H was rushed into signing the contractual paperwork at the end of a long sales meeting, without having sufficient time to properly consider the implications of the agreement into which she was entering. I acknowledge and appreciate that Ms H may have felt weary after a sales process that went on for a long time. But what she has said does not give me the impression that the Supplier made her feel as if she had no choice but to purchase Fractional Club membership when she simply did not want to. She was also given a 14-day cooling off period and she has not provided a credible explanation for why she did not cancel the membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Ms H made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Ms H's credit relationship with Novuna was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with Novuna was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her 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

Novuna does not dispute, and I am satisfied, that Ms H'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 – saying, in summary, that Ms H was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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 Ms H the prospect of a financial return – whether or not, 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*.

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 Ms H 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 her as an investment, i.e. told her 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, 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 Ms H, 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 Ms H 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.

Would the credit relationship between Novuna and Ms H have been rendered unfair to her had there been a breach of Regulation 14(3) of the Timeshare Regulations?

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 Ms H and Novuna under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Ms H and Novuna that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Ms H has said in the course of her complaint about how the membership was sold to her and her motivation for purchasing it.

I would note first of all that the evidence in this respect is quite limited. Within the Letter of Complaint, it is said that Ms H was told that she had purchased an investment and could expect a profit. There was no further detail underpinning these statements within the Letter of Complaint, which are rather generic in nature. In fact, such assertions are made in an identical fashion by the PR in a number of other complaints.

When referring the complaint to us, the PR included a statement made by Ms H in her own words in which she set out her recollections of her purchase from the Supplier. And in response to our Investigator's assessment, the PR highlights that Ms H said:

> *"… the reps reiterated to us on a number of occasions that it was not a time share, but an investment opportunity that would give us money back which formed the basis for our purchase alongside the luxury accommodation."*

And:

> *"We were continually advised it was a great investment that we could technically utilise for free for the term of the agreement then it would be sold and we would get money back and a share of the profits."*

Taken in isolation and at face value, I would agree these comments – and some other similar mentions of the investment element within the statement – support the allegation that the Supplier positioned the membership as an investment opportunity to Ms H (a possibility that I have already accepted, as explained above) and, more importantly, that this influenced her decision to purchase it.

Looking at things more broadly, however, I am not persuaded that Ms H would have acted any differently had the membership not been presented to her as an investment opportunity.

I say this primarily because on my reading of Ms H's statement as a whole, the appeal of the holiday options on offer would always have led her to purchase the membership. Much of the statement is focused on the holiday options (and some other related benefits) available through the membership.

Evidently, Ms H was interested in the type of holidays offered by the Supplier, having already purchased a trial membership. Ms H recalls that, when on the "prelude week" at the Time of Sale, she was "*impressed*" by the "*luxurious*" accommodation and extras – and coming to understand that she would need to upgrade in order to access such a standard of holiday:

> "*After showing us videos of yachting holidays and worldwide exchange resorts in USA and the Caribbean, [the Supplier's representative] went on to advise that if we wanted to have all that and the luxury they had shown us so far today we would have to upgrade as we would not be able to access those benefits via the trial membership*."

Ms H also explained how the Supplier offered to waive the annual maintenance fees for the first year and offered her an additional 1,000 points to sign up. She also cited the option to exchange holidays as something of interest to her.

Also, I am conscious that there is little detail to what Ms H has said about the investment element, both in terms of what the Supplier actually said to her and what

benefit she was expecting to derive from it. This may, at least in part, reflect the difficulty Ms H will have had in recalling matters from some time ago – with the complaint being raised some six years after the Time of Sale. But, as exemplified above, Ms H appears to have remembered points relating to the holiday options in significantly more detail. I think that may well reflect the weight she placed upon the two matters when deciding whether to purchase the membership.

The timing of the statement is also significant in that it comes after the widespread publication of the outcome of the highly relevant court case, *Shawbrook & BPF v FOS*[1]. I think there is a risk that Ms H's testimony was coloured by this outcome in some way, either directly or through her conversations with others.

Weighing all of this up, I'm not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Ms H decided to go ahead with her purchase. That's not to say she 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 Ms H herself 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 Ms H'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 her 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 Ms H and Novuna was unfair to her 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 Ms H was not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms.

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 Ms H sufficient information, in good time, on the various charges she could have been subject to as a Fractional Club member 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 Ms H nor the PR have persuaded me that she would not have pressed ahead with her purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with

[1] *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) ('*Shawbrook & BPF v FOS*').

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 there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Ms H in practice, nor that any such terms led her to behave in a certain way to her detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

Ms H's Commission Complaint

The PR says that a payment of commission from Novuna to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

As both sides already know, the Supreme Court handed down an important judgment on 1 August 2025 in a series of cases concerned with the issue of commission: *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ('*Hopcraft, Johnson and Wrench*').

The Supreme Court ruled that, in each of the three cases, the commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or the dishonest assistance of a breach of fiduciary duty, had to be predicated on the car dealer owing a fiduciary duty to the consumer, which the car dealers did not owe. A "disinterested duty", as described in *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471, is not enough.

However, the Supreme Court held that the credit relationship between the lender and Mr Johnson was unfair under Section 140A of the CCA because of the commission paid by the lender to the car dealer. The main reasons for coming to that conclusion included, amongst other things, the following factors:

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);
2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

The Supreme Court also confirmed that the following factors, in what was a non-exhaustive list, will normally be relevant when assessing whether a credit relationship was/is unfair under Section 140A of the CCA:

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

From my reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, it sets out principles which apply to credit brokers other than car dealer–credit brokers.

So, when considering allegations of undisclosed payments of commission like the one in this complaint, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules ('DISP').

But I don't think *Hopcraft, Johnson and Wrench* assists Ms H in arguing that her credit relationship with Novuna was unfair to her for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that Novuna and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Ms H, nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Ms H into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge that it's possible that Novuna and the Supplier failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

But as I've said before, 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. And with that being the case, it isn't necessary to make a formal finding on that because, even if Novuna and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it is for the reasons set out below that I don't currently think any such failure is itself a reason to find the credit relationship in question unfair to Ms H.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by Novuna to the Supplier for arranging the Credit Agreement that Ms H entered into wasn't high. At £758.04, it was only 4% of the amount borrowed and even less than that (3.71%) as a proportion of the charge for credit. So, had she known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Ms H wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the impact of commission on the cost of the credit she needed for a timeshare she wanted doesn't strike me as disproportionate. So, I think she would still have taken out the loan to fund her purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Ms H but as the supplier of contractual rights she obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to her when arranging the Credit Agreement and thus a fiduciary duty.

Overall, therefore, I'm not currently persuaded that the commission arrangements between the Supplier and Novuna were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Ms H.

Section 140A: Conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Ms H and Novuna under the Credit Agreement and related Purchase Agreement was unfair to her. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Ms H's credit relationship with Novuna wasn't unfair to her for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Ms H's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

The first ground relates to whether Novuna is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from Novuna without telling Ms H (i.e., secretly). And the second relates to Novuna's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Ms H a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to her. And while it's possible that Novuna failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on Novuna's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think she would still have taken out the loan to fund her purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Concerns relating to the trial membership

Within the Letter of Complaint, the PR appears to have set out that the concerns Ms H was raising related to both her Fractional Club membership and the trial membership that preceded it.

These have not been addressed by our review of the complaint to date and I cannot see that the PR has objected to this. But for completeness I would note the following:

1. Ms H's Section 75 claim in relation to the trial membership was raised outside of the six-year limitation period, affording Novuna a complete defence to it. It follows that I do not think it did anything wrong in declining to consider this claim further.

2. The complaint about the fairness of this credit relationship between Novuna and Ms H was not raised within the time limits that apply under our rules. The relationship started and ended more than six years before the complaint was raised. And I think Ms H ought reasonably to have been aware she had cause for complaint about the matter more than three years before she brought it, particularly given her allegations that affordability checks were not carried out and that she was subjected to "oppressive" sales techniques.

I should also highlight that in assessing the fairness of the credit relationship between Novuna and Ms H in respect of the Credit Agreement (being that which facilitated the purchase of the Fractional Club membership), I considered whether there was any existing unfairness from any related credit agreement – with the Novuna loan used to fund the trial membership and consolidated within the one used to purchase the Fractional Club membership being "related". I did not find that there was any such existing unfairness, given the circumstances of that sale.

I have kept these findings brief given that I understand the focus of Ms H's complaint to be the matters relating to the Fractional Club membership, but will consider any further comments or evidence she or the PR wishes to send me about the trial membership before making my final decision.

In conclusion, given the facts and circumstances of this complaint, I did not think that Novuna acted unfairly or unreasonably when it dealt with Ms H's Section 75 claims, and I was not persuaded that Novuna 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 could see no other reason why it would be fair or reasonable to direct Novuna to compensate her.

Novuna did not respond to the PD.

The PR also responded. It did not accept the PD and provided some further comments it wanted me to take into account.

Having received the relevant responses from both parties, I'm 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:

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

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]

<u>The FCA's Principles</u>

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD only relate to the issue of whether the credit relationship between Ms H and Novuna was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Ms H as an investment at the Time of Sale.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in their response to my PD. Indeed, it hasn't said it disagrees with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in response.

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

The PR has highlighted under Section 140B (9) of the CCA, the burden of proof falls on Novuna to disprove the allegation that its relationship with Ms H was unfair. I agree that this is correct, placing a burden on lenders during the process of litigation. That does not mean, though, that Novuna – or I – should take a claim at face value. There remains an onus on Ms H to provide some evidence for the claim she is making, despite the overall burden of proof resting with Novuna, as was set out in the judgment in *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34 at paragraph 40. I also remind both parties that it is my role to make findings on what I consider to be fair and reasonable in all the circumstances of any given complaint.

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

In its response to my PD, the PR has reasserted its view that the Supplier marketed the Fractional Club membership to Ms H as an investment and that this was a motivating factor in her decision.

I accepted in my PD that the membership may well have been marketed as an investment to

Ms H in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it wasn't necessary for me to make a finding on this as it is not determinative of the outcome of the complaint. I explained that regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. The PR's response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Ms H to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

In my PD I explained the reasons why I didn't think any breach of Regulation 14(3) had led Ms H to proceed with her purchase. In short, I was not persuaded that her decision was motivated by the prospect of a financial gain (i.e., a profit). In reaching that view, I took into account the testimony given by Ms H in the course of her complaint. I recognise the PR has interpreted Ms H's testimony differently to how I have, and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion.

The PR objects to the approach I've taken in assessing this aspect of the complaint, believing that I have detracted from the judgment in *Shawbrook & BPF v FOS* and the case law that contributed to it, by requiring Ms H to have been "primarily or mainly motivated" by the investment element in order to uphold the complaint. But I did not make such a finding. I said that, in my view, Ms H was highly motivated by the holiday options offered by the Supplier – which was a factor in my overall conclusion in light of all the available evidence that she would, on balance, have pressed ahead with her purchase of the Fractional Club membership even if there had been a breach of Regulation 14(3).

So for the reasons given in my PD and above, I still do not think that any breach of Regulation 14(3), if there was one, was material to Ms H's decision to purchase the Fractional Club membership.

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

The PR also highlights an apparent ambiguity in the proposed sale date of the Allocated Property. The PR suggests that a delayed sale date could lead to an unfairness to Ms H in the future, as any delay could mean a delay in the realisation of her share in the Allocated Property.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2035. This same date is set out under point 1 of the Members Declaration, which has been initialled and signed as being read by Ms H. This date indicates that the membership has a term of 17 years. The ambiguity identified by the PR is that in the Information Statement provided as part of the purchase documentation it says the following:

> "The Owning Company will retain such Allocated Property until the automatic sale date in **19 years time** or such later date as is specified in the Rules or the Fractional Rights Certificate." (my emphasis)

It seems clear to me that the contractual commencement date for the start of the sales process is 31 December 2035. This actual date is repeated in the sales documentation as I've set out above. The Information Statement is, in my view, reflective of the fact that most fractional memberships were set up to run for nineteen years. But not all memberships attached to a given Allocated Property were sold at exactly the same time, so often the time left before the sale date was less than nineteen years at the actual time of sale. I accept that

this could be confusing, however I do not think Ms H was misled by this at the Time of Sale. So, I can't see that this is a reason to find the credit relationship unfair and uphold this complaint.

Section 140A: conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Ms H and Novuna under the Credit Agreement and related Purchase Agreement was unfair to her. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that Novuna acted unfairly or unreasonably when it dealt with Ms H's Section 75 claims, and I am not persuaded that Novuna 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 Novuna to compensate her.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H to accept or reject my decision before 9 March 2026.

Ben Jennings
Ombudsman