DRN-6021163

Financial Ombudsman Service

The complaint

Mr O's complaint is, in essence, that Mitsubishi HC Capital UK Plc (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 a claim under Section 75 of the CCA.

Mr O is represented in his complaint by a professional representative ("PR").

What happened

I issued a provisional decision on Mr O's case on 14 November 2025, in which I set out the background to the complaint and my provisional findings on it. A copy of that provisional decision is appended to and forms part of this final decision, so it's not necessary for me to go over all the details again here. But to summarise the most relevant aspects:

- Mr O bought a timeshare from a timeshare provider (the "Supplier") on 17 September 2012 (the "Time of Sale"), trading in his existing "Vacation Club" membership for a "Fractional Club" membership, a kind of asset-backed timeshare which entitled him to a share in the net sale proceeds of a property named on his contract (the "Allocated Property") at the end of his membership term. The timeshare cost £11,399 after the trade-in.

- The purchase was funded by a loan from the Lender for the balance of the purchase price (the "Credit Agreement"), repayable over 180 months at £178.97 per month.

- Having taken court action against the Supplier in Spain, resulting in his timeshare contract being declared null and void, Mr O complained to the Lender, seeking to find it responsible under the principles of connected lender liability for certain alleged wrongs by the Supplier. These included that the Supplier had made misrepresentations to Mr O, giving him a claim under Section 75 of the CCA, and that the Supplier had improperly marketed or sold the timeshare to him as an investment, rendering the credit relationship between him and the Lender unfair to him within the meaning of Section 140A of the CCA.

The Lender rejected the complaint, but in my provisional decision I said I thought the complaint should be upheld. The full reasons for this can be found in the appended document, but to summarise again:

- Under Regulation 14(3) of the Timeshare Regulations, it was prohibited for a timeshare provider to market or sell a timeshare (such as the Fractional Club membership) as an investment.

- I thought it more likely than not that the Supplier *had* sold or marketed the Fractional Club membership to Mr O as an investment, in the sense that it had laid out as something from which Mr O could hope for or expect to make a financial gain or profit. This was because:

  - Mr O had recalled, in a witness statement, the Supplier having marketed the product in this way, stating that it was "a good investment and would increase in value".

  - The training materials for the Supplier's sales representatives which related to the version of the Fractional Product sold by the Supplier on this occasion ("FPOC1"), explicitly described the product as an investment, and I thought it was likely the product would have been framed as such to Mr O as a result.

  - I took the view, having seen other training materials authored by the Supplier, that the Supplier was likely to focus on, or emphasise, to existing Vacation Club members (like Mr O) the benefits of the share in the net sale proceeds of the Allocated Property, as this was the key difference between the product they held and the product the Supplier was trying to sell.

- Having established that the Supplier had likely breached the prohibition in Regulation 14(3) of the Timeshare Regulations, I noted that this wouldn't automatically render the credit relationship between Mr O and the Lender unfair to him. The Supplier's improper selling would need to have been material to Mr O's decision to go ahead with the purchase. On balance, I thought it more likely than not that it had been material.

I concluded that the credit relationship between Mr O and the Lender had been rendered unfair to him as a result, meaning fair compensation was warranted. This fair compensation, very broadly-speaking, involved refunding the repayments Mr O had made towards the Credit Agreement, along with annual management charges relating to the extra points he'd acquired at the Time of Sale, but with any benefits from the purchase deducted.

I asked the parties to the complaint to let me have any further submissions they wanted me to consider. PR, on behalf of Mr O, said it agreed with the provisional decision. The Lender said it disagreed, making a number of points which I could summarise as follows:

- Mr O's witness statement simply wasn't good enough to support the conclusions reached. In particular:

  - When Mr O stated that he'd been informed the product was a good investment that would increase in value, this didn't demonstrate that he himself believed that he might make a financial gain, or give an indication of what exactly he was told or shown which led him to believe the membership would increase in value.

  - If it accepted that Mr O had given a description of how the product had been presented to him, it didn't agree that he had demonstrated the prospect of a financial gain was important to him. He hadn't stated this expressly, or implied it.

  - The statement covered multiple sales and I had myself acknowledged the statement was confusing and contained some inaccuracies, which the Lender considered were more serious. For example, the Lender considered that when Mr O referred to the membership potentially being 90 years long, he was clearly referring to the Fractional Club membership. And if he had thought this was 90 years long this was inconsistent with a belief that it was a means of making a financial gain.

- It considered the conclusions reached were based more on speculation than

evidence. In particular, it thought I had taken a narrow view of the additional benefits offered by the Fractional Club membership as opposed to the previous Vacation Club membership. I had focused on the share in the net sale proceeds of the Allocated Property as the key benefit and used this to support the conclusion that it had made a material contribution to Mr O's purchasing decision.

However, the Lender said there were other benefits to the purchase. These included the acquisition of 397 more points, which gave him more holiday rights, and a lowering of his annual management/maintenance fees.

The case has now been returned to me to review once more.

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.

Having done so, I've arrived at the same conclusions as I did in my appended provisional decision, and for much the same reasons. However, it's important that I address the Lender's arguments in this final decision, which I will do presently.

I accepted in my provisional decision that Mr O's witness statement was confusing in places. That said, I noted in my provisional decision that poor drafting or articulation on Mr O's part should not lead me to a conclusion that there was nothing to be gleaned from his evidence. I remain of that view.

The Lender appears to accept there was a possibility that the Supplier marketed or sold the Fractional Club membership to Mr O as an investment (I still consider this likely happened, for the reasons already explained) but disagrees strongly with this having been material to his decision to go ahead with his purchase. The Lender cites there having been no indication by Mr O that this was something which attracted him to the purchase, meaning my conclusions on this point were essentially speculative. It also says that certain aspects of Mr O's evidence, such as him apparently thinking the membership was 90 years long, aren't consistent with him expecting a financial gain from the product, and that there were other benefits that would have attracted him to it.

I acknowledge that Mr O doesn't specifically say that the prospect of making a financial gain or profit from the product was a material reason for him purchasing it. However, he does appear to have thought the Fractional Club membership, or the underlying fractional asset, was an investment and would increase in value. He says the Supplier told him that it would, and he doesn't say that he didn't believe this at the time. He also doesn't mention any other benefits in his witness statement, other than "extra bonuses" and the quality of the Supplier's accommodation, but these appear to be general comments about the Supplier's facilities, and incentives offered towards a previous purchase.[1] I'm inclined to accept that the main benefit mentioned by Mr O in relation to the purchase in question, the prospect of the product being an investment that would appreciate in value, was something which was an important factor in his decision at the time

Regarding Mr O's apparent belief that the membership was for a period of 90 years, I note there is a question mark next to this number and that the *actual* membership term was 19 years. Both numbers sound similar when spoken – and I think it's possible the rendering of

[1] Mr O refers to a voucher for a free week on a yacht, which resulted in him being pressured into signing up for a Yacht Club membership. Based on his membership history with the Supplier, this would date this specific "extra bonus" to 2011 or earlier.

90 years in the statement was an error, although I appreciate that is somewhat speculative. Regardless, I think it's reasonable to doubt that Mr O believed the membership was 90 years long.

The other benefits the Lender has referred to appear to me to be minor in nature compared to the key feature of the Fractional Club membership which set it apart from Mr O's existing Vacation Club membership – the share in the net sale proceeds of the Allocated Property.

Mr O did obtain additional points to use, but these represented only a 13.6% increase in his holdings with the Supplier. The Supplier also claims Mr O's annual fees decreased after his purchase, from 1,888 euros to £1,497. Based on the exchange rates of the time, these numbers appear to be essentially the same, albeit the cost "per point" would have been slightly less.[2] On the other hand, I'm aware that Fractional Club membership came with additional booking fees that Mr O did not have to pay as a Vacation Club member, so there were in fact some *disadvantages*, in terms of holiday benefits, to him switching to the Fractional Club.[3]

While I think this is a borderline case, on balance I remain of the view that Mr O was likely to have been motivated by the prospect of the Fractional Club membership being an investment in the sense that it could or would make him a financial gain in the future. I'm not convinced he would have gone ahead with the purchase regardless of him having held this motivation. This means that, in my view, the Supplier's breach of Regulation 14(3) when selling the membership to him, rendered the credit relationship between him and the Lender unfair to him, and warrants fair compensation as a result.

Fair Compensation

Having found that Mr O would not have agreed to purchase Fractional Club membership ("FC Membership 1" for the purposes of this section) 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 the Consumer 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 he not purchased FC Membership 1 (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr O and any joint purchaser agrees to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr O was an existing Vacation Club member and his membership was traded in against the purchase price of Fractional Club membership. Under his Vacation Club membership, he had 2,501 points. And, like Fractional Club membership, he had to pay annual management charges as a Vacation Club member. So, had Mr O not purchased Fractional Club membership, he 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 O from the Time of Sale as part of his Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid as an ongoing Vacation Club member.

On 8 June 2014 (the "Time of Upgrade"), Mr O upgraded his FC Membership 1 by trading in his existing Fractional Points, paying an additional £7,814 and entering a new purchase agreement for a total of 3,340 Fractional Points ("FC Membership 2"). And the Credit

[2] The mid-market rate on 12 September 2012 was approximately 80 pence to one euro, meaning 1,888 euros would have equated to about £1,500.

[3] These fees were 10p per point, per week booked in a year, up to a maximum of £200 per week.

Agreement remained in place after the upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented Mr O's FC Membership 1, rolling over his existing Fractional Points into the new membership. And as I've already said, I don't think the upgrade ended the unfairness under the Credit Agreement and related Purchase Agreement that stemmed from the acts and/or omissions of the Supplier at the Time of Sale given the facts and circumstances of this complaint. So, I think that there were ongoing effects of unfairness from Mr O's original purchase of FC Membership 1 and the Credit Agreement for which the Lender is answerable.

However, I recognise that the upgrade in question was paid for by funding from a new lender who is likely to bear some responsibility for any acts and/or omissions in the sales presentation. And for that reason, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the 442 additional Fractional Points Mr O purchased on 8 June 2014.

So, in my view, the Lender needs to refund a proportion of the management charges payable after the Time of Upgrade that relate to the 2898 Fractional Points Mr O held originally – which, in this occasion, equates to 87% of the annual management charges paid after the Time of Upgrade.

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

(1) The Lender should refund Mr O'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 Mr O's Fractional Club annual management charges paid, between the Time of Sale and the Time of Upgrade, and what his Vacation Club annual management charges would have been had they not purchased Fractional Club membership. The Lender should also refund the difference between 87% of the FC Membership 2 annual management charges he paid after the Time of Upgrade and the annual management charges he would have paid had he not purchased FC Membership 1.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr O used or took advantage of at the Time of Sale;
   ii. Before the Time of Upgrade, the market value of the holidays* Mr O took using his Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points he would have been entitled to use at the time of the holiday(s) as an ongoing Vacation Club member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

   For example, if Mr O took a holiday worth 2,550 Fractional Points and he would have been entitled to use a total of 2,500 Vacation Club Points 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 he would have been entitled to use 2,600 Vacation Club Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

And

iii. After the Time of Upgrade, the market value of the holidays* Mr O took using his Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points he would have been entitled to use at the time of the holiday(s) as an ongoing Vacation Club member. However, this deduction should relate to only 87% of the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr O took a holiday worth 2,550 Fractional Points and he would have been entitled to use a total of 2,500 Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to 87% of the 50 additional Fractional Points that were required to take it. But if he would have been entitled to use 2,600 Vacation Club Points, 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 O's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr O's FC Membership 2 is still in place at the time of this decision and any joint purchaser agrees to this, the Lender must ask the Supplier to reduce the number of Fractional Points he holds by 2,898 Fractional Points. If the Supplier agrees to do that, then Mr O and any joint purchaser must agree to hold the remaining Fractional Points for the benefit of the Lender (or assign them to the Lender if that can be achieved). What's more, the Lender must indemnify Mr O against 87% of all ongoing liabilities as a result of their Fractional Club membership.

However, if in response to this provisional decision the Supplier doesn't agree to reduce the number of Fractional Points Mr O holds, the Lender must let me know so that I can consider the most appropriate remedy with that being the case.

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

**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

For the reasons explained above, and in the appended provisional decision, I uphold this complaint and direct Mitsubishi HC Capital UK Plc to take the actions set out in the "Fair Compensation" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 12 January 2026.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at the same general conclusions as our Investigator, but I've explained my reasons in more detail. I'm issuing this provisional decision to give the parties an opportunity to make further submissions.

The deadline for both parties to provide any further comments or evidence for me to consider is **28 November 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance accepts my provisional decision, it should let me know. If Mr O also accepts, I may arrange for the complaint to be closed as resolved at this stage without a final decision.

The complaint

Mr O's complaint is, in essence, that Mitsubishi HC Capital UK Plc (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 a claim under Section 75 of the CCA.

What happened

Mr O purchased a number of timeshare products from a timeshare provider (the 'Supplier') between 2006 and 2014. This complaint concerns a purchase Mr O made of a membership of a timeshare I will refer to as the 'Fractional Club' on 17 September 2012 (the 'Time of Sale'). This was Mr O's penultimate purchase from the Supplier and, at the Time of Sale, he was a member in a different timeshare product offered by the Supplier, called the 'Vacation Club'.

At the Time of Sale, Mr O entered into an agreement with the Supplier to buy 2,898 fractional points (the 'Purchase Agreement'). The price stated on the Purchase Agreement was £11,399. This was the price after an allowance was given for Mr O's existing 2,501 Vacation Club points – the price before this trade-in is not currently in evidence.

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

Mr O paid for his Fractional Club membership by taking a loan of £11,399 from the Lender (the 'Credit Agreement'). The loan was arranged by and paid to the Supplier, and was repayable over 180 months at £178.97 per month. As of 2024, the loan was still in repayment.

It's my understanding that Mr O took legal action against the Supplier in Spain, resulting in a judgment from the Spanish courts in January 2022 declaring his timeshare contracts null and void. It's also my understanding that subsequent appeals were decided in Mr O's favour, but the judgment remains unpaid due to the entity within the Supplier's group against which judgment was obtained, having gone insolvent.

Mr O – using a professional representative (the 'PR') – then wrote to the Lender on 11 February 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because the Lender didn't carry out the right credit assessment.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Office of Fair Trading ('OFT') to carry out such an activity.
5. The Credit Agreement having been rescinded due to the Spanish court's declaration that the Purchase Agreement was null and void.

(1) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

Mr O says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Falsely told him that Fractional Club membership was an "investment" in a share of a property which would considerably increase in value.
2. Falsely told him that he would be able to sell the Fractional Club membership back to the Supplier or easily to third parties at a profit.
3. Falsely told him he would have access to "the holiday apartment" at any time all year round.

Mr O says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr O.

(2) <u>Section 140A of the CCA: the Lender's participation in an unfair credit relationship</u>

The Letter of Complaint set out several matters which I've interpreted as reasons why Mr O thinks that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The Purchase Agreement contained unfair contract terms.
3. He was pressured into purchasing Fractional Club membership by the Supplier.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr O's concerns as a complaint and issued its final response letter on 30 March 2022, rejecting it on every ground.

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

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr O at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr O was

rendered unfair to him for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. While the Lender made relatively detailed submissions, they could probably be fairly summarised as follows:

- It disagreed that the Supplier had likely breached Regulation 14(3) of the Timeshare Regulations or that, if a breach had occurred, that any unfairness had resulted. This was because of concerns it had about Mr O's witness statement, which our Investigator had relied on:
    - There was a general lack of context in respect of the conversations which took place with the Supplier's sales representatives, and a lack of detail, such as dates or locations of events. The statement was drafted in a broad way which made it unclear which of Mr O's many purchases he was referring to. He was not necessarily referring to the purchase which was the subject of this complaint.
    - The statement didn't indicate that Mr O thought he was buying an investment or that he wouldn't have proceeded if he had not had that understanding.
    - There were factual errors in the witness statement that called into doubt how reliable it was. These included Mr O seemingly thinking the membership was for 90 years when in fact it was 19 years, and Mr O stating that he'd not been told about his cooling off period when records showed he'd exercised his right to cancel several other purchases from the Supplier.

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 published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context here.

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 Regulations by marketing and/or selling Fractional Club membership to Mr O as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him 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 Mr O's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the timeshare was misrepresented to Mr O, and that the Lender failed to carry out the right checks before lending to him.

That's because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr O in the same or a better position than he would have been in, had those aspects of the complaint been successful.

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

Having considered the entirety of the credit relationship between Mr O 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; and
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;
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 O and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr O'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 O says the Supplier did exactly that – saying the following in a witness statement dating to 8 April 2019:

"We were informed it was a good investment and would increase in value especially being fractional it would be easy to sell even back to the resort."

I'm aware the Lender thinks Mr O is unclear as to which of his purchases from the Supplier he is referring to here. I think he can only be referring to one or both of the fractional timeshare purchases he made, given he refers to the product in question being "fractional". Given what is known about how the Supplier sold the different versions of its Fractional Club product over the years, I think it's probable that Mr O is at least referring to the product he purchased at the Time of Sale. I will explain that in a little more detail later.

In any case, my view is that Mr O alleges that the Supplier breached Regulation 14(3) at the Time of Sale because it told him the Fractional Club product was an investment and would increase in value.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a*

transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr O's share in the Allocated Property clearly constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract <u>as an investment</u>. 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 O 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 O, the financial value of his 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 for the primary purpose of holidays and that the Supplier was unable to make any representations as to future value. On the other hand, one of the disclaimers in the contractual paperwork referred to the Supplier's representatives not being investment advisors and having only given information based on their own experiences as investors. This, I think, had the potential to give mixed messages to consumers. The fact the Supplier found it necessary to include such a disclaimer also, in my view, suggests it expected its representatives to speak about Fractional Club membership in the context of discussions about investment.

And in any case, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr O or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

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 a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

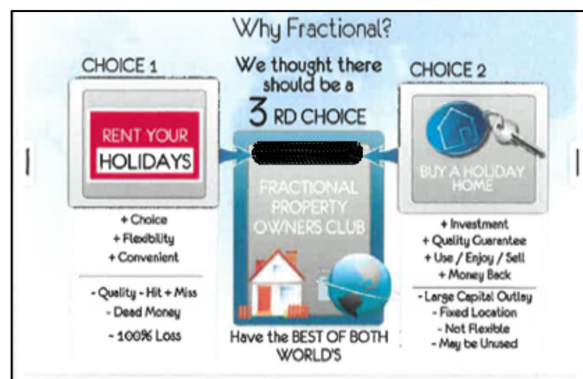
As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. The version of the Fractional Club sold at the Time of Sale was this earlier version of the product. Where it is necessary to distinguish it from the second version of the product which the Supplier began selling in the middle of 2013, I will use "FPOC1" to describe the first version and "FPOC2" to describe the second version.

It isn't entirely clear whether Mr O 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 O Fractional Club membership; and

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

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled "*Why Fractional?*" indicates that sales representatives would have taken Mr O through three holidaying options along with their positives and negatives:

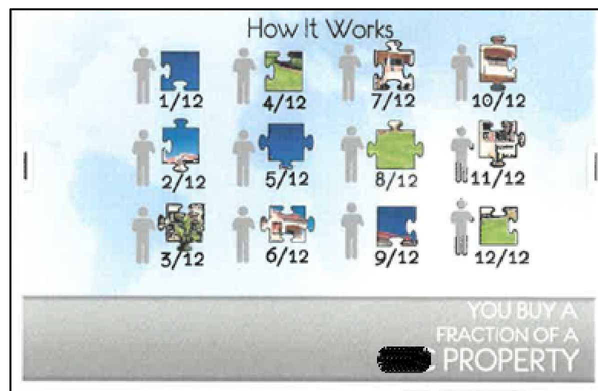
(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

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

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr O that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment he could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as) , I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there was no 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 O the financial value of the proprietary interest he was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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))."*[4] 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.

I return now to the question of *which* purchase Mr O was referring to in his witness statement. I mentioned earlier that the wording of the statement left it open as to whether he was speaking about the Time of Sale, or his second purchase of membership in the Fractional Club, or possibly both, but that I thought he was *at least* referring to the purchase he made at the Time of Sale.

My reason for this is related to the fact that Mr O was a long-term customer of one of the Supplier's other products, which was similar to the Fractional Club in most aspects, but did not come with any investment features like a share in an Allocated Property. I'll call this product the "Vacation Club".

I think the Supplier was more likely to emphasise the investment features of the Fractional Club product to customers who were existing Vacation Club members and who did not yet have a Fractional Club membership. Given this was the key difference between the products, it's perhaps not surprising that significant focus would be given to the share in the Allocated Property for a member who had a similar product which lacked this feature.

And indeed, there is evidence from the Supplier's training and marketing materials for another variation of their Fractional Club product – called "Signature" – that it adapted its sales pitch depending on whether a customer already had a Fractional Club membership, or if they were a Vacation Club member. For the Signature product, Vacation Club members received a sales pitch which was quite similar to the one I've just described above for the FPOC1 product. Existing Fractional Club members received a rather different pitch that had more of an emphasis on the unique features of the Signature membership compared to more ordinary Fractional Club membership.

So I think, given Mr O was a Vacation Club member at the Time of Sale, it's likely discussion of the share in the Fractional Property would have had some prominence and I think this makes it more likely that when Mr O speaks of the fractional products being described to him as investments, he is including the FPOC1 purchase he made at the Time of Sale.

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[4] 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

And when speaking about what the Supplier told him at that time, Mr O says the Supplier positioned membership of the Fractional Club as an investment to him. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr O. And as the slides clearly indicate that the Supplier's sales representative was likely to have led him to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find him either implausible or hard to believe when he says he was told the Fractional Club product was an investment that would increase in value. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr O was led by the Supplier to believe 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 O and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

I appreciate the Lender has some concerns about the witness statement. I accept that it is somewhat confusingly structured and unclear in places, and is rather a broad journey through Mr O's experiences with the Supplier over a long period of time, including many sales which are not relevant to this complaint. Sometimes the lack of clarity is unhelpful for interpretation – for example where Mr O says he understood the length of his contract was 90 years, it's unclear what product he's referring to. And what Mr O says about not being informed of cooling off periods seems unlikely to be true given he cancelled two purchases from the Supplier during their respective cooling off periods.

That said, I don't think these issues are necessarily a reason to say that Mr O's witness statement can't be relied on. I'm wary of finding that poor drafting or articulation means there is nothing that can be taken from such a document. While I acknowledge the statement's flaws, on balance I think the relevant parts reflect Mr O's recollection of what he was told about the Fractional Club membership at the Time of Sale.

On my reading of Mr O's testimony, and considering the factual position at the Time of Sale, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase. That doesn't mean he was not interested in holidays. His multiple historic holiday related purchases and the fact that he acquired a small number of additional points over and above what he had owned in the Vacation Club, demonstrates that he quite clearly was. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr O says (plausibly in my view) that Fractional Club membership was marketed and sold to him at the Time of Sale as something that offered him more than just holiday rights, on the balance of probabilities, I think his purchase was motivated by his 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 his existing Vacation Club membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made.

Mr O has not said or suggested, for example, that he would have gone ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that he would have gone ahead with his purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr O 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.

Fair Compensation

Having found that Mr O would not have agreed to purchase Fractional Club membership ("FC Membership 1" for the purposes of this section) 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 the Consumer 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 he not purchased FC Membership 1 (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr O and any joint purchaser agrees to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr O was an existing Vacation Club member and his membership was traded in against the purchase price of Fractional Club membership. Under his Vacation Club membership, he had 2,501 points. And, like Fractional Club membership, he had to pay annual management charges as a Vacation Club member. So, had Mr O not purchased Fractional Club membership, he 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 O from the Time of Sale as part of his Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid as an ongoing Vacation Club member.

On 8 June 2014 (the "Time of Upgrade"), Mr O upgraded his FC Membership 1 by trading in his existing Fractional Points, paying an additional £7,814 and entering a new purchase

agreement for a total of 3,340 Fractional Points ("FC Membership 2"). And the Credit Agreement remained in place after the upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented Mr O's FC Membership 1, rolling over his existing Fractional Points into the new membership. And as I've already said, I don't think the upgrade ended the unfairness under the Credit Agreement and related Purchase Agreement that stemmed from the acts and/or omissions of the Supplier at the Time of Sale given the facts and circumstances of this complaint. So, I think that there were ongoing effects of unfairness from Mr O's original purchase of FC Membership 1 and the Credit Agreement for which the Lender is answerable.

However, I recognise that the upgrade in question was paid for by funding from a new lender who is likely to bear some responsibility for any acts and/or omissions in the sales presentation. And for that reason, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the 442 additional Fractional Points Mr O purchased on 8 June 2014.

So, in my view, the Lender needs to refund a proportion of the management charges payable after the Time of Upgrade that relate to the 2898 Fractional Points Mr O held originally – which, in this occasion, equates to 87% of the annual management charges paid after the Time of Upgrade.

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

(7) The Lender should refund Mr O'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.

(8) In addition to (1), the Lender should also refund the difference between Mr O's Fractional Club annual management charges paid, between the Time of Sale and the Time of Upgrade, and what his Vacation Club annual management charges would have been had they not purchased Fractional Club membership. The Lender should also refund the difference between 87% of the FC Membership 2 annual management charges he paid after the Time of Upgrade and the annual management charges he would have paid had he not purchased FC Membership 1.

(9) The Lender can deduct:

iv. The value of any promotional giveaways that Mr O used or took advantage of at the Time of Sale;

v. Before the Time of Upgrade, the market value of the holidays* Mr O took using his Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points he would have been entitled to use at the time of the holiday(s) as an ongoing Vacation Club member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

   For example, if Mr O took a holiday worth 2,550 Fractional Points and he would have been entitled to use a total of 2,500 Vacation Club Points 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 he would have been entitled to use 2,600 Vacation Club Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

And

vi. After the Time of Upgrade, the market value of the holidays* Mr O took using his Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points he would have been entitled to use at the time of the holiday(s) as an ongoing Vacation Club member. However, this deduction should relate to only 87% of the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr O took a holiday worth 2,550 Fractional Points and he would have been entitled to use a total of 2,500 Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to 87% of the 50 additional Fractional Points that were required to take it. But if he would have been entitled to use 2,600 Vacation Club Points, 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)

(10) 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.

(11) The Lender should remove any adverse information recorded on Mr O's credit file in connection with the Credit Agreement reported within six years of this decision.

(12) If Mr O's FC Membership 2 is still in place at the time of this decision and any joint purchaser agrees to this, the Lender must ask the Supplier to reduce the number of Fractional Points he holds by 2,898 Fractional Points. If the Supplier agrees to do that, then Mr O and any joint purchaser must agree to hold the remaining Fractional Points for the benefit of the Lender (or assign them to the Lender if that can be achieved). What's more, the Lender must indemnify Mr O against 87% of all ongoing liabilities as a result of their Fractional Club membership.

However, if in response to this provisional decision the Supplier doesn't agree to reduce the number of Fractional Points Mr O holds, the Lender must let me know so that I can consider the most appropriate remedy with that being the case.

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

**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 provisional decision

For the reasons explained above, I'm minded to uphold Mr O's complaint and direct Mitsubishi HC Capital UK PLC to take the actions in the "Fair Compensation" section of this decision.

Will Culley
Ombudsman