DRN-5534427

The complaint

The Estate of Ms M ("the Estate") complains that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance (the "Lender") acted unfairly and unreasonably by being party to an unfair credit relationship with Ms M under Section 140A of the Consumer Credit Act 1974 (the "CCA").

What happened

On 2 September 2019 (the "Time of Sale"), Ms M - together with another - attended a sales presentation with a timeshare provider (the "Supplier"). During that meeting, they entered into an agreement (the "Purchase Agreement") to purchase membership of a timeshare product (the "Timeshare") incorporating 2,100 points to be used each year to secure accommodation and experience bookings from a portfolio operated by the Supplier.

The purchase price agreed was £25,068 which was funded under a Fixed Sum Loan agreement with the Lender in Ms M's sole name, repayable over 120 months (the "Credit Agreement").

On 28 June 2024, the Estate – using a professional representative (the "PR") – wrote to the Lender (the "Letter of Complaint") to raise a claim under Section 140A of the CCA ("S140A"). The specific reasons and allegations detailed within the claim include:

- They were subjected to systemic high pressure sales and knowingly misleading statements.
- They were told that Fractional ownership would be a good investment, and at the end of the ownership period they could sell their ownership and get their money back with a profit – constituting a breach of *"the Timeshare Regulations 2011 – Section 14(3)".*
- They were told they would have no problem in booking holidays wherever they so choose but experienced problems with holiday availability.

Furthermore, the PR allege Ms M (and the other party) were not provided with clear information about the possible rates of future management charges payable and that costs would rise annually based upon what the resort wanted to charge.

The Lender dealt with the Estate's concerns as a complaint and issued its final response letter on 15 July 2024, rejecting it on every ground.

The PR (on behalf of the Estate) then referred the complaint to the Financial Ombudsman Service. It was assessed by an investigator who, having considered all the evidence and information provided, didn't think the Estate's complaint should be upheld.

The Estate didn't agree with the investigator's findings, so the PR requested that the complaint be considered further by an ombudsman. In doing so, the PR argued:

- the witness statement provided by the Estate directly contradicted the investigator's findings;
- it is aware of many similar recollections and experiences from other unconnected consumers;
- it believes this service has seen evidence of the Supplier promoting such purchases

as investments; and

- the complaint had been reviewed in a narrow and technical manner.

As an informal resolution could not be achieved, the Estate's complaint was passed to me.

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.

Relevant Considerations

In doing so, I am required under DISP[1] 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.

The Timeshare was purchased in the joint names of Ms M and another party. However, the Credit Agreement was in Ms M's sole name. Because of that, only Ms M is an eligible claimant and as a result, the only eligible complainant. Sadly, Ms M passed away in April 2024. So, this complaint is brought by Ms M's estate. Because of that, I will refer to either Ms M or the Estate throughout my decision.

The claim submitted to the Lender was made pursuant to S140A and includes the allegations I've summarised above. However, some of those appear to be allegations of misrepresentation and/or breach of contract. So, in considering the Estate's complaint, I've also considered the claims that could be made under the various other provisions of the CCA.

S140A looks at the fairness of the relationship between Ms M and the Lender arising out of the credit agreement (taken together with any related agreement). And because the Timeshare purchased was funded under the Credit Agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

Section 75 of the CCA ("S75") introduced a regime of connected lender liability that affords consumers (like Ms M) a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants (like the Supplier) 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 S75 essentially mirrors the claim the Estate could make against the Supplier.

It's important to stress that this service's role as an Alternative Dispute Resolution Service is to provide mediation in the event of a dispute. The complaint being considered here specifically relates to whether I believe the Lender's treatment of the Estate's claim was fair and reasonable given all the evidence and information available. This service is not afforded powers to decide a legal claim. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my

[1] Dispute Resolution: Complaints Sourcebook

decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

A S75 claim for misrepresentation and/or breach of contract

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Ms M purchased Fractional Club membership as an investment that would increase in value. I will address this particular allegation together with the implications and my findings later on in this decision.

The PR also says the Supplier told Ms M she would have no problem booking holidays wherever she so choose. But it says she experienced problems in securing bookings at her preferred locations and preferred times.

For me to conclude there were misrepresentations by the Supplier in the ways alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the Timeshare. In other words, that it told Ms M something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that any misrepresentation was material in inducing Ms M to enter into the Purchase Agreement. This means I would need to be persuaded that she reasonably relied on those false statements when deciding to buy the Timeshare.

The difficulty I have is identifying what Ms M was (or was not) told by the Supplier at the Time of Sale. The Letter of Complaint provides limited details and evidence to support the misrepresentations the Estate says the Supplier made, although I acknowledge it does set out some of these matters in a written witness statement. So, I've thought about this alongside the limited evidence that is available from the Time of Sale.

In the witness statement provided by the Estate, it said,

> *"…we discovered that not only was there no availability for the place we wanted but also it was very difficult, near impossible to get much at all."*

So I have gone on to consider what was included within the documentation provided at the Time of Sale. In particular, I've considered what it says in the Information Statement which Ms M signed and acknowledged receipt of by signing the Member's Declaration.

Part 1, section 2 - Short description of the Product – says, *"The* [Timeshare] *is a multi-resort holiday Points system which allows Members to acquire their Points each year to use and enjoy the various Resorts located worldwide held within the* [Supplier's portfolio] *from time to time".*

Part 1, section 3 – Exact nature and content of the right(s) includes, *"On becoming a Member, you will be entitled to exercise occupancy rights (subject to availability) in any of the* […] *accommodation…".*

Part 3, section 1 – Information about the rights acquired – says, *"…all reservation requests* […] *are subject to availability and seasonal demands…No assurances can be given that a specific resort or facility will remain within* [the Supplier's portfolio] *for the lifetime of a membership or for the entire duration of the* [Timeshare scheme] *or any individual term of membership".*

Having carefully considered everything, I can't reasonably conclude that the Supplier did misrepresent the Timeshare in the way alleged.

However, my reading of this particular allegation could also suggest that the Estate considers that the Supplier was not living up to its end of the bargain and had breached the Purchase Agreement.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. As I've summarised above, some of the sales paperwork signed by Ms M is clear that the availability of holidays was/is subject to demand.

From the information included in the Lenders final response, it appears Ms M made use of the Timeshare to successfully secure 24 bookings between January 2020 and January 2024, albeit it appears nine of those bookings were later cancelled – it's unclear by whom and in what circumstances. I accept that Ms M may not have always been able to take certain holidays. But I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement.

It's also alleged that when taking holidays under the Timeshare, accommodation was often not to the standard presented at the Time of Sale. However, the PR doesn't appear to have provided any further details or evidence in support of that particular allegation - either in terms of evidencing what the Supplier presented or specifically what Ms M experienced. So, I can't reliably conclude that the Supplier did misrepresent the accommodation available under the Timeshare, or that the accommodation provided was of a differing standard such that it would constitute a breach of the Purchase Agreement entered into.

S140A – did the Lender participate in an unfair credit relationship?

I have already explained why I am not persuaded that the contract entered into by Ms M was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under the CCA and outcome in this complaint. But the Estate gives other reasons why it believes that the credit relationship between Ms M and the Lender was unfair under S140A, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I will explore next.

Under S140A, 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).

The pressured sale and process

The claim suggests Ms M purchased the Timeshare and entered into the Credit Agreement following a lengthy and pressurised sales presentation. I acknowledge what the PR has said about this. So, I can understand why it might be argued that the prolonged nature of the presentation might have felt like a pressured sale – especially if, as Ms M approached the closing stages, she was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

I've carefully considered the documentation from the Time of Sale and note that it provides a cooling off period of 14 days, during which Ms M had the right to cancel the purchase – together with any associated Credit Agreement – without giving any reason. This is a requirement of the Timeshare Regulations. There is a 'Schedule' on page 4 of the Purchase Agreement headed 'Sperate Standard Withdrawal Form to Facilitate the Right of Withdrawal'. Not only does it explain that Ms M had until 2 September 2019 to withdraw from and cancel the agreement, but she also appears to have signed that document acknowledging its receipt.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Ms M agreed to the purchase in 2019 when she simply didn't want to. And neither the PR nor the Estate have provided a credible explanation for why she didn't

subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If she only agreed to the purchase because she felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Ms M was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate she made the decision to proceed because her ability to exercise choice was – or was likely to have been – significantly impaired.

The investment allegation

The Letter of Complaint alleges that Ms M purchased a Fractional timeshare. A Fractional timeshare is one that is asset backed – which means it gives the purchaser more than just holiday rights. It would usually include a share in the net sale proceeds of a property detailed within the Purchase Agreement (the 'Allocated Property') after the membership term ends.

To support the claim, the PR makes specific reference to the findings in the judgment in *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*').

The PR suggests that the Supplier represented and sold the Timeshare to Ms M as a *"good investment"* which she *"could sell* […] *and get* [her] *money back with a profit".* And in doing so, the Supplier was in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Timeshare Regulations"), rendering the credit relationship unfair under S140A.

Furthermore, in the witness statement provided by the Estate, it is claimed Ms M was told she *"would own a 25% percentage of the holiday unit* [which was] *a great investment as it was bricks and mortar* [and] *there would be a profit".*

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of a Timeshare 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 the Estate say that the Supplier did exactly that at the Time of Sale. So, I have considered that particular allegation further.

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.

Shawbrook & BPF v FOS considered two particular cases involving the sale of Fractional timeshares. However, having considered all the documentation provided from the Time of Sale, I can't see that Ms M did purchase a Fractional timeshare. The Purchase Agreement is clear that it was an 'Application for Membership' and 'Purchase of Points Rights'. And the Member's Declaration and Information Statement clearly show that Ms M had purchased membership of the Supplier's 'Vacation Club' rather than a Fractional timeshare. There is no reference to there being an 'Allocated Property,' or any suggestion that in entering into the Purchase Agreement, Ms M secured any interest in an Allocated Property or its sales proceeds at a future date. With that being the case, it doesn't appear Ms M did purchase a Fractional Timeshare. So, the recollections detailed within the witness statement and the Letter of Complaint appear to directly contradict the documentation from the Time of Sale.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing the Timeshare purchased as an 'investment'. In particular:

- Note 5 on the front page of the 'Acquisition Agreement' says, *"We understand that the purchase of our membership* […] *is a personal right for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as a real estate interest or an investment in real estate and* [the Supplier] *makes no representation as to the future price or value of the* [Timeshare]. This is repeated in note 6 over the Member's Declaration.
- At the foot of Part 1 section 3 of the Information Statement, it says, *"Membership is for the purposes of reserving holidays and confers personal rights to use the Points Rights and does not grant any real estate or lease interest given the involvement of the Trustee".*

Having considered all the evidence available, I don't think the Timeshare can have been marketed and sold as an investment contrary to the Timeshare Regulations simply because there may have been some inherent value to Ms M's membership. And in any event, I've found nothing within the evidence provided to suggest the Supplier provided any assurances or guarantees about the future value of the Timeshare purchased. The Supplier would had to have presented the membership in such a way that used its investment element to persuade Ms M to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the Timeshare Regulations.

The provision of information and adequate explanations

The PR suggests the Supplier failed to provide all the material information and explanations to ensure Ms M understood the ongoing annual management charges and the basis of their calculation.

One of the main aims of the Timeshare Regulations 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 a breach of the regulations that apply, resulting in the credit agreement potentially being found to be unfair under S140A.

However, the Supreme Court made it clear in *Plevin*[2] that it does not automatically follow that regulatory breaches create unfairness for the purposes of S140A. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I've considered all the documentation provided to Ms M at the Time of Sale which appears to comply with the requirements of the Timeshare Regulations. Each document appears to have been signed and acknowledged by Ms M at that time..

- The front page of the Acquisition Agreement clearly states, *"Management Charges (annual service charges): €1,890.00 EUROS".*
- Note E of the 'Acquisition Agreement Terms and Conditions' says, *"The Applicant hereby agrees* […] *to pay the annual Management Charges (annual service charges) as set out in the Rules and Regulations of the Company."*
- Note 3 of the 'Members Declaration' says, *"We understand that currently the annual Points Rights Dues (Annual Service Charge) are €1,890.00 for 2019. The basis of this fee is set out in the Scheme Rules and Regulations of the Company."*
- Part 1, note 14 on page 6 of the Information Statement states, *"Management Charges for 2019 are 1,890.00 Euros. Fees are subject to review and increase by the*

[2] Plevin v. Paragon Personal Finance Limited UKSC/2014/0037

[membership] *Club.*

Based upon this evidence, it appears Ms M was aware that she would need to pay some form of annual management charge given they were referred to on various occasions in the documentation from the Time of Sale. It's also not unusual for such agreements to include provisions for recalculation of those charges each year. So, I wouldn't consider increases to be out of the ordinary in themselves. Furthermore, and in the absence of any further supporting evidence, I don't think it's possible to reasonably assess the fairness (or otherwise) of their calculation and application here. And as I haven't seen any evidence to suggest that the requirement to pay those charges operated in such a way as to cause unfairness in Ms M's case, I can't reasonably conclude that it did.

On balance, having considered all the documentary evidence, I'm not persuaded that the Supplier failed in its duty to explain how the Timeshare operated and the basis of any ongoing management/service charges. And even if it had – and I make no such finding – I've found nothing that suggests Ms M's decision to purchase would've been any different. On that basis, I'm not persuaded that the Supplier's actions resulted in any unfairness that a court is likely to find the Lender liable for under S140A.

Summary

Having carefully considered all the evidence and information provided, I can find no reason to conclude that the Lender acted unfairly or unreasonably in rejecting the Estate's claim in the way it did.

I acknowledge the PR's comments in response to the investigator's findings. However, my findings need to be based upon the available evidence specific to this complaint. I don't see how the circumstances of other (unrelated) complaints help to establish the facts of what actually happened in these particular circumstances.

Whilst I appreciate the representative of the Estate will be extremely disappointed, I will not be asking the Lender to do anything more here.

My final decision

For the reasons set out above, I do not uphold the Estate of Ms M's complaint about Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Ms M to accept or reject my decision before 23 July 2025.

Dave Morgan
Ombudsman