DRN-5331513

The complaint

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

The timeshare in question was bought jointly by Mr and Mrs H, but as the associated credit agreement was in Mr H's sole name, he is the only eligible complainant here. I shall, however, refer to both Mr and Mrs H where appropriate.

What happened

Mr and Mrs H purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 23 August 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 870 fractional points (the 'Purchase Agreement') and after trading in their previous timeshare membership, they ended up paying £5,554.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs H more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs H paid for their Fractional Club membership by taking finance of £17,295 from the Lender in joint names (the 'Credit Agreement'). This loan consolidated the outstanding balance of a loan provided by a different lender to fund their previous membership[1].

Mr H – using a professional representative (the 'PR') – wrote to the Lender on 13 November 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

- Told them that purchasing additional points in a new Fractional Club membership would allow them to travel around the world at times that were convenient to them, when that was not true.
- Told them that Fractional Club membership was an "investment" which would hold its value.

[1] A complaint about the previous purchase and associated credit agreement has been considered separately by this Service.

Mr H says that he has a claim against the Supplier in respect of one or both 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 H.

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

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

- The misrepresentations set out above.
- The Supplier acted recklessly and did not apply due care towards his and Mrs H's needs and financial circumstances.
- They were pressured into purchasing Fractional Club membership by the Supplier.

The Lender dealt with Mr and Mrs H's concerns as a complaint but was unable to complete its investigations within the eight weeks that the regulator required, so Mr H referred the complaint to the Financial Ombudsman Service. While it was waiting for assessment Mr H told our Service that he no longer wished to be represented by the PR.

An Investigator, having considered the information on file, upheld the complaint on its merits. They thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs H at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr H was rendered unfair to him for the purposes of 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 agreed with the outcome reached by the Investigator, in that I thought Mr H's complaint ought to be upheld, but there was additional reasoning to support this. So I set out my initial thoughts in a provisional decision (the 'PD') and invited both Mr H and the Lender to respond with any new evidence or arguments that they wished me to consider before I made my final decision.

In my PD, I began by setting out 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 Consumer Rights Act 2015.*
- *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').*

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').

I then went on to set out what I had 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 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 and Mrs H as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them 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 H's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier misrepresented Fractional Club membership to Mr and Mrs H, because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr H in the same or a better position than he would be if the redress was limited to misrepresentation.

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 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 Mr H 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 H'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."

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 H 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;*
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

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

Mr H and the Lender.

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs H's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr H says that the Supplier did exactly that at the Time of Sale – saying so in their Letter of Complaint, and saying the following in an email sent to this Service on 13 October 2023 in response to the Investigator asking for an account of what happened:

> *"We were told that we had purchased an investment and that the timeshare would appreciate in value. We were told that we would have a share of a property and its value would increase, therefore we were promised a considerable return on investment. We were also told that we could sell the timeshare back to the resort or easily sell it at a profit."*

And then specifically about the Time of Sale:

> *"We were confused as we were told at time of signing in 2016 by the sales team that we do have enough points. We were deceived and mis-sold. We were now told that we need to sign up for new as we will own a bigger share and that we will then have enough points to use for holiday. They said we now need to pay £199 and own then 2.2% share instead of 0.95% so this will provide considerable return on investment."*

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

(1) *There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.*

(2) *They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.*

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

Mr and Mrs H's share in the Allocated Property clearly, 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 <u>as an investment</u>. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club.

They just regulated how such products were marketed and sold.

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

There is evidence in this case that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold 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 Fractional Rights which are personal rights and not interests in real estate..."*

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 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.

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 H's 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" and (2) that membership of the Fractional Club could make them 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 and Mrs H or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them 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'.

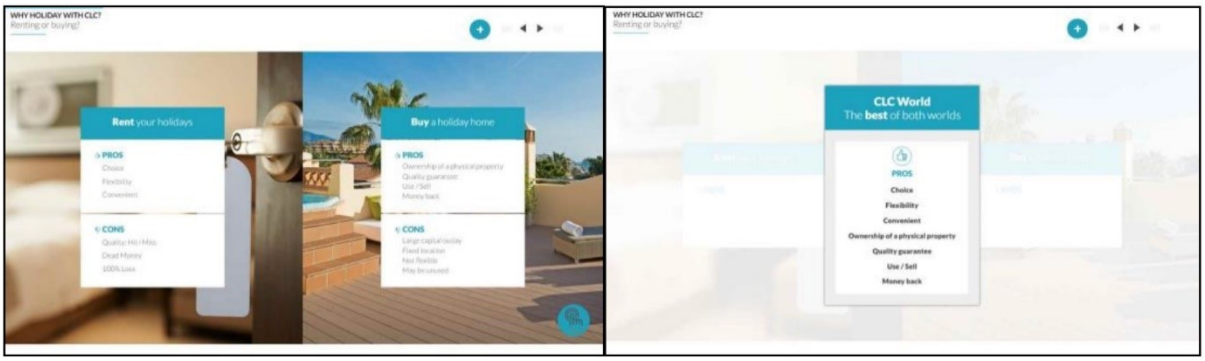
How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Mr and Mrs H's – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual')

As I understand it, the 2017 Fractional Training Manual was used from November 2016 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr and Mrs H appear to have purchased. It is not entirely clear whether Mr and Mrs H would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

1. *the training the Supplier's sales representatives would have got before selling Mr and Mrs H their Fractional Club membership; and*
2. *how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs H.*

Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seems to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr and Mrs H that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:

All three indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

1. *"Rent Your Holidays"*
2. *"Buy a Holiday Home"*
3. *The "Best of Both Worlds"*

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical 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 any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

> *"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."*

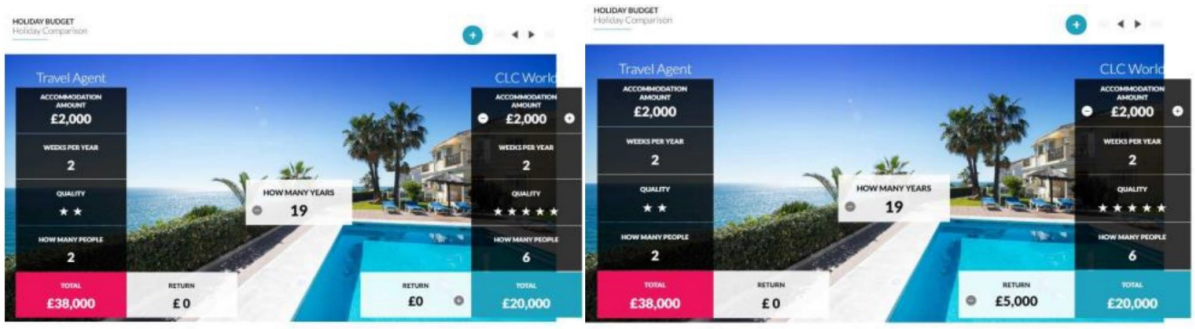
And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

> *"So really 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?".*

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 53 included the following slides and accompanying notes:

> *"We aren't only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spend over £… with no return.*
>
> *However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.*



> *We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get*

some money back from the sale, so even if you only say £5,000, it would still be more than you would get renting your holidays from a travel agent wouldn't it."

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the 2017 Fractional Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

1. *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*
2. *A significant financial return at the end of the membership term.*

And to consumers (like Mr and Mrs H) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr and Mrs H) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, 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.

I acknowledge that there may not have been a 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 and Mrs H the financial value of the proprietary interest they were 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 Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

---

[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

"[…] 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 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.

And it is also fair to bear in mind that this was the second fractional purchase that Mr and Mrs H had bought from the Supplier in 11 months. And although a complaint about the first sale, which took place in September 2016 is not being considered here, I think it is entirely reasonable for me to think about what they were likely to have been told during that previous sale. Afterall, the Fractional Membership they purchased in August 2017 at the Time of Sale was the same product as that sold to them by the same Supplier previously. So I think there is a clear risk that whatever they had been told during the previous sale of the fractional points was likely to have influenced their subsequent purchase of Fractional Membership at the Time of Sale.

As I've said, Mr H set out in his statement how Fractional Club was sold to him and Mrs H. And he went on to say how they were told by the Supplier at the Time of Sale that in order for them to be able to take the holidays they wanted, they would need to purchase more points. But this would also give them a bigger share. And with that being the case, I don't find Mr H either implausible or hard to believe when he says:

> *"We were told that we had purchased an investment and that the timeshare would appreciate in value. We were told that we would have a share of a property and its value would increase, therefore we were promised a considerable return on investment. We were also told that we could sell the timeshare back to the resort or easily sell it at a profit."*

Overall, therefore, as the slides and training material 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 and Mrs H to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And this is supported by what Mr H has said in the email he sent to this Service.

And for those reasons, I think it more likely than not that 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 H and the Lender under the Credit Agreement and related Purchase Agreement.

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

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 H and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[4] led him and Mrs H to enter into the Purchase Agreement, and Mr H into the Credit Agreement is an important consideration.

That doesn't mean they were not interested in holidays – they have made clear in both the Letter of Complaint and the email that they were, which is not surprising given the nature of the product at the centre of this complaint. And it seems from the email that the Supplier told Mr and Mrs H that they needed the extra points from the purchase to enable them to use them for the holidays they wanted. But while the potential holidays were likely to have been a motivation for them to purchase the Fractional Club membership at the Time of Sale, I don't think that was the reason they went ahead with it. On my reading of Mr H's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. Mr H has said in the email:

> *"We were made to believe that timeshare was an investment and would increase in value. We believed in it, relied on it and as a result were induced to enter into contract, which otherwise would [sic] not have done. Were [sic] materially influenced by misrepresentation, because relying on this representation decided to enter into the contract."*

As I've said, Mr H's recollections of the way the Supplier sold Fractional Club membership to them, and their motivation for their purchase, were set out in an email sent to this Service. I have considered how much weight I can put on this evidence. I have born in mind that it relates to events some seven years before it was written, and that memories fade over time. I am also aware that it was written after the judgement in Shawbrook & BPF v FOS so there is a risk that Mr and Mrs H's memories may have been affected by this. But having considered everything, and whilst remaining cognisant of any possible material errors, I am satisfied that I am able to place weight on, and rely on, the contents of the email. It was, after all, sent at a time when they were no longer professionally represented, and it has not adduced anything new – it just expands on what was submitted in the Letter of Complaint.

So as Mr H says (plausibly in my view) that Fractional Club membership was marketed and sold to him and Mrs H at the Time of Sale as something that offered them not only holiday rights, but a share in the Allocated Property and the possibility of a profit, on the balance of probabilities, I think their purchase was motivated by this share and the possibility of a profit when the Allocated Property came to be sold.

And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I am not persuaded that they would have pressed ahead with their purchase regardless.

As I've said, given that it was likely that the sale of Fractional Club was pitched as an investment in breach of Regulation 14(3), and I think it likely that the potential for a profit was an important driver for Mr and Mrs H in their purchase of the Fractional Club membership, it follows that the associated credit relationship under the Credit Agreement with the Lender was rendered unfair to Mr H as a result.

---

[4] which, having taken place during its antecedent negotiations with Mr and Mrs H, 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

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr H under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

I concluded by setting out what I considered to be the fair and reasonable way that the Lender should calculate and pay any compensation that may be due to Mr H:

The responses to the PD

Mr H accepted what I had said in the PD with no further comment. The Lender responded and said that while it accepted the decision and was willing to arrange the redress as set out, it maintained its belief that Mr and Mrs H's motivation to make the purchase of the Fractional Club was for the enjoyment of holidays. It pointed to Mr and Mrs H's usage of their membership – taking five weeks of holiday – and that they had referred four families to the Supplier during their membership.

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 in light of the submissions from the Lender in response to the PD. Although I see that they have accepted the outcome, I will address their subsequent points.

As I said in my PD, Mr and Mrs H's purchase of the upgraded Fractional Club did not mean they were not interested in holidays – they made clear in both the Letter of Complaint and the email that they were, which is not surprising given the nature of the product at the centre of this complaint.

But the Lender says in its response that Mr and Mrs H already had enough points to take the holidays that they wanted. And the Lender says that the fact that Mr and Mrs H obtained further fractional rights in an allocated property was a consequence of obtaining more points and the associated holiday rights. But this, in my view, only strengthens the argument that Mr and Mrs H's purchase of the upgraded Fractional Club membership was motivated by the investment element. It can only have been this if, as the Lender has said, the evidence suggests that Mr and Mrs H *already had* the number of points they needed to take the holidays they wanted.

So, having considered everything afresh, I see no reason to depart from my findings as set out above in the extract of the PD.

Putting things right

Having found that Mr and Mrs H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr H was unfair under section 140A of the CCA, I think it would be fair and reasonable to put Mr H back in the position he would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and he therefore not entered into the Credit Agreement, provided Mr H agrees to assign to the Lender their Fractional

Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs H were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of the Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 1,040 bi-annual fractional points. These were, in effect, equivalent to 520 annual fractional points. So the upgrade on 23 August 2017 provided Mr and Mrs H an additional 350 annual fractional points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr and Mrs H not purchased FC Membership 2, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs H from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

Formally, the agreement Mr H entered into in August 2017 was a new contract that superseded the old one relating to his and Mrs H's first purchase of fractional points. But I think the purpose of this upgrade was to continue and supplement their existing FC Membership 1. So that the August 2017 upgrade was really just a top-up of Mr and Mrs H's fractional points by rolling over those that they had and providing them, as members of the Fractional Club, with enough points to enable them to take annual holidays, albeit while also holding an interest in the net sales proceeds of a different Allocated Property.

And as the function of the Supplier's trade-in credit was to roll over Mr and Mrs H's existing fractional points into their upgrade, their original purchase of FC Membership 1, and the associated credit agreement with their original lender had ongoing financial consequences for them, which continued the unfair relationship with that lender. And for that reason, the Lender being considered here is only answerable for the specific unfairness associated with the 23 August 2017 Credit Agreement and associated FC Membership 2 Purchase Agreement.

Further, Mr and Mrs H paid for FC Membership 1 using finance ('Loan 1') that they refinanced using the Credit Agreement. So, part of what Mr H borrowed at the Time of Sale was used to repay the borrowing under Loan 1 that always had to be repaid. I have considered a complaint made by Mr and Mrs H in relation to Loan 1 and I have decided to uphold it. As part of the compensation I have provisionally directed, I have told the earlier lender to refund everything paid to that loan, including any sum paid to settle the debt. So the amount borrowed from the Lender to repay what was owed under Loan 1 will be covered in that decision. So, mindful that Mr and Mrs H ought not to get compensation twice for the same thing, I do not think it would be fair for the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

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

(1) The Lender should refund the difference between Mr H's repayments to it under the Credit Agreement and what he and Mrs H (as they were joint debtors) would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Mr H would only owe now what he and Mrs H would have owed under Loan 1 and change any future repayments so that he is making the

same repayments they were towards Loan 1.[5]

(2) In addition to (1), the Lender should also refund 40% of the annual management charges paid after the Time of Sale under FC Membership 2*.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs H used or took advantage of relating to FC Membership 2; and

   ii. A proportion of the market value of the holidays** Mr and Mrs H took using FC Membership 2 which used more than 520 fractional points. However, this deduction should relate only to 40% of the additional Fractional Points that were required to take the holiday(s) in question. For example, if Mr H took a holiday worth 600 Fractional Points, any deduction for the market value of that holiday should relate only to 40% of the 80 additional Fractional Points that were required to take it.

   (I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

(4) Simple interest*** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr H's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs H's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify Mr H against 40% of ongoing liabilities as a result of their Fractional Club membership.

*Mr and Mrs H upgraded FC Membership 1 when they purchased FC Membership 2. They originally had an equivalent of 520 annual fractional points which were rolled into their new membership, and they would have been responsible for paying the management fees associated with the FC Membership 1 in any event. So it would not be fair and reasonable for the Lender to be responsible for repaying all of the management fees associated with FC Membership 2, only the additional fees.

But the Lender is also not responsible for the unfairness that was carried over from Loan 1 into the Credit Agreement being considered here. So the Lender is only responsible for repaying a proportion of the difference in the annual management fees Mr and Mrs H ended up paying. Taking into account the number of points carried over (520) and the additional points purchased (350) the Lender is only responsible for repaying 40% (rounded to the nearest whole number) of the difference in management fees Mr and Mrs H ended up paying as a result of their FC Membership 2 purchase, when compared to what they paid under FC Membership 1.

**I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs H took using their fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

[5] Mr H can use any compensation received from his other complaint to pay down anything that remains owed if he so wishes.

***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.

My final decision

I uphold Mr H's complaint, and direct Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance to calculate and pay fair compensation to Mr H as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 14 March 2025.

Chris Riggs
Ombudsman