DRN-4921543

The complaint

Mr H'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 a claim under Section 75 of the CCA.

Although the purchase in question here was made in the joint names of Mr and Mrs H, the associated credit agreement was in Mr H's name only. As such, he is the only eligible complainant here. I will however refer to both Mr and Mrs H where appropriate to do so.

What happened

Mr and Mrs H were existing members of a points-based timeshare arrangement (the 'Vacation Club') with a timeshare provider (the 'Supplier'), holding 1,501 Vacation Club points.

As Vacation Club 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 August 2013 (the 'Time of Sale') Mr and Mrs H traded in their Vacation Club points towards the purchase of a different type of timeshare membership (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 1,750 fractional points (the 'Purchase Agreement'), and after trading in their existing timeshare, they ended up paying £7,850 for membership of the Fractional Club.

Fractional Club membership differed from the Vacation Club in a number of ways, but primarily because it was asset backed – which meant it gave Mr and Mrs H 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 H paid for their Fractional Club membership by taking finance of £7,850 from the Lender in his sole name (the 'Credit Agreement').

Mr H, using a professional representative (the 'PR'), wrote to the Lender on 25 July 2018 (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. 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.

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

[1] At the time the lending was provided, this business was trading as Hitachi Personal Finance

Mr H says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Told them that Fractional Club membership was an "investment" when that was not true.
- Told them that the property would be sold after the fractional period and they would then be free of all liabilities, when this was not true.

Mr H says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above. Therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr H.

2. Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr H says that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

- There was commission paid to the Supplier by the Lender and this was not disclosed to Mr H.
- Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr H's concerns as a complaint and issued its final response letter on 24 October 2018, rejecting it on every ground.

The PR, on Mr H's behalf, referred the complaint to the Financial Ombudsman Service. As part of the submission, it provided a statement from Mr H, dated 10 May 2018, setting out his recollections of his and Mrs H's entire relationship with the Supplier. This statement was later dated 19 September 2018 and signed as having been amended by Mr and Mrs H.

As regards the sale of Fractional Club membership that is being considered here, he said:

> *"…We were, once again, approached by the representatives who advised us of a new product called fractional points. The representatives went on to advise us that if we purchased fractional points, we would be investing in a property and would make a return on our money. The representatives went on to advise that the property would go on the market on a set date, at which point the property would be sold. At this point according to the representatives we would get our money back plus a return. At the sale of the property we would also exit our timeshare contract. We therefore felt that we were Investing in a property and investing in our future and decided to take 1,750 fractional points which was offered to us by the representatives at a discounted rate."*

Mr and Mrs H's complaint was assessed by an Investigator, who thought it should be upheld. In summary, the Investigator was persuaded by what Mr H had said about how Fractional Club had been sold and marketed to him and Mrs H, so he thought it likely that the Supplier had marketed and sold Fractional Club membership to Mr and Mrs H as an investment, in breach of Regulation 14(3) of the Timeshare Regulations.

The Investigator acknowledged that there were disclaimers in some of the contractual paperwork provided to and signed by Mr and Mrs H at the Time of Sale, that the

membership should not be considered or treated as an investment, and he also accepted that it was possible to sell Fractional Club membership without breaching Regulation 14(3). But when considering everything, he thought the investment element was clearly a major part of its rationale and the Supplier's justification for the cost of the membership, and he did not think the Supplier would have included the feature without relying on it to promote the sale, and this was supported by what Mr H had said in his testimony. So, the Investigator thought it more likely than not that the Supplier had presented the investment element of Fractional Club in a way that, from Mr H's perspective, led him to believe that he could make a profit at the end of the membership term.

As a result, and because the Investigator didn't think Mr and Mrs H would have made the Fractional Club membership purchase at all if it had not been for the Supplier's breach of Regulation 14(3), he concluded that the associated credit relationship that Mr H entered into with the Lender, was rendered unfair to him. The Investigator then set out how he considered the Lender ought to calculate and pay fair compensation to Mr H.

The Lender did not agree with the Investigator's outcome. It did not think there was a breach of Regulation 14(3) by the Supplier when it marketed and sold the Fractional Club membership to Mr and Mrs H. It thought that because the testimony from Mr and Mrs H:

- Did not indicate any sales material was shown to Mr and Mrs H which indicated the membership was an investment;
- Did not indicate that Mr and Mrs H were unclear about any of the content of the sales presentation or that they felt the need to ask more questions due to any uncertainty about the nature of the product and its purpose; and
- Does not indicate that Mr and Mrs H thought they were buying an investment and that they would not have proceeded with the purchase had they not understood it to be an investment.

The Supplier went on to highlight inaccuracies within the statement, which they say were enough to provide sufficient reason to doubt and disbelieve the claim that the membership was sold as an investment. These inaccuracies were:

- The statement is annotated as having a word count of 1478, where in fact it has 60+ more words than this. This gives the impression that the testimony has been altered after the fact and casts some doubts over the authenticity of the statement.
- There are errors in his recollections of the sales in 2008, including where they took place, and the circumstances which led to them having that holiday. Mr H also did not mention that he cancelled this first points purchase within the recission period.
- There are also errors in his recollections of the sale in 2009. He was on a trial membership when he made this purchase, so it cannot be correct that he said he was persuaded to purchase more points or that he was told *"more points mean more availability…if we purchased additional points".*
- Regarding the Time of Sale, Mr H was actually in Scotland, and not in Cornwall as said in the statement. It also suggests that this was the first time that fractional membership was presented to Mr and Mrs H when this is untrue. They had attended a fractional membership presentation in March 2013 where they had elected not to purchase.

In summary, the Lender thought the claims were generic, and Mr H had not described any events personal to him that had happened during the presentation or sales process, and there was an absence of compelling witness testimony substantiating the complaint allegations made.

Mr H's complaint, and the Lender's response to the Investigator's view was considered afresh by a different Investigator. And having looked at everything again, the second Investigator also thought the complaint ought to be upheld. He acknowledged that Mr H's testimony wasn't particularly detailed, lacked some context, and there were some inaccuracies relating to the previous sales. But he didn't think this meant the testimony ought to be disregarded. He thought that some errors and inconsistencies were a normal part of trying to recollect something from some time ago, and there was a core of acceptable evidence, and that the inconsistencies had little to no bearing on whether he could rely on the testimony.

And having considered the testimony, the Investigator was persuaded that it was likely there was a breach of Regulation 14(3) by the Supplier at the Time of Sale, and that breach was material to Mr and Mrs H's purchasing decision. The Investigator then set out how he thought the Lender should calculate and pay fair compensation to Mr H.

In response the Lender provided some further documentation and sales notes from the Time of Sale. It also said that the sales presentation which Mr and Mrs H would have been shown was fully scripted, and so they were not advised that they were *"investing in a property".* It said the Fractional Club membership was sold as a fixed term holiday membership with a share in the proceeds after the sale date in full accordance with the Timeshare Regulations. It also said that Mr and Mrs H had engaged with a representative for a 'termination service' and Mr H had informed the Supplier that he hoped to get a refund. There had been no mention of the Fractional Club being sold as an investment.

The Investigator responded and said that the presentation shown to Mr and Mrs H showed, in his view:

- the Supplier's sales staff were instructed to highlight the idea of ownership in the Allocated Property and that being an advantage over 'renting' your holiday accommodation (e.g. booking a hotel through a travel agent); and
- it was highlighted to prospective customers that they would get a return when the Allocated Property was sold at the end of their membership term.

He didn't think that the Supplier explicitly set out the likely return that Mr and Mrs H might expect to get, but it was probably implied that the return was likely to lead to an overall profit or financial gain, and that was a good reason to purchase a membership. And this was supported by what Mr H had said in his testimony.

The Investigator also considered the disclaimers contained in the Supplier's sales documentation. But he didn't think they showed there wasn't a breach of Regulation 14(3) at the Time of Sale. He thought this because they were only shown to Mr and Mrs H after they had been through the oral sales process and after they had agreed to make the purchase. And he didn't think they were drawn to Mr H's attention, nor were they sufficiently strong to overcome the problems with the sales presentation.

On balance, given the evidence the Investigator had seen, including the training material and Mr H's own memories of the sale, he thought it likely that the Supplier did lead Mr and Mrs H to believe that the Fractional Club membership was an investment that might lead to a financial gain. So, the Investigator remained persuaded that the Supplier did breach Regulation 14(3) of the Timeshare Regulations, and Mr H's complaint of an unfair credit relationship under Section 140A of the CCA ought to be upheld.

No agreement could be reached, so the complaint has come to me for a final decision.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is as follows:

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations

Section 75: Liability of Creditor for Breaches by a Supplier

Sections 140A: Unfair Relationships Between Creditors and Debtors

Section 140B: Powers of Court in Relation to Unfair Relationships

Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in

   Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

My Understanding of the Law on the Unfair Relationship Provisions

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

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

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

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(1)(c) CCA.

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

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

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

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

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

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

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

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

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

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

<u>The Law on Misrepresentation</u>

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that

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

it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[3]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the

[3] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.
2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham)
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth)
4. *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston)
5. *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff)

Relevant Publications

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

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 agree with the findings of the two Investigators, for broadly the same

reasons. 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 and Mrs H as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr H and the Lender unfair to him for the purposes of Section 140A of the CCA.

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 Mr H's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier made misrepresentations at the Time of Sale and the Lender ought to have accepted and paid the claim made under Section 75 of the CCA, because, even if that aspect of the complaint ought to succeed, the redress I'm directing the Lender to calculate and pay puts Mr H in the same or a better position than he would be if the redress was limited to misrepresentation.

Mr H's testimony

I have considered everything that has been submitted by the Lender in relation to the testimony given by Mr H. And having done so, I feel able to place weight on, and rely on what he has said. I acknowledge that there are some inconsistencies in his testimony, but I do not think these fundamentally undermine the core of acceptable evidence it contains. Whilst being cognisant of the fact that memories can fade over time, I am satisfied that it is an accurate reflection of his memories of the Time of Sale.

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

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; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. 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 breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs 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 as has been set out, Mr H says that the Supplier did exactly that at the Time of Sale.

Mr H 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.

(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*, 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 H'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 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 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 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.

And, for the same reasons as set out by the Investigators in this case, and having considered everything that has been said and submitted, I am satisfied that the Supplier breached Regulation 14(3) at the Time of Sale. I'll explain.

How the Supplier marketed and sold the Fractional Club membership

As has been set out, Mr and Mrs H went through a sales presentation from one of the Supplier's sales staff. The type of membership being sold here was the Supplier's second version of what it called the 'Fractional Property Owners Club' (FPOC2 - I shall continue to refer to it as the Fractional Club).

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 to sell FPOC2. The contents of this training material is well known to both sides, so I do not intend to repeat it here, but I am satisfied the Supplier's sales representatives were likely to have been encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And this seems to be reflected in what Mr H says in his statement:

> *"The representatives went on to advise us that if we purchased fractional points, we would be investing in a property and would make a return on our money. The representatives went on to advise that the property would go on the market on a set date, at which point the property would be sold. At this point according to the representatives we would get our money back plus a return. At the sale of the property we would also exit our timeshare contract. We therefore felt that we were Investing in a property and investing in our future…"*

And indeed, as the Fractional Club training manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentation was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the training slides 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, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs H 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. And with that being the case, I don't find Mr H either implausible or hard to believe when he says that was how the Supplier led them to view Fractional Club membership.

On the contrary, on the balance of probabilities, I think that's likely to be what Mr and Mrs H were led by the Supplier to believe at the relevant time.

I do acknowledge, as did both Investigators, that 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 H, 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 H as an investment.

However, the relevant sales paperwork was not given to, and signed by, Mr and Mrs H until after the sales presentation and after they had agreed to make the purchase, and in any event they do not seem to have been focussed on by Mr and Mrs H at the Time of Sale.

So, for all of these reasons, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at 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 H and the Lender under the Credit Agreement and related Purchase Agreement.

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

It also seems to me in light of *Carney* and *Kerrigan,* 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 them to enter into the Purchase Agreement and Mr H into the Credit Agreement is an important consideration.

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 they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. His own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint.

But as Mr H says (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think his and Mrs H's 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 Vacation Club membership.

And Mr H says as much when he concludes his statement:

> *"We therefore felt that we were Investing in a property and investing in our future and decided to take 1,750 fractional points which was offered to us by the representatives at a discounted rate."*

And, based on all the evidence available, I do not think 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. After all, Mr H faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself and Mrs H to long-term financial commitments, so had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

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 so the associated credit relationship was rendered unfair to Mr H as a result.

Conclusion

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.

Putting things right

Having found that Mr and Mrs 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 Mr H 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 they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and Mr H therefore not entered into the Credit Agreement, provided Mr and Mrs H agree to assign to the Lender their Fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs H were existing Vacation Club members, and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had a number of Vacation Club points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs H not purchased Fractional Club membership, they 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 and Mrs H from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

So, here's what the Lender needs to do 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 and Mrs H's Fractional Club annual management charges paid after the Time of Sale and what their Vacation Club 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 and/or Mrs H used or took advantage of; and

   ii. The market value of the holidays* Mr and/or Mrs H took using their Fractional points *if* the points value of the holiday(s) taken amounted to more than the total number of Vacation Club points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club members. 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 H took a holiday worth 2,550 Fractional points and they would have been entitled to use a total of 2,500 Vacation Club 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 Vacation Club 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 and Mrs H'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/or Mrs H 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 H a certificate showing how much tax it's taken off if he asks for one.

My final decision

I uphold this complaint against Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance and direct it to calculate and pay fair compensation to Mr H 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 14 August 2025.

Chris Riggs
Ombudsman