DRN-4730700

The complaint

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

What happened

Mr A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 7 July 2016 (the 'Time of Sale'). Mr A and his wife, Mrs A, entered into an agreement with the Supplier at a cost of £7,200 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr A 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 A paid for his Fractional Club membership by taking finance of £9,304 from the Lender (the 'Credit Agreement') in his sole name. This included an amount to consolidate an existing loan.

Mr A – using a professional representative (the 'PR') – wrote to the Lender on 25 May 2022 (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 dealt with Mr A's concerns as a complaint and issued its final response letter on 12 September 2023, rejecting it on every ground.

Mr A had, by that time, referred the complaint to the Financial Ombudsman Service. 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 A 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 A 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.

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 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 A 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've outlined below puts Mr A 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?

Having considered the entirety of the credit relationship between Mr A 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 any 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 A 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 A'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 A 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 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 A'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 A 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 A, 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, the Supplier argues, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr A 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

Little if any information has been provided by the Lender (or the Supplier) as to how the Fractional Club membership was marketed and sold to Mr A, or more generally. That's despite the complaint having been upheld by the Investigator in the first instance and having been given ample opportunity to provide further information and evidence in support of its position.

That being the case, I can't be certain what sales materials were shown to Mr A, or specifically what any sales representatives may have said to him. But I think there was at least the potential for the Fractional Club product to be sold in a way that did not accord with any of the Supplier's official policies that may have been in place from that time. And I don't think the Supplier would have needed to have deviated very far from a simple description of

how the Fractional Club product worked in terms of the sale of the fractional asset at the end of the term, to have fallen foul of 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)).'*[1] 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, 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 99 and 100 of *Shawbrook & 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.*"

Considering the relevant circumstances at the Time of Sale, I think these contributed to a risk that the Supplier would market the Fractional Club product to Mr A as an investment, in the absence of other significant selling points for him.

It seems unlikely, for example, that Mr A would have been attracted by the prospect of additional holiday rights given he had already upgraded his trial membership to full membership just a year earlier in 2015.

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[1] 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

Taking everything into account, I think it's more likely than not that the Supplier strayed from describing how the sale of the Allocated Property worked, and either stated or implied that Mr A could or would make a profit when the Allocated Property was sold. In doing so, it breached Regulation 14(3) of the Timeshare Regulations.

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

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr A 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.

A key piece of information in that regard comes in the form of Mr A's client statement dated 10 August 2021. I've thought about the Lender's and the Supplier's misgivings about the statement. That includes what they say about uncertainty as to when it might date back to. However, I find the contents of the statement to be broadly consistent with the PR's Letter of Complaint, which is dated 25 May 2022, and which also sets out the allegation that the Fractional Club membership was sold as an investment. And I note that the PR has provided evidence, by way of a screen shot, indicating it did speak to Mr A on the day the statement was dated. Overall, I think I can rely on it.

On my reading of Mr A'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. I think that comes across in his witness statement, where I feel his focus when talking about the Fractional Club membership is very much on his share of the Allocated Property and the prospect of making a profit:

'*Our final purchase took place in 2016. We were on holiday using the 2-bed apartment we had purchased, when we were asked to attend another meeting. At this meeting, we were told about the benefits of fractional ownership. The sales staff said that with this, we would own an apartment which they would rent out for us every year. It was effectively sold as a buy-to-let. They said that we would never be able to use the apartment, it was only for rental purposes, and at the end of the period they would sell it for us, and we would make a profit. It was sold as an investment, and we were expecting a significant return.*

Therefore, on the 7th of July 2016, we upgraded to a fractional membership – 1-week at [an apartment in the Supplier's resort]*. Our apartment number was later changed, although I cannot remember what it was changed to, and we were not told why. In 2016, we paid £7,200 for the fractional week, and this was paid with another Hitachi Loan.*'

Mr A does refer to the Fractional Club membership being sold as a '*buy-to-let*' but I don't think him having an interest in that aspect is at odds with him having been motivated in his purchase by the prospect of investing. That's because a buy-to-let feature involved making money through letting and potentially making a return in that way.

That doesn't mean Mr A 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. But as Mr A 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 A 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

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr A 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.

Putting things right

Having found that Mr A 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 and Mrs A agree to assign to the Lender their Fractional rights or hold them on trust for the Lender if that can be achieved.

What's more, Mr A paid for his trial membership using finance ('Loan 1'), £2,104 of which he refinanced using the Credit Agreement. So, part of what he borrowed at the Time of Sale was used to repay the earlier borrowing under Loan 1 that always had to be repaid. I recognise that the credit agreement entered into as part of Loan 1 is a related agreement (under Section 140C(4)(a)) for the purposes of an assessment of unfairness under the Credit Agreement. But I can't see that any complaint has been made about there being an unfair credit relationship under Loan 1]. As a result, I don't think it would be fair or reasonable to direct the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mr A would be in a better position than he would have been if he hadn't purchased Fractional Club membership. In light of that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

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

(1) The Lender should refund the difference between Mr A's repayments to it under the Credit Agreement and what he would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce

any outstanding balance under the Credit Agreement, if there is one, so that Mr A would only owe now what he would have owed under Loan 1 and change any future repayments so that he is making the same repayments he was towards Loan 1.

(2) In addition to (1), the Lender should also refund the annual management charges Mr A paid as a result of Fractional Club membership.

(3) The Lender can deduct:

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

ii. The market value of the holidays* Mr A took using his Fractional rights.

(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 A's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr A's Fractional Club membership is still in place at the time of this decision, as long as Mr and Mrs A 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 A 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 Mr A a certificate showing how much tax it's taken off if he asks for one.

My final decision

For the above reasons, my final decision is that I uphold this complaint. I require Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance, to put things right for Mr A as explained above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 6 May 2026.

Nimish Patel
Ombudsman