

## **The complaint**

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

## **What happened**

Mrs D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 29 January 2019 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy a one-week biannual Signature Collection membership, equivalent to 1,800 fractional points every other year, at a cost of £15,240 (the 'Purchase Agreement') after trading in her Trial timeshare membership.

Fractional Club membership was asset backed – which meant it gave Mrs D more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after her membership term ends.

Mrs D paid for her Fractional Club membership by taking finance of £19,419 from the Lender (the 'Credit Agreement'). The additional amount was used to consolidate an existing loan used which paid for Trial membership.

Mrs D – using a professional representative (the 'PR') – wrote to the Financial Ombudsman Service on 1 June 2023 (the 'Letter of Complaint') to raise several different concerns. Since then, the PR has raised some further matters it says are relevant to the outcome of this complaint. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above. We notified the Lender of the complaint.

The Lender issued its final response to the complaint on 13 July 2023, 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.

Mrs D disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I issued a provisional decision explaining that I was not planning to uphold the complaint.

The Lender accepted my provisional decision or my provisional findings on commission.

The PR disagreed with my provisional findings and provided some comments it wanted me to consider when making my final 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 no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

### **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. Having done so, I've reached the same decision as that which I outlined in my provisional findings – and for broadly the same reasons. A copy of my provisional findings is below. I do not uphold this complaint.

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

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The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") if there is an actionable misrepresentation and/or breach of contract by the supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

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

1. Told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.
2. Told by the Supplier that she owned a 'fraction' of the Allocated Property when that was not true as it was owned by a trustee.

Neither the PR nor Mrs D have set out in any detail what words and/or phrases were allegedly used by the Supplier to misrepresent Fractional Club for the reason given in points 1 or 2. However, the PR says that such representations were untrue because the Allocated Property was legally owned by a trustee and there was no indication of what duty of care it had to actively market and sell the property. Further, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrases in points 1 or 2 above would have been untrue at the Time of Sale even if they were said. It seems to me that they reflect the main thrust of the contract Mrs D entered. And while, under the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor'<sup>1</sup>, longer than that if there were problems selling and the 'Owners'<sup>2</sup> agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

The PR has raised other matters as potential misrepresentations, but it seems to me that they are not allegations of the Supplier saying something that was untrue. Rather, that Mrs D wasn't told things about the way the membership worked – for example, that the obligation to pay management fees could be passed on to her children. It seems to me that these are allegations that Mrs D wasn't given all the information she needed at the Time of Sale, and I will deal with this further below.

So, while I recognise that Mrs D - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this Section 75 claim.

### **Section 75 of the CCA: the Supplier's Breach of Contract**

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I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mrs D says that she could not holiday where and when she wanted to. That was framed, in the Letter of Complaint, as an alleged misrepresentation. However, on my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mrs D states that the availability of holidays was/is subject to demand. It also looks like she made use of her fractional points to holiday. So, while I accept that she may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement.

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

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

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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

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<sup>1</sup> Defined in the Fractional Club Rules.

<sup>2</sup> Defined in the Fractional Club Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mrs D and the Lender along with all 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. The commission arrangements between the Lender 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.
5. The inherent probabilities of the sale given its circumstances.
6. Any existing unfairness from a related credit agreement.

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

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

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

They include allegations that:

1. Mrs D was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.
2. The right checks weren't carried out before the Lender lent to Mrs D.
3. The loan interest was excessive.
4. The fact that the loan was used to refinance an earlier one wasn't set out in the Credit Agreement.
5. The Lender failed to correctly calculate the interest due on the loan as set out in the Credit Agreement
6. The Lender failed to set out everything required by the CCA on the face of the Credit Agreement

However, none of this strikes me as a reason why this complaint should succeed.

I acknowledge that Mrs D may have felt weary after a sales process that went on for a long time. But she says little about what was said and/or done by the Supplier during her sales

presentation that made her feel as if she had no choice but to purchase Fractional Club membership when she simply did not want to. Mrs D was also given a 14-day cooling off period and she have not provided a credible explanation for why she did not cancel her membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs D made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

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

The PR says that the fact that the loan was used to refinance an earlier one wasn't set out in the Credit Agreement, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mrs D knew, amongst other things, how much she was borrowing and repaying each month, who she was borrowing from, that she was refinancing an earlier loan 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 didn't contain all the information it needed to (which I make no formal finding on), I can't see why that led to Mrs D experiencing a financial loss – such that I can say that the credit relationship in question was unfair on her as a result. Further, I don't think the rate of interest was excessive, compared either to other rates available from other point-of-sale lenders or on the open market. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate her.

It has been submitted by the PR that the Lender did not properly calculate the interest due to be paid by Mrs D, meaning she have been overcharged. I am aware that the PR has raised this as a blanket point of complaint for every loan advanced by the Lender and other ombudsmen have issued detailed decisions rejecting the arguments that the PR say apply to all its complaints. I think that the Lender has worked out the interest in the way it said it would in the Credit Agreement, and it gave figures to Mrs D in that agreement setting out the total interest payable if the loan ran to term as well as the monthly repayment. But even the Lender wasn't as clear as it ought to have been about the interest charged or that it gave incorrect information on the interest rate that applied, I can't see Mrs D lost out as a result. She knew how much she was repaying each month, for how long and the total charge for credit. And there is no evidence that she was unhappy with those figures. So even if the Lender presented information differently, I can't see how that would have made any difference to Mrs D's decision to take out the loan. It follows that I can't say Mrs D has lost out or that the Lender needs to do anything further because of this issue.

Overall, therefore, I don't think that Mrs D's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason why the PR now says the credit relationship with the Lender 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 the prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mrs D's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

*"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."*

But the PR and Mrs D say that the Supplier did exactly that at the Time of Sale – saying, in summary, that she 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 net sale proceeds of the Allocated Property could constitute an investment as it offered Mrs D 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*.<sup>3</sup>

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 Mrs D as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to 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, the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as 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.

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<sup>3</sup> The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in 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).

On the other hand, I think 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 Mrs D as an investment in breach of Regulation 14(3).

However, whether there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

### **Was the credit relationship between the Lender and Mrs D rendered unfair?**

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mrs D and the Lender under the Credit Agreement and related Purchase Agreement 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 Mrs D and the Lender that was unfair to her and warranted relief as a result, it is important for me to consider whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement.

On my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mrs D decided to go ahead with her purchase. I say this because:

- Mrs D's statement dated 16 January 2024, which sets out her recollections of what happened at the Time of Sale, only speaks of Mrs D recovering her money when the Allocated Property is sold. It does not say she hoped or expected to make a profit. Given Mrs D has not said she hoped or expected to make a profit, I see no reason to conclude that this was material to her decision to make the purchase.
- The PR has provided a call note dated 6 February 2023, when Mrs D first contacted the PR. This said, "*after buying we would own a share of the property and after 15 years, they would sell the property and we will recover our money and maybe something more after any fees taken out*". While that does suggest Mrs D was told she might make a profit, it does not appear this was of importance to her – otherwise I would have expected her to make this explicitly clear in her statement. But she did not.
- Likewise, the PR provided a questionnaire from a timeshare advice company that referred Mrs D to the PR. This appears to be based on a conversation with Mrs D's partner (who was also named on the Purchase Agreement). This mentioned "*money back*" and "*return on investment*". But again, if this was important to Mrs D's decision to purchase, I would expect her to say so in her statement. But she did not do so.

That doesn't mean Mrs D 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 Mrs D 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 marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs D's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests she would have pressed ahead with her purchase regardless of whether there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs D and the Lender was unfair to her even if the Supplier did breach Regulation 14(3).

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

The PR says that Mrs D was not given sufficient information at the Time of Sale by the Supplier about Fractional Club membership, including about the ongoing costs and the fact that Mrs D's heirs could inherit these costs.

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 Mrs D sufficient information, in good time, on the various charges she could have been subject to as Fractional Club members 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 Mrs D 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 Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

As for the PR's argument that Mrs D's heirs would inherit the on-going management charges, I fail to see how that could be the case or that it could have led to an unfairness that warrants a remedy.

### **Mrs D's Commission Complaint**

The PR expressed some concerns about the commission paid by the Lender to the Supplier not being disclosed to Mrs D at the Time of Sale. The PR has now accepted our approach to those concerns and that in this case this would not lead to the complaint being upheld.

## The PR's response to my provisional findings about an unfair relationship

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 provisional decision only relate to the issue of whether the credit relationship between Mrs D and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mrs D as an investment at the Time of Sale.

As outlined in my provisional decision, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn't make any further comments in relation to those in their response to my provisional decision. Indeed, they haven't said they disagree 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 provisional decision. So, I'll focus here on the PR's points raised in response to my provisional decision.

The PR has provided further comments which in my view relate to whether Mrs D's purchase was motivated by a hope or expectation of making a financial gain or profit. Specifically it argues that the statement is sufficient to show such a motive when considered alongside the other evidence. But the PR's comments and evidence in this respect do not persuade me that I should uphold Mrs D's complaint. They do not make me think it's any more likely that the Supplier's breach of Regulation 14(3) (if there was one, about which I make no finding) led Mrs D to enter into the Purchase Agreement and the Credit Agreement. As I said in my provisional decision, if the possibility of making a profit was material to Mrs D's decision, I would have expected her to make this clear in her statement. Instead, she does not even refer to being told she might make a profit – only that she could recover her money when the Allocated Property is sold.

I recognise the PR has interpreted Mrs D's evidence differently to how I have. And although I have carefully considered the PR's arguments in response to this, I'm not persuaded the conclusions I reached on this point were unfair or unreasonable.

So, ultimately, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Mrs D's purchasing decision. And for that reason, I do not think the credit relationship between Mrs D and the Lender was unfair to Mrs D even if the Supplier had breached Regulation 14(3).

## **Conclusion**

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In conclusion, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with Mrs D under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate her.

## **My final decision**

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 14 April 2026.

Phillip Lai-Fang  
**Ombudsman**