DRN-4644397

The complaint

Mr L's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance[1] (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.

The timeshare in question was bought jointly by Mr and Mrs L, but as the loan used to make the purchase was in Mr L's sole name, he is the only eligible complainant here. I will, however, refer to both Mr and Mrs L where it is appropriate to do so.

What happened

Mr and Mrs L first became members of a timeshare from a timeshare provider (the 'Supplier') in September 2013 when they purchased a trial membership.

Then, in June 2014 they purchased a full membership of the Supplier's European Collection membership (the 'EC'). They traded in their trial membership towards the purchase of 10,000 EC points, for which they paid £10,000. This was funded by a loan from a different finance provider ('Business A').

As EC members, every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 25 September 2014 they made a further purchase of 5,000 EC points for £4,950, again bought using a loan from Business A.

Then, on 12 May 2015, Mr and Mrs L bought a different type of timeshare from the Supplier. They agreed to exchange their 15,000 EC points towards the purchase of 23,000 'fractional' points (they were given a conversion value of £1 per EC point) and paid £17,520 for this new membership. A credit agreement was arranged with a different lender, but Mr and Mrs L cancelled this purchase within the 14-day statutory cooling off period, and no monies were taken.

None of the purchases set out up to this point are the subject of this complaint, and are included for background purposes only.

On 21 October 2015 (the 'Time of Sale' being considered here) Mr and Mrs L entered into an agreement with the Supplier to convert 8,000 of their EC points into 8,000 fractional points (hereon referred to as the 'Fractional Club'). They were again given a conversion rate of £1 per EC point, and ended up paying £10,160 (the 'Purchase Agreement') for their membership of the Fractional Club.

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

The fractional memberships, such as the Fractional Club and their cancelled May 2015 membership, differed from the EC membership. The two significant differences were that they had a shorter membership term (15 years compared to an end date of 2054 for the EC membership) and were also asset backed – which meant the Fractional Club membership gave Mr and Mrs L more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr L paid for their Fractional Club membership by taking finance of £10,160 from the Lender in his sole name (the 'Credit Agreement').

Mr L – using a professional representative (the 'PR') – wrote to the Lender on 19 October 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA (which the Lender failed to accept and pay);
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA (which the Lender failed to accept and pay); and
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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 dealt with Mr L's concerns as a complaint and issued its final response letter on 2 March 2022, rejecting it on every ground.

The PR, on Mr L's behalf, referred the complaint to the Financial Ombudsman Service. As part of its submissions the PR sent a statement from Mr L which was dated 7 January 2021. This set out his and Mrs L's recollections of their entire relationship with the Supplier and their purchases (the relevant sections of this will be set out later in this decision).

Mr L's complaint was assessed by an Investigator who, having considered the information on file, thought it ought to be upheld. They thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs L 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 their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr L 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.

While the complaint was waiting for allocation to an Ombudsman, it was reviewed by a second Investigator. And having considered everything on file the second Investigator also thought Mr L's complaint ought to be upheld. He too thought it likely that the Fractional Club had been sold and/or marketed to Mr and Mrs L as an investment in breach of Regulation 14(3) of the Timeshare Regulations, and this had rendered Mr L's credit relationship with the Lender unfair to him. The Investigator then set out how he thought the Lender should calculate and pay fair compensation to Mr L.

The Lender again did not agree, and sent a comprehensive response. It called into question the credibility of Mr L's testimony because:

- It refers to the purchase on 21 October 2015 as a "further Fractionals" purchase. This is factually incorrect. The earlier purchase on 12 May 2015 was cancelled during the cooling-off period on 22 May 2015. Therefore the October 2015 transaction was his first Fractional purchase.
- The testimony fails to mention the cancellation of the May 2015 purchase, and discusses it as if it were completed and active. This omission is significant, as it forms the basis of the claim that the October purchase was an enhancement of an existing investment. The justification for the October purchase – i.e. to improve returns on a prior investment is therefore flawed and cannot be substantiated.
- The sales notes clearly state that Mr L purchased due to the flexibility of Fractionals and the rental programme, which explains why Mr L may have paid more for the same number of points.
- The claim that the product was sold as an investment lacks detail. There is no indication of who allegedly made these statements, what was specifically said, or what materials were shown to support the idea of a profitable return. Given Mr L has failed to describe how it was marketed as an investment, it is improbable that the Supplier marketed the Fractional Club in the way he described.
- The testimony was provided over five years after the sale and may have been influenced by the involvement of a PR. The Investigator acknowledged the inconsistencies but dismissed their relevance. The inconsistencies are material, particularly the incorrect assertion of prior ownership, and cast doubt on the reliability of the entire testimony.
- It is likely that the statement was influenced and/or drafted by the PR. This is suggested by the repetitive nature of the statement (comparable to others submitted by the same PR); the considerable factual inaccuracies; and previous Ombudsman decisions which have acknowledged that this PR is likely to prepare a statement on behalf of their client.

The complaint has now come to me for a 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.

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.

And having done that, I am satisfied that this complaint should be upheld, for largely the same reasons as given by the second Investigator. I think it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs L as an investment, which, in the

circumstances of this complaint, rendered the credit relationship between Mr L 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 will direct the Lender to pay puts Mr L in the same or a better position than he would otherwise be in.

Mr L's testimony

Much of the Lender's argument following the second Investigator's view was around the credibility and accuracy of Mr L's testimony. It set out that it didn't think it could be relied upon when considering the merits of his complaint.

As I've said, the testimony set out all of Mr and Mrs L's purchases from the Supplier. But for clarity, I will set out the sections which refer to the May 2015 and October 2015 purchases:

> *"On 12th May 2015, we purchased Fractional investment points with [the Supplier]. We made this purchase whilst once again on holiday making use of our timeshare in Spain when we were approached by a representative from [the Supplier]. Therefore, we attended this meeting in a large sales room with a number of sales taking place around us and lasted most of the day (which was longer than expected). The meeting was very pressured, in which we were told about the benefits of purchasing Fractionals with [the Supplier]. We were told that through the purchase of Fractional shares, we would be buying an investment and it would be possible to enjoy a better standard of holiday, which included cruises etc. The most vital factor, however, was that it would be possible to resell these Fractionals within a set period, meaning we would receive a profit from our investment and be rid of our timeshare. Therefore, feeling this was a good way to invest our money, we agreed to this purchase.*
>
> *Therefore, we purchased 15,000 Fractionals for 2-bedroom unit 29 and 1- bedroom unit 21 at Cromer CC resort. This was purchased for £17,520 and was paid with a loan from [another lender]. This loan was brokered by [the Supplier] and provided with pre prepared paperwork. They didn't do any credit checks or ask about our income or outgoings. Due to the pressure of this meeting, we were not given adequate time to read and digest this paperwork and at no point were given access to financial advice. There was no mention of any commissions. Upon return to the UK, we changed this loan to a different company in order to avoid the high interest rates. We later found that the exclusiveness that was promised was not true due to these resorts being advertised on holiday booking sites.*
>
> *On 21st October 2015, we made a purchase of further Fractionals with [the Supplier]. We made this purchase whilst on holiday making use of our timeshare in Spain, when we were approached by a representative from [the Supplier] and asked to attend a sales meeting. This lasted a long time. At this meeting (which was pressured), we were told about the further benefits of investing in more Fractionals. We were told that through investing in more Fractionals, we would be entitled to more flexible and better holidays which could be put towards better resorts in Spain as well as cruises and a much bigger return profit in our investment. Once again, we were assured that within a number of years, these Fractional points would be resold which would allow us to exit this timeshare while having a bigger profit gain. They advised us that the more fractional points we purchased the better the return in the investment. We were advised that these resorts*

would be exclusive to owners after raising the issues, however we again found the resorts on online booking sites."

This statement, as dated, was compiled about 9 months prior to the Letter of Complaint being sent to the Lender, and the statement was probably prepared as part of the PR's case preparation.

The statement was, in my view, clearly prepared and written by the PR, and from what I know about the way this particular PR worked, was probably taken during a telephone conversation with Mr L. So, I am mindful of the risk that Mr L may have been guided through the process, and the associated risk that what has been written may not be his own specific recollections. But it does contain personal information about their circumstances that only he would have known so I have no doubt that Mr L had a significant input into the statement's contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives.

However, as the Lender has pointed out, there are some errors and inconsistencies in the statement which I need to consider when deciding how much weight I can place on its contents.

And when considering how much weight I can place on Mr L'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 written evidence Mr L 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 Ms 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* ***he*** *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* ***him*** *ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

So, as I've said, I have thought about how much weight I can place on this statement when considering the merits of Mr L's complaint. In doing so I am cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between what he says has happened over the course of their purchases, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr L, such that the inconsistencies have little to no bearing on whether his testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what the Supplier was likely to have said and/or done during the sale of the Fractional Club.

The Lender has pointed to some inaccuracies in the statement as a reason to doubt its credibility, and I have set these out above.

As I've said, inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. Addressing Mr L's failure to mention that their May 2015 purchase was cancelled, I agree that this is, on the face of it, a fairly significant omission. But I think this is likely to simply have been forgotten by Mr L, and the failure to mention something, even something significant, does not, in my view, necessarily mean the same as saying something that is untrue, and doesn't mean that everything in the statement is unreliable. So, although this omission is odd, I don't think it is in any way material to whether the Fractional Club was marketed to them in October 2015 as an investment. I also note that this error has flowed into what has been written about the Time of Sale, in that Mr L has referred to *"investing in more Fractionals"* which is inaccurate as they didn't own any at that time. But I think this is just a continuation of the earlier mistake in forgetting that the previous purchase had been cancelled. And, I don't think it detracts from the core of what Mr L is saying in relation to this purchase.

So, having given considerable thought to this issue, I find myself in agreement with the second Investigator, in that I do not think these mistakes or inconsistencies fundamentally undermine the crux of the statement, which, in my view, sets out that the Fractional Club was sold to them as an investment at the Time of Sale.

So, overall, I am satisfied that I can place weight on Mr L's testimony when considering what most likely happened at the Time of Sale and the merits of his complaint.

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

Having considered the entirety of the credit relationship between Mr L 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;
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 L 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 and Mrs L'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 L says that the Supplier did exactly that at the Time of Sale – saying in summary, that they were told by the Supplier that the Fractional Club membership would not only provide them with holidays, but was an investment that would provide them with a profit at the end of the membership term.

Mr L alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property; and

(2) They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*[2], 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 [56]. I will use the same definition.

Mr and Mrs L's share in the Allocated Property clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more

[2] *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)

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 as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

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

There is 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 L, 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 not sold to Mr and Mrs L as an investment.

For example, on the second page of the Purchase Agreement, titled "Terms and Conditions", the first read:

> *"You should not purchase Your […] fractional points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your […] fractional points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

Further, on the document titled "Key Information", an extract of which read:

> *"Exact nature and content of the right(s):*
>
> *…*
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] fractional points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] fractional points should not be viewed by you as a financial investment."*

Finally, there was a "Customer Compliance Statement/Declaration to Treating Customers Fairly", which included the following:

> *"5. We understand that the purchase of our […] fractional points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our […] fractional points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and that there is no guarantee as to the eventual sale price of the Property.*

6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each year until the Property is sold."

These were signed by Mr and Mrs L.

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 its dealing with complaints of a similar nature, this Service has seen some training material and some internal documents relating to the sale of Fractional Club by the Supplier. The Supplier has also provided, in relation to other fractional timeshare complaints, witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell its products, and the Lender has cited these and other case law in support of its position following the first Investigator's view.

I have carefully considered all of these, and I recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above. Indeed, I acknowledge what the previous employees say about the Supplier training its sales staff to not refer to Fractional Club membership as an 'investment', not to make any reference to the value of the Allocated Property and to make every effort to not give customers, such as Mr and Mrs L, the impression that they were investing in something that would make them a profit.

However, I think the argument by the Lender on this issue runs the risk of taking too narrow a view of the prohibition against marketing and selling timeshares as an investment. 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)).'* 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.

So, in my view, 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.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 100 of S*hawbrook & BPF v FOS*, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
>
> *"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers.* ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."* (emphasis my own)

So, I'm not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word 'investment' when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in S*hawbrook & BPF v FOS*, at 76 (when discussing an ombudsman's approach to Regulation 14(3)):

> "*[…] He was entitled in other words to be highly sensitive to the* ***overt and covert*** *messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed, he was required as a matter of law to do so."* (emphasis my own)

Mr L says in his testimony that the Supplier sold and/or marketed Fractional Club membership to him and Mrs L as an investment. So, I've thought about how the membership would likely have been presented to them. Alongside the information I have about the sale, and what this Service has been told about how the Supplier trained its staff, I've considered the inherent probability of the allegation when assessing whether I find that thing did or did not happen.

And I am satisfied I am able to do that. After all, in *Onassis v. Vergottis* [1968] 10 WLUK 101, Lord Pearce referred to the need to look at "probabilities", as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (at p.431). In *Armagas Ltd v. Mundogas SA (The Ocean Frost)* [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at "the overall probabilities" when ascertaining the truth (at p.57). And in *Gestmin SGPS S.A. v. Credit Suisse (UK) Limited* [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on "inferences drawn from the documentary evidence and known or **probable** facts" (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is

sold in a way promoting that element, and therefore risking a breach of Regulation14(3), compared with the sale of a product without the possibility of a monetary return.[3]

For the avoidance of doubt, it would not have been a breach of Regulation 14(3) to merely describe the nature of the product and how it worked. But in the circumstances of this complaint, it wouldn't have made much sense if the Supplier included this feature in the product without relying on it to promote the sale, given Mr and Mrs L paid a large sum for no increase in holiday rights. After all, Mr and Mrs L exchanged 8,000 of their EC points for exactly the same number of fractional points, and paid an additional £10,160 to do so. So given there was no increase in holiday rights with the purchase, it seems likely that the additional cost was reflective of the Allocated Property element of the membership.

I again acknowledge the disclaimers contained in the contractual paperwork which I have set out above. But it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members. And this is especially true when customers, such as Mr and Mrs L who were existing members, made the purchase and did not increase their holiday rights as they had done previously. Afterall, if it were just the additional holiday rights they wanted, they could just have increased their holding of EC points, given the range of resorts and accommodation available to EC members and fractional members was exactly the same. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase this new type of membership in particular. In other words, some discussion of why Mr and Mrs L ought to purchase the Fractional Club in the way that they did.

The investment element of membership was plainly a major part of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales, especially when the reality was that the principal benefits of the move to Fractional Club were its investment element i.e., the share in the net sale proceeds of the Allocated Property and the shorter membership term.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs L when selling Fractional Membership to them given that they already had a substantial number of EC points. And as Mr and Mrs L were laying out a considerable sum to make the purchase, I think it's clear that they expected to get a significant sum back – after all they weren't buying any additional points and therefore not getting any extra holiday entitlement - so it seems common sense that the return was an important factor in the sale. Further, Mr and Mrs L have said from the outset of their complaint that they were led to believe the fractional points would provide them with a profit at the end of the agreement. I think that belief fits with what they did at the Time of Sale – make a significant purchase for the same holiday rights plus an interest in the sale proceeds of the Allocated Property.

Mr L has been specific in what he says about how the Fractional Club was sold to them. He has said that it was positioned as an investment, and that they were told *"…the more fractional points we purchased the better the return in the investment."*

[3] This is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I make no such finding.

And given their circumstances, and what I think likely happened at this particular sale, I am persuaded it is more likely than not that the Supplier's salesperson positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly. So, I am satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

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 L and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin*[4] 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.

It also seems to me in light of *Carney*[5] and *Kerrigan*[6], that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr L and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The Lender has pointed to evidence in the sales notes that Mr and Mrs L were attracted to the flexibility of the Fractional Club and the rental possibilities that it provided. The 'Wish to Rent' scheme, as it was referred to by the Supplier is, in my view, part of the investment element of the Fractional Club, as it was ultimately a way for the members to make some money from their membership. But I can't see that this note evidences that they would likely have bought the membership for this reason, and in any event, no evidence has been provided to show that they made use of the ability to rent out their points at any stage, so I don't think it helps either side's arguments anyway. I'm not saying that they weren't interested in that at the Time of Sale, as that was one of the differences when compared to their EC membership, but I am not persuaded that this was a significant motivating factor which would have meant they bought the membership anyway.

I think it likely that it was the prospect of a financial gain at the end of their membership term that was a significant and motivating factor in Mr and Mrs L's purchasing decision. And Mr L has said as much (plausibly in my view) in his statement. Therefore, on the balance of probabilities, I think their purchase was motivated by their 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 their existing EC membership. Mr L has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

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[4] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61
[5] *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958
[6] *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made, and therefore rendered Mr L's associated credit relationship with the Lender unfair.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr L 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 am satisfied that it is fair and reasonable that I uphold this complaint.

Putting things right

Having found that Mr and Mrs L 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 Mr L was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put Mr L back in the position he would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore had he not entered into the Credit Agreement, provided Mr and Mrs L assign to the Lender their 8,000 fractional points or hold them on trust for the Lender.

Mr and Mrs L were existing EC members, and 8,000 of their EC points were traded in against the purchase price of the Fractional Club membership. Like Fractional Club membership, they had to pay annual management charges as EC members. So, had Mr and Mrs L not purchased Fractional Club membership, they would have always been responsible for paying an annual management charge of some sort on those 8,000 EC points. With that being the case, any refund of the annual management charges paid by Mr and Mrs L from the Time of Sale as part of their Fractional Club membership should amount only to the difference (if any) between those charges and the annual management charges they would have paid resulting from those 8,000 EC points.

So, here's what I am directing the Lender to do to compensate Mr L with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr L's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs L's Fractional Club annual management charges paid after the Time of Sale and what their EC annual management charges would have been (relating to 8,000 EC points) had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs L used or took advantage of; and

   ii. The market value of the holidays* Mr and Mrs L took using their 8,000 fractional points *if* the points value of the holiday(s) taken amounted to more than the total number of EC points they would have been entitled to use at the time of the holiday(s) as ongoing EC members with 8,000 points . 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 and Mrs L took a holiday worth 2,550 fractional points and

they would have been entitled to use a total of 2,500 EC 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 they would have been entitled to use 2,600 EC 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 L's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs L's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their 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 and Mrs L took using their 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 their usage.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 11 March 2026.

Chris Riggs
Ombudsman