DRN-4949829

The complaint

Mr N'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 N purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 10 March 2015 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 1,800 fractional points at a cost of £14,016 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr N 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 N paid for his Fractional Club membership in part by taking finance of £9,016 from the Lender (the 'Credit Agreement').[1]

Mr N – using a professional representative ('PR') – wrote to the Lender on 11 June 2018 (the 'Letter of Complaint') to complain about his Fractional Club membership. The Letter of Complaint read (in full):

> "*Our clients bought into [the Supplier] in 2014 to save money on foreign holidays and also because they were told that buying into Fractional Points was a definite investment as the Resort would be sold within 19 years and they would make a substantial profit on their investment. They returned in November 2015 when they were subjected to a very long presentation to get them to invest further.*
> *They spent a further £14016 paying £5000 by Bank Transfer and, again using your finance.*
>
> *They were also told that the maintenance fees would not increase (a blatant lie) and that they were joining an exclusive members only club which would always maintain the very highest standards. In fact, the maintenance fees have increased yearly. It is also far from exclusive as the holidays at [the Supplier's resorts] are advertised and freely available to anyone [online] and at a much cheaper rate than the maintenance fees our clients are paying. Also, we would draw your attention to Clause 4 of the Member Declaration (highlighted) which clearly states they have no intention of selling the resort*
>
> *Our clients wish to make a claim under Section 75 of the Consumer Credit Act of 1974.*
> *We await your comments with interest.*"

[1] Although Mr N took out the Fractional Club membership with another, as the Credit Agreement was in his sole name, only he is able to bring this complaint to our service. Given that, I will refer to Mr N throughout.

The Lender dealt with Mr N's concerns as a complaint and issued its final response letter on 30 August 2018, rejecting it on every ground. In doing so, it noted that it had only provided a loan in 2015 to fund Fractional Club membership from the Suppler and not any earlier purchase.

Mr N then referred the complaint to the Financial Ombudsman Service. It was assessed by an investigator who, in November 2023, having considered the information on file, rejected the complaint on its merits.

Mr N disagreed with the investigator's assessment and so the complaint has been passed to me for a decision. In doing so, PR asked for an ombudsman to review the complaint, taking into account the judgment in *R (on the application of Novuna 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) ('*Novuna & BPF v FOS*'). It was argued that the Fractional Club membership did not offer any additional benefits over the rights Mr N already had under his earlier membership, but with a shorter duration. Given that, it was alleged that the Fractional Club amounted to a collective investment scheme ('CIS') and the sale of such a CIS rendered the associated debtor-creditor relationship unfair as defined by section 140A.

In July 2024, I issued a provisional decision, rejecting Mr N's complaint. I invited both parties to respond to what I had said, but neither party responded. An extract of that decision reads:

> *"I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.*
>
> *And having done that, I do not think this complaint should be upheld.*
>
> *But 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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.*
>
> *What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.*
>
> ***The legal and regulatory context***
>
> *In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4 R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when appropriate), what I consider to have been good industry practice at the relevant time.*
>
> *I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:*
>
> - *The CCA (including Section 75 and Sections 140A-140C)*
> - *The law on misrepresentation*
> - *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').*
> - *Unfair Terms in Consumer Contracts Regulations 1999*

- *Consumer Protection from Unfair Trading Regulations 2008*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area)*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel')*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith')*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney')*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan')*
    - *Novuna & BPF v FOS.*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And 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').

The evidence provided on behalf of Mr N

Before I consider the merits of the complaint, I think it is helpful to set out what I have seen to substantiate the allegations made. Alongside the contractual documentation provided from the Time of Sale, Mr N's position is set out in two documents – the Letter of Complaint and an email from PR that it says is a write up of a note from an interview it conducted with Mr N at his home.

The Letter of Complaint does not set out in much depth what it is the complaint is actually about, but refers to two sales, one in 2014 and one in 2015. The sale in 2015 is said to have taken place in November, but I am satisfied it related to the sale funded by a loan from the Lender, as it gives the correct purchase price of £14,016. So I think it most likely the date of November 2015 is simply a mistake and PR refers to the March 2015 sale. Having read the letter, I think Mr N alleged that he was told the 2014 membership was an investment and the complaint about the 2015 sale was primarily that the maintenance fees associated with the membership would not increase and that the Fractional Club was 'exclusive'.

The email from PR, said to be based on a note from its interview with Mr N, does not greatly assist me in understanding his complaint. It does not set out to which purchase his concerns relate and does not set out any recollections from Mr N himself about the sale. The vast majority of this email refers to Mr N having being sold a membership as an investment. But in the Letter of Complaint it was the earlier membership that appears to have been allegedly positioned in that way and not the one I am considering as part of this complaint. Also, surprisingly, this email does not refer to any allegation that the maintenance fees increased or that Mr N was told his membership was 'exclusive', both things raised in the Letter of Complaint. Finally, this email is written by PR and does not contain any of Mr N's own memories of the sale set out in his own words. Having considered everything, I place little evidential weight on PR's email. But, given what PR has said, I will also consider whether there is enough for me to conclude that Mr N's 2015 Fractional Club membership was sold to him as an investment and, if so, what the effect of that was.

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

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr N could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I am satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr N at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership was 'exclusive' and that maintenance fees would not increase and it is alleged that these things were not true.

It is possible that a representation that accommodation within the resorts available to Fractional Club members was only available to members would have been a misrepresentation if that was found to be untrue. The Supplier has said that the type of membership Mr N actually took in 2015 was 'exclusive', in that it offered accommodation in a type of apartment only available to members of that particular type of membership. But I have not seen anything to suggest that Mr N was told that resorts more widely were only available to the Supplier's members and no such assurance appears in the contractual documentation. Further, by the Time of Sale, Mr N had been a member with the Supplier for two years, and it has not been explained when became aware that some non-members were able to stay at the Supplier's properties – it appears Mr N had the opportunity to realise non-members were able to use the Supplier's resorts before he took out their Fractional Club membership. On balance, I am not satisfied that he relied upon any misrepresentation that the Supplier's resorts were exclusively available only to its members.

PR has said that the Supplier had no intention of ever selling the Allocated Property and pointed to Clause 4 of the Member's Declaration. That clause read:

> *"We understand that [the Supplier], the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or Vacation Club Points) or act as an agent in the sale other than as a trade in against future property purchases (see Paragraph 11 below)"*

However, that clause does not mean the Supplier will not sell the Allocated Property at the end of the membership period, rather it says that the Supplier does not buy back memberships from its members, nor does it run a membership resale programme on their behalf. In fact, the scheme rules set out in detail how the sale of the Allocated Property was to be handled. So I disagree that it was misrepresented that the Allocated Property would be sold in the future.

Mr N has said that he was told that the maintenance fees would not increase, which was untrue, however Mr N has provided anything to show there had actually been any increase. Mr N has not explained what was said, so I am not able to make any finding based on the Letter of Complaint alone on either what he was told or whether that turned out to be untrue. I have considered the documentation available at the Time of Sale, but nothing in that suggests that any representation was made that maintenance fees would remain the same over the duration of Fractional Club membership. In fact, the Fractional Club rules set out how the fees would be calculated and suggested they could well increase every year. On balance, I cannot say any such representation was made.

Further, as there is nothing else on file that persuades there were any false statements of existing fact made to Mr N by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons he alleges.

For these reasons, therefore, I do not think the Lender is liable to pay Mr N any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

PR has asked our service to consider whether the credit relationship between Mr N and the Lender was unfair under Section 140A of the CCA. Although that did not form part of the original Letter of Complaint, that was something our investigator considered and the Lender has not said it should not have been looked at in that way. So I have considered this further.

As Section 140A of the CCA is relevant law in the context of this complaint, I do have to consider it. So, in arriving at a fair and reasonable outcome to this complaint, it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Mr N and the Lender.

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."

The Lender does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr N's membership of the Fractional Club 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.140(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 Novuna & 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 v British Credit Trust Limited [2014], 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.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in Plevin made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

However, an assessment of unfairness under Section 140A is not 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 v Patel [2009] EWHC 3264 (QB) (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 is not 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.

I have considered the entirety of the credit relationship between Mr N and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. I will explain why. When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me from both parties, including the Supplier's sales process – which includes:

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.*

I have then considered the impact of (1) and/or (2) on the fairness of the credit relationship between Mr N and the Lender.

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

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

Mr N's complaint about the Lender being party to an unfair credit relationship was made by PR on the basis that Fractional Club membership had been sold to him as an investment. This allegation was first made in November 2023, some five years after Mr N's complaint was first made. I have considered that further.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

PR has argued that the Fractional Club was a CIS and that led to an unfair debtor-creditor relationship. However, Mr N acquired holiday rights when joining the Fractional Club, so it met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. And it also meant it did not meet the definition of a CIS, so PR is mistaken in its argument on this point (see paragraphs 39-54 in Novuna & BPF v FOS).

However, Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club 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 PR now says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Novuna & 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 N's share in the Allocated Property clearly, in my view, 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 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 does not 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 the sale of 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 N 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 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.

When PR first complained, it said Mr N bought into an earlier membership because he was told it was an investment. But it did not specifically allege that Mr N was told his 2015 Fractional Club membership was sold him in the same way. Further, PR has not set out in any greater detail why Mr N's 2015 Fractional Club membership was sold as an investment or what he was told that led him to believe it was an

investment. So I have also considered, amongst other things, the paperwork provided from the Time of Sale, as well as what I know about how the Supplier sold memberships at that time.

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 N, the financial value of his share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr N as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And while that was not alleged by either Mr N not his PR when he first complained, I accept that it's possible that Fractional Club membership was marketed and sold to him as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

So, I have taken all of that into account. However, on my reading of the evidence provided and the Mr N's initial recollections of the sales process at the Time of Sale, that is not what appears to have happened at that time. At no point did he say or suggest that the Supplier led him to believe that his Fractional Club membership would lead to a financial gain (i.e., a profit).

So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mr N as an investment, in light of its more recent email following the outcome of Shawbrook & BPF v FOS, I do not recognise that assertion in Mr N's initial Letter of Complaint.

Indeed, Mr N's Letter of Complaint was put together much closer to the Time of Sale and is, in my view, better evidence of what he remembers of the sales process at that time and why he was unhappy with it, rather than the recent email. After all, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale, it is difficult to understand why PR made no mention of it in the Letter of Complaint. And with that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led him to believe that membership offered him the prospect of a financial gain (i.e., a profit), given his evolving version of events.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way given what I have already said about Mr N's recollections of the sales process at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was there an unfair relationship between the Lender and Mr N?

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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

> *"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"*

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

> *"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. […]*
>
> *[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"*

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr N and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (deemed to be something done by the Lender under section 140(1)(c) of the CCA) lead him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I have already said, there was no suggestion in Mr N's initial Letter of Complaint that the Supplier led him to believe that the Fractional Club membership was an investment from which he would make a financial gain nor was there any indication that he was induced into the purchase on that basis. Further, Mr N did not provide any evidence himself, and in the absence of any direct evidence from him, it is difficult to say that he was induced into the purchase on the basis that Fractional Club membership was a way of making a profit or financial gain.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr N's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). And for that reason, I do not think the credit relationship between Mr N and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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

Mr N has complained that his maintenance fees have increased since the Time of Sale, which was not something he had been told would happen. So I have thought about what information he was given about the fees at the Time of Sale and whether a lack of information provided then could have caused an unfair debtor-creditor relationship.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr N when he purchased membership of the Fractional Club at the Time of Sale. One of the main aims of the Timeshare Regulations was to enable consumers to understand the financial implications of their purchase so that they were put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they did not fully understand at the time of contracting, that may lead to the Timeshare Regulations being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I have said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant. Here, Mr N has not set out what, if any, increases there have been or why, given his personal circumstances, such increases caused any unfairness. So I am unable to make any assessment of the impact of any increase on her.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's provision of information about maintenance fee increases at the Time of Sale are likely to have prejudiced Mr N's purchasing decision at the Time of Sale and rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA.

Moreover, as I have not seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr N was unfair to him because of an information failing by the Supplier, I am not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I do not think the credit relationship between the Lender and Mr N was unfair to him for the purposes of Section 140A. And taking everything into account, I think it is fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr N's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

If there is any further information on this complaint that Mr N wishes to provide, I would invite him to do so in response to this provisional decision."

What I have 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.

As neither party has responded to my provisional decision, I see no reason to depart from my earlier findings.

My final decision

I do uphold Mr N's complaint against Mitsubishi HC Capital UK PLC, trading as Novuna Personal Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 9 September 2024.

Mark Hutchings
Ombudsman