DRN-5148340

The complaint

Mr K's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Novuna[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 K's sole name, he is the only eligible complainant here. However, as the timeshare in question was bought in the names of both Mr K and Mrs L, I shall refer to both of them where appropriate to do so.

What happened

Mr K and Mrs L purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 10 November 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £10,488 plus £806 for the first year's management charges (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr K and Mrs L 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 K paid for their Fractional Club membership by taking finance of £11,249 from the Lender in his sole name (the 'Credit Agreement').

Mr K – using a professional representative (the 'PR') – wrote to the Lender on 16 May 2018 (the 'Letter of Complaint'). In this letter the PR said:

- The Supplier had misrepresented the true nature of the long-term holiday product.
- The Supplier had applied undue pressure on Mr K and Mrs L to procure their agreement to purchase the Fractional Club.
- The Supplier had failed to ensure compliance and due diligence.
- The Supplier had failed in its duty of care towards Mr K and Mrs L.
- The Supplier had misled Mr K and Mrs L about the quality of the accommodation.
- Mr K and Mrs L had no voting rights, so had no control over if and when the Allocated Property would be sold, so this could be delayed.

The Lender dealt with Mr K's concerns as a complaint and issued its final response letter on 7 August 2018, rejecting it on every ground.

The PR wrote further to the Lender on 15 August 2018 rejecting its response, and adding that:

- Mr K and Mrs L had increased the number of fractional points they held in 2014 as

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

the Supplier had advised them that this increase would enable them to secure the holidays that they wanted, but even after the upgrade they were unable to find availability.

- The resorts were not exclusive as they had been led to believe – non-members were able to book the accommodation.
- They were not told that all fractional owners must agree to the sale of the Allocated Property – had they been told this they would not have made the purchase.

On 12 September 2018 the PR referred Mr K's complaint to the Financial Ombudsman Service where it was considered by an Investigator. And having looked at all the available evidence and arguments, the Investigator did not think Mr K's complaint ought to be upheld. He didn't think it likely that the Supplier had made any misrepresentations at the Time of Sale and didn't think Mr K's credit relationship with the Lender was unfair to him.

Mr K's complaint was then passed to a second Investigator, who asked Mr K if he had made any witness statement in relation to his and Mrs L's purchase of Fractional Club. Mr K replied via email on 30 November 2023 with his recollections. He said, as far as is relevant:

> *"We were at the presentation for about 6 hours, we were promised holidays anytime and anywhere wherever [the Supplier] had resorts or apartments.*
>
> *We were told that the product was an investment that when it comes to the end of the term they will sell and you will get a share.*
>
> *We realised this wasn't for us when we tried on numerous occasions to book a holiday but were told that it was not available. We did ask to come out of it but were told it was too late to change your mind and you will have to find a buyer for it yourselves.*
>
> *We were not offered any alternatives.*
>
> *My wife suffers from [redacted] and I suffer from [redacted].*
>
> *At the time of paying for the product myself and my wife were both employed.*
>
> *Annual income was about 25k before tax.*
>
> *We did not have any savings.*
>
> *The loan was paid off a year later, we remortgaged our house to enable us to do this."*

The second Investigator, having considered everything, thought that Mr K's complaint ought to be upheld. He thought the Supplier had likely sold and/or marketed the Fractional Club to Mr K and Mrs L as an investment, in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And this breach had rendered the credit relationship between Mr K and the Lender unfair to him under Section 140A of the CCA.

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

Having considered everything that had been submitted, I didn't think it would be fair or reasonable to uphold Mr K's complaint. I wasn't persuaded that the Lender ought to have accepted Mr K's claim under Section 75 of the CCA, and I didn't think his credit relationship with the Lender was unfair to him.

So I set out my initial thoughts in a provisional decision, and invited all parties to submit any new evidence and arguments that they wished to in response. In my provisional decision I said:

The provisional decision

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under the rules by which this Service operates (specifically DISP 3.6.4R) to take into account:

- *relevant law and regulations;*
- *the regulators' rules, guidance and standards;*
- *codes of practice; and (where 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').*

I will also 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 Consumer Protection from Unfair Trading Regulations (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').*

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 I will do, is focus on what I consider to be the crux of the matter, and explaining the reasons for reaching my decision.

And where evidence is incomplete, inconclusive, or contradictory, I make my decision on the balance of probabilities i.e., what I think is more likely than not to have happened based on the evidence available and the wider circumstances of the complaint.

Mr K's complaint was made for several reasons that I set out at the start of this decision. Although presented as misrepresentations, many of the points made were not about what the Supplier told Mr K and Mrs L at the Time of Sale, but were more about the way they were treated, and that these aspects led to the associated credit relationship between Mr K and the Lender to be unfair to him. So, looking at the allegations made, I have separated them into what could be construed as misrepresentations to be considered under Section 75 of the CCA, and those, including the alleged misrepresentations, that could have caused unfairness under Section 140A of the CCA.

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 K could make against the Supplier.

I'm satisfied that Section 75 applies to this transaction, so if I find that the Supplier is liable for having misrepresented something to Mr K at the Time of Sale, the Lender is also liable.

They include the suggestion that the Supplier had misrepresented the true nature of the long-term holiday product. But other than this bare allegation, Mr K has not expanded in any way as to what he was told by the Supplier, and how what he was told was actually untrue. And in any event, having looked at the nature of the Fractional Club, I do not agree that the Fractional Club is a long-term holiday club, as defined under Section 7-10 of the Timeshare Regulations. It is a 'Timeshare Contract' which is defined as:

> *…a contract between a trader and a consumer-*
>
> (a) *Under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation, and*
>
> (b) *Which has a duration of more than one year…*

Mr K also said the Supplier misled him and Mrs L about the quality of the accommodation available. But again, other than the bare allegation, he has not provided any information about what he was told about the quality of accommodation he could expect to receive as part of his membership, or even when he found that this was untrue as I can't see that Mr K and Mrs L have actually used their Fractional Club membership. So, without knowing what was said, I cannot say that what was said was untrue and was therefore a misrepresentation.

While I recognise that Mr K has concerns about the way in which their Fractional Club membership was sold, he has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons he alleges. What's more, as there's nothing else on file that persuades there were any false statements of

existing fact made to Mr K by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier.

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

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

I have already explained why I am not persuaded that the contract entered into by Mr K was misrepresented 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 K 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 the Mr K 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 K and Mrs L'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 K 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;*
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 K and the Lender.

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

Mr K'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 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 they have not provided a credible explanation for why they did not cancel their membership during that time, if, as Mr K is saying, they only made the purchase due to the pressure put on them by the Supplier. Moreover, they did go 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 K and Mrs L made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Mr K has also said that the Supplier failed in its duty of care, and also misled Mr K and Mrs L. On my reading of this part of the complaint, it seems that Mr K may be saying that the Supplier carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for his Section 75 claim for misrepresentation. But 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 K said that he and Mrs L have no voting rights, so therefore have no control over if and when the Allocated Property is sold. But I can't see that this is true. 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 by the unanimous written consent of all fractional owners, in which Mr K and

Mrs L are included.

I'm not persuaded, therefore, that Mr K'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, although not explained to this Service until much later, why he says 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 K 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 K, in his email to the Investigator dated 30 November 2023 says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In 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 K and Mrs L'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 K and Mrs L 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 K and Mrs L, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr K and Mrs L as an investment.

With that said, I acknowledge that the Supplier's training material, that has been seen by this Service, left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And while that was not alleged by either Mr K nor his PR when he first complained about a credit relationship with the Lender that was unfair to him, I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

So, I have taken all of that into account. However, on my reading of the evidence provided and Mr K's initial recollections of the sales process at the Time of Sale, as set out in the Letter of Complaint, there was no suggestion that that had happened. At no point did he say or suggest that the Supplier led them to believe that their Fractional Club membership would lead to a financial gain (i.e., a profit).

So, while Mr K now argues in his email dated 30 November 2023 that the Supplier marketed and sold Fractional Club membership to them as an investment, Mr K's initial recollections in the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what he remembers of the sales process at that time and why they were unhappy with it, than his very recent recollections. After all, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale, it is difficult to understand why he did not mention that in his initial recollections as set out in the Letter of Complaint either.

But, given the circumstances of this complaint, I do not think it is necessary for me to make a finding on whether Mr K and Mrs L's membership was sold and/or marketed as an investment in breach of Regulation 14(3) of the Timeshare Regulations in any event. This is because, given Mr K'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. I'll explain.

<u>Was the credit relationship between the Lender and Mr K rendered unfair?</u>

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 K 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 K into the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in Mr K 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 nor was there any indication that they were induced into the purchase on that basis. Indeed, the concerns Mr K articulated in both the letter of complaint, and in his later email, were largely regarding the perceived lack of accommodation availability.

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 K and Mrs L'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 K and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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 K 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 K 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 K.

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

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

Neither Mr K, his PR nor the Lender responded to my provisional decision.

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.

As none of the parties involved in this case responded to my provisional decision, no further submissions or evidence has been submitted. So, having reconsidered everything, and having revisited my initial findings, I see no reason to depart from the outcome I reached in my provisional decision.

My final decision

I do not uphold this complaint against Mitsubishi HC Capital UK PLC trading as Novuna.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 12 December 2024.

Chris Riggs
Ombudsman