DRN-5334779

The complaint

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

What happened

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought Hitachi Personal Finance should resolve it. I've reproduced my provisional findings below, which form part of this final decision.

What happened

Mr S and his wife purchased membership of a timeshare (the "Fractional Club") from a timeshare provider ("C") on 24 November 2014 (the "Time of Sale").

Mr and Mrs S were existing customers of C, having held a variety of timeshare arrangements with it and a predecessor scheme. On two occasions – in April 2001 and again in September 2009 – they'd traded in existing arrangements to buy points in C's 'Vacation Club', which entitled them to use their points to stay at C's holiday accommodation. As I understand it, they'd regularly made use of their membership.

At the Time of Sale, Mr and Mrs S entered into an agreement with C to buy 2,520 'fractional points' (the "Purchase Agreement"), giving them four weeks of fractional rights of use, which they could use to reserve holidays in various resorts. They traded in their 2,251 Vacation Club (non-fractional) points. After trading in their existing timeshare, they ended up paying £8,788 for membership of the Fractional Club. This was paid using a Hitachi Personal Finance fixed sum loan in Mr S's name (the "Credit Agreement"). With interest, the total amount payable under the Credit Agreement was £24,836.40.

Fractional Club membership was asset backed, giving Mr and Mrs S more than just holiday rights. Membership also included a share in the net sale proceeds of a property named on their Purchase Agreement (the "Allocated Property") after their membership term ended.

Mr S used a professional representative "F" to write to Hitachi Personal Finance on 17 January 2019 to complain about:

1. misrepresentations by C at the Time of Sale and subsequent breaches of contract, giving him a claim against Hitachi Personal Finance under Section 75 of the CCA, which Hitachi Personal Finance failed to accept and pay.
2. being pressurised by C both in relation to the sale of Fractional Club membership and into entering into the loan agreement, including failing to inform him that he could consider other creditors.
3. the Purchase Agreement containing unfair terms.

4. a failure to carry out a proper creditworthiness assessment to ensure the lending was affordable to him.
5. Hitachi Personal Finance being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

Mr S's claims under Section 75 of the CCA

Mr S said that C made a number of pre-contractual misrepresentations at the Time of Sale – namely that C:

1. told him that C's holiday resorts were exclusive to its members when that was not true.
2. told him that Fractional Club membership was an "investment" when that was not true.

In addition, Mr S said he and his wife found it difficult to book the holidays they wanted, when and where they wanted.

In light of the above, Mr S said that he has a claim against C both in misrepresentation and in breach of contract, and that under Section 75 of the CCA, he has a like claim against Hitachi Personal Finance who, with C, is jointly and severally liable to him.

Mr S's claim under Section 140A of the CCA: Hitachi Personal Finance's participation in an unfair credit relationship

Mr S's complaint letter set out several reasons why Mr S felt that his credit relationship with Hitachi Personal Finance was unfair to him under Section 140A of the CCA. In summary, they included the following:

1. the terms of the agreement were unfair in themselves, as undisclosed commission was paid to C by Hitachi Personal Finance.
2. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
3. C pressured him into purchasing Fractional Club membership.
4. the decision to lend was irresponsible because Hitachi Personal Finance didn't carry out the right creditworthiness assessment.

Hitachi Personal Finance dealt with Mr S's concerns as a complaint and issued its final response letter on 14 March 2019, rejecting it on every ground. Mr S then referred the complaint to us. It was assessed by an investigator who, having considered the information on file, upheld the complaint on its merits.

The investigator found Mr S's testimony sufficiently persuasive in relation to the marketing of Fractional Club membership notwithstanding C's paperwork stating that Fractional Club membership wasn't an investment. He considered it was more likely than not that C *had* marketed and sold Fractional Club membership as an investment to Mr and Mrs S at the Time of Sale, in breach of Regulation 14(3) of the Timeshare Regulations.

Given the impact of such a breach on Mr and Mrs S's purchasing decision, the investigator concluded that rendered unfair the credit relationship between Hitachi

Personal Finance and Mr S for the purposes of section 140A of the CCA. He proposed that (as far as it was possible to do so) Hitachi Personal Finance should look to restore Mr S to the position he was in before entering into the Credit Agreement, reimbursing – with interest – any money he was out of pocket taking into account payments he'd made and benefits he'd received from Fractional Club membership.

Hitachi Personal Finance disagreed with our investigator's assessment. and asked for the case to be reviewed by an ombudsman, as it is entitled to do under our rules. It said, again in summary:

- it didn't agree that the Fractional Club membership was marketed or sold to Mr S as an investment, or that there was cause to conclude the credit relationship was rendered unfair under section 140A of the CCA.
- the assessment reached erroneous conclusions based on an incorrect interpretation of case law and what Hitachi Personal Finance considered inappropriate reliance on limited and unsupported testimony.
- Mr S was an experienced timeshare owner and had a membership relationship with C dating back over many years. He appeared to have been happy with his purchase and had not raised any complaints with C during his membership. He had used his memberships frequently, both before and after he purchased Fractional Club membership.
- he had previously upgraded his membership twice, increasing his points for additional holiday usage. Mr S had attended nine previous presentations over the years and had made purchases on two occasions, declining to do so on the other nine occasions. He had a good understanding of the way the sales presentations worked and his right either not to attend or purchase.

The legal and regulatory context

In considering what's 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'll refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I'm 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 ("UTCCR")
- the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT")
- 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 I've already noted, I'm also required to take into account, where appropriate, what I consider to have been good industry practice at the relevant time. In this complaint, that 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.

Having done that, I'm currently minded to conclude that C breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr S and Hitachi Personal Finance unfair to him for the purposes of Section 140A of the CCA. As a result, I propose to uphold Mr S's complaint.

Before I explain why, I should make clear that my role as an ombudsman doesn't require that I address every single point that has been made to date. Rather, it's to decide what's fair and reasonable in the circumstances of this complaint. While I recognise there are several aspects to Mr S's complaint, it isn't necessary to make formal findings on all of them.

This includes the allegations of misrepresentation and breach of contract in respect of the Fractional Club membership, and the suggestion that Hitachi Personal Finance ought to have accepted and met his claims under Section 75 of the CCA. I say this because, even if those other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr S in the same or a better position than he would be if those claims were to have been met.

Where necessary, I have reached conclusions on the balance of probabilities – which means I have based them on what I consider more likely than not to have happened given the available evidence and the wider circumstances.

<u>Section 140A of the CCA: did Hitachi Personal Finance participate in an unfair credit relationship?</u>

Section 140A of the CCA is relevant law. So in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr S and Hitachi Personal Finance 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."*

Hitachi Personal Finance doesn't dispute that there was a pre-existing arrangement between it and C. So the negotiations conducted by C during the sale of Mr S's Fractional Club membership 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 C as an agent for Hitachi Personal Finance 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 and Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that *"negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

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

So, C is deemed to be Hitachi Personal Finance'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 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 as Hitachi Personal Finance has noted, 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 S and Hitachi Personal Finance 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. C's sales and marketing practices at the Time of Sale;
2. The provision of information by C at the Time of Sale, including the contractual documentation and disclaimers made by C;
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.

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

I have then considered the impact of these on the fairness of the credit relationship between Mr S and Hitachi Personal Finance.

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

Hitachi Personal Finance does not dispute, and I am satisfied, that Mr S'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 C from marketing or selling Fractional Club membership as an investment. At the Time of Sale the provision said:

> *"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 S says that C did exactly that at the Time of Sale – saying the following in a statement dated 11 January 2019:

> *"The representative advised us that the purchase was an investment in property, the property would be sold on a specific date and we would make a profit (£36,000 based on previous performance)."*

Mr S's statement (and his letter of complaint) alleges then, that C breached Regulation 14(3) at the Time of Sale because he was told by C there would be a profit on the sale of the Allocated Property and that he would make money from Fractional Club membership. The statement was not signed by Mr S, but it does appear to be a record of the evidence he and his wife gave to F about why they were unhappy with Fractional Club membership. Mr S signed a complaint form when bringing their complaint to our service, with this statement sent as part of that complaint. I'm satisfied this was his evidence, Hitachi Personal Finance's concerns about the format that statement took notwithstanding.

Was Mr S's Fractional Club membership an investment?

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

Mr S's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it.

But the fact that Fractional Club membership included an investment element didn't 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*. The Timeshare Regulations didn't ban products such as Fractional Club membership. They just regulated how such products were marketed and sold.

Bearing this in mind, for me to conclude that Fractional Club membership was marketed or sold to Mr S as an investment in breach of Regulation 14(3), I have to be

persuaded it was more likely than not that C marketed and/or sold membership to him as an investment; that is, told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (a profit) given the facts and circumstances of *this* complaint.

Was Fractional Club membership marketed and/or sold to Mr S as an investment?

There is evidence in this complaint that C made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers, such as Mr S, 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 Hitachi Personal Finance has pointed to in support of its position that Fractional Club membership wasn't sold to Mr S as an investment.

For example, there was a document titled *"Member's Declaration"*, which comprised a 15-point declaration to be made by Mr S, which included the following:

> *"5. 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 [C] makes no representation as to the future price or value of the Fraction."*

Further, there was a nine-page document titled *"*[*C*] *Fractional Property Owners Club Information Statement"* that contained the following wording:

> *"Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain."*

and

> *"**5. Primary Purpose***
>
> *The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [C] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights...*
>
> *…**11. Investment advice***
>
> *The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized 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 advisors 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."*

Mr S signed both documents to confirm he had received them. But weighing up what happened in practice is in my view rarely as simple as looking at the contemporaneous paperwork. Mr S has made a specific allegation that C breached Regulation 14(3) at the Time of Sale, including expressly telling him that Fractional Club membership was an *"investment",* and that he would make a profit on his Fractional Club membership.

I'm inclined to say that the existence of these disclaimers recognises there was a real risk of buyers forming the impression, from the way C was marketing and selling

membership of the Fractional Club, that it was an investment. The difficulty of articulating the benefit of fractional ownership in a way that distinguished it from Mr S's existing timeshare membership is a relevant factor in this case.

Further, I think it would be fair to say that in light of the specific allegations Mr S has made about what C told him, the disclaimer wording in the documents doesn't entirely counter what he has said. A prospective member who was told what Mr S says C told him could easily read the disclaimers in question without being dissuaded that investment was a legitimate secondary purpose of membership, even if it wasn't the primary purpose. And the suggestion the prospective member seek professional investment advice in relation to membership of the Fractional Club bolsters that view rather than acting as a counter to it.

So, I have considered:

(1) whether it is more likely than not that C, at the Time of Sale, sold or marketed Fractional Club membership as an investment; that is, told Mr S or led him to believe during the marketing and/or sales process that Fractional Club membership was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn

(2) whether C's actions constitute a breach of Regulation 14(3).

For reasons I'll now come on to, given the facts and circumstances of this complaint, I'm minded to conclude that the answer to both of these questions is 'yes'.

How C marketed and sold the Fractional Club membership

In the course of our work on complaints relating to timeshare sales we've seen C's training and sales materials, which give an indication as to how its representatives may have sold or marketed the membership to Mr S. These include:

1. a document called the 2013/2014 Sales Induction Training (the "2013/2014 Induction Training");
2. screenshots of a Electronic Sales Aid (the "ESA"); and
3. a document called the "*FPOC2 Fly Buy Induction Training Manual*" (the "Fractional Club Training Manual")

Neither the 2013/2014 Induction Training nor the ESA I've seen contain any notes. But the Fractional Club Training Manual includes very similar slides to those used in the ESA. So it seems to me that the Fractional Club Training Manual is reasonably indicative of:

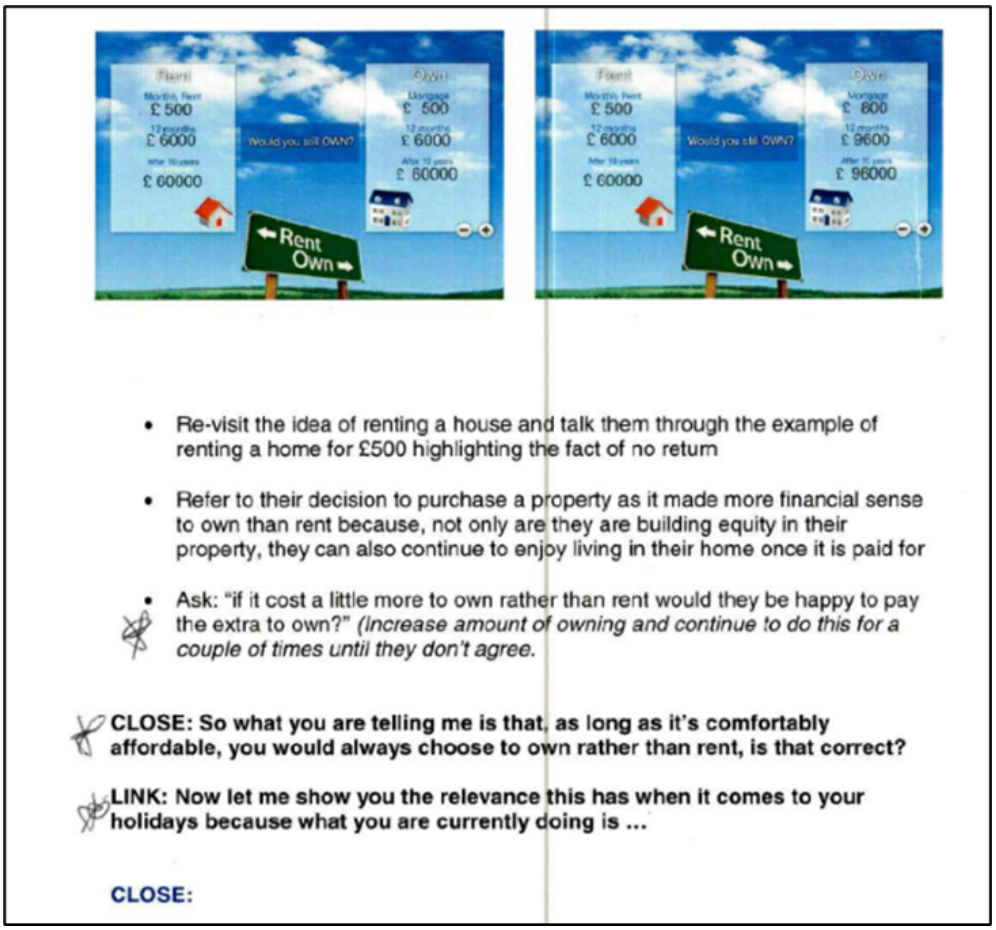
(1) the training C's sales representatives would have got before selling Fractional Club membership; and

(2) how the sales representatives would've framed C's multimedia presentation (the ESA) during the sale of Fractional Club membership to potential members including Mr S.

The Fractional Club Training Manual indicates that a proportion of time would've been spent taking prospective members through a comparison between 'renting' and 'owning' along with how membership of the Fractional Club worked and what it was intended to achieve.

Page 32 of the Fractional Club Training Manual covered in more detail how C's

representatives should address that comparison. It suggests they should seek to emphasise the financial advantages of owning property rather than renting, including the latter offering no return:



- Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return
- Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for
- Ask: "if it cost a little more to own rather than rent would they be happy to pay the extra to own?" *(increase amount of owning and continue to do this for a couple of times until they don't agree.*

CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

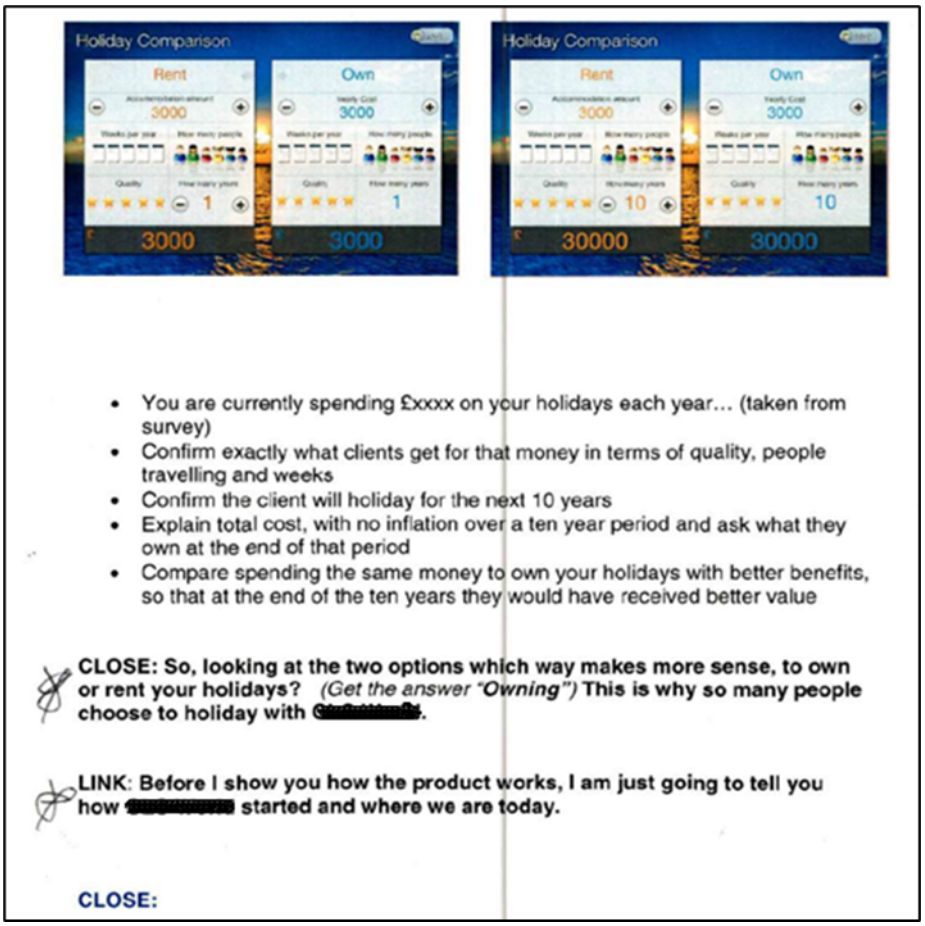
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

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

While the slides don't include express reference to the 'investment' benefit of ownership, their content alludes to much the same concept. That concept was simply rephrased in the language of "*building equity*". That being the case, it seems to me that the approach to marketing Fractional Club membership was to imply quite strongly that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved C's representatives onto a cost comparison between 'renting' holidays and 'owning' them. Representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to 'own' their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



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

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

*...Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……...**Would you mind explaining to them how their interest will be protected over the next 19 year[s]**?"*

The Fractional Club Training Manual doesn't give any immediate context to what the manager would have said to prospective members in answer to the question posed by the sales representative at the handover. Page 43 of the manual has the word "*script*" on it but otherwise it's blank. However, after the Manual covered areas like the types of holiday and accommodation on offer to members, it went onto "*resort management*", at which point page 61 said this [again, my emphasis in bold]:

"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time…

*...CLOSE: **I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.** So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*

Mr S as a long-standing non-Fractional Club member would no doubt have been familiar with the concept of having to pay annual maintenance fees in addition to his annual membership fee. But the wording used here again references maximising his return and is being portrayed as a benefit of ownership, reinforcing the idea that this was a key aspect differentiating Fractional Club membership from his existing membership.

There are other points within the Fractional Club Induction Training Manual that further suggest members would have been told that there was the prospect of a return. Mr S has mentioned C's representative giving him a specific figure of £36,000. I can't be certain that this was a definitive statement made by C's representative and note that this assertion is denied by C and by Hitachi Personal Finance. But given the way in which the Training Manual made multiple references to returns, I don't think it would be right for me simply to dismiss the possibility.

Further, if I were to only concern myself with whether C made express efforts to quantify to Mr S the financial value of the proprietary interest he was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3). The way in which Fractional Club membership was marketed to an existing timeshare member like Mr S was, I think, clearly intended to emphasise the advantages of ownership and the opportunity to build equity offering the prospect of a return (in the sense of a possible profit) on the money he was paying, over taking holidays in the way he had previously done. And 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 Mr S that the financial return was in fact an overall profit.

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))." 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.

That suggests that 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, 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 100 of *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice said the following:

> *"…I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle,* ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3)…Getting the governance principles and paperwork right may not be quite enough. The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective…If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?****…What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
>
> *"...although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers.* ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very 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."* [emphasis added]

I'm not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word 'investment' when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in *Shawbrook & BPF v FOS*, at [76] (when discussing an ombudsman's approach to Regulation 14(3)):

> *"…He was entitled in other words to be highly sensitive to the* ***overt and covert*** *messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was*

done here. Indeed he was required as a matter of law to do so." [emphasis added]

As Hitachi Personal Finance has submitted, Mr S already held non-fractional timeshare membership over many years. He had taken many holidays over that time, and attended (as well as declined to attend) sales presentations. On previous occasions when he had purchased or exchanged membership rights, it had been to acquire additional holiday benefits. But on this occasion, Mr S paid a large sum for only 269 more points that appear to have conferred little material benefit in terms of additional holiday rights, other than the interest in the Allocated Property.

It is not a breach of Regulation 14(3) to merely describe the nature of the product and how it worked. But in the circumstances of this complaint, it wouldn't have made much sense if C included this feature in the product without relying on it to promote the sale.

I think it's more likely than not there was some discussion at the Time of Sale as to why Mr (and Mrs) S should purchase this type of membership in particular, compared to the other non-fractional ones bought previously. In other words, some discussion of why Mr and Mrs S should change their membership type in the way that they did, with such a nominal impact on their existing holiday rights.

The testimony from Mr S and his complaint letter not only say he was told by C that he would get his money back but also that there was the potential for this to include a profit. He has been consistent from the start of his complaint that Fractional Club membership was sold to him as an investment.

Taking into account what I've already said, I think likely that the language used by C during its sales presentation was consistent with the idea that Fractional Club membership was an investment, highlighting the possible returns (in the sense of a possible profit) available to Mr S. And as Mr S was paying a fairly large sum to switch to Fractional Club membership when the surrounding circumstances indicate he was otherwise entirely happy with his existing arrangements, I think it's clear that he expected to get a significant sum back.

In my view, therefore, it is more likely than not that C's representative positioned Fractional Club membership as an investment that may lead to a financial gain (a profit) in the future, whether explicitly or implicitly. There appears no other reason Mr S would have paid out nearly £9,000 to increase his holiday rights only nominally other than that he expected to get back more than he paid (a profit). In my view, were that the case he'd instead most likely have done what he did at previous non-fractional presentations and declined to purchase.

Overall, when I consider Mr S's evidence in combination with the sales and training materials which, in my view, adds credence to the allegation made, I find Mr S persuasive when he says he was told that by buying fractional points, he would be making an *"investment in property"* and he "*would make a profit"*. It follows that I'm minded to think C breached Regulation 14(3) of the Timeshare Regulations in this particular case.

Did that breach render unfair the credit relationship between Hitachi Personal Finance and Mr S?

Having found that C was likely to have breached Regulation 14(3) at the Time of Sale, I now need to consider whether that breach was causative of an unfair credit

relationship between Mr S and Hitachi Personal Finance under the Credit Agreement and related Purchase Agreement. As the Supreme Court's judgment in *Plevin* makes clear, it doesn't 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 S and Hitachi Personal Finance that was unfair to him and warranted relief as a result, whether C's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr S, 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 Hitachi Personal Finance) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

Hitachi Personal Finance has highlighted the use Mr S made of the Fractional Club membership. I don't think that offers much in the way of persuasive reasons for the purchase; as an existing timeshare member it seems quite likely that he would otherwise have simply continued to make use of his non-Fractional membership.

Mr S's purchasing history shows that he and his wife had twice increased points in previous years with their non-Fractional Club membership. But buying more holiday rights cannot have been a main reason Mr S made the purchase of Fractional Club membership. The 269 additional points received for the upfront cost of £8,788 didn't give him materially much more in terms of rights. Further, it strikes me that if Mr S was merely interested in increasing his holiday rights, he and his wife could simply have increased their non-fractional points again in the same way as they had before.

This suggests there had to be some other reason Mr S purchased the Fractional Club membership. That doesn't mean he wasn't interested in holidays. His use of his existing membership demonstrates that he quite clearly was. That is hardly surprising given the nature of a timeshare product. But on my reading of Mr S's evidence, it was the prospect of a financial gain from Fractional Club membership that was key, and a prime motivating factor when he decided to go ahead with his purchase and the associated borrowing.

Mr S hasn't said or suggested, for example, that he would have pressed ahead with the purchase in question had C not led him to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money as a fairly long-term financial commitment, had he not been encouraged by the prospect of a financial gain from Fractional Club membership, I think it unlikely he would have done so.

That being the case, I think C's breach of Regulation 14(3) was material to the decision Mr S ultimately made. Because of this I propose to conclude that the credit relationship between Mr S and Hitachi Personal Finance was unfair to him.

Conclusion

Given the facts and circumstances of this complaint, I think Hitachi Personal Finance participated in and perpetuated an unfair credit relationship with Mr S under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. So I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

My findings are that:

(1) Mr S would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for a breach of Regulation 14(3) of the Timeshare Regulations by C (as deemed agent of Hitachi Personal Finance); and

(2) the impact of that breach meant the relationship between Hitachi Personal Finance and Mr S was unfair under section 140A of the CCA

With this in mind I propose (as far as can practically be achieved) that Hitachi Personal Finance puts Mr S back in the position he would have been in had he not purchased the Fractional Club membership (that is, had he not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement. This is provided Mr S agrees to assign to Hitachi Personal Finance his Fractional Points or holds them on trust for Hitachi Personal Finance if that can be achieved.

Mr S was an existing Vacation Club member, and his membership was traded in against the purchase price of Fractional Club membership. Under Vacation Club membership, Mr and Mrs S had 2,251 Vacation Club (non-fractional) points. As a result of the trade-in they held 2,520 'fractional points' (the "Purchase Agreement"). Although this was a modest increase in points it doesn't appear to have given them any material benefit beyond their existing holiday rights. I think it's fair to say that any holidays they took under Fractional Club membership were holidays they would've been able (and just as likely) to take using their Vacation Club membership. I've taken this into account in my redress proposal.

I also have no reason to think that had Mr S not purchased Fractional Club membership, he would have cancelled his Vacation Club membership. Therefore he would always been responsible for paying annual management charges and membership fees of some sort. Any loss in this respect only arises if the Vacation Club fees were less than Mr S paid under Fractional Club membership. It follows that any refund of annual management charges or membership fees that Mr S paid from the Time of Sale as part of his Fractional Club membership should be calculated based on the difference between those charges and those Mr S would otherwise have paid as a Vacation Club member.

However, if either party feels strongly about these aspects, they can let me know in their responses to my provisional decision.

So, here's what I think Hitachi Personal Finance needs to do to compensate Mr S – whether or not a court would award such compensation:

1. Refund Mr S's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

2. Refund any loss to Mr S arising from the difference between his Fractional Club annual management charges paid after the Time of Sale and what his Vacation Club annual management charges would have been had he not purchased Fractional Club membership.

3. Hitachi Personal Finance can deduct:
    i. The value of any promotional giveaways that Mr S used or took advantage of;
    ii. The market value of the holidays[2] Mr S took using his Fractional Points if the points value of the holidays taken amounted to more than the total number of Vacation Club points he would have been entitled to use at the time of the holidays as an ongoing Vacation Club member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holidays in question[3]; and
    iii. if any of Mr S's Vacation Club annual management charges would have been higher than his equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holidays taken using Fractional Points in the years in question as he could have taken those holidays as an ongoing Vacation Club member in return for the relevant annual management charge.

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

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[2] 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 S took using his 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 his usage.

[3] For example, if Mr S took a holiday worth 2,520 Fractional Points and he would have been entitled to use a total of 2,251 Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to the 269 additional Fractional Points that were required to take it.

4. Simple interest at 8% annually should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint. HM Revenue & Customs may require Hitachi Personal Finance to deduct tax from this interest. If that's the case, Hitachi Personal Finance must give Mr S a certificate showing how much tax it's deducted if he asks for one.

5. Remove any adverse information recorded on Mr S's credit file in connection with the Credit Agreement reported within six years of this decision.

6. I understand Mr (and Mrs S) relinquished Fractional Club membership in early 2019. However, if that's not the case and the Fractional Club membership is still in place at the time of this decision, as long as Mr and Mrs S agree to hold the benefit of their interest in the Allocated Property for Hitachi Personal Finance (or assign it to Hitachi Personal Finance if that can be achieved), Hitachi Personal Finance must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

I invited both parties to let me have any further comments they wished to make in response to my provisional conclusions.

Response to my provisional decision

F responded on behalf of Mr S to say he accepted my provisional findings and proposed conclusion. Hitachi Personal Finance also agreed with my intended decision and to compensate Mr S as I set out.

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 both parties have accepted my provisional decision, I've no reason to change any of my findings, or what I proposed should be done to resolve the complaint. I therefore adopt my provisional conclusions in full in this final decision.

My final decision

My final decision is that I uphold this complaint. To settle it, I require Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance to take the steps I've set out at points 1-6 under the heading 'Fair Compensation' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 17 March 2025.

Niall Taylor
Ombudsman