DRN-5884036

The complaint

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

The timeshare in question was bought in the joint names of Mr and Mrs M. But as the loan to finance the purchase was in Mr M's sole name, he is the only eligible complainant here. I will, however, refer to both Mr and Mrs M where it is appropriate to do so.

What happened

Mr and Mrs M bought a trial timeshare membership from a timeshare provider (the 'Supplier') on 25 September 2016 for £3,995. This provided them with a free 'prelude' week of accommodation, and then a further five weeks of accommodation that they could use over the following three years.

Whilst using their 'prelude' week, Mr and Mrs M purchased a full membership of a timeshare (the 'Fractional Club') from the Supplier on 18 April 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,130 fractional points, and after trading in their trial membership they ended up paying £14,469 for membership of the Fractional Club (the 'Purchase Agreement').

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

Mr M paid for their Fractional Club membership by taking finance of £14,469 from the Lender in his sole name (the 'Credit Agreement').

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 24 January 2019 (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 did not respond to the Letter of Complaint, so on 31 May 2019 the PR, on Mr M's behalf, referred his complaint to the Financial Ombudsman Service.

After being contacted by this Service, the Lender dealt with Mr M's concerns as a complaint and issued its final response letter on 1 November 2022, rejecting it on every ground.

Mr M did not accept this, so his complaint was assessed by an Investigator who, having considered the information on file, did not uphold it.

Mr M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

[1] At the time of the loan agreement, the Lender was trading as Hitachi

The provisional decision

Having considered everything that had been submitted, I thought that the complaint ought to be upheld. As this was a different outcome to that reached by the Investigator, I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments that they wished me to consider before I made my final decision.

In the 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 and Mrs M as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr M 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 M in the same or a better position than he would otherwise be in.

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

Having considered the entirety of the credit relationship between Mr M 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 M 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 and Mrs M'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 M says that the Supplier did exactly that at the Time of Sale – saying, in summary, that the Supplier sold the membership to them as an investment, and that they were guaranteed to get their money back when the Allocated Property was sold.

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 and Mrs M'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 and Mrs M 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.

And 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 and Mrs M, 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 and Mrs M as an investment.

However, weighing up what happened in practice is, in my view, rarely as simple as looking

at the contemporaneous paperwork. 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.

<u>How the Supplier marketed and sold the Fractional Club membership</u>

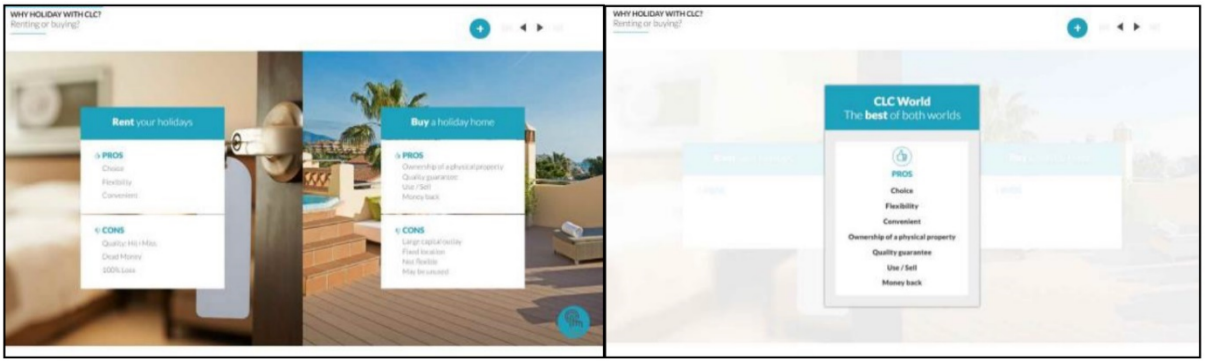
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares to people like Mr and Mrs M – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the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

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

(1) *The training the Supplier's sales representatives would have got before selling Mr and Mrs M's Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to them.*

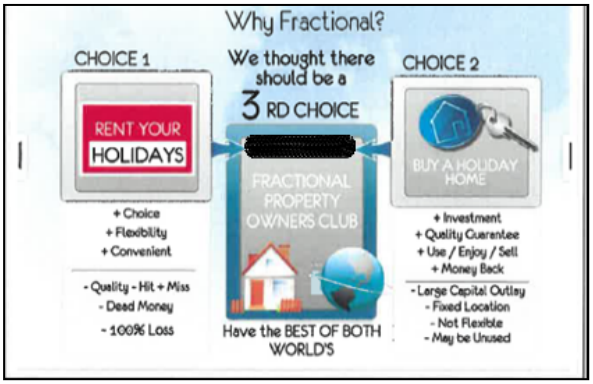
Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



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

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

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



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

(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

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

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

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

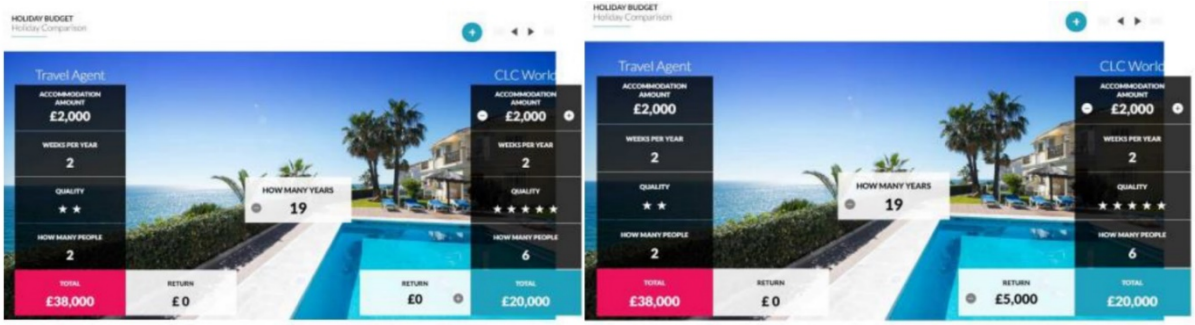
"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

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

"So really FPOC equals a passport to fantastic holidays for 19 years with a return at the end of that period. When was the last time you went on holiday and got some money back?".

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

Page 53 included the following slides and accompanying notes:



"We aren't only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spend over £… with no return.

However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.

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

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

(1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*

(2) *A significant financial return at the end of the membership term.*

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

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

Mr M has said that the Supplier guaranteed they would get their money back at the end of the term. But even if there wasn't a direct comparison between the expected level of financial return and the purchase price of Fractional Club membership, if I were to only concern myself with express efforts to quantify to Mr and Mrs M 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)).'"[2] *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.

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 and Mrs M), 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 Membership were a good reason to purchase it – which, broadly speaking, is consistent with Mr M's recollections of the sale. In this regard, Mr M said in his statement:

> *"We were advised that we would have partial ownership of a complex which would be sold after 19 years. The reps introduced us to the Fractional Owners Property Club. We were guaranteed that we would receive our money back. This was sold to us as an investment."*

So, overall, on the balance of probabilities, I think the Supplier's sales representative was likely to have led Mr and Mrs M 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, I do not find him either implausible or hard to believe when he says that they were told that they were buying shares in property that, being an investment, may well lead to a financial gain. On the contrary, given everything I have seen so far, I think that is likely to be what Mr and Mrs M were led to believe by the Supplier at the relevant time. And for that reason, 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 M 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 M 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 M into the Credit Agreement is an important consideration.

On my reading of Mr M'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

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[2] 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

their purchase. That doesn't mean they were not interested in holidays. His own testimony and their purchase history demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr M says (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing trial membership and the more 'standard' type of timeshare available to them.

Mr M 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 M 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 went on to set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr M:

"Fair Compensation

Having found that Mr and Mrs M 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 M was unfair under section 140A of the CCA, I think it would be fair and reasonable to put Mr M 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 had he not entered into the Credit Agreement, provided Mr and Mrs M agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs M were trial members before purchasing Fractional Club membership. As I've said, trial membership involved the purchase of five week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of the trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs M's trial membership was, therefore, a precursor to their Fractional Club

membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what I think needs to be done to compensate Mr M – whether or not a court would award such compensation:

(1) The Lender should refund Mr M'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:

i. The annual management charges Mr and Mrs M paid as a result of Fractional Club membership.

ii. The trade-in value given to Mr and Mrs M's trial membership.

(3) The Lender can deduct:

i. *The value of any promotional giveaways that Mr and Mrs M used or took advantage of; and*

ii. *The market value of the holidays* Mr and Mrs M took using their Fractional Points.*

(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 M's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs M'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 and Mrs M 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 the provisional decision

Mr M accepted what had been said in the PD but the Lender did not. It said, in summary that it did not feel any weight should be placed on the testimony, because:

- The witness statement contains similarities in wording, phrases and claims to other statements prepared by the same PR. This raises questions about the authenticity and independence of the testimony.
- There is a lack of detail to substantiate that this is Mr M's own personal recollection.

It does not explain what was shown to him; what was said; when it was said; or under what circumstances.

- Given the above, it did not agree with the Ombudsman's conclusion that the statement supported that the Supplier marketed the Fractional Club as an investment, and that the statement broadly aligned with how the Ombudsman thought the membership would likely have been presented.
- The phrasing contained within the statement, particularly referencing *"partial ownership of a complex"* appears very similar, if not identical to multiple other statements. This raises serious questions about whether the statement reflects Mr M's own recollections, or whether it has been influenced or templated, thereby undermining its reliability.
- Reference to *"partial ownership of a complex"* is inconsistent with the Supplier's actual sales practices. No such reference would have been made during any presentation by the Supplier.

In summary, it thought that taken together, the lack of specificity, the templated nature of the language, and the use of terminology not aligned with the Supplier's practices all contribute to serious doubts about the reliability and evidential value of Mr M's statement.

It further said:

- It would expect a statement to provide a reasonable explanation of the events, but it does not do so, and it misses some information which would provide some context as to what happened. For example, Mr M has said the presentation was high-pressured, but does not explain that Mr M actually declined to purchase immediately, and went back to their apartment to think about it first.
- It had concerns about when the statement was gathered and provided. Although dated 6 August 2018 it was not submitted until October 2023, and the document's metadata indicates it was created or modified on the same day it was provided to the Financial Ombudsman Service. It was also submitted shortly after the Judicial Review[3]. Taken together, these factors raise serious doubts about the authenticity, reliability and independence of the testimony beyond the concerns already outlined regarding its content and similarity to other statements.

As the deadline for further submissions has now passed, the complaint has returned to me for a final 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.

[3] *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*').

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 M'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 lacks context and fails to provide any specific information to support the claims.

But having considered the testimony afresh, 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 M, as a party to the events, could have known about – for example, that he had his child with him who was being looked after in the creche.

I am also 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 M has said should be disregarded as a whole. Afterall, 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 or very similar way by the same PR.

When considering how much weight I can place on Mr M'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 M has provided. Paragraph 40 reads as follows:

> *"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 she 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)."*

So, I have thought about how much weight I can place on this statement when considering the merits of Mr M's complaint.

And having done so, and having taken into account everything that the Lender has said in response to the PD, I feel able to place weight on, and rely on the contents of Mr M's statement. But 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 M has said happened, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr M, 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 M has failed to mention in his statement that he went back to their apartment before making the decision to purchase, when he was describing the sales process as high-pressure. Failing to set out that he had some time to think about the purchase is not, in my view, material to whether the membership itself 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.

I have also considered what the Lender has said about the metadata casting doubt on the date the statement was prepared. But this data reflects the date the statement was sent to this Service, so it is likely that it reflects *that* date, not the date it was originally created. And as I've said, the original letter of complaint, which was sent to the Supplier in January 2019, follows closely what it said in the statement, so the statement was probably used to inform the letter of complaint.

So overall, I remain persuaded that it is likely to be a reliable recollection of events, and I remain satisfied that I can place weight on Mr M's testimony when considering what most likely happened at the Time of Sale.

Having considered everything afresh, I remain satisfied that the Fractional Club membership was sold and/or marketed to Mr and Mrs M as an investment in breach of Regulation 14(3) of the Timeshare Regulations. I also remain satisfied that this breach of Regulation 14(3) was material to Mr and Mrs M's purchasing decision, so it follows that the associated credit relationship between Mr M and the Lender was rendered unfair to him 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 and Mrs M 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 M under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

So, 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 M. Neither Mr M 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 and Mrs M 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 M was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put Mr M 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 had he not entered into the Credit Agreement. This is on the proviso that Mr and Mrs M agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs M were trial members before purchasing Fractional Club membership. As I've

said, trial membership involved the purchase of five week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of the trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs M's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what I direct the Lender to do to compensate Mr M – whether or not a court would award such compensation:

(1) The Lender should refund Mr M'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:

   i. The annual management charges Mr and Mrs M paid as a result of Fractional Club membership.

   ii. The trade-in value given to Mr and Mrs M's trial membership.

(3) The Lender can deduct:

   iii. The value of any promotional giveaways that Mr and Mrs M used or took advantage of; and

   iv. The market value of the holidays* Mr and Mrs M took using their Fractional Points.

   (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 M's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs M'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 and Mrs M 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.

My final decision

I uphold Mr M'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 M to accept or reject my decision before 13 November 2025.

Chris Riggs
Ombudsman