DRN-5120652

The complaint

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

What happened

Mr and Mrs P purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 26 October 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,520 fractional points at a cost of £34,286 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £6,775 for membership of the Fractional Club.

Mr and Mrs P had been existing customers of the Supplier since 2003 when they purchased 1071 Vacation Club (non-fractional) points. Later the same year they upgraded to 'gold level' membership and purchased a further 1000 points. In 2011, they upgraded to 'platinum level' membership and took their total points holding up to 2501 points, after they purchased another 430 points.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs P 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 and Mrs P paid for their Fractional Club membership by taking finance of £6,755 from the Lender in Mr P's name (the 'Credit Agreement'). Mr P paid a lump sum to settle the loan in full on 21 October 2015, having made 10 monthly repayments.

Mr P – using a professional representative (the 'PR1') – wrote to the Lender on 17 November 2016 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.
5. The Credit Agreement was rescindable as a result of the Supplier's breach of Spanish law.

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

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

1. told him that Fractional Club membership was an "investment" and "valuable" when that was not true because it is worthless.
2. told him that Fractional Club membership "retained a resale value", "was a desirable", and "worth a lot of money on the resale market" when that was not true because she could not resell it or derive any value from it.
3. told him that he was buying an interest in a specific piece of "real property" when that was not true and he now has to pay perpetual maintenance fees on a property he does not own.

Mr P says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and 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 P.

Section 75 of the CCA: the Supplier's breach of contract

Mr P says that he found it difficult to book the holidays he wanted, when he wanted.

As a result of the above, Mr P says that he has a breach of contract claim against the Supplier, and 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 P.

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

The Letter of Complaint set out several reasons why Mr P 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:

1. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. He was pressured into purchasing Fractional Club membership by the Supplier.
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
4. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr P's concerns as a complaint and issued its final response letter on 3 July 2017, rejecting it on every ground.

Mr P then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr P later appointed a different professional representative ('PR2') to represent his case. A second Investigator reviewed Mr P complaint after the judgment in *R (on the application of Novuna Bank Ltd) v Financial Ombudsman Service Ltd; 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*"). He also rejected the complaint on its merits.

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

Having considered everything, I came to a different conclusion to our investigator and I thought Mr P's complaint ought to have been upheld. So I issued a provisional decision, setting out my thoughts and invited both parties to respond with anything further they wished me to consider before I issue a final decision. An extract of that provisional decision reads:

"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.

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 Regulations.*
- *The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').*
- *The CPUT Regulations.*
- *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).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *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 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').

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and

reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr P 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 Mr P's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- *the Supplier misrepresented the Fractional Club membership and breached the Purchase Agreement so the Lender ought to have accepted and paid the claim under Section 75 of the CCA;*
- *the Credit Agreement was unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity;*
- *the Credit Agreement was rescindable as a result of the Supplier's breach of Spanish law.*

This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr P in the same or a better position than he would be if the redress was limited to misrepresentation/breach of contract etc.

What is more, Mr P's membership pricing summary lists the full purchase price (cash price) as £34,286 – i.e., exceeding the upper limit to claim under Section 75. This means the Lender wouldn't be liable to pay Mr P any compensation for the alleged breach of contract and/or misrepresentations of the Supplier.

In any event, 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.

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr P and the Lender was unfair.

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 doesn't 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 P'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, 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."[1]

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 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.

I have considered the entirety of the credit relationship between Mr P and the Lender along with all of the circumstances of the complaint and 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 P and the Lender.

<u>The Supplier's breach of Regulation 14(3) of the Timeshare Regulations</u>

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

The Lender does not dispute, and I am satisfied, that Mr P'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 P says that the Supplier did exactly that at the Time of Sale – saying the Supplier represented that the product was "an investment", that it was "enriching in that future sales would make me/us money", "a product that retained a resale value", and "a product that would go up in value".[2]

Provided alongside the initial complaint was a witness statement signed and dated by Mr P on 30 April 2017 ("the First Witness Statement"). I must, however, approach the First Witness Statement with a degree of caution given its generic nature and because I have seen very similar points presented in other cases referred to this Service by PR1. What's more, Mr P refers to 'similar fact evidence' from other consumers represented by PR1 – which I take to mean pooled evidence – and I cannot be sure how much of the First Witness Statement is referring to his recollections, and how much refers to those of others. I also note inconsistencies contained within the First Witness Statement – for example, it refers to the presentation commencing with a tour of the property within which Mr P would acquire a fractional share. But the Allocated Property was in Málaga, Spain and the sales presentation took place in Cornwall, UK. This is certainly unhelpful but still, I don't think it enough to undermine the complaint in its entirety. Further, I do not think it would be fair or reasonable to discount all of Mr P's evidence simply due to the poor presentation of his complaint by PR1. But I do note that Mr P did say the Supplier presented Fractional Club membership as an investment.

Mr P went on to provide a further statement ("the Second Witness Statement"), signed and dated 19 December 2023 – this was prepared and presented by PR2. This statement appears to me to be more in Mr P's own voice and, in respect to the purchase that forms the subject of this decision, Mr P said:

<u>Third and final purchase</u>

7) *On the 26th of October 2014 I was approved by the resort to attend the presentation hall as there were changing in how the resort would operate in the future. [The Sales Representative] explained that the had developed a new type of timeshare and existing members were being invited to a meeting so it could be fully explained to them. They explained that a new club was created however this timeshare was an investment model whereby the people in the club would own a part of the property which they occupied from time to time. By owning the property, it would be sold in around 13 years and when sold we would receive the resale price which on account of inflation would deliver us a profit when sold. He explained that each property within the resorts had its own deeds and the share in the property would be split into 52 weeks therefore the more weeks you owned the money you would make when we wanted to resell them. At the same time he also explained that CLC wanted an Option to buy our property in the future and would match any price were given by others.*

[2] These words and phrases appeared in the Letter of Complaint and Mr P's First Witness Statement and it was alleged they were said by the Supplier.

8) He explained that fractional ownership was no different to a couple jointly owning their own home and I all cases they would own a half share each were as fractions ownership in holiday resorts you could own 1/52 of the property or more parts whereby when it was resold, we would make more money.

9) The way it was being sold was that we could holiday and make money in the long term and all the holiday resort and maintenance of the apartments would be managed and updated by CLC to ensure the investment potential would rise.

…

14) The entire event consisted of us listening to [the Sale Representative] telling us haw investing into holiday property was very rewarding in the long and short term. He exampled that every time we have bought in the past, we made money and as this was property-based assets it would only bring better rewards in the future. [sic]

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

(1) *There were two aspects to his Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.*
(2) *He was told by the Supplier that he would get his money back or more during the sale of Fractional Club membership.*
(3) *He was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.*

But I'm conscious that the Second Witness Statement was written nearly ten years after the Time of Sale and from experience I am aware that memories can fade or change over the passage of time. I'm also conscious that there's a real risk that Mr P#s memories were influenced by the judgement in Novuna & BPF v. FOS which considered a similar sale and was widely publicised after it was handed down. Further, I am conscious of what was said by Mrs Justice Thornton in the judgment in Smith v. Secretary of State for Transport [2020] EWHC 1954 (QB), where it was held, at para 40:

"In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial."

So I have considered all of the other available evidence in this complaint to see whether it points to Mr P being sold Fractional Club membership by the Supplier as an investment.

Part of that evidential matrix is what it was that Mr P actually bought. At that Time of Sale, he had 2,501 points, which he exchanged for 2,520 fractional points. The purchasing power in respect of exchanging points for holidays was the same between the two types of points – in other words, Mr P only acquired a very small increase in his holiday purchasing points (0.7% increase) for £6,775. This small increase points to the purpose of the upgrade being for something other than increased holiday rights, in other words, that it was possible Mr P bought it for the investment potential.

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 P'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 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 P 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 P, 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 P as an investment.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr P allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make him a financial gain and/or would retain or increase in value.

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr P or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn*
(2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

1. *a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*

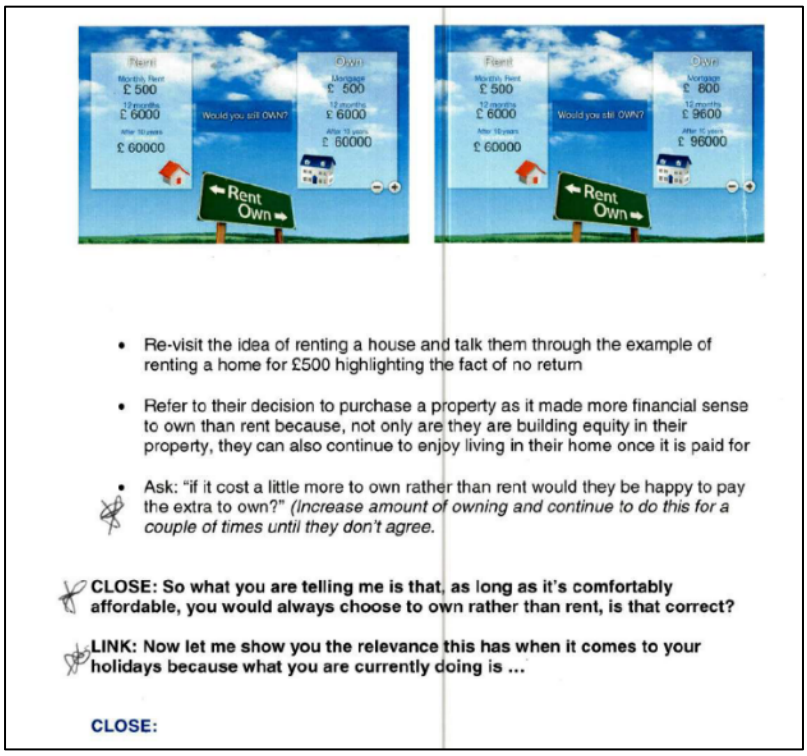
2. *screenshots of an Electronic Sales Aid (the 'ESA'); and*
3. *a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')*

Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Fractional Club membership; and*
(2) *how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr P when upgrading from his non-fractional membership.*

The "Game Plan" on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of the Fractional Club worked and what it was intended to achieve.

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners "are building equity in their property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth over time.

And to consumers (like Mr P) who were existing members of The Supplier's non-fractional holiday club, who by virtue of joining the non-fractional holiday club had already bought into the idea of "renting" from The Supplier over the long-term, the proposition of paying "a little more to own" is likely to have got their interest. More so in Mr P's case, because he was later offered a one-for-one points exchange for his existing membership together with a substantially (circa 20%) discounted purchase price.

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how Fractional Club membership worked. And, on pages 41 and 42 of the Fractional Club Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar***
> *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*
>
> *SUMMARISE LAST SLIDE:*
> *FPOC equals a passport to fantastic holidays for 19 years* ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
> *[…]*
>
> *LINK: Many people join us every day and one of the main questions they have is* ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*
> *[…]*
>
> *"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……...****Would you mind explaining to them how their interest will be protected over the next 19 year[s]****?"*
> *(My emphasis added)*

Mr P, as a member non-fractional holiday club since 2003, would've been very familiar at having to pay an annual maintenance change as well as an annual membership fee. The Fractional Club Training Manual at page 61 said this:

> *"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.*
> *[…]*
>
> *CLOSE:* ***I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.*** *So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*

(My emphasis added)

I think a statement such as the one above would lead consumers (like Mr P) who were existing members of The Supplier's non-fractional holiday club, to believe that they too would benefit from the annual maintenance change (via their share of the sale proceeds), and not solely the resort itself.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr P the financial value of the proprietary interest he was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

So, 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 Novuna & BPF v FOS when, 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*

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[3] 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

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."

I think the Supplier's sales representatives were 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 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 presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr P 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 them either implausible or hard to believe when they say they were told: that the product was "an investment", that it was "enriching in that future sales would make me/us money", "a product that retained a resale value", and "a product that would go up in value". On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr P was led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr P 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.

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 P and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr P, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

For this reason, I've also thought about the terms of the bargain. Mr P acquired a very small increase in holiday rights when he took out Fractional Club membership, a shorter membership term and the investment element as set out above. So I've considered all of these aspects further. For the £6,775 Mr P ended up paying for membership of the Fractional Club, he gained an extra 19 points rights (in addition to his 2,501 existing (non-fractional) rights which were exchanged on a one for one basis to Fractional Club points rights) and an 8.35% share in the sale proceeds of the allocated property. It strikes me that had Mr P had been seeking to only increase his points rights by an extra 19 points, he could have done so more economically by extending his existing membership. The nominal additional purchasing power these 19 points rights represented, noting his existing 2,501 were already sufficient for Mr P to qualify for the platinum level of membership, begs the question as to why he would seek to increase his holding and what benefit he would hope to gain.

Further, I've not seen any evidence that points to Mr P wishing to have a shorter membership term, rather the evidence points to the investment element being a major factor in his purchasing decision.

So, I think the prospect of a financial gain from Fractional Club membership was the more important and motivating factor when he decided to go ahead with his purchase – and my reading of Mr P's testimony doesn't suggest otherwise. That doesn't mean he was not interested in holidays. His use of his existing membership demonstrates that he quite clearly was. And that is not surprising given the nature of the product at the centre of this complaint. But I have not seen enough evidence to persuade me that the prospect of a financial gain from Fractional Club membership was so insignificant, in his view, compared to the additional holiday rights that came with membership, that his "desire" for 19 extra points rights rendered the Supplier's breach of Regulation 14(3) unimportant to the decision he ultimately made.

Mr P 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 have not seen enough to persuade me 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 P under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr P 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 P agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can't be achieved.

I think Mr and Mrs P would have kept their membership of the non-fractional holiday club, and would have kept the same amount of non-fractional points rights as they exchanged for fractional points rights. Mr and Mrs P gained 19 additional points rights as part of their Fractional Club membership – an increase of 0.75%. I don't know whether they made use of these or not, but given their nominal value, and out of pragmatism, I think it's fair to assume that the holiday rights they had with the Supplier after the Time of Sale were effectively the same as they have before then. It follows that any holidays they took under the Fractional Club membership were holidays they would have been able to take using their existing membership. Therefore, I don't think fair compensation needs to consider the value of any holidays Mr and Mrs P took as members of the Fractional Club, as they would have taken these under their previous membership. If either party feels strongly about this, they can let me know in their responses to my provisional decision.

Mr and Mrs P also would have needed pay both an annual membership fee and an annual management charge as members of the non-fractional holiday club. The annual management charge Mr and Mrs P paid as members of the Fractional Club was calculated differently. But I don't think the amount they paid compared to the amount they would've paid, had they stayed members of the non-fractional holiday club, would've have been significantly different. So, again out of pragmatism and reflecting the circumstances of this particular complaint, I don't think fair compensation needs to consider the management charges Mr and Mrs P paid as members of the Fractional Club. Again, if either party feels strongly about this, they can let me know in their responses to my provisional decision.

Mr P settled the Credit Agreement in 2015 and so I doubt very much that any trace of it remains on his credit file today, some nine years later. So, I don't think the Lender needs to take any action to correct the information it shared with the Credit Reference Agencies about Mr Ps loan.

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

(1) The Lender should ask the Supplier to reinstate Mr and Mrs P's existing membership they had prior to the purchase in question. If Mr and Mrs P don't want their existing membership reinstated and Mr P is happy to accept this redress without reinstatement, the Business can ignore this step. Mr P should let me know in his response to this provisional decision. If Mr P would like his existing membership reinstated when it isn't possible, I will, of course, consider what else (if anything) the Business needs to do.

(2) The Lender should refund the repayments Mr P made under the Credit Agreement, including the sum he paid to clear the outstanding balance. The Lender can deduct the value of any promotional giveaways that Mr P used or took advantage of.

(3) 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.*

(4) If Mr and Mrs P'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 Mr P against all ongoing liabilities as a result of their Fractional Club membership.

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

Responses to my provisional decision

Novuna replied and whilst it didn't agree entirely with my findings, it agreed with the overall decision to uphold Mr P's complaint.

PR2 also replied and agreed with the overall decision to uphold Mr P's complaint but made a detailed submission on the issue fair compensation. In summary, PR2 disagrees with the redress direction requiring Novuna to ask the Supplier to reinstate Mr and Mrs P's Vacation Club (non-fractional) membership because it considers the direction unenforceable. The remedy it seeks as a fair alternative is a cash sum equal to the trade-in value Mr and Mrs P got towards the cost of joining the Fractional Club. PR2 accepted the remaining redress direction.

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.

I have only included a brief summary of PR2's further submission above and the parties should note I have not responded to every individual point raised – I am not required to do this – but I reassure both parties I have reviewed again all the available evidence and submissions and focused on what I consider to be relevant to resolving this matter.

I have not been provided with anything further to consider on the fundamental decision to uphold Mr P's complaint, so I see no reason to now depart from my provisional findings other than to reconsider fair compensation following PR2's submission.

PR2 explained that Mr P considers his relationship with the Supplier as irretrievably broken down. It also considers there to be a risk that the earlier membership has fundamentally changed in terms of what it has to offer. Mr P is unwilling to accept such risk. So, it is clear Mr and Mrs P don't want their existing membership reinstated.

PR2 is seeking an alternative remedy in lieu of the reinstatement of Mr and Mrs P's original membership. PR2 submits that a cash sum equal to the trade-in value Mr and Mrs P were given for their original membership towards the cost of joining the Fractional Club would be a fair remedy. I disagree the remedy PR2 is seeking is a fair one – I'll explain why.

While the Supplier gave Mr and Mrs P credit of £27,511 for their Vacation Club membership, in the absence of any evidence to suggest otherwise, that credit wasn't the equivalent of cash. It was a deduction that simply reflected the fact that the starting price of Fractional Club membership was a commercial opening position from which the Supplier would and could profitably offer deductions or discounts such as that granted to Mr and Mrs P.

After all, had Mr and Mrs P tried to sell their Vacation Club membership without joining the Fractional Club, I've seen nothing to demonstrate that they would have got anything like £27,511 for it given its objective value and the state of the secondary timeshare market at that time.

What's more, the purchase price Mr and Mrs P paid for their original membership to the Supplier's Vacation Club was akin to one-off membership fees paid by those who join, for instance, a golf club and whose ongoing access to that club is predicated on keeping up with its ongoing costs – like the Vacation Club annual management charges. Indeed, under their original membership agreement, Mr and Mrs P weren't entitled to any sort of refund of what they first paid for membership if they were to relinquish it. In practice, the purchase price was lost to the Supplier the moment Mr and Mrs P's 14-day rescission period expired, regardless of whether they chose to take advantage of the membership benefits or not.

With all this in mind, I think fair compensation should not now place Mr and Mrs P in a better position than the one they would be, had they not joined the Fractional Club. So I'm not convinced that a cash award is merited in lieu of the reinstatement of Mr and Mrs P's original membership, because this would place Mr and Mrs P in a better position.

My final decision

For the reasons set out above, I uphold this complaint and direct Mitsubishi HC Capital UK PLC, trading as Novuna, to compensate Mr P in line with everything I've said above, which in summary, includes taking the following steps:

(1) The Lender should refund the repayments Mr P made under the Credit Agreement, including the sum he paid to clear the outstanding balance.

(2) The Lender can deduct the value of any promotional giveaways that Mr P used or took advantage of.

(The difference between (1) and (2) are the 'Net Repayments')

(3) 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.

(4) If Mr and Mrs P'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 Mr P against all ongoing liabilities as a result of their Fractional Club membership.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 29 November 2024.

Stefan Riedel
Ombudsman