

## **The complaint**

Mr H's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

## **What happened**

Mr H, and another party, initially purchased a trial membership from a timeshare provider (the 'Supplier') in February 2009. They then purchased a Vacation Club membership in April 2009, but had cancelled this with the rescission period. Shortly afterwards, in November 2009, they purchased a Destinations Plus membership which entitled them to holiday for 1 week per year in any season apart from peak season in a selection of 50 resorts.

On 10 October 2013 (the 'Time of Sale'), Mr H, and the other party, purchased membership of another timeshare which I'll call the 'Fractional Club'. They entered into an agreement with the Supplier to buy 1,035 fractional points at a cost of £8,623 (the 'Purchase Agreement').

Mr H paid for their Fractional Club membership by taking finance of £8,623 from the Lender in his sole name (the 'Credit Agreement'). Whilst the Purchase Agreement was in joint names, Mr H is the only eligible claimant (and complainant) under the Credit Agreement. For that reason, I shall refer to Mr H only throughout this decision.

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

Mr H – using a professional representative (the 'PR') – wrote to the Lender on 24 March 2021 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender hadn't issued a response to Mr H's complaint so Mr H referred the complaint to the Financial Ombudsman Service. The Lender issued its final response letter after our involvement, rejecting it on all grounds. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr H at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr H was rendered unfair to him for the purposes of section 140A of the CCA.

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

### ***“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. But if either side would like me to confirm what I think that context is, they can let me know in response to this provisional decision.*

### ***My provisional findings***

*I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr H as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and the Lender unfair to him for the purposes of Section 140A of the CCA.*

*However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am currently proposing puts Mr H in the same or a better position than he would otherwise be in.*

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

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*Having considered the entirety of the credit relationship between Mr H and the Lender along with all of the circumstances of the complaint, I 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 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;*
- 2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
- 3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
- 4. The inherent probabilities of the sale given its circumstances.*

*I have then considered the impact of these on the fairness of the credit relationship between Mr H and the Lender.*

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

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

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

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

*But Mr H says that the Supplier did exactly that at the Time of Sale – saying, in summary, that he 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.*

*Mr H's share in the Allocated Property clearly constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*

*In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.*

*To conclude, therefore, that Fractional Club membership was marketed or sold to Mr H as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.*

*There is 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 H, the financial value of his 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 not sold to Mr H as an investment.*

*However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.*

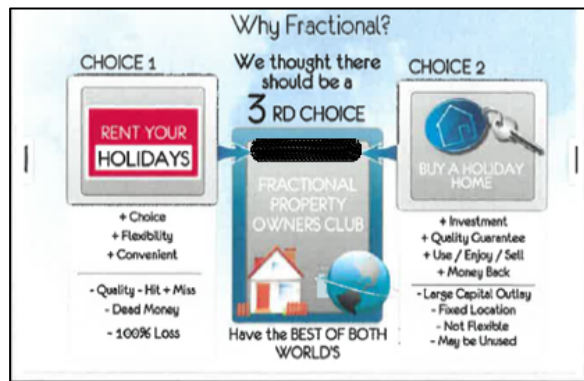
***How the Supplier marketed and sold the Fractional Club membership***

During the course of the Financial Ombudsman Service’s work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called “2011 Spain PTM FPOC 1 Practice Slides Manual” (the ‘2011 Fractional Training Manual’).

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier’s first version of a product called the Fractional Property Owners Club – which I’ve referred to and will continue to refer to as the Fractional Club. It isn’t entirely clear whether Mr H would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

- (1) the training the Supplier’s sales representatives would have got before selling Mr H Fractional Club membership; and
- (2) how the sales representatives would have framed the sale of Fractional Club membership to Mr H.

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:

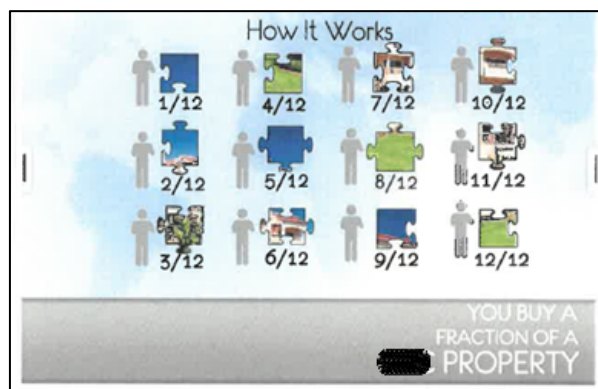


This slide titled “Why Fractional?” indicates that sales representatives would have taken Mr H through three holidaying options along with their positives and negatives:

- (1) “Rent Your Holidays”
- (2) “Buy a Holiday Home”
- (3) The “Best of Both Worlds”

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr H that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:





*I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.*

*However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as) , I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.*

*I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr H the financial value of the proprietary interest he was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).*

*When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'<sup>1</sup> And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

<sup>1</sup> The Department for Business Innovation & Skills "Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)". <https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf>

*So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.*

*Mr H says, in his own words, that the Supplier positioned membership of the Fractional Club as an investment to him. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr H. And as the slides clearly indicate that the Supplier's sales representative was likely to have led him to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find him either implausible or hard to believe when he says he was told he would be investing in a property that would lead to a financial gain. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr H was led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.*

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

*Having found 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 Mr H 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 that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr H and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration. To help me decide this point, I've carefully considered what Mr H has said in the course of his complaint about how the membership was sold to him and his motivation for taking it out.*

*Having done so, on my reading of Mr H's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase.*

*We shared a copy of Mr H's testimony with the Lender, and it raised some concerns about it. In the first instance, the Lender pointed out that the witness statement was submitted in evidence after the judgment in the Judicial review in 'Shawbrook & BPF v FOS'<sup>2</sup> was handed down. So, it said that the testimony given by Mr H could have been influenced by what was said in the Judicial Review.*

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<sup>2</sup> *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)

*The Lender also says the statement was created on 31 October 2023. The PR says this is the date the document was created to send to our Service. And I can see, the PR did send us a copy of the statement on 31 October 2023, so this action altered the 'created date'; of the document.*

*Although I accept the statement was provided to us much later than taken, I have seen evidence, in the form of a screenshot, that Mr H was booked in on 28 November 2017 to take his statement. So, on balance, I think the statement was written on the date recorded on the statement.*

*Having said that, I do not think Mr H's testimony is worded in a way that suggests it was coloured by the judgment in *Shawbrook & BPF v FOS*. I think it is more than likely that this was an honest account of his recollections of how the Fractional Club membership was sold to him by the Supplier. And although I accept there's some inconsistencies in the testimony, I don't think this undermines the core of acceptable evidence it contains.*

*The Lender has also said his testimony does not indicate that any sales material was shown to him which would indicate the membership was sold to him as an investment. From my understanding of how the Supplier sold this particular version of the Fractional Club, the slides I have referred to are a good indication of how the sales representatives would have framed the sale of Fractional Club membership to Mr H. And as I've said, the training included that they should expressly describe the Fractional Club membership as an investment. So, his recollections, set out in their own words, seem to reflect that his membership was sold to him as an investment.*

*Within his statement, Mr H says:*

*"We were on holiday in October in Tenerife in 2013 when we were again approached by the representatives. We told them we were very worried about the perpetuity clause in our timeshare product. The representatives agreed that it was in perpetuity and told us that the only way around this was to become a fractional member. This meant that we would have a fractional ownership in a property that would have a guaranteed exit and that at the end of the contract the property would be sold and any profits made passed to us. We were told as this was property and an investment and it would only ever increase in value. The representatives scribbled this on paper to show us the profit to be made. The representatives were very keen for us to make a purchase and were coming and going with prices and information. There was no time to think about anything but we were very keen that our family did not inherit our timeshare product and on the basis that we had a guaranteed exit date and would be investing in property to make a profit we purchased 1035 fractional points at a price of £8623. This was signed on the day with the representatives through [the Lender] on the 10/10/13.*

*We are now increasingly concerned about our timeshare purchases and we know now that we have been miss-sold these products which are not fit for purpose and are not what we were promised by the representatives.*

*We have struggled to get availability for the holidays we want when we want. The representatives were extremely keen to sell us an RCI membership and thankfully we did not take this on board as we now know that this would have cost us another membership and a booking fee for every holiday taken.*

*We took out our membership specifically for the standard of accommodation that we were promised by [the Supplier]."*

*In my opinion, Mr H has given a number of reasons as to why he went ahead with his membership – one of the reasons being because of the investment element of his membership. This is when he says “...on the basis that we had a guaranteed exit date and would be investing in property to make a profit we purchased 1035 fractional points at a price of £8623”.*

*That doesn't mean he was not interested in holidays. His own testimony demonstrates that he quite clearly was. And that is not surprising given the nature of the product at the centre of this complaint. The Lender says Mr H confirms the reason he went ahead with his purchase due to the standard of accommodation the Supplier promised. But Mr H had access to the Supplier's portfolio of resorts as a result of his previous membership.*

*Having considered all of the information I have, Mr H says (plausibly in my view) that Fractional Club membership was marketed and sold to him at the Time of Sale as something that offered him more than just holiday rights, on the balance of probabilities, I think his purchase was motivated by his share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that marked it apart from his existing membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made.*

*Mr H has not said or suggested, for example, that he would have pressed ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that he would have pressed ahead with his purchase regardless.*

## **Conclusion**

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*Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr H under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.*

## **Fair Compensation**

*Having found that Mr H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr H agrees to assign to the Lender his Fractional Points or hold them on trust for the Lender if that can be achieved.*

*Mr H was an existing Destinations Plus member and I believe his membership was traded in against the purchase price of Fractional Club membership. Under his previous membership, he had right to a 1 week's holiday per year. And, from my understanding, like Fractional Club membership, he had to pay annual management charges as a Destinations Plus member. So, had Mr H not purchased Fractional Club membership, he would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr H from the Time of Sale as part of his Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid as an ongoing Destinations Plus member.*

*I'm also conscious that he lost his holiday rights under his Destinations Club membership as a result of this purchase. It isn't clear if, in light of that fact, he wants his previous Destinations Club membership reinstated nor, in turn, whether that can be achieved to the satisfaction of both parties to it. If he wants his previous Destinations Club membership reinstated, he can let me know in response to this provisional decision.*

*So, here's what I think needs to be done to compensate Mr H with that being the case – whether or not a court would award such compensation:*

- (1) The Lender should refund Mr H's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.*
- (2) In addition to (1), the Lender should also refund the difference between Mr H's Fractional Club annual management charges paid after the Time of Sale and what his Destinations Plus annual management charges would have been had they not purchased Fractional Club membership.*
- (3) The Lender can deduct:*
  - i. The value of any promotional giveaways that Mr H used or took advantage of; and*
  - ii. The market value of the holidays\* Mr H took using his Fractional Points if the Points value of the holiday(s) taken amounted to more than the equivalent number of Destinations Plus Points he would have been entitled to use at the time of the holiday(s) as an ongoing Destinations Plus member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.*

*For example, if Mr H took a holiday worth 2,550 Fractional Points and he would have been entitled to use the equivalent of 2,500 Destinations Plus Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if he would have been entitled to use 2,600 Destinations Plus Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.*

*(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)*

- (4) Simple interest\*\* at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.*
- (5) The Lender should remove any adverse information recorded on Mr H's credit file in connection with the Credit Agreement reported within six years of this decision.*
- (6) If Mr H's Fractional Club membership is still in place at the time of this decision, as long as*

*he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his Fractional Club membership.*

*\*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr H took using his Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect his usage.*

*\*\*HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one."*

In conclusion, given the facts and circumstances of this complaint, I was persuaded that a breach of Regulation 14(3) of the Timeshare Regulations was material to Mr H's purchasing decision.

The PR responded to the PD and accepted it.

The Lender also responded but did not accept the PD and provided some further comments and evidence they wish to be considered.

In summary, they stated:

- It had concerns with Mr H's statement and questioned its credibility. They say as the statement was typed by the PR, it may not constitute a true first hand account from Mr H and it's not possible to establish whether the recollections were elicited through leading questions.
- It didn't agree that any alleged breach of Regulation 14(3) induced Mr H to enter into the agreement. Rather they felt the evidence suggests Mr H purchased his membership due to the promise of a guaranteed exit from his membership and the holiday options due to the standard of accommodation that the Supplier had to offer.
- It also didn't see how Mr H could have purchased the membership as an investment only to seek to terminate the membership later.

Having received the relevant responses from both parties, I'm now finalising my decision.

### **The legal and regulatory context**

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints - which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

[The Office of Fair Trading's Irresponsible Lending Guidance - 31 March 2010](#)

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

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

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

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

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

#### **What I've decided – and why**

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

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

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

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

#### **Mr H's testimony**

As I mentioned in the PD, I have seen evidence, in the form of a screenshot, that Mr H was booked in with the PR on 28 November 2017 to take his statement. So, on balance, I think the statement was written on the date recorded on the statement.

As this statement was taken during a telephone call, I am mindful of the risk that Mr H may have been guided through the process, and the associated risk that what has been written may not be his own specific recollections. But I think that risk is low, as I can see it contains detailed personal information about his purchasing history and what happened at the Time of Sale that only Mr H would have known, so I have no doubt that Mr H had a significant input into its contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Mr H's recollections of the Time of Sale.

When considering how much weight I can place on Mr H's statement, I am assisted by the judgement in the case of *Smith v Secretary of State for Transport [2020] EWHC 1954 (QB)*.

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr H has provided. Paragraph 40 reads as follows:

*“At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*

- a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
- b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
- c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
- d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
- e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
- f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of her ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).”*

The question to consider, therefore, is whether there is a core of acceptable evidence from Mr H. And having considered his testimony, whilst being mindful that Mr H is recalling events which started back in 2009 and up until 2013, which was four years before it was written,

and that memories can fade over time, I am satisfied that I am able to place weight on and rely on what Mr H has said.

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

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

The Lender believes the evidence suggests Mr H purchased his membership due to the promise of a guaranteed exit from his membership and the holiday options due to the standard of accommodation that the Supplier had to offer. In the PD, I acknowledge there were a number of reasons Mr H provided as to why he went ahead with his purchase, including the guaranteed exit and holiday options the Supplier had to offer. And, I agree those may well have been factors in his decision making but for the reasons already explained, I'm satisfied that the promise of profit was also a material factor in his decision. After all, Mr H hasn't said he would have pressed ahead with his purchase had the Supplier not led him to believe that the membership was an appealing investment opportunity.

The Lender provided a copy of an email they say Mr H sent the Supplier, which says:

*"Dear Sirs*

*I have recently spent a week at [...], Portugal and I feel I have to express my disappointment at the standard of the accommodation provided.*

*The key factor in us joining [the Supplier] was the promised high standard and consistency of good quality accommodation that would be provided. [The Supplier] is not cheap and it was this promise that made us feel the membership would be worthwhile. Unfortunately this was not the case with room 323. The kitchen was of poor quality and very dated as was the bath and decor, we couldn't use the drawers in the wardrobe as they had been roughly nailed together and were falling apart! - certainly not what was expected.*

*We certainly did not feel we were part of any club - there was no mention of [the Supplier] anywhere and it was obvious that there was nothing special about our membership or the room was offered.*

*We could have just as easily booked any room at this hotel directly and have had exactly the same deal and at less cost - there is no point being a member if all we are to get is the same as everyone else."*

The Lender says this supports their view, in addition to what they've said, that Mr H was not motivated by the investment element of his membership. The Lender has not shared when this was sent, but within this email Mr H refers to visiting Portugal. Looking at Mr H's reservation history, he only ever visited Portugal in December 2010 – prior to his Fractional Club membership purchase. This email does not in any way persuade me to depart from my PD, and in any event, I accept Mr H was interested in holidays but I'm also mindful of the fact he had access to the Supplier's portfolio of resorts as a result of his previous membership.

The Lender also says that Mr H's recollections are directly contradicted by the contemporaneous documentation. But as I've already said, there were disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr H as an investment but weighing up what happened in practice is rarely as simple as just looking at the paperwork. I've also looked at the Supplier's sales and marketing practices at the time along with what both parties have said on what was likely to have been said and/or done at the time. Ang having done so, I'm still of the opinion that the Supplier breached

Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr H as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and the Lender unfair to him for the purposes of Section 140A of the CCA.

Lastly the Lender has questioned why Mr H would seek to terminate his timeshare if he felt it was a valuable investment. I've considered this but do not find it a particularly persuasive argument to make. If a consumer, like Mr H, was unhappy with some element of their membership, it isn't uncommon to seek advice on how to terminate such a contract. This, in my opinion, does not detract from the fact that I believe the investment element was a material factor in his purchasing decision.

So, ultimately, for the above reasons, along with those I already explained in my PD, I remain persuaded that a breach of Regulation 14(3) was material to Mr H's purchasing decision. As such I still think the credit relationship between Mr H and the Lender was unfair to him for this reason.

### **Putting things right**

Having found that Mr H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr H agrees to assign to the Lender his Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr H was an existing Destinations Plus member and I believe his membership was traded in against the purchase price of Fractional Club membership. Under his previous membership, he had right to a 1 week's holiday per year. And, from my understanding, like Fractional Club membership, he had to pay annual management charges as a Destinations Plus member. So, had Mr H not purchased Fractional Club membership, he would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr H from the Time of Sale as part of his Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid as an ongoing Destinations Plus member.

I'm also conscious that he lost his holiday rights under his Destinations Club membership as a result of this purchase. It isn't clear if, in light of that fact, he wants his previous Destinations Club membership reinstated nor, in turn, whether that can be achieved to the satisfaction of both parties to it. However, as requested within my PD, Mr H did not respond to it to confirm if he wanted his Destinations Club membership reinstated.

So, here's what I think needs to be done to compensate Mr H with that being the case – whether or not a court would award such compensation:

- (1) The Lender should refund Mr H's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
- (2) In addition to (1), the Lender should also refund the difference between Mr H's Fractional Club annual management charges paid after the Time of Sale and what his Destinations Plus annual management charges would have been had they not

purchased Fractional Club membership.

- (3) The Lender can deduct:
- i. The value of any promotional giveaways that Mr H used or took advantage of; and
  - ii. The market value of the holidays\* Mr H took using his Fractional Points if the Points value of the holiday(s) taken amounted to more than the equivalent number of Destinations Plus Points he would have been entitled to use at the time of the holiday(s) as an ongoing Destinations Plus member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr H took a holiday worth 2,550 Fractional Points and he would have been entitled to use the equivalent of 2,500 Destinations Plus Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if he would have been entitled to use 2,600 Destinations Plus Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

- (4) Simple interest\*\* at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mr H's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr H's Fractional Club membership is still in place at the time of this decision, as long as he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his Fractional Club membership.

\*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr H took using his Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect his usage.

\*\*HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

### **My final decision**

For the reasons set out above, I uphold this complaint and direct Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance to calculate and pay Mr H fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 13 May 2026.

Sameena Ali  
**Ombudsman**