DRN-5142980

The complaint

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

As the finance agreement was in Mr N's sole name, he is the only eligible complainant here. But as the timeshare in question was bought in the joint names of Mr and Mrs N, I shall refer to both of them where appropriate in this decision.

What happened

Mr and Mrs N purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 21 July 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £12,251 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs N 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 N paid for their Fractional Club membership by taking finance of £12,251 from the Lender in his sole name (the 'Credit Agreement').

On 31 May 2016 Mr and Mrs N traded in their Fractional Club membership when they purchased further fractional points from the Supplier. This new membership was purchased using finance from a different lender, and this new loan consolidated, and so settled, the outstanding balance on the Credit Agreement that Mr N entered into for their purchase of Fractional Club.

Mr N – using a professional representative (the 'PR') – wrote to the Lender on 24 May 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA (which the Lender failed to accept and pay).
2. 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 decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

[1] At the time the finance was agreed the Lender was trading as Hitachi.

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

- Told them that Fractional Club membership had a guaranteed end date, specifically after 19 years, after which they would have no further legal liability to the Supplier under, or in respect of, the Scheme, when that was not true.
- Told them that they were buying an interest in a specific piece of "real property" when that was not true.
- Told them that Fractional Club membership was an "investment" when that was not true.

Mr N 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 him.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr N says that the Supplier breached the Purchase Agreement because they found it difficult to book the holidays they wanted, when they wanted. He also says the standard of available accommodation was not what they were promised, and that the resorts were not exclusive to members.

As a result of one or more of the above, Mr N 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 him.

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

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

- The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership, were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- 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.
- They did not receive a copy of the Information Statement prior to entering into the Purchase Agreement or, if they did, they did not have adequate time to review the Information Statement before signing the Purchase Agreement.
- They were pressured into purchasing Fractional Club membership by the Supplier.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr N's concerns as a complaint and issued its final response letter on 13 August 2018, rejecting it on every ground.

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

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, but thought there was some extra explanation for the reasons to not uphold Mr N's complaint which hadn't previously been explored. So I sent my initial thoughts to both Mr N and the Lender in the form of a Provisional Decision (the 'PD'), and invited all parties to respond with any new evidence and arguments if they wished to.

My Provisional Decision

In my PD I said:

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 Consumer Rights Act 2015.*
- *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').*
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').*

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').

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I do not currently 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.

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'm 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 which I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs N were told that the Fractional Club membership had a guaranteed end date. But I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Mr and Mrs P are included.

Mr N says that their Fractional Club membership had been misrepresented by the Supplier because they were told by the Supplier that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs N's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Mr N also makes an allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had they been told their Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

What's more, as there's nothing else on file that persuades me that there were any false statements of existing fact made to Mr and Mrs N by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons alleged.

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

I've already summarised how Section 75 of the CCA works and why it gives Mr N a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mr N says that he and Mrs N could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that he considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs N states that the availability of holidays was/is subject to demand. It is also clear that Mr and Mrs N had this Fractional Club membership for less than one year before trading it in, and they haven't said when they were unable to book a holiday due to the lack of availability. I accept that it is possible that they may not have been able to take certain holidays, but I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr N also says that the quality of the available accommodation was not as good as they were led to believe it would be. I understand that the 'show apartment' they saw when they bought their Fractional Club membership was of high quality, but I've not seen anything in the contractual documentation which sets out what Mr and Mrs N could expect, and how what they actually got was a breach of the contract. And as I've said, their Fractional Club membership was only in existence for less than one year, so any breach of the contract must have happened during this time. And it appears that the only holiday Mr and Mrs N took whilst members of this Fractional Club was from a bonus free week they received when they made the purchase. And they have said the following about this week:

> *"We booked our free week and went back to Fuengirola again and took our daughter, her partner and 2 grandchildren in May 2016. This time we were booked into a luxury apartment called Santa Cruz Suites, which had a Jacuzzi bath."*

So given what they have said, I find it hard to understand how the availability and quality of accommodation was inferior to what they feel they ought to have received.

Mr N says that the Supplier's resorts were not exclusive to members as they had been led to believe they would be. However, I cannot see that the contractual documentation sets out that the resorts will be exclusive, and in any event, I find it hard to believe that Mr and Mrs N would have been told something like this by the Supplier, because Mr and Mrs N themselves were staying in the resort as non-members when they bought their Fractional Club

membership.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr N any compensation for a breach of contract by 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?

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs N was misrepresented and/or breached by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr N also says that the credit relationship between him and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that he has concerns about. It is those concerns that I explore here.

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 Mr N 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 and Mrs 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 Shawbrook & BPF v FOS at paragraph 135:

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

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

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

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

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

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

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

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

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. 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;*
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 N and the Lender.

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

Mr N's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr N and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons he gave for his Section 75 claim for misrepresentation. But, like my findings on the alleged misrepresentations, given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Mr N says that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and he has not provided a credible explanation for why they did not cancel their membership during that time, if, as he now asserts, they only made the purchase due to undue pressure from the Supplier at the Time of Sale. Moreover, they went on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs N made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR says that the right checks weren't carried out before the Lender lent to Mr N. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr N was actually unaffordable before also concluding that he lost out as a result, and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr N. If there is any further information on this (or any other points raised in this provisional decision) that Mr N wishes to provide, I would invite him to do so in response to this provisional decision.

I'm not persuaded, therefore, that Mr N's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he says that his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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?

The Lender does not dispute, and I am satisfied, that Mr and Mrs N'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 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 Mr and Mrs N say, in a statement they have submitted to this Service dated 10 August 2017, that the Supplier did exactly that at the Time of Sale. As far as is relevant, they said:

> *"[The Supplier] said that we would be buying a Fractional Property. We would own 1/52nd of this house…We would pay the maintenance on this property of about €1,000 per year, but were not told I (sic) would go up every year. We assumed it would go up with inflation.*
> *…*
> *We were told we would own the property for 19 years. The property would then be sold and we would get back "whatever we could get for it".*

And the PR said similar in the Letter of Complaint, so that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs N's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs N, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. From the way Mr and Mrs N have described what they were told by the Supplier: "…and we would get back "whatever we could get for it"" it seems the Supplier was being careful not to imply that Mr and Mrs N were likely to make a profit. And there were also disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs N as an investment.

For example, in the Member's Declaration document it states:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that the Supplier makes no representation as to the future price or value of the Fraction."

And in the Information Statement, it states:

"Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." And: "The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. The Supplier makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorised by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers to determine their own specific investment needs; (D) no warranty is given as to any future values or returns in respect of an Allocated Property."

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the sale of the Allocated Property weren't guaranteed.

Yet I think it would be fair to say, that while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

And in addition, 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. So, I accept that it's possible that their Fractional Club membership was marketed and sold to Mr and Mrs N 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.

But even if the Supplier did breach Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club memberships to Mr and Mrs N, I do not think it necessary to make a finding on this point. That is because, given Mr and Mrs 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 the credit relationship between the Lender and Mr N rendered unfair?

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)[3] led them to enter into the Purchase Agreement and Mr N into the Credit Agreement is an important consideration.

[3] which, having taken place during its antecedent negotiations with Mr N, 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)

It appears Mr and Mrs N were not members of any type of timeshare or holiday club at the time they purchased their membership of the Fractional Club. They were at one of the Supplier's resorts on holiday having accepted a promotional discounted break from the Supplier. So I think it is a fair assumption to make that Mr and Mrs N were interested in holidays.

But as I've already said, there was no suggestion in Mr and Mrs N's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain – in fact, as I've said, it appears from Mr and Mrs N's recollections of what the Supplier told them, it appears that it expressly did not. Nor was there any indication that they were induced into the purchase on that basis.

As regards their motivation to make the purchase of the Fractional Club, they said in their statement:

> *"We were offered lots of incentives, including an iPad. We kept saying no as it would not suit us as [Mr N] has fixed week holidays from work, but they said we would get "any holidays we want" in "5-star accommodation".*
>
> *We decided to buy because we were told we were getting a great deal. We could have luxury holidays at a fixed price. We could share this with our family and grandchildren. We would get our money back in 19 years."*

On my reading of this, Mr and Mrs N's primary motivation for making the purchase was for the quality of the holidays they could get, and that they could go on these with their extended family. And I can see they did this on the first holiday they took after their purchase. And whilst I accept they thought they would get some money back at the end of the membership, from what I have seen I do not think this aspect was material to the decision they ultimately made.

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 and Mrs 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). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). 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

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 and Mrs N when they purchased membership of the Fractional Club at the Time of Sale. But Mr N and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision, or if it did, they did not have time to read it.

But I can see that Mr and Mrs N were provided with the contractual documentation relating to both the sale and ownership of Fractional Club, and the terms relating to the Credit Agreement, because Mr and Mrs N have signed to say they've received and read them. They were also given an iPad which contained copies of the contractual documentation. So I am not persuaded that there was an information failing on behalf of the Supplier here. And although Mr and Mrs N say they felt under pressure and just signed quickly because they wanted to leave, I can't see that they didn't get what they wanted. So even if Mr and Mrs N didn't read all of the contractual documentation prior to signing, I'm not persuaded that the

credit relationship between Mr N and the Lender was rendered unfair for this reason.

The PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the CRA.

One of the main aims of the Timeshare Regulations and the CRA was to enable consumers to understand the financial implications of their purchase so that they were/are 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 didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've 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.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the CRA and the CPUT Regulations are likely to have prejudiced Mr and Mrs N's purchasing decision at the Time of Sale and rendered Mr N's credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA. I say this because I cannot currently see that there is any evidence that any term was actually operated against Mr and Mrs N, let alone unfairly, or that the existence of any specific term, in and of itself, caused unfairness.

Moreover, as I haven't 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'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't 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's 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 Mr N.

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.

The response to my PD

The PR, on Mr N's behalf, did not agree with the provisional outcome, and sent a comprehensive response, all of which I have read and considered. In summary, it said:

- Mr N makes clear that one of the factors in purchasing the Fractional Club was that it was an investment, because he and Mrs N would share in the *"proceeds of the sale".*
- Whilst the investment element was not their only motivation, the judgement in *Shawbrook & BPF v FOS* made clear that it did not need to be*.*
- Mr and Mrs N already had points from the Supplier, so the benefit of the purchase was the *"proceeds of the sale"*.
- Although mentioning them, the Ombudsman has not named the training slides and the contents are not discussed – so it is thought the Ombudsman has not properly taken them into account.
- Mr and Mrs N had already been a client of the Supplier for many years, and the prospect of a financial gain from the Fractional Club was an important and motivating factor when they decided to go ahead with their purchase.
- It is not apparent that fractional membership offered cheaper fees, nor is there anything to suggest that the fees would decrease. Mr and Mrs N say the investment element of the membership was something the salesperson used as a way to overcome these concerns, as they would get money back once the Allocated Property was sold.
- Had they not been encouraged by the prospect of a financial gain, they would not have pressed ahead with their purchase of Fractional Club regardless.
- It is wrong to place too much weight on what Mr and Mrs N said in their statements. It is for the creditor to prove that the facts alleged do not give rise to unfairness, and the Lender has not provided any evidence whatsoever to prove that this is not the case.
- *Shawbrook & BPF v FOS* found that fractional products were sold to consumers as "investments". And the training materials show that the Supplier marketed or sold the fractional products to Mr and Mrs N as an investment.

The PR thought, that overall, the evidence shows that the Lender participated in and perpetuated an unfair credit relationship with Mr N under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, the PR thought it is fair and reasonable that this complaint be upheld.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And I have reconsidered everything afresh, including everything that the PR has submitted in response to my PD. But having done so, I remain satisfied that Mr N's complaint should not be upheld. I'll explain.

The PR has said that given the training that the Supplier's salespersons were given, when taken together with what Mr N has said, it is likely that the Fractional Club was sold and marketed to Mr and Mrs N as an investment, contrary to Regulation 14(3) of the Timeshare Regulations. When coming to my provisional findings I considered the training slides closely. And as I recognised in my PD, and still do, it is *possible* that the Fractional Club was sold and/or marketed to Mr and Mrs N at the Time of Sale as an investment in breach of Regulation 14(3). But as I also explained, in the circumstances of *this* complaint, I did not think that made a difference, as I did not think, even if that had happened, that caused an unfairness in the credit relationship between the Lender and Mr N.

And in response to that point, the PR did not agree. It said that the investment element of the Fractional Club was marketed to Mr and Mrs N as a way to overcome their concerns that the management fees would increase. And as they already had points (having already been clients of the Supplier for many years), the prospect of a financial gain was an important and motivating factor for Mr and Mrs N in their decision to purchase, and they would not have done so had they not been encouraged by the prospect of a financial gain. But I think the PR has misunderstood what has happened here. From the evidence I have seen Mr and Mrs N were not existing clients of the Supplier, and did not own any 'points' when they purchased Fractional Club. They were new members.

So I am not persuaded by this. Having taken everything into account, I remain satisfied that I think it likely that Mr and Mrs N would have pressed ahead with their purchases of Fractional Club regardless of whether it was sold and/or marketed to them as an investment. This is because, like I said in my provisional decision, I think they were motivated by other factors, the main one being the prospect of taking luxury holidays which they could share with their family. Mr and Mrs N said this in their statement:

> *"We were offered lots of incentives, including an iPad. We kept saying no as it would not suit us as [Mr N] has fixed week holidays from work, but they said we would get "any holidays we want" in "5-star accommodation".*
>
> *We decided to buy because we were told we were getting a great deal. We could have luxury holidays at a fixed price. We could share this with our family and grandchildren. We would get our money back in 19 years."*

The PR has said that I should not place much weight on what Mr and Mrs N have said. But it is important that I consider everything, and I consider what Mr and Mrs N say happened and what they were thinking at the time is crucial when trying to establish their motivation for their purchases of the Fractional Club, and whether Mr N's credit relationship was rendered unfair as a result. So I remain satisfied that the statement, setting out their recollections and thoughts, is the best evidence of what happened at the time.

So, in the circumstances of this complaint, and having considered everything afresh, I remain satisfied that there is no reason why it would be fair or reasonable to direct the Lender to compensate Mr N.

My final decision

I do not uphold this 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 11 December 2024.

Chris Riggs
Ombudsman