DRN-6118315

Financial Ombudsman Service

The complaint

Mrs D's complaint is, in essence, that Mitsubishi HC Capital UK PLC, trading as Novuna, ("Novuna") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under s.140A of the Consumer Credit Act 1974 (as amended) ("CCA") and (2) deciding against paying a claim under s.75 CCA.

Background to the complaint

Mrs D, alongside her late husband, Mr D, took out a timeshare membership ("Fractional Club") from a timeshare provider ("the Supplier") on 24 May 2013 ("the Time of Sale"). This type of 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 after their membership term ended ("the Allocated Property"). With this membership, they also had 1,050 fractional points they could use each year to take holidays at the Supplier's resorts. The cost was set out on the timeshare membership application ("the Purchase Agreement") as £14,749, which included £798 for the first year's annual management fees.

Mr and Mrs D paid for their Fractional Club membership by taking finance of £14,749 from Novuna in Mrs D's name ("the Credit Agreement").[1] The Credit Agreement was set up to run over ten years at an APR of 18.9%

The following month, Mr and Mrs D took out a further timeshare membership from the Supplier. They traded in their earlier membership and entered into an agreement with the Supplier to buy 1,600 fractional points – 550 additional points – at an additional cost of £7,291. This was paid by Mr and Mrs D taking an additional loan from a different lender.

Mr and Mrs D – using a professional representative ("PR1") – wrote to Novuna on 9 October 2017 ("the Letter of Complaint") to make a claim under s.75 CCA. Although the Letter of Complaint ran to five pages, at no point did it set out the factual basis on which PR1 alleged Novuna ought to have accepted the claim. However, attached to the Letter of Complaint were several other documents:

1. A thirty-five page 'Position Statement'. Although this document has Mr and Mrs D's names on the first page, it does not mention them again, nor does it contain any complaint specific information.
2. A five-page witness statement signed by Mr and Mrs D, attaching other documents containing their memories of the sale.

Novuna did not respond to the complaint, and so PR1 referred a complaint to our service on Mr and Mrs D's behalf.

On 3 April 2018, Novuna responded to PR1, stating that the complaint made was not specific to Mr and Mrs D's circumstances. Novuna gave details that Mr and Mrs D had taken

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[1] As Mrs D only was named on the Credit Agreement, only she can bring this complaint. But as it was brought in both of their names, I have referred to both throughout.

seven holidays in a four-year period, as well as making a reservation for later in 2018. In respect of the complaint raised, it rejected it on every ground.

In March 2022, a different professional representative ("PR2") took over the complaint from PR1.

One of our investigators considered Mr and Mrs D's complaint, but did not think Novuna needed to do anything further to answer it. PR2 disagreed and asked for everything to be considered again by an ombudsman. In doing so, it made the following comments:

- the Supplier had marketed and sold membership to them as an investment in breach of Reg.14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations") and this caused an unfair credit relationship as defined by s.140A CCA.
- the investigator's view had not properly considered the judgment in *R (on the application of Shawbrook Bank Ltd) v. Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v. Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("*Shawbrook & BPF v. FOS*").
- the Supplier had foreclosed the timeshare due to the non-payment of membership fees, meaning Mrs D was left with only a liability. This was inherently unfair.[2]

PR2 also provided a witness statement from Mrs D that explained that Mr D had sadly passed away, but Mrs D provided her memories of the sale and a description of the problems she said she had with Fractional Club membership.

Having considered all of the available evidence and arguments, I issued a provisional decision ("PD") on Mrs D's complaint. I agreed with our investigator that the complaint ought not to be upheld and explained why, inviting both parties to provide any further evidence or arguments they wished me to consider. In summary, I did not think the evidence suggested that there were actionable misrepresentations that Novuna was liable to answer under s.75 CCA, nor did I think the way that Fractional Club membership was sold gave rise to an unfair credit relationship. I also thought about the payment of commission by Novuna to the Supplier, but I concluded that in all of the circumstances, the commission paid did not mean that there was an unfair credit relationship or any other reason for me to direct Novuna pay compensation.

Novuna did not provide anything further it wished me to consider.

PR2, on Mrs D's behalf, did. It provided detailed submissions that I have considered and will address in this 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.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

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[2] As noted above, Mr and Mrs D traded in the membership that is the subject matter of this complaint after a month, so this issue is about a different membership not financed by Novuna and falls outside of the scope of this complaint.

- The CCA (including ss.75 and 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCR”).
- The Consumer Protection from Unfair Trading Regulations 2008 (“CPUTR”).
- The Office of Fair Trading Guidance from 2010 and 2011 on irresponsible lending and for credit brokers and intermediaries.
- Case law on Section 140A of the CCA – including, in particular:

  - The Supreme Court’s judgment in *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61 (“*Plevin*”) (which remains the leading case in this area).
  - *Scotland v. British Credit Trust [2014] EWCA Civ 790 (“Scotland and Reast”)*
  - *Patel v. Patel* [2009] EWHC 3264 (QB) (“*Patel*”).
  - The Supreme Court’s judgment in *Smith v. Royal Bank of Scotland Plc* [2023] UKSC 34 (“*Smith*”).
  - *Carney v. NM Rothschild & Sons Ltd* [2018] EWHC 958 (“*Carney*”).
  - *Kerrigan v. Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) (“*Kerrigan*”).
  - *Shawbrook & BPF v. FOS*.
  - *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 (“*Hopcraft, Johnson and Wrench*”).

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider having been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation’s Code of Conduct dated 1 January 2010 (“the RDO Code”).

My findings

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 still do not currently think this complaint should be upheld. But 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.

This is especially so in the circumstances of this particular complaint due to the way in which it has been brought. As noted above, PR1 sent Novuna a Letter of Complaint and a Position Statement, both of which were generic in nature and did not contain specific facts or allegations about Mr and Mrs D’s complaint. For example, page 18 of the Position Statement deals with the Limitation Act 1980 and its effect on any claim that could have been made. However, PR1 first wrote to Novuna within six years of the Time of Sale, so this was not relevant. So, in my PD I focused on what Mr and Mrs D said happened in their evidence provided by PR1 at the outset of their complaint, the more recent statement from Mrs D and PR2’s submissions that were focused on the factual background to this complaint. In my PD, I said that if Mrs D and/or PR2 disagreed with this approach, they could let me know in response to this provisional decision. In response, PR2 has provided submissions that deal with matters dealt with in my PD and specific submissions on matters I did not address. So in this final decision I will think about and address everything PR2 has said.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

The evidence of the parties

Mr and Mrs D provided a witness statement signed on 7 November 2017 ("the 2017 Statement") that appears to have been drafted by PR1. Within it, Mr and Mrs D explained that they had participated in a 'similar fact evidence investigation' with PR1, stating that their concerns were similar to those PR1 had seen from other of its clients. With respect to their memories of sale, they said this:

> *"The Representations*
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> *14. On the 24th of May, we were invited by [the Supplier] to and did attend a sales presentation with [the Supplier]. During that presentation the seller verbally explained to us, the benefits which would flow from the timeshare, should we elect to buy it. The sale presentations took many hours and the seller elected to and did deliver many verbal representations. Some of the representations we recall, as we did believe they were truthful. When delivered to us we rely upon them and when made a transitional decision to buy the product. These core representations are detailed in the questionnaire we completed and are contained in Appendix 2.*[3]
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> *15. When the product was sold the seller did not refer to any contractual documents or any other document which contained any terms and conditions. We were not invited to read, peruse or consider the contract and when it was presented we could not and were not invited to personalize any documents in any way.*
>
> *16. When the documents were presented they were presented in an order that the seller wanted, the documents were controlled by the seller and that signing was rushed and after a long and arduous sale event.*
>
> *17. I confirm we were handed the sales documents and the finance contract but, were not given the club constitution, the rules of the club, the trust contract, the management agreement, or any other pertinent document which would assist us in fully understanding, the contractual matrix of the associated companies and contractual matrices."*[4]

The statement went on to deal with the holidays taken, what Mr and Mrs D were not told by the Supplier, a paragraph stating that representations made were false and therefore misrepresentations and a section titled "*Familiar of the Respondent and the Merchant to provide Documents and Information*" which dealt with information Mr and Mrs D say was missing at the Time of Sale. None of this statement contained any detail of Mr and Mrs D's actual sale and, I said in my PD that in my view, it appeared to be the submissions of PR1, rather than the evidence of Mr and Mrs D.

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[3] This was a document attached to the witness statement titled "*EXAMPLE MISREPRESENTATIONS CONSUMERS ARE SUBJECTED TO BUY TIMESHARE SELLERS (POINTS TO CONSIDER AND USE THAT HAVE BEEN USED IN PREVIOUS MISREPRESENTATION CASES)*" (sic) ("the Example Misrepresentation Document")

[4] An identical statement was prepared for a complaint made in respect of the second sale the following month, the only difference being the date was changed.

Attached to the 2017 Statement at Appendix 2 was the Example Misrepresentation Document. That document did provide actual evidence from Mr and Mrs D. It ran to eleven pages and had a paragraph at the top that read:

> *"Enough stress cannot be placed at expressing the truth at all times. By being truthful, [PR1] can match what you were told to others who were told the same thing. With your own knowledge you may have very specific and particular representations that other may also recall, so it's important to take your time and recall as many statements the salesman made when you acquired the timeshare."*

The following three pages contained a list of potential representations that could have been made for PR1's clients to 'tick' if such representations had been made. For example, the first section was titled "*Before the Presentation – I was induced to attend because: (please tick all that apply)"* and then gave seven possible reasons – Mr and Mrs D ticked the boxes that said "*Free food/meals*", *"Free drinks",* "*Free or discounted holiday*", "*The presentation "would only last for a short time"* and *"Others"*. At times, this document asked Mr and Mrs D to answer yes/no questions, such as "*Did you repeatedly tell them you were not interested in the timeshare – YES/NO*" – here they circled the "yes" answer. Further, some of the document left spaces for them to enter information, for example the time at which the sales presentation started and ended.

Pages four and five of the Example Misrepresentation Document contained spaces for Mr and Mrs D to write in their own words details of the sale. It was titled "*The Resort Promises*" and gave five boxes that could be filled in, each giving space for Mr and Mrs D to explain what the Supplier told them at the Time of Sale, why the statement was false and why it was of material significance to them. Mr and Mrs D filled in four of the five boxes. Their first issue was that they said the Supplier told them that they would get exclusive '5 star' holidays several times a year, but they said they were unable to get the holidays they wanted or of the quality expected. Their second issue was that the Supplier told them they were buying resold points from someone else, but they have found out the Supplier does not resell points and they have not been able to sell on their points. Their third issue was that the Supplier told them that the finance arranged could be changed for a better rate when they retuned home, but that had not been the case. Finally, they said the Supplier told them that the maintenance fees would be free for the first year and an annual fee of £150 thereafter, but that was not the case.

The remainder of the Example Misrepresentation Document contained questions specific to the Supplier (over other timeshare providers). Here, Mr and Mrs D wrote to say that they had asked the Supplier to sell their Fractional Club membership, but the Supplier refused to do so. They said they asked for this in June 2014 and the Supplier said that it could suspend their membership so no maintenance fees would fall due. Finally, Mr and Mrs D were asked to write down, in their own words, what happened at the sales presentation. They said:

> "*We were phoned and told we have been selected to a weeks holiday at discounted rate.*
> *We were told on arrival that we had to attend 1hrs presentation as part of our holiday deal. We were phoned in apartment as soon arrived and early next morning to be taken to presentation. They began by taking us to breakfast which was nice and relaxed and then took us to their offices in [Spain] for short presentation which lasted for several hours not the 1hr they said it would be."*

Having considered the 2017 Statement, it was my view that I could not place any evidential weight on the body of its contents. It appeared to me that this statement was wholly generic and, on balance, likely templated. It contained no evidence from Mr and Mrs D of what actually happened to them at the Time of Sale. This was clear when compared to a second

statement Mrs D went on to provide, dated 4 January 2024, via PR2 ("the 2024 Statement"). An excerpt of that statement, dealing with what happened at the Time of Sale, reads as follows:

> "*7. In May 2013, we took advantage of a promotional holiday voucher given to us by [the Supplier]. The voucher entitled us to visit [the Supplier's resort].*
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> *8. The voucher entitled us to stay for 1 week's holiday at their resort conditional upon us attending a meeting with the resort…."*

The language in the 2024 Statement is completely different, written in a conversational tone and giving details of Mrs D's actual memories of the sale.

It was my view that Mr and Mrs D's actual evidence was contained in the Example Misrepresentation Document and not in the 2017 Statement. So, I placed no weight on the contents of the 2017 Statement, rather I took what was in the Example Misrepresentation Document as their evidence given at that time.

I also had the 2024 Statement from Mrs D. This statement contained a description of both sales between Mr and Mrs D and the Supplier that took place in 2013, as well as a description of some problems Mrs D said there were with the memberships.

Novuna provided a written response from the Supplier, disputing the complaints made by Mr and Mrs D, as well as the documents from the Time of Sale and information about the holidays taken.

In response to my PD, although PR2 made submissions on the weight I placed on the evidence I had seen, it did not dispute my findings on the contents of the 2017 Statement.

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

The CCA introduced a regime of connected lender liability under s.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.

In short, a claim against Novuna under s.75 CCA essentially mirrors the claim Mrs D could make against 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. Novuna does not dispute that the relevant conditions are met in this complaint. As I am satisfied that s.75 CCA applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs D at the Time of Sale, Novuna is also liable.

From my reading of the two statements and PR2's response, I set out in my PD what thought were the alleged misrepresentations made by the Supplier:

1. It told Mr and Mrs D that they would get '5-star' and exclusive holidays, two to three times per year and they would have sufficient points to do this.
2. It told Mr and Mrs D that they were buying resold points from someone, and this was a one-time discount.
3. It told Mr and Mrs D that they could sell their Fractional Club membership at any time and that it would help arrange the sale.

4. It told Mr and Mrs D that the finance arranged could be changed anytime for a better rate when they returned home.
5. The maintenance fee would be free for the first year it would be an annual fee of £150 thereafter.[5]

Having considered everything, I was not persuaded that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons alleged. But before I dealt with the detail of the alleged misrepresentations, as part of my assessment of the evidence, I considered Mrs D's more recent evidence in general to determine the weight I could place on her memories of the sale.

Mrs D gave details about what happened at the Time of Sale in her 2024 Statement:

> *"10. …[The Supplier's salesman] explained we bought the property, we would be buying a part of a property in the resorts which was like investing in a commercial holiday property and if bought, we could visit the resort and stay at the property were owned.*
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> *11. At this point we were taken to a villa which was available for sale in weekly lots. At the time he explained that the previous owner wanted to sell their 2-week share in the property and so he was commissioned to assist the buyer in selling the same, He explained the buyer had bought in early and made a nice profit and was selling as he was retiring and cashing in all his investments.*
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> *12. [The Supplier's salesman] explained the property number was [Address] and we would be buying two fractional owner weeks which meant that we owned 1/26 of the property. He explained the property would grow in value over time which would then deliver us a profit when we wanted to sell it.*
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> *13. He also explained if we did not want to stay at the resort then we would be allocated 1,050 points which could be used so we could visit other [of the Supplier's resorts]. The cost of the fractional investment would be £14,050.00. However, he explained that he would waive the upfront fees, however, explained that we were required to pay [the Supplier's] legal and administration fees of £699.00. Therefore, the total was £14,749.00 on the day.*
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> *14. We could not afford to pay the sums being asked for as – we simply did not have those funds. In reply, he explained the product was so good that [the Supplier] had done a deal with [Novuna], and they would lend up to 100% of the sale price (£14,749).*
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> *15. [The Supplier] would make the application and they would get an answer straight away. He made the application and returned around 15 minutes later explaining the loan was approved and [Novuna] would provide us with all the money needed. He also explained that [the Supplier] would give us 500 bonus points which we could use later. He went on to explain that the interest rate would be 18% however, when we got back home, we could refinance the loan for 8% which would reduce the payment from £260.00 to £157.00.*

[5] I explained that if Mrs D or PR2 thought I had misunderstood or missed any alleged misrepresentations, they could let me know in response to my PD. However, I was not asked to revisit or add to the list of identified issues.

16. We were troubled at the costs and maintaining a large loan however, he explained that this was an investment that would grow over time and we would have either 18-year rental fees coming to us each year or we could holiday in the resort and take the investment reward when we decided to sell the property. If we wanted to resell it, the resort would gladly resell the property as this was how they made money."

However, some of Mrs D's memories did not tally up with what Fractional Club membership offered. For example, Mr and Mrs D's membership did not provide the opportunity for them to stay that the Fractional Property in which they had bought an interest. This was set out clearly on the first page of the Purchase Agreement, where it was said:

"Fractional Points. Fractional Points do not transfer or grant the right of use to any allocated property. We acknowledge that the Properly is described below for the sole purposes of identifying it for the purposes of its disposal at the Sale Dale in accordance with the Rules and the subsequent distribution to the Owner of the appropriate one fifty second part (or multiples of) held in trust for the Owner."

This was expanded on in the accompanying two-page terms and conditions where it was said:

"Fractional Rights deposit: the Applicant agrees that to be able to enjoy a flexible holiday reservation facility using Points he immediately releases to and deposits with the Manager until the Sale Date all the Owner's rights to use his Fractional Rights all as described in clauses 1.1 to 1.5 inclusive on the first page of this Agreement…"

Further, the Supplier did not operate a resale programme or buy back points from members. This was set out in a one-page Member's Declaration, where Mr and Mrs D initialled next to each of 15 paragraphs. One of these read:

"4. We understand that [the Supplier], the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or Vacation Club Points) or act as an agent in the sale other than as a trade in against future property purchases (see Paragraph 11 below)."[6]

I said it was possible that the Supplier's salesperson told Mr and Mrs D that they could stay at the Allocated Property in which they had bought an interest and that the membership they bought was being sold on behalf of another person who wished to 'cash in' all of his investments. However, I found it unlikely that Mr and Mrs D would have been told something that was in direct contradiction to the paperwork that they signed at the Time of Sale, therefore being so easily shown to be untrue at the time the representation was made. I also noted that Mrs D had not explained why her memories were so different to the paperwork that she signed. Finally, her memories of what happened in her 2024 Statement had, in my view, changed from what was in the Example Misrepresentation Document, where there was no detail given that the salesperson had said that they had been commissioned to assist the previous owner to sell their membership and cash in their investments. Rather, it was said that they were buying '*resell points from someone'* and that they were told *'we would be able to sell out points back at anytime if needed*'. It seemed to me that Mrs D's evidence had changed over the passage of time, something I did not find surprising as I knew that people's memories are not fixed and often change and evolve over time.

Mrs D also gave evidence about what happened a month later at the second sale. She said:

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[6] Paragraph 11 set out that the membership could be traded in against purchasing a whole freehold property from the Supplier.

"18. It was explained that we had not bought enough points when we made our 1st purchase in May therefore, needed to as a matter of urgency upgrade our property portfolio so that we could get the holidays we expected.

19. We explained that we did not want any more, however, they explained that if we did not buy anymore, we would have to leave the resort today as we did not have enough to stay at the resort.

20. We were very angry, but the representative was insistent, explaining someone made a big mistake as we did not have the necessary quota of points and if we did not meet the minimum threshold, we would lose all the money we had currently invested. He explained he was trying to be helpful. He explained the minimum requirement was 2,650 points and we simply did not have the qualifying minimum.

21. To put the matter right we needed a further 1,600 points…"

However, I did not think Mrs D's memories of what happened at that second sale could have been right. I said that because Mr and Mrs D traded in their existing membership, increasing their total number of fractional points from 1,050 to 1,600. So, had they been told they needed 2,650 points to take holidays, I did not understand why they only ended up with 1,600.

On balance, although I did not doubt Mrs D's evidence was her honest recollections, it seemed to me that she was mistaken. It seemed that Mrs D was honestly trying to fit her recollections of what happened at the second sale to the documentary evidence available, however for the reasons set out, I thought she was mistaken in what she remembered. On balance, I thought there were questions about the reliability of Mrs D's 2024 Statement and I took that into account when considering the weight I could place on her evidence as a whole.

Turning to the alleged misrepresentations identified above, I dealt with each in turn.

It was alleged that Mr and Mrs D were told that they would get '5-star' and exclusive holidays, two to three times per year and they would have sufficient points to do this. When expanding on what problem this caused, Mr and Mrs D said in their Example Misrepresentation Document:

> "Because *we have been unable to get the holidays they said would be available to us. We have an accumulation of points we have been unable to use. Out of the few holidays we have had with [the Supplier] (4 in 4 yrs) they have not been to the standard sold to us."*

However, it was not clear to me whether it is alleged that things were said to Mr and Mrs D at the Time of Sale or at the sale that took place a month later after they increased their points holding (or both). Further, it was not clear precisely what the alleged untrue statement from the Supplier was and, therefore, what parts of it were alleged to be untrue. The Supplier provided evidence that after the second sale Mr and Mrs D took five holidays in a five-year period, plus a further two holidays booked but not taken. At the Time of Sale, Mr and Mrs D bought 1,050 points, increasing that to 1,600 the following month. And they booked holidays over a six-year period, using on average 1,366 points a year, in other words it seemed that they did make use of the majority of their points (and all of the points purchased at the Time of Sale). Further, each holiday booked with the Supplier used a different number of points, so it was possible that they would have been able to take more holidays had they chosen locations and times that required fewer points to book. On balance, the evidence demonstrated that Mr and Mrs D were able to use their membership, so based on the

available evidence, I could not say there was an actionable misrepresentation made at the Time of Sale.

Mr and Mrs D said that they were buying resold points. I thought this was possible as often, when members upgraded their memberships, the Supplier would take back and resell the old membership that was traded during the upgrade – this is what happened to Mr and Mrs D a month after the Time of Sale when they upgraded their membership. So I accepted that it was possible that they were told they were buying resold points, and possibly that they were at a discount at the time. However, for the reasons set out above, I did not think that Mr and Mrs D were told by the Supplier that it would help to sell their membership or that it would buy it back from them at any time.

Mr and Mrs D said that they were told they could arrange a lower interest rate loan when they retuned home after the Time of Sale. It was not said in either the Example Misrepresentation Document nor the 2024 Statement that Novuna would agree to lower the interest rate later on, so it seemed that the allegation was that a different lender could lend at a lower rate. From what I know about the lending market at the Time of Sale, I was aware that other lenders would arrange loans at lower rates of interest, so I could not say that if they were told that it was untrue. But I could not see why Mr and Mrs D would have relied on a statement from the Supplier's salesperson that a third-party lender, unrelated to the sale, was likely to have lent to them. That was especially so given that, based on the evidence I had seen, no specific lender was named as being able to lend to them. So it seemed that if anything was said, it was simply a general observation that other lenders could have lent at a lower rate, which was not untrue.

Mr and Mrs D said that the maintenance fee in the first year would be free and then it would be an annual fee of £150 thereafter. However, on the front of their Purchase Agreement the price of £14,749 is set out as comprising £13,951 for the purchase price plus £798 for '*membership/dues*', so it was made clear that they were paying for maintenance fees for the first year. Further, in the Member's Declaration, Mr and Mrs D initialled next to the following statement:

> *"We understand that currently the annual Management Change Is £798.00 for 2013 and that an invoice win be sent for this within 3 months of full payment of the Agreement and thereafter by 1st January each year...The basis of these dues is set out in the Rules and Project Regulations."*

So I found it inherently unlikely that they were told something different at the Time of Sale, nor had I seen any explanation of why they did not question the written statement they initialled at the time. It followed that I did not think this allegation was made out.

Further, as there was nothing else on file that persuaded me there were any false statements of existing fact made to Mr and Mrs D by the Supplier at the Time of Sale, I did not think there was an actionable misrepresentation by the Supplier for the reasons they alleged.

In response to my PD, PR2 did make submissions on the way in which I dealt with Mr and Mrs D's evidence, but that was in relation to what I said in the next section of this decision. It did not invite me to reconsider my findings on s.75 CCA.

So, for the reasons set out above, I still do not think Novuna is liable to pay Mrs D any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think Novuna acted unfairly or unreasonably when it dealt with the s.75 CCA claim in question.

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

PR argued that the credit relationship between Mrs D and Novuna was unfair under s.140A CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. I set out my findings on those concerns in my PD.

As s.140A CCA is relevant law, I had to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I considered whether the credit relationship between Mrs D and Novuna was unfair.

Under s.140A CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with s.56 CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

S.56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while s.56(1) CCA sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by s.12(b) CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And s.11(1)(b) CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

Novuna did not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs D's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by s.12(b) CCA. That made them antecedent negotiations under s.56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for Novuna as per s.56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(1)(c) CCA.

Antecedent negotiations under s.56 CCA cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

> *"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.'* […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the*

creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v. FOS,* at paragraph 135:

> "*By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer*".

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of s.56(2) CCA meant that "*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

> *"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."*[7]

So, the Supplier is deemed to Novuna's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under s.140A CCA is not limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of 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"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under s.140A, therefore, is stark. But it is not a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin*, at paragraph 17:

> *"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."*

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

In my PD, I considered the entirety of the credit relationship between Mrs D and Novuna along with all of the circumstances of the complaint and I did not think the credit relationship between them was likely to have been rendered unfair for the purposes of s.140A. When coming to that conclusion, and in carrying out my analysis, in particular I looked at:

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[7] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between Novuna and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
5. The inherent probabilities of the sale given its circumstances.

I then considered the impact of these on the fairness of the credit relationship between Mrs D and Novuna.

Finally, PR2 argued that Novuna had produced no evidence to rebut what Mr and Mrs D alleged happened, for example by way of statements from the sales staff. It further argued that in litigation surrounding unfair credit relationships the burden of proof is on the lender to prove that the relationship is in fact fair.

I said that the Financial Ombudsman Service is inquisitorial in nature and complaints are dealt with by way of investigation and not by way of adversarial hearings. Further, I made my findings on the balance of probabilities, in other words, having considered all of the evidence, I made a finding based on what I found more likely than not to have happened. This meant that, unlike in a court, neither Mrs D nor Novuna had to 'prove' anything or discharge a burden of proof.

Rather, I considered all of the evidence available to decide what I thought most likely happened. So, in this complaint, I considered everything when weighing up Mrs D's evidence and I had not accepted it in totality just because Novuna had not provided any evidence in rebuttal. For example, PR2 argued that Novuna had not provided any evidence or information about or from the sales representatives involved in Mr and Mrs D's sale in rebuttal of what Mrs D said happened. However, even if Novuna could provide evidence from the sales representative involved in this sale, I doubted what evidential value it would have, given the sale took place over twelve years ago and I would not expect the representative to be able to provide any meaningful evidence of what happened (if they could even remember this individual sale). So just because no such evidence had been provided, it did not mean I must accept, unquestioned, Mrs D's evidence of the sale. I said that there may be circumstances where I might uphold a complaint if one party fails to make submissions or provide evidence when the other party has, however that is not a conclusion I would reach by default. I would still need to be satisfied on the balance of probabilities that I could make the findings necessary based on the evidence and arguments provided.

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

In their evidence, Mr and Mrs D raised a number of matters that could give rise to a complaint about Novuna being party to an unfair credit relationship. I explored those allegations further.

In the Example Misrepresentation Document, Mr and Mrs D said that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. They described the atmosphere during the sale as starting out as friendly, but becoming very pressured. However, in the 2024 Statement, Mrs D did not make any such allegations. Given this, I found it hard to say what, if any, pressure was applied to Mr and Mrs D. I also noted that they went on to upgrade their membership the following month, which did not on the face of it support an allegation that they only bought membership due to a pressured sale. I further noted that Mr and Mrs D were given a fourteen-day cooling off period and they had

not provided a credible explanation why they did not cancel their membership during that time. I acknowledged that they may have felt weary after a sales process that went on for a long time. But, having considered everything, I thought there was 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.

I have not been asked to revisit my provisional findings on the level of pressure applied during the sale, so I have not changed my mind from what I said before. I am not persuaded, therefore, that Mrs D's credit relationship with Novuna was rendered unfair to her under s.140A CCA due to the alleged pressure. But there is another reason, perhaps the main reason, why PR2 said the credit relationship with Novuna was unfair to Mrs D. And that is the suggestion that Fractional Club membership was marketed and sold as an investment in breach of prohibition against selling timeshares in that way.

<u>Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations?</u>

Novuna did not dispute, and I was 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 membership of the Fractional Club 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 PR2 said that the Supplier did exactly that at the Time of Sale. So, that is what I considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v. FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" at paragraph 56. I used the same definition in my PD.

Mr and Mrs D's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract <u>as an investment</u>. It does not 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 said that I had 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.

I noted that there was evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was sold to Mr and Mrs D for the primary purpose of taking holidays. However, prospective customers such as Mr and Mrs D were only shown the contractual paperwork *after* any sales presentation and *after* they had expressed an interest in purchasing the membership. In my view, determining what they were told during the sales presentation went further than reading the sales paperwork.

During the course of considering complaints about the sale of timeshares, the Supplier shared with the Financial Ombudsman Service materials it used to train its sales staff. Having considered the materials that were used around the Time of Sale, I acknowledged that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. However, having taken all of that into account, on my reading of the evidence provided, I did not think I needed to make a finding on whether the Supplier breached Regulation 14(3) in this case at the Time of Sale. And that was because, even if I did think Fractional Club membership was marketed or sold as an investment, I was not persuaded that would mean this complaint ought to be upheld for reasons I went on to explain.

Was the credit relationship between Novuna and Mrs D rendered unfair?

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

I was also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney* and *Kerrigan* (respectively) on causation.

In *Carney*, HHJ Waksman QC said the following in paragraph 51:

> *"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"*

And in *Kerrigan*, HHJ Worster said this in paragraphs 213 and 214:

> *"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court* ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*
>
> *[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the*

relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seemed to me that, if I was to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs D and Novuna that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her and Mr D to enter into the Purchase Agreement and the Credit Agreement was an important consideration.[8] In deciding that question, I started by looking at what Mr and Mrs D said when they first complained to our service.

As noted above, much of what was presented by PR1 was not specific or tailored to Mr and Mrs D's actual sale and so it is very difficult to know what their actual concerns were about. The only evidence that was specific to them was contained in the Example Misrepresentation Document attached to their 2017 Statement. The first three pages of that document contained a number of statements that Mr and Mrs D could tick to indicate they were made by the Supplier at the Time of Sale as well as lists of other possible things that were done during the sale, again that Mr and Mrs D could indicate were done. The section dealing with representations made read as follows:

The Representations Made to Me

The salesman said: *(please tick all that apply)*

☑ The timeshare he was selling was an investment
☑ It was valuable
☑ It was worth a lot of money on the resale market
☑ It was a one-time opportunity
☑ It was only available for sale that day
☑ They could sell it for me at any time
☑ The future sale would make me money
☑ They were easy to resell
☑ The timeshare had a resale value
☑ I could give it back to them whenever I wanted to
☑ I could give it up at any time - no further charge
☐ What the charges would be if I did give it up
☐ I could exchange it free of charge
☐ It was a red, blue, or green week
☑ It was a desirable product
☑ They had buyers waiting

On one hand, the fact that some of the boxes were not ticked appeared to show that Mr and Mrs D carefully considered them before only ticking the ones that applied to their sale. However, I had serious reservations about the way in which PR1 went about gathering this evidence. Here, rather than asking for Mr and Mrs D to provide their own recollections of the sale, several possible pre-preparred representations made by the Supplier had been suggested to them already. In other words, they were already presented with answers and asked to confirm if they were right. I thought that such an approach ran the real and serious risk that the evidence was not an accurate reflection of their memories, as a list of prompted responses suggesting an answer for them could very well contaminate their honestly held memories of the sale. [9]

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[8] In saying this, I noted that any breach by the Supplier took place during its antecedent negotiations with Mr and Mrs D, so is covered by s.56 CCA and falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of s. 140(1)(c) CCA and is deemed to be something done by Novuna.

[9] See *Susan Saunderson & Others v. Sonae Industria (UK) Ltd* [2015] EWCA 2264 (QB), at para. 456

In the final two pages of the Example Misrepresentation Document, Mr and Mrs D were given space to describe the sale and any problems they had in their own words. As noted above, they set out a number of concerns such as the cost of the maintenance fees and that they could refinance the loan, but they did not mention, or imply, that the Supplier had positioned Fractional Club membership to them as an investment, nor that any such positioning was an important factor in their purchasing decision.

Overall, given the suggestive nature of the tick-box evidence gathering by PR1, I placed little evidential weight on the contents of this document, apart from what Mr and Mrs D wrote in their own words. I simply could not say what was their evidence and what was something that was suggested to them, in other words, which parts of the evidence was reliable. And when they were given the opportunity to provide their own memories of the sale, they did not mention Fractional Club membership being sold to them as an investment, so I did not think this was particularly important to them when they remembered the sale in 2017.

Mrs D's evidence in the 2024 Statement was significantly different to the earlier evidence. In the extract of the 2024 Statement set out above, Mrs D was much clearer about how the Supplier sold Fractional Club membership to her. However, I had already explained that I had some reservations about the evidence that had been provided. I had no reason to doubt that the 2024 Statement was Mrs D's honest recollections, but I said that I must consider that memories change and evolve over the passage of time, especially when someone is being asked to recall what happened during the process of litigation or bringing a complaint to our Service, where they will have a stake in a particular version of events.[10] For example, Mrs D said that she was told that she would have been able to realise a profit from membership when she wanted to sell it. However, that was not how Fractional Club membership was set up to work. Instead, the Allocated Property was to be placed for sale at the end of the membership term and once it was sold, the proceeds would have been divided up amongst the relevant members. There was no provision to realise any interest in the Allocated Property before then, save for the possibility of selling their unrealised interest privately. Further, Mrs D recalled being told that the Supplier would resell the membership on their behalf, but for the reasons set out above, that was not something I thought was likely to have been said to them. Nor was there any provision for the Supplier to rent out their holiday entitlement, so I was not satisfied that was something they were told could happen. All of this pointed, in my opinion, to Mrs D's evidence not being particularly reliable as to what happened at the Time of Sale.

I also noted that the 2024 Statement was made eleven years after the Time of Sale and I failed to understand why, if the investment element was important to Mr and Mrs D at the Time of Sale, more was not made of it in their earlier Example Misrepresentation Document. I was also surprised that the 2024 Statement made very little mention of the holidays that Mr and Mrs D could have taken with their membership, something I would have expected them to have mentioned given their usage of their subsequent memberships. To me that seemed to be minimising a very central part of the purchase and seemed somewhat unrealistic.

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 was 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). Given that, I did not think that the credit relationship between Mrs D and Novuna was unfair to her for this reason.

<u>PR2's response to my PD</u>

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[10] See Smith v. Secretary of State for Transport [2020] EWHC 1954 (QB), at para. 40

PR2 made several submissions about how I approached Mrs D's evidence. I have considered everything with which I have been provided, however it has not changed my mind from my provisional findings. I will explain why.

With respect to the approach it says I ought to take to s.140A CCA, PR2 said that although it accepted I did not need to apply a 'court-style burden of proof', s.140A CCA requires particular caution where unfairness is properly alleged, the lender holds, but does not produce, evidence capable of addressing the allegation and the borrower's evidence is the only direct evidence of what happened. In light of that, it argued that is not fair or reasonable to resolve evidential uncertainty against a consumer by default.

Linked to this were concerns that I had accepted evidence from Novuna and the Supplier at face value, not applying the scrutiny I had done to Mr and Mrs D's evidence. PR2 submitted that Novuna had provided no evidence addressing the primary issues in dispute, including what was said during the sales presentation, the training that the Supplier gave to its staff, and the monitoring or due diligence that Novuna undertook of the Supplier and its sale practices. Given the findings that I made around the investment element inherent to Fractional Club membership and the contents of training material that I had seen, it was more likely than not that the product was sold to Mr and Mrs D as an investment in breach of Regulation 14(3).

I have considered what PR2 has said, but it overlooks some of the findings I made in my PD. For the avoidance of doubt, I will briefly summarise them here. I accept that Novuna and the Supplier have provided little evidence of what happened at the Time of Sale, however I addressed this in my PD when I said:

> *"…[I]n this complaint, I have considered everything when weighing up Mrs D's evidence and I have not accepted it in totality just because Novuna has not provided any evidence in rebuttal. For example, PR2 has argued that Novuna has not provided any evidence or information about or from the sales representatives involved in Mr and Mrs D's sale in rebuttal of what Mrs D said happened. However, even if Novuna could provide evidence from the sales representative involved in this sale, I doubt what evidential value it would have, given the sale took place over twelve years ago and I would not expect the representative to be able to provide any meaningful evidence of what happened (if they could even remember this individual sale). So just because no such evidence has been provided, it does not mean I must accept, unquestioned, Mrs D's evidence of the sale…"*

Further, I explained that I thought there was evidence that the Supplier could well have breached Regulation 14(3) at the Time of Sale, but I did not need to make a finding on that point. That was because I thought the issue determinative of this complaint was whether any breach by the Supplier of Regulation 14(3) led Mr and Mrs D to enter into the Purchase Agreement and the Credit Agreement. So I did not make a firm finding on whether such a breach occurred, rather I assessed whether the evidence suggest such a breach was an important or motivating factor behind the purchase, assuming that such a breach had occurred. I remain of the view that this is the correct way to approach this complaint.

Given that, the key issue for me to determine is Mr and Mrs D motivations at the Time of Sale. I find that none of the rebuttal evidence PR2 says is outstanding from Novuna (or the Supplier) goes to that issue, rather it went to the way in which the product was sold. In my view, it is Mr and Mrs D's own evidence that is crucial when thinking about why they took out Fractional Club membership. That is why the majority of my provisional findings on this point constituted an assessment of that evidence.

PR2 has provided a number of submissions on the weight I ought to place on the evidence I have been provided and the conclusions I ought to draw from that evidence. PR2 thought I had not placed significant weight on the 2024 Statement because it had been produced many years after the sale and aspects of her memories did not precisely align with the contractual documentation. It argued that the very essence of the complaint was that Mr and Mrs D's understanding of the product did not match the legal reality set out in the paperwork, so it was arguable that any discrepancy between memories and the documentation was an indicator that the product was misrepresented.

PR2 said that I had accepted Mrs D's evidence was honestly given. In light of that, it said the mere passage of time does not justify placing little weight on her evidence, especially when there is no evidence in rebuttal. PR2 also pointed out that the 2024 Statement is the only detailed narrative account of what happened and it is not fair to discount it just because it does not align with the contractual documents.

I have thought about what PR2 has said, but I disagree. As I said, I have no reason to doubt that the 2024 Statement was Mrs D's honest recollections, but it does not follow they were correct. Memories do naturally change over time and are subject to external influences, such as being involved in the complaints process itself. So just because Mrs D has given her memories as honestly as she can, it does not mean that I ought not to scrutinise them, comparing them to other evidence to see what I think was most likely to have happened.

One of the issues in this complaint is that the evidence I received in 2024 was provided over ten years from the Time of Sale and it is natural that Mrs D's memories would not have been as fresh as they were closer to 2013. So I have looked at what she said in 2024, comparing it to what was in the contractual documentation and the Example Misrepresentation Document, before concluding that I could not place significant weight on its contents.

With respect to my findings on the 'tick boxes' in the Example Misrepresentation Document, PR2 said that I had erred in my approach to this. It argued that Novuna and the Supplier's evidence was accepted at face value, whereas Mr and Mrs D's evidence had been given little weight. It said that the questionnaire that was filled in was first-hand witness evidence addressing the core issues in dispute and they have been supplemented with signed witness statements.

I explained in my PD why I thought the 'tick boxes' in the Example Misrepresentation Document were things upon which I could place little weight and nothing PR2 has said has changed my mind on this. I do not think the 2024 Statement is enough to effectively ratify what was ticked by Mr and Mrs D in the earlier document. In my view, there are changes between the documents that show how the evidence has changed over time. In addition to examples I set out in my PD, I note that in the Example Misrepresentation Document, Mr and Mrs D wrote down that the presentation environment '*began friendly but became more pressure*". They ticked boxes to say that they did not get regular breaks and could not leave the presentation when they wanted. But in the 2024 Statement, no such recollections are set out at all, so I do not accept that the later statement reflects the same memories of the sale. In total Mr and Mrs D made 102 separate selections in the Example Misrepresentation Documents by either ticking a box or selecting a 'yes' or 'no' answer, not including the selections not ticked and additional comments made, and the vast majority of those selections were not referred to again in their evidence. This is, in my view, a significant number of selections and I think it fanciful that they could possibly all match Mr and Mrs D precise memories. In addition to my concerns about the leading nature of the information gathering exercise, in my mind the Example Misrepresentation Document is also too broad in its scope and too shallow in its detail to provide any meaningful evidence beyond what Mr and Mrs D had written in their own hand.

PR2 has also made submissions that the evidence suggested that an investment motivation behind Mr and Mrs D's purchase. It argued:

- If holidays alone were the objective, equivalent vacation points could have been obtained without a large, credit-funded capital purchase.
- The annual allocation of points was subject to a recurring management charge; the only meaningful return on the substantial upfront cost was the future sale proceeds.
- The subsequent "upgrade", which resulted in no increase (and in fact a reduction) in annual points, is inconsistent with a holiday-driven motivation and more consistent with an investment-led narrative.

I have not seen any evidence from Mr and Mrs D that they were offered Fractional Club membership and also another type of membership that was not associated with an Allocated Property. So it does not appear that they selected Fractional Club membership over a 'holiday only' membership type, therefore indicating that they were motivated by the financial return aspect of membership. So it may well have been the case that Mr and Mrs D could have bought a different product more suited to their own purchasing motivations, but I cannot see that they were offered such a product.

It is right that there was a management charge associated with their membership, however such a charge is also levied on every timeshare membership that I have seen, irrespective of whether it is associated with an Allocated Property. So I do not think that such a charge is indicative of the upfront cost being seen as only relating to the purchase of the interest in the sale proceeds of the Allocated Property. Further, Mrs D has not said in her evidence that was her understanding of the purchase.

Finally, although PR2 argues that the subsequent upgrade did not increase their annual points, that is incorrect. They increased their fractional points from 1,050 to 1,600 around a month after the Time of Sale, so I do not accept the submissions on this point.

So although I have considered PR2's submissions on whether a breach of Regulation 14(3) caused an unfair credit relationship, for the reasons set out here and in my PD, I do not think that it did.

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

PR2 pointed to information it says ought to have been provided by the Supplier, but was not, in breach of the Timeshare Regulations.

In my PD, I noted that one of the main aims of the Timeshare Regulations was to enable consumers to understand the financial implications of their purchase so that they were put in the position to make an informed decision. And if a supplier's disclosure did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they did not fully understand at the time of contracting, that may lead to the Timeshare Regulations being breached or the sales practices falling foul of the CPUTRs, and, potentially the credit agreement being found to be unfair under s.140A CCA. In Mrs D's 2024 Statement, she said:

> *"35. In contravention of the Timeshare Regulations 2010 we were not provided with the following documents.*
>
> *36. Full description of the building, its location upon which rests the right expressed, the registration data, the term that is subject to the contract indicating the days and hours when the holiday starts and ends, the details of the National Consumer*

Institute, other Competent Bodies, the contact details of the Automatous communities in tourism and consumptions and the contract details of the municipal offices of consumption the contact details of the Property registers and Notaries.

37 The timeshare sold did not clearly state what rights were to be enjoyed if bought by us. Then exclusively for the specific period each year [consecutive or alternative], the furniture inventory was not unidentified, the exact nature of the retained inventory in the "pool", the concrete properties which the timeshare right would be enjoyed, information as to the periods those right could be enjoyed, an outline of the obligatory costs imposed under the contract, the forward annual contributions, a summary of the services, a summary of the facilities, the existence or nature of the product the main characteristics of the product, the motives for the commercial practice, the nature of the sales process, the price or the manner in which the price is calculated, our rights or the risks we may face, the availability of the product, the real benefits and liabilities of the product, the risks associated with the product, the composition of the product inventory, any assured delivery of the product, the fitness for purpose of the product [in respect to providing long-term holiday products], how to fully use and access the product benefits and or the legal validity of all the agreements and the peripheral/parallel agreements."

However, as I explained, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of s.140A CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Given the facts and circumstances of this complaint, I was not persuaded that the Supplier's alleged breaches of Regulation 12 of the Timeshare Regulations or of the CPUTRs were likely to have prejudiced Mr and Mrs D's purchasing decision at the Time of Sale and rendered Mrs D's credit relationship with Novuna unfair to her for the purposes of s.140A CCA. And I said this because I could not see how the information that PR2 had said was missing was material in any way to their decision to purchase. For example, I could not see how Mr and Mrs D would have acted differently had the Supplier fully identified the furniture inventory at their Allocated Property. In my view, the breaches identified in the passage above were, if found, wholly technical in nature and were immaterial to Mr and Mrs D's decision to take out Fractional Club membership.

Moreover, as I had not seen anything else to suggest that there were any other reasons why the credit relationship between Mrs D and Novuna was unfair to her because of an information failing by the Supplier, I was not persuaded it was.

PR2 did not ask me to revisit these findings from my PD, so I have not changed my mind from my provisional findings.

<u>The payment of a commission by Novuna to the Supplier</u>

PR1 argued 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 s.140A 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 is unfair under s.140A 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 s.56 CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

In my PD, I explained that 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 am required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules.

But I did not think *Hopcraft, Johnson and Wrench* assisted Mrs D 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 had not seen anything to suggest that Novuna and Supplier were tied to one another contractually or commercially in a way that was not properly disclosed to Mrs D, nor had I seen anything that persuaded me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mrs D into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledged that it was 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 explained, the case law on s.140A CCA 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 was not 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 was for the reasons I went on to explain that I did not think any such failure is itself a reason to find the credit relationship in question unfair to Mrs D.

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 Mrs D entered into was not high. At £1,438.03, it was only 9.75% of the amount borrowed and even less than that (8.71%) 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 was not persuaded that she either would not have understood that or would have otherwise questioned the size of the payment at that time. After all, Mrs D 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 did not strike me as disproportionate. So, I thought she would still have taken out the loan to fund her purchase at the Time of Sale had the amount of commission been disclosed.

I also said that the Supplier's role as a credit broker was not 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 could not 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 was not acting as an agent of Mrs D but as the supplier of contractual rights she obtained under the Purchase Agreement, the transaction did not 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 was not 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 Mrs D.

PR2 did not ask me to revisit these findings from my PD, so I adopt them into this final decision.

<u>The authorisation of the credit broker that brokered the Credit Agreement</u>

In response to my PD, PR2 argued for the first time that the entity that brokered the loan was not authorised by either the Office of Fair Trading ("OFT") or the Financial Conduct Authority ("FCA") to carry on credit broking. It argues that this is a serious failing that is relevant to whether there is an unfair credit relationship and is also a breach of the Financial Services and Markets Act 2000 ("FSMA"). Under s.27 FSMA, PR2 says that Mrs D would be entitled to a return of all payments made under the Credit Agreement.

This issue was not raised by PR2 before now and I cannot see that it has been put to Novuna before either. However, I will consider it in this decision.

PR2 says that the FCA has confirmed that the entity named on the credit agreement was not authorised, however I make no finding on that point as I do not need to in the circumstances of this decision. That is because the sale took place at a time when the provisions of FSMA did not apply to such a credit agreement, and therefore Mrs D has no right to the remedy PR2 says that she does.[11] It is possible that if the Credit Agreement was not properly arranged (and I make no finding on that point), it was therefore not enforceable against

[11] See https://www.fca.org.uk/firms/validation-orders for further guidance.

Mrs D, however I fail to see how that could be disadvantageous to her, rather it would be helpful protection had Novuna taken steps against her (which I cannot see that it did).

I also do not think this could have caused an unfair credit relationship as it seems to me that Mrs D was aware of how much she was borrowing and repaying each month, what the Credit Agreement was for and from whom she was borrowing. There is no evidence that the lending was unaffordable for Mrs D, so even if the borrowing was arranged by a broker that did not have the required permissions to do so (which I do not make a finding on), I cannot see that this led to any financial loss such that there was an unfair credit relationship.

Section 140A: Conclusion

In response to my PD, PR2 submitted that I ought to have found, under a holistic assessment of the entire sale process, there was an unfair credit relationship. It said that factors including the investment-style marketing unauthorised brokering, pressured upgrades, information asset, lack of evidence from the Supplier and the payment of a commission were enough for me to come to the conclusion that, cumulatively, there was an unfair credit relationship. I have thought about this and agree that it might be theoretically possible for an accumulation of problems that individually did not cause an unfair credit relationship, to cause one in the round. However, for the reasons set out above, I think that many of these issues are not made out or were not material to the purchasing decision that Mr and Mrs D made. Given that, I do not think that any of the issues identified either individually or collectively gave rise to an unfair credit relationship and I do not think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I have found that Mrs D's credit relationship with Novuna was not 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 Mrs D's complaint about an unfair credit relationship. So, for completeness, I considered those grounds in my PD.

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 Mrs D (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 was not persuaded that the Supplier – when acting as credit broker – owed Mrs D a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission were not, in my view, available to her. And while it is 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 did not 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 thought 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.

PR2 did not ask me to revisit these findings and so I do not depart from my PD on these points.

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 Mrs D's s.75 CCA claims, and I am not persuaded that Novuna was party to a credit relationship with Mrs D under the Credit Agreement that was unfair to her for the purposes of s.140A CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct Novuna to pay compensation.

My final decision

I do not uphold Mrs D's complaint against Mitsubishi HC Capital UK PLC, trading as Novuna.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 13 March 2026.

Mark Hutchings
Ombudsman