DRN-5341074

The complaint

Mrs A's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna[1] (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her 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

Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 7 August 2016 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 780 fractional points at a cost of £14,065 (the 'Purchase Agreement').

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

Mrs A paid for her Fractional Club membership by taking finance of £14,065 from the Lender in her sole name (the 'Credit Agreement').

Mrs A wrote to both the Lender and the Supplier to complain about various aspects of how the Supplier had sold Fractional Club membership to her at the Time of Sale. The letter to the Lender is dated 12 May 2019, and whilst the letter to the Supplier is undated, it was received on 21 May 2019. Her complaints were, in essence, that:

- The Supplier had pressured her into the sale.
- The Fractional Club was presented as an investment that could provide her with a profit, and this was untrue.
- She was given false information about what she could do in the future if she wanted to quit the Purchase Agreement.
- She was told by the Supplier that Fractional Club membership would allow her to use any good hotel anywhere in Africa at 10% of the cost price, which was untrue.
- She was not told that a maintenance fee would need to be paid.

The Lender dealt with Mrs A's concerns as a complaint and issued its final response letter by email on 1 July 2019, rejecting it on every ground.

Mrs A then referred the complaint to the Financial Ombudsman Service. Although it had not been set out in these exact terms, the Investigator considered Mrs A's complaint to be that the Lender had been party to an unfair credit relationship with Mrs A under Section 140A of the CCA, and that it was unfair in its rejection of her claim under Section 75 of the CCA.

And having considered everything on file, the Investigator upheld Mrs A's complaint on its

[1] At the time of the sale the Lender was using the trading name 'Hitachi'.

merits. The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mrs A at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on her purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mrs A was rendered unfair to her 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 on file, I didn't think Mrs A's complaint ought to be upheld. So, on 5 February 2025 I issued a provisional decision (the 'PD') setting out my initial thoughts, and invited Mrs A and the Lender to respond with any new evidence or arguments that they wished to submit before I made a final decision.

My provisional decision

In my PD I said:

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

And having done that, I do not currently think this complaint should be upheld. I understand this will come as a disappointment to Mrs A, and I'm sorry about that.

But before I explain why I have come to the provisional decision that I have, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

The CCA introduced a regime of connected lender liability under Section 75 that gives consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 of the CCA essentially mirrors the claim Mrs A could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mrs A at the Time of Sale, the Lender is also liable.

I think it may be useful to set out what a misrepresentation is. A material and actionable misrepresentation is an untrue statement of existing fact, made by the Supplier, that induces a consumer into entering a contract. So, in Mrs A's case, for me to say there had been a pre-

contractual misrepresentation by the Supplier, I would have to be satisfied, on the balance of probabilities, that Mrs A was told something that was factually untrue, and that this induced her to make her Fractional Club purchase.

Although not set out in these exact terms, it is clear from the Letter of Complaint that Mrs A is alleging that the Supplier made misrepresentations at the Time of Sale which induced her into making the purchase.

Mrs A has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs A. So, I will deal with each alleged misrepresentation in turn.

- *The Fractional Club was presented as an investment that could provide her with a profit, and this was untrue.*

I shall address this allegation further below. But for the reasons I will go on to explain, had Mrs A been told that her Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

- *She was given false information about what she could do in the future if she wanted to quit the Purchase Agreement.*

Mrs A has said that the Supplier told her that if she wished to come out of her contract with it, should her circumstances change in the future, all she would have to do is to cancel her direct debit. But again, I can't see that this is something that the Supplier was likely to have said. I say this because if something like this was said, it would quickly and easily open up the Supplier to claims where a consumer tried to cancel their direct debit and found their membership didn't automatically cancel as a result, so it is an inherently unlikely thing for the Supplier to have said. And the contractual paperwork given to Mrs A at the Time of Sale (which I will describe in more detail later) set out the terms of both her Purchase Agreement and the Credit Agreement. Mrs A signed to say she had read and understood the terms and Mrs A has not provided any detail as regards when she was told this, or indeed who by. So, on balance, I'm not persuaded that this was something that the Supplier said to her at the Time of Sale.

- *She was told by the Supplier Fractional Club membership would allow her to use any good hotel anywhere in Africa at 10% of the cost price, which was untrue.*

Again, given the lack of context or any detail about who said this and when, I'm not persuaded that this was something that was likely to have been said at the Time of Sale. From my knowledge of how Fractional Club worked, I am aware that members were able to book hotels worldwide through travel partners, so given Mrs A's interest in this I think it likely that this was discussed, but I'm not persuaded by the evidence on file that the Supplier would have said she was able to book any African hotel room for 10% of the cost price.

So, while I recognise that Mrs A has concerns about the way in which her Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons she alleges.

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

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

I have already explained why I am not persuaded that the contract entered into by Mrs A was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mrs A also says there were issues with other aspects of the Time of Sale. These can only be considered by this Service by looking at the credit relationship that came about between Mrs A and the Lender, and considering whether this was rendered unfair due to the actions of the Supplier and/or the Lender.

So, I have considered if the credit relationship between Mrs A and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that she has concerns about. It is those concerns that I explore here.

Under Section 140A of the CCA, a debtor-creditor relationship, like the one between the Lender and Mrs A, can be found to have been or be unfair to the debtor (Mrs A) because of one or more of the following: the terms of the credit agreement itself; how the creditor (the Lender) 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 of unfairness 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.

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 Mrs A'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). So, they were what is known as antecedent negotiations under Section 56(1)(c) – so 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.

So, this means that the Supplier is deemed to be the 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. It needs to take into account the entirety of the credit relationship.

So, I have considered the entirety of the credit relationship between Mrs A and the Lender, along with all of the circumstances of the complaint. In carrying out my analysis, and in coming to my conclusion, 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 Mrs A and the Lender. And having done that, I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. I'll explain.

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

Mrs A's concerns about how Fractional Club was sold and marketed to her at the Time of Sale were set out at the start of this decision.

They include that the Supplier had pressured her into the sale. I acknowledge that she may have felt weary after a sales process that went on for a long time. But she says little about what was said and/or done by the Supplier during her sales presentation that made her feel as if she had no choice but to purchase Fractional Club membership when she simply did not want to. She was also given a 14-day cooling off period and although she has said she called the Supplier during this time, there is no evidence to support she did, nor is there any evidence to suggest why she called as she claims. And Mrs A has not provided a credible explanation for why she did not cancel her membership during this 14-day period. She has also said that her husband, who was with her at the time, made the decision not to purchase with her. So, I find it hard to understand how Mrs A was pressured into making a purchase, when her husband was not. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs A made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mrs A's credit relationship with the Lender was rendered unfair to her under Section 140A for the reason of pressure. But there is another reason why her credit relationship with the Lender may be unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment, as this may have been in breach of prohibition against selling timeshares in that way.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

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

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

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

But Mrs A says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that "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.

Mrs A's share in the Allocated Property clearly, in my view, constituted an investment as it

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

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

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs A, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mrs A as an investment.

However, with all of that said, I acknowledge that the Supplier's training material, which has been provided to this Service in relation to other complaints, left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's possible that Fractional Club membership was marketed and sold to Mrs A as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

But given the circumstances of this complaint, I do not think it is necessary for me to make a finding on whether Fractional Club membership was likely to have been sold in breach of Regulation 14(3) of the Timeshare Regulations. I think this because I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mrs A rendered unfair?

There has been a significant amount of case law in this area, and I've taken it all into consideration here. For example, 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.

So, what does that mean to the complaint I am considering here? If I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs A and the Lender that was unfair to her and warranted relief (for example, compensation) as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

It appears Mrs A was not a member of any type of timeshare or holiday club at the time she purchased her membership of the Fractional Club. She was there with her husband and children as part of a promotional break having been recommended by one of their friends. So, I think it is a fair assumption to make that Mrs A was interested in holidays, and specifically the type of holidays the Supplier could provide. And this is supported by her

apparent disappointment in finding that she was unable to book accommodation in Africa as part of her membership, at the rate she expected.

As I've said, it is possible that the Supplier did in fact breach Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club to Mrs A as an investment. But in order to find this has caused an unfairness to her credit relationship with the Lender, I need to be persuaded that this breach was a material factor in her purchasing decision.

The Letter of Complaint says, as far as is relevant:

> *"…they said it's a kind of investment that can give us profit…"*

And then later she says the following:

> *"We were told that the timeshare was an investment that it would increase in value…"*

But these only talk about how the membership was sold to her. It doesn't suggest the investment element was a motivation for her to make the purchase at the Time of Sale. I can see from her Letter of Complaint that Mrs A made enquiries about selling her membership two years after the Time of Sale, and that she was disappointed that it was valued at less than what she had paid for it. But again, this doesn't assist me in establishing her motivation to purchase at the Time of Sale, because this decision to try and sell seems to have coincided with Mrs A having some financial difficulties, not from a longstanding desire to make a financial gain from the Fractional Club. And it is also difficult to explain why she would have tried to sell it so soon if it had been bought as an investment.

I've also seen the notes of the sale, completed by the Client Liaison at 6.17pm on the day of the sale. These say:

> *"Mrs [A] buying on her own as Mr [A] didn't want to use his money for this. Mrs [A] comfortable with purchase, here with 2 overaged sons who have been added as [joint members] and are happy with the purchase. Mrs [A] explains that Mr [A] is not for taking decisions and that in the past this has avoided them from purchasing and have regretted it…"*

This, on my reading, suggests that Mrs A had thought previously about the purchase of a timeshare, and had regretted not doing so. So, it seems that a timeshare purchase is something that she had wanted to do for some time.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs A's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests she would have pressed ahead with her purchase in order to take the holidays that she and her sons wanted, whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs A and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs A when she purchased membership of the Fractional Club at the Time of Sale. But she says that the Supplier failed to provide her with all of the information she needed to make an informed decision, and specifically, that she

wasn't told she would be required to pay ongoing management fees as part of her membership.

One of the main aims of the Timeshare Regulations and the CRA was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

I can see from the contractual documentation that was completed at the Time of Sale, that Mrs A signed to say she accepted and understood the terms of the contract. And for example, on the Member's Declaration form that she has signed, there are 16 bullet points, setting out the terms. Number 4 says:

> *"We understand that currently the Management Charge is €999.00 for 2018 and that an invoice will be sent for this within 3 months of full payment of the Agreement and thereafter by 1st January each year of occupation."*

So, I think it likely that Mrs A was provided with the information about the requirement to pay management charges in addition to the cost of the membership itself. But even if she wasn't, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant. And I can't see that this lack of information, if that is what it was, would have made a difference here. I think Mrs A wanted to purchase the membership anyway and would have likely done so even if the requirement to pay management charges was made clearer than it was. So, while it's possible the Supplier didn't give Mrs A sufficient information, in good time, on the various charges she would be subject to as a Fractional Club member in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't seen enough to persuade me that this, alone, rendered Mrs A's credit relationship with the Lender unfair to her.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mrs A was unfair to her because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mrs A was unfair to her for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs A's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mrs A.

If there is any further information on this complaint that Mrs A wishes to provide, I would invite her to do so in response to this provisional decision.

The responses to the PD

The Lender did not respond nor provide any further argument.

Mrs A did respond, and said the following in an email:

> *"When I asked [the Supplier] that if I don't like what I bought and I want to come out of it, what can I do? I was told that, I can call them and stop my direct debit. But when I want to do this later, they said no! This is part of the lies they told me at the beginning. Thank you."*

As the deadline for any new submissions has now passed, the complaint has come back to me for consideration.

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 having done so, I still don't think Mrs A's complaint ought to be upheld.

Mrs A's complaint was made for several reasons as set out at the start of this decision. And in the PD, I gave my initial thoughts and reasoning for whether each aspect of her complaint ought to be upheld.

In response to my PD Mrs A has only addressed one of these points – that being her allegation that she was given false information by the Supplier at the Time of Sale about what she could do in the future if she wanted to quit the Purchase Agreement.

In response to the PD Mrs A has repeated this allegation, but has said she was told she could call the Supplier and then cancel her direct debit. But, as I've said in the PD, Mrs A had not, and still has not provided any detail as regards when she was told this, or indeed who by. And I remain unpersuaded that this is likely to have been something that the Supplier would have said for the reasons I set out in the PD.

So having reconsidered everything in the light of Mrs A's response to the PD, I remain satisfied that it would not be fair or reasonable to uphold this complaint. I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs A's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mrs A.

My final decision

I do not uphold Mrs A's complaint against Mitsubishi HC Capital UK PLC trading as Novuna.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 19 March 2025.

Chris Riggs
Ombudsman