

The complaint

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

The timeshare in question was bought in the joint names of Mr C and Ms B. But as the associated credit agreement was in Mr C's sole name, he is the only eligible complainant here. I will, however, refer to them both where it is appropriate to do so.

What happened

Mr C and Ms B were members of a timeshare provider (the 'Supplier') – having purchased a total of 2,001 Vacation Club points in 2008. On 8 December 2012 they traded in their Vacation Club points towards the purchase of 2,241 Fractional points, paying an additional £6,739. This purchase was financed by a loan from another lender and is recorded here for background purposes only.

The product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which Mr C and Ms B bought on 12 June 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,330 Fractional points at a cost of £34,119 (the 'Purchase Agreement'). But after the trade in value given to Mr C and Ms B's existing membership, they ended up paying £4,986 for membership of the Fractional Club.

Fractional Club membership, like their previous Fractional points holding¹, was asset backed – which meant it gave Mr C and Ms B more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr C paid for their Fractional Club membership by taking finance of £4,986 from the Lender (the 'Credit Agreement').

Mr C – using a professional representative (the 'PR') – wrote to the Lender on 13 November 2018 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr C's concerns as a complaint and issued its final response letter on 27 February 2019, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr C disagreed with the Investigator's assessment and asked for an Ombudsman's decision

¹ Mr C and Ms B's rights to the share in the allocated property connected to their first fractional membership ended when their points were traded in.

– which is why it was passed to me.

The provisional decision

Having considered everything that had been submitted, I thought the complaint ought to be upheld. This was because, on my reading of the evidence, I thought Mr C's credit relationship with the Lender had been rendered unfair to him for the purpose of Section 140A of the CCA. So I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments they wanted me to consider. In my PD I said:

“The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here. But if either side would like me to confirm what I think that context is, they can let me know in response to this provisional decision.

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.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') by marketing and/or selling Fractional Club membership to Mr C and Ms B as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr C and the Lender unfair to him for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am currently proposing puts Mr C in the same or a better position than he would otherwise be in.

Mr C's testimony

As part of Mr C's submissions to this Service, the PR has provided a statement dated 15 June 2018. As regards both of their Fractional points purchases, he says:

“In August 2012, we were on holiday again in Spain when we were approach to attend an update session. As part of this timeshare we were told that we would have partial ownership of a unit of a complex We were also told that this would be a way out of the previous timeshare agreements thereby making this an exit strategy for us. As this was sold to us as partial ownership, the representatives told us that the value of the property would rise and after 19 years the property would be sold for us and we would get our money back with interest. We felt as though this was a very high-pressured sale,

especially as it was made out to be a sound investment with a guaranteed return on our money. As such, we had taken another loan agreement with [redacted], which was the only financial provider was again shown to us. We were not given any sufficient time alone to be able to read the terms and conditions of this agreement nor did we fill out the paperwork ourselves. The representatives filled everything out and got us to sign it At [sic] no point had we been made aware of any commission that the representative would receive.

As such, on the 8th of August 2018², we had purchased 2,241 fractional points for a total cost of £6,739 which had been paid for through a [redacted] loan.

In June 2015, we were in the UK. We had been invited along to another update session. We had taken out further fractional points as the benefits of the investment aspect was very appealing We felt as though this was a very high-pressured sales environment namely as the agreement had to be taken there and then We [sic] were told by the representatives that if we would take out more points we would improve our level of membership and have wider access to resorts. This has not manifested to be true. We always have to compromise on certain aspects of the holiday. In being able to finance this agreement, we had taken out a [Lender] loan. This was the only financial provider shown to us and we felt as though we had to take the loan to be able to get these extra fractional points. We had never heard of [the Lender] before and as such, we thought that it was a touch strange that we were not given time alone to be able to read the terms and conditions of the agreement In [sic] fact, we were just made to sign documents and did not actually fill out any paperwork ourselves. Additionally, we had again not been made aware of commission for the loan.

Therefore, on the 12th of June 2015 we had purchased 2,330 fractional points for £4,986 which had been financed through a [Lender] Loan.”

I have considered how much weight I can place on this statement when assessing the merits of Mr C's complaint.

The statement was dated five months prior to the Letter of Complaint being sent to the Lender, and the statement was probably prepared as part of the PR's case preparation. Indeed, the Letter of Complaint is generally consistent with the contents of the statement, which leads me to think that the statement was used to inform the Letter of Complaint.

But the statement appears to have been prepared and written by the PR, and was probably taken during a telephone call with Mr C. So, I am mindful of the risk that Mr C may have been guided through the process, and the associated risk that what has been written may not be his own specific recollections.

But I think that risk is low, as I can see it contains personal information about all of his timeshare purchases that only Mr C would have known, so I have no doubt that Mr C had a significant input into its contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Mr C's recollections of the Time of Sale.

When considering how much weight I can place on Mr C's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr C has provided. Paragraph 40 reads as follows:

² This appears to be an error and should read 2012

“At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith’s evidence with the following in mind:

- a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
- b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party’s sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
- c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
- d. Exaggeration or even fabrication of parts of a witness’ testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
- e. The mere fact that there are inconsistencies or unreliability in parts of a witness’ evidence is normal in the Court’s experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
- f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of her ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).”*

I have thought about how much weight I can place on this statement when considering the merits of Mr C’s complaint. And having done so, I feel able to place weight on, and rely on its contents. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I’m not surprised that there may be some inconsistencies between what Mr C has said happened, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr C, such that the inconsistencies have little to no bearing on whether his testimony can be relied on, or

whether such inconsistencies are fundamental enough to undermine, if not contradict, what the Supplier was likely to have said and/or done during the sale of Fractional Club.

I don't, for example, find it in any way material that Mr C has apparently mistakenly said that they bought their first Fractional points in August 2018 when it was in fact August 2012. Making a mistake and writing the wrong year is not, in my view, material to whether the membership was sold as an investment or not or whether the testimony can be relied on. I don't think this fundamentally undermines the crux of the statement, which sets out that Fractional Club was bought because of its investment potential.

So overall, I am satisfied that I can place weight on Mr C's testimony when considering what most likely happened at the Time of Sale.

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

Having considered the entirety of the credit relationship between Mr C and the Lender along with all of the circumstances of the complaint, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

- 1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
- 2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
- 3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
- 4. The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of these on the fairness of the credit relationship between Mr C and the Lender.

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

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

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

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

But Mr C says that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Fractional Club membership was an investment.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

Mr C and Ms B's share in the Allocated Property clearly constituted an investment as it

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

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

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

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

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork, and it is important to note that these documents would have been given to Mr C and Ms B to sign after they had been through the sales presentation, and after they had agreed to purchase the Fractional Club membership on the basis of the presentation and what they had been told by the Supplier.

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

- 1. A document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
- 2. Screenshots of an 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 included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

- (1) the training the Supplier's sales representatives would have got before selling Fractional*

Club membership; and

(2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr C and Ms B.

The "Game Plan" on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have 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 how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:

• 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:

Indeed, one of the advantages of ownership referred to in the slide above 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 size of the mortgage secured against 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.

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply 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 the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales 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:

- You are currently spending £xxxx on your holidays each year... (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

CLOSE: So, looking at the two options which way makes more sense, to own or rent your holidays? (Get the answer "Owning") This is why so many people choose to holiday with ~~Clubhouse~~.

LINK: Before I show you how the product works, I am just going to tell you how ~~Clubhouse~~ started and where we are today.

CLOSE:

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:

"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]?**” (My emphasis added)*

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:

“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?...” (My emphasis added)*

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn’t entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a “return”.

For example, on page 69 of the Fractional Club Induction Training Manual, it included the following screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:



[...]

“We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only got a small part of your initial outlay, say £5,000 it would still be more than you would get renting your holidays from a travel agent, wouldn't it?”

I acknowledge that the slides above set out a “return” that is less than the total cost of the

holidays and the “initial outlay”. But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

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

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

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr C and Ms B the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that “[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).”³ And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I’m wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 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 she have no right to stay in meanwhile – is persistently elusive.”

³ The Department for Business Innovation & Skills “*Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)*”. <https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf>

*“[...] 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 she confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect she 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 her 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 my own)*

*So, 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 my own)*

And as regards the disclaimers which I have mentioned above, it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members. This is especially true when customers, such as Mr C and Ms B, had an existing Fractional timeshare membership. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase the new Fractional Club membership in particular. In other words, some discussion of why Mr C and Ms B ought to purchase the Fractional Club in the way that they did.

I acknowledge that what Mr C has said about how the Fractional Club was sold and/or marketed to them at the Time of Sale isn't hugely detailed, but the investment element of membership was plainly a major part of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the feature in the product without relying on it to promote sales, especially when the reality was that the principal benefit of the Fractional Club was its investment element i.e., the share in the net sale proceeds of the Allocated Property.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr C and Ms B when selling Fractional Club membership to them given that they already had a substantial number of Fractional points. And as they were laying out a considerable sum to make the purchase, I think it's clear that they expected to get a significant sum back. After all, they only bought 89 additional points and therefore only about 4% extra holiday entitlement, and this cost nearly £5,000. So, it seems common sense that the return was an important factor in the sale. Further, Mr C has said from the outset of his

complaint that they bought the Fractional Club due to its investment potential. I think that belief fits with what they did at the Time of Sale – make a significant purchase for only a small increase in holiday rights plus an interest in the sale proceeds of the Allocated Property.

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Mr C and Ms B), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it – which, broadly speaking, is consistent with what Mr C says about why they did so.

So, overall, on the balance of probabilities, I think the Supplier's sales representative was likely to have led Mr C and Ms B to believe that Fractional membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, given everything I have seen so far, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr C and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr C and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Mr C to enter into the Credit Agreement is an important consideration.

On my reading of Mr C's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays - his own testimony demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. I also note that the purchase of this Fractional Club membership meant that they would no longer have to pay a booking fee for each holiday booked. But this has not been mentioned at all by Mr C as being a motivation for them. But Mr C does say (plausibly in my view) that they bought this Fractional Club membership as it offered them more than just holiday rights. He says:

“We had taken out further fractional points as the benefits of the investment aspect was very appealing.”

So, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit. Mr C has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them 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 while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Conclusion

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

I then set out what I thought was a fair and reasonable way for the Lender to calculate and pay compensation to Mr C. I said:

"Fair Compensation

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

Mr C and Ms B were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of the Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 2,241 Fractional points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr C and Ms B not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr C and Ms B from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

I'm conscious that, under FC Membership 1, Mr C and Ms B were entitled to a share in an allocated property. However, I am aware that a complaint about their FC Membership 1 (and the associated credit agreement) was made to the finance provider, and an offer of redress was made and accepted by Mr C and Ms B. So, as they have already received what they considered to be satisfactory compensation for their previous membership, it would not be right for me to require that their FC Membership 1 is reinstated.

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

- (1) The Lender should refund Mr C'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) In addition to (1), the Lender should also refund the difference between the annual management charges paid after the Time of Sale under FC Membership 2 and what Mr C and Ms B's annual management charges would have been under FC Membership 1 had they not purchased FC Membership 2.*
- (3) The Lender can deduct:*

- i. *The value of any promotional giveaways that Mr C and Ms B used or took advantage of; and*
- ii. *The market value of the holidays* Mr C and Ms B took using FC Membership 2 if the points value of the holiday(s) taken amounted to more than the total number of Fractional points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 members. However, this deduction should be proportionate and relate only to the additional Fractional points that were required to take the holiday(s) in question.*

For example, if Mr C and Ms B took a holiday worth 2,550 Fractional points after the Time of Sale and they would have been entitled to use a total of 2,500 Fractional points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional points that were required to take it. But if they would have been entitled to use 2,600 Fractional points under FC Membership 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

- (4) *Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.*
- (5) *The Lender should remove any adverse information recorded on Mr C's credit file in connection with the Credit Agreement reported within six years of this decision.*
- (6) *If Mr C and Ms B's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.*

**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 C and Ms B took using their Fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

***HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one."*

The responses to my provisional decision

Mr C agreed with what I had said with no further comment, but the Lender did not. It said, in summary:

- The potential impact of Mr C's statement being prepared by the PR has been downplayed and warrants closer scrutiny. The involvement of a third party in drafting the statement raises questions about the authenticity and independence of the account.
- Other than containing information regarding each purchase, such as what, when and where it was made, the statement contains no personal recollections that provide any insight or context to the sale of the membership.
- The wording used "As part of this timeshare we were told that we would have partial ownership of a unit of a Complex" has been seen in other witness statements prepared

by the same PR.

- There is a lack of detail and no substantive insight into what was actually presented or said to Mr C which suggests that his 2015 Fractional Club membership was marketed as an investment.
- The Ombudsman's decision about the 2015 purchase appears to have been influenced, at least in part, by the statement regarding the 2012 purchase. This presents several issues:
 - The explanation of how the membership was sold may have been shaped by the PR, especially given the similarities across other witness statements, and the absence of specific personal details relating to the recollections.
 - The two sales had different circumstances, including the presentation Mr C attended and was shown. Mr C has not provided a personal account of what was said or shown to him regarding the 2015 sale, particularly in terms of how it was presented as an investment.
- The only insight the statement provides is regarding what the sales representatives said about the improved holiday rights.
- Mr C has erred in his statement in significant ways, and these call into question the reliability of the statement and the claims it contains, for example;
 - Mr C's 2012 purchase was made in the UK, not in Spain as he said.
 - Mr C's 2015 purchase was made in Turkey, not the UK. Mr C apparently did view the presentation in the UK but declined to purchase on that occasion.
- The Ombudsman's interpretation of the reasons for the purchase of the membership overlook the substantial benefits associated with it. These were:
 - Increased holiday rights with reduced annual maintenance fees, leading to long-term savings over the duration of the membership.
 - The removal of the booking fee typically applied when making reservations.
- If the Ombudsman's logic, that Mr C's increase in holiday rights was only 4% and therefore wasn't material, is applied to the investment increase, then this shows that Mr C's increased investment return was also minimal, and therefore would also not have been a material factor in his purchasing decision.
- The trade-in price given to his first fractional membership showed a depreciation of nearly £10,000. If the membership had genuinely been marketed or understood by Mr C to be a financial investment, this significant loss in value would have prompted concern or enquiry. There was no such concern which suggests that financial gain was not the primary motivation behind the original (2012) purchase.

As the deadline for new submissions has now passed, the complaint has been passed back to me for a decision.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. In my PD I

asked if either party wished me to set the context out in detail, and neither asked me to do that. And with that being the case, it is not necessary to set it out here.

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, and having reconsidered everything afresh in light of the Lender's response to my PD, I remain satisfied that it is fair and reasonable to uphold Mr C's complaint, for broadly the same reasons as set out above in the extract of my PD. I will, however, address what the Lender has said in response.

But before I do, I want to repeat 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. And I do that whilst taking into account all the available evidence.

Much of the Lender's response has focussed on whether the testimony can be relied upon as it may have been influenced by the PR, and it contains significant errors or inconsistencies. It also says it lacks context and fails to provide any specific information to support the claims.

And I have considered everything the Lender has said here, and I have taken due regard to the mistakes that it says Mr C has made in the statement.

But as I said in the PD, what I need to consider is whether there is a core of acceptable evidence from Mr C such that the inconsistencies or errors have little to no bearing on whether his testimony can be relied on, or whether such errors are fundamental enough to undermine, if not contradict, what he says about what the Supplier said and did to market and sell Fractional Club membership as an investment.

And having considered the testimony, I remain persuaded that it is likely to be a reliable recollection of events. I say this as it follows, in the main, what was said in the original Letter of Complaint and contains a level of detail that only Mr C, as a party to the events, could have known. And I don't think that misremembering *where* a particular sales presentation occurred fundamentally undermines what was said during that presentation.

I also say this being mindful of the repetitious nature of some aspects of the statement, when being compared to other consumer's statements submitted by this same PR. But I don't think this means that what Mr C has said should be disregarded as a whole. After all, the membership being complained about here was the same product being complained about in many other statements, and these memberships were sold in a particular way. So it is perhaps unsurprising that different people said similar things about how they were sold, and they were written down in the same way by the same PR.

So, whilst being mindful of the fact that the testimony was compiled some three years after the event, and having considered what the Lender has had to say on this issue, I remain satisfied, in this particular case, that I am able to place weight on what Mr C has said.

And having considered everything afresh, I remain satisfied that the Fractional Club membership was sold and/or marketed to Mr C and Ms B as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

As regards whether that breach rendered the credit relationship between Mr C and the Lender unfair to him, I have also considered what the Lender has said in this regard.

The Lender has said that it thought Mr C and Ms B bought the Fractional Club membership for the improved holiday rights it gave them; the reduced maintenance fees; and the removal of the booking fee each time a holiday was booked. And it has adduced some notes which were made on the date of the sale by the Supplier to support this.

These are:

TSW Contact Note	Dao	12/06/2015	14:44	Client Liaison
Note: 12-06 F1 to F2 Relinquished 3000 pt's for reduced price so very happy as would loose them otherwise .2 yrs l. l one yr Plut ... On Hitachi Finance over 180 mlths. More pt's less -fees so aware in the long run will make savings. Seems positive no questions at this stage said happy can afford to do . b-up d.s r-h 13-06				
TSW Contact Note	Jpr	15/06/2015	8:59	Client Liaison
Note: MNGRS NOTES: WOODY They did not like the booking fee and were glad to move to FPOC2. They had a lot of banked pts and they relinquished 3000 and this will clean up the membership. Moving forward Ian said he will more finance on return home. Money no problem. Was asked for 7k @ Hustyms but turned it down.				
TSW Contact Note	Jpr	15/06/2015	8:58	Client Liaison
Note: REPS NOTES: SANDIE Upgrade to FPOC 2. Likes Real Estate but has a large mortgage in UK. Liked the 15p per pt dropped and man fees. Had seen it in the Uk but too expensive. like it under the 5. No consolidation as went home next day but happy. Good deal, happy with change.				

I acknowledge that these do suggest that the maintenance fees would be less going forward, and they didn't like the booking fee that was required under their previous membership.

But, as I said in the PD, I think it's clear that Mr C and Ms B expected to get a significant sum back upon the sale of the Allocated Property - after all, they only bought 89 additional points and therefore only about 4% extra holiday entitlement, and this cost nearly £5,000. And the Lender has not said how much less maintenance fee they would actually pay, just that it would be less. So, it seems common sense that the return was an important factor in the sale. Further, Mr C has said from the outset of his complaint that they bought the Fractional Club due to its investment potential. I think that belief fits with what they did at the Time of Sale – make a significant purchase for only a small increase in holiday rights plus an interest in the sale proceeds of the Allocated Property.

And the third note added does, in my view, support that. It seems he saw the Fractional Club membership as something akin to a purchase of Real Estate, and similar to having a mortgage. And this supports what I have said about it being likely that the investment element of the membership (i.e. the Allocated Property) was material to his purchasing decision.

And because of that, and because I'm satisfied that the membership and the Allocated Property was presented in a way that was in breach of Regulation 14(3), it follows that the associated credit relationship was rendered unfair for the purposes of Section 140A of the CCA.

Conclusion

Given the circumstances, I am persuaded it is more likely than not that the Supplier's salesperson positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future. So, I am satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale. And I remain satisfied that this breach was material to the decision Mr C and Ms B ultimately made to purchase membership of the Fractional Club.

And with that being the case, I am satisfied that the Lender participated in and perpetuated

an unfair credit relationship with Mr C under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

Taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Putting things right

In the PD I set out how I thought the Lender should calculate and pay fair compensation to Mr C. Neither Mr C nor the Lender made any submissions regarding this, and having reconsidered everything, I see no reason to depart from what I said in the PD in relation to it. For clarity, I have set this section out again here.

Fair Compensation

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

Mr C and Ms B were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of the Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 2,241 Fractional points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr C and Ms B not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr C and Ms B from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

I'm conscious that, under FC Membership 1, Mr C and Ms B were entitled to a share in an allocated property. However, I am aware that a complaint about their FC Membership 1 (and the associated credit agreement) was made to the finance provider, and an offer of redress was made and accepted by Mr C and Ms B. So, as they have already received what they considered to be satisfactory compensation for their previous membership, it would not be right for me to require that their FC Membership 1 is reinstated.

So, here's what I direct the Lender to do to compensate Mr C with that being the case – whether or not a court would award such compensation:

- (1) The Lender should refund Mr C'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) In addition to (1), the Lender should also refund the difference between the annual management charges paid after the Time of Sale under FC Membership 2 and what Mr C and Ms B's annual management charges would have been under FC Membership 1 had they not purchased FC Membership 2.
- (3) The Lender can deduct:
 - i. The value of any promotional giveaways that Mr C and Ms B used or took advantage of; and

- ii. The market value of the holidays* Mr C and Ms B took using FC Membership 2 if the points value of the holiday(s) taken amounted to more than the total number of Fractional points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 members. However, this deduction should be proportionate and relate only to the additional Fractional points that were required to take the holiday(s) in question.

For example, if Mr C and Ms B took a holiday worth 2,550 Fractional points after the Time of Sale and they would have been entitled to use a total of 2,500 Fractional points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional points that were required to take it. But if they would have been entitled to use 2,600 Fractional points under FC Membership 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

- (4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mr C's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr C and Ms B's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*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 C and Ms B took using their Fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr C a certificate showing how much tax it's taken off if he asks for one.

My final decision

I uphold Mr C's complaint and direct Mitsubishi HC Capital UK Plc trading as Novuna Consumer Finance to calculate and pay fair compensation to him as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 12 November 2025.

Chris Riggs
Ombudsman