DRN-6078053

Financial Ombudsman Service

The complaint

Mr V says that Mitsubishi HC Capital UK Plc, trading as Hitachi Capital Consumer Finance – (the Lender), unfairly declined his claim under Section 75 and Section 56 of the Consumer Credit Act 1974 ('CCA'). And he says his creditor- debtor relationship with the Lender was unfair to him under section 140A of the CCA.

What happened

On 25 January 2015, Mr V with his wife, purchased a timeshare membership – which I'll call 'Fractional Club' membership – from a timeshare provider (the 'Supplier'). It included 1,740 fractional points. The membership was asset backed – which means it gave Mr V more than just holiday rights. It included a share of the net sale proceeds of a property named on the purchase agreement (the 'Allocated Property') after the membership term ended.

The purchase price was £6,288 and Mr V borrowed £6,288 from the Lender in his sole name to pay for it. The loan was repaid on 17 March 2015.

On 4 March 2021, Mr V – using a professional representative ('PR1') – wrote to the Lender (the 'Letter of Claim'), to make a claim under sections 56, 75 and 140 of the CCA.

In summary, the Letter of Claim said that the Supplier made two misrepresentations. Firstly, it told Mr V that the only way he could 'exit' his existing timeshare membership was to purchase Fractional Club membership, when he could have exited his membership in different circumstances. Secondly, it guaranteed that Mr V would 'exit' the Fractional Club membership after a finite period, but this wasn't true as a purchaser must first be found. In addition:

- It went on to say that there had been a breach of contract in respect of Mr V receiving the net proceeds from the sale of the property, as there was nothing within the documentation to confirm that Mr V owned any part of the property and that he would receive any proceeds from the sale.
- It said specific terms in the management agreement that governed Fractional Club membership were unfair pursuant to the Unfair Terms in Consumer Contracts Regulations 1999.
- The Supplier didn't conduct a proper assessment of Mr V's financial position and his ability to repay the loan, which rendered the creditor-debtor relationship unfair to him.
- The Supplier applied 'undue' pressure on Mr V to procure his agreement to the loan.
- The Supplier 'breached EU law'.

The Lender dealt with the Letter of Claim as a complaint and issued its final response letter on 15 April 2021. It rejected the complaint on every ground. In October 2021, PR1 referred the complaint to this service. And it said it didn't think the complaint was time barred, as Mr V only discovered the Timeshare had been mis-sold to him at the end of 2019. And it went onto say that he had been subject to deliberate and gross misrepresentations designed to induce him into proceeding with payment for the membership.

In February 2023, Mr V changed his professional representative to 'PR2'. In August 2023, PR2 made some further submissions. In summary, it said Mr V was told the Fractional Club membership would be a 'good investment', and that at the end of the term, he would 'get his money back with a profit'.

PR2 specifically referred *to R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (Admin) ('Shawbrook v Financial Ombudsman Service')*, which confirmed that a creditor-debtor relationship could be unfair under section 140A of the CCA if the timeshare membership was sold as an investment. And it said the contract should be void for illegality.

One of our investigators looked into the complaint and rejected it on its merits.
PR2 asked that an ombudsman make a final decision. It subsequently provided a witness statement from Mr V in support of the complaint.

The complaint was passed to me for review. I issued a provisional decision explaining why I didn't think the complaint should be upheld. No response was received from the Lender. PR2 responded and explained why it didn't agree with my decision. In summary it said:

- The complaint was always advanced under Section 140 of the CCA.
- Section 140 claims accrue from the end of the credit relationship, not the transaction date.
- The Lender's **(a different Lender to that complained about)** loan facility terminated within six years of the complaint being pursued.
- The complaint was therefore not statute barred.
- Reliance on Section 140A and Shawbrook constituted clarification, not amendment.
- Any drafting deficiencies by PR1 should not deprive Mr V of statutory protection.
- The complaint should therefore be accepted as within jurisdiction and determined on its merits.

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, in many ways, 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 in detail here. But I would add that the following regulatory rules/guidance are also relevant:

<u>The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

Below are the most relevant provisions and/or guidance as they were at the relevant time.

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

And having done so, I remain of the opinion that this complaint should not be upheld. I've set out my reasoning below.

Before I explain why, I want to make it clear that my role as an ombudsman isn't to address every single point that's been made to date – it's to decide what's fair and reasonable in the circumstances of this complaint. So, if I haven't commented on, or referred to, something that either party has said, it doesn't mean I haven't considered it.

Section 75 of the CCA

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr V could have made against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, but I don't think Mr V would have been able to make a successful claim for misrepresentation under Section 75. I'll explain why.

The sale complained about took place on 25 January 2015. The claim letter from PR1 is dated 4 March 2021. At the time the Lender received notification of PR1's claim, in March 2021, I think it would have been time-barred under the Limitation Act 1980 ("LA"). The LA sets out limitation periods (time limits) for bringing various types of legal claim. If a claim is brought too late, the respondent is likely to have a complete defence to the claim on that basis.

For claims relating to misrepresentation, the limit normally runs six years from the date a person suffers damage as a result of the misrepresentation – such as entering into a contract and incurring liabilities they wouldn't have otherwise. This means the time to bring a claim for misrepresentation would have been six years from the Time of Sale, so the limitation period for such a claim would have expired on 25 January 2021, which was before the Lender was notified of the claim. So, I do not think the Lender would be wrong to decline it.

In its letter of claim, PR1 said that it didn't think one of the agreements was statute barred. As only one agreement is being complained about, I find it odd that PR1 referred to another

agreement. I've also noted that this is very similar wording to that used by it in other similar complaints that I have seen.

PR1 also referred to Section 32 of the LA as postponing the limitation period in the case of fraud, concealment or mistake. I disagree. Section 32(1) of the LA has the potential to postpone the relevant limitation period in cases of fraud, concealment, or mistake. I have thought about that here. But in this case the PR has simply referenced section 32(1), but it hasn't explained what acts were carried out, that would make it a relevant consideration that might extend time. So, I find it very difficult to see taking into account the brief submissions provided by PR1 in this case, how section 32(1) could extend the time limit for Mr V.

Also, Mr V refers to the lack of availability and exclusivity of the accommodation. So, my understanding is that he believed the Timeshare was misrepresented because he couldn't holiday in the way he says he was led to believe by the Supplier, and it wasn't exclusive in the way he was expecting. But that would have been clear to him soon after the Time of Sale and before the end of 2019, which is when PR1 said he became aware the Timeshare had been mis-sold. So, even if it could be said that section 32(1) is likely to have postponed the limitation period until he first discovered that the availability of holidays was not what he thought it would be, and the accommodation wasn't exclusive, (and I make no such finding that it would), I'm not persuaded that would make a difference here.

However, the judgment in Scotland and Reast explains that, even if a limitation period has expired for a standalone misrepresentation claim, relevant misrepresentations that could be attributed to the Lender can be considered as part of the assessment of the unfairness of the credit relationship. So, I have gone on to consider those matters later in this decision.
As noted above Mr V has said he could not holiday where and when he wanted to. On my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, meaning it could be viewed as also potentially breaching the Purchase Agreement. It is not clear precisely when this was alleged to have happened, but if it happened within six years of the time the complaint was first made, such a claim would not have been made too late under the LA.

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mr V, states that the availability of holidays was/is subject to demand. It also looks like he made use of his fractional points to holiday on a number of occasions. I accept that he may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr V any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

PR2 has said that the complaint pursuant to Section 140 was not statute barred, as time ran from the end of the credit relationship. I'm a little surprised that PR2 has made this argument, as I considered the merits of the Section 140A complaint in my provisional decision, and I didn't say that it was statute barred. I did say, as I've explained above, that I considered Mr V's Section 75 claim in respect of misrepresentation would have been time-barred under the Limitation Act 1980 ("LA"). I've set out my thinking in respect of Mr V's Section 140A claim below.

Section 140A says a court may make an order if it thinks the relationship between a creditor and a debtor is unfair to the debtor. It's deliberately framed in wide terms, and a finding of unfairness can flow from something done on the creditor's behalf in connection with a 'related agreement'. Here, the purchase agreement is a 'related agreement'. And, by virtue of section 56 of the CCA, the Lender is legally answerable for the Supplier's actions.

Having considered the entirety of the relationship, I don't think it was unfair for the purposes of section 140A. In reaching this conclusion, I've considered:

(1) The standard of the Supplier's commercial conduct, which includes its sales and marketing practices at the time of sale, and any relevant training material.
(2) The information provided by the Supplier at the time of sale, including the contracts and any disclaimers made by the Supplier.
(3) The commission arrangements between the Lender and the Supplier at the time of sale and the disclosure of those arrangements.
(4) All the evidence provided by both parties on what was supposedly said and/or done at the time of sale.
(5) The inherent probabilities of what's likely to have happened given the circumstances of the sale; and when relevant
(6) Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr V and the Lender given his circumstances at the Time of Sale.

The Supplier's sales and marketing practices at the time of sale

There are several reasons why PR1 and PR2 say Mr V's creditor-debtor relationship with the Lender was unfair to him.

PR1 says that the right affordability checks weren't carried out. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr V was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for him.

PR1 said Mr V was subject to undue pressure during the sale. I appreciate that Mr V may have felt weary after a sales process that went on for a long time. But it's not clear to me from what Mr V has said, as to what was done by the Supplier during the sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership when he simply didn't want to.

I'm not persuaded, therefore, that Mr V's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he says his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of the prohibition against selling timeshares in that way.

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

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

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

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

But PR2 says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, 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 V's share in the Allocated Property clearly, in my view, 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 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 V 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.

As I said in my provisional decision, there is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.
On the one hand, it is clear 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 V, 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 V as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to him as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr V as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Would the credit relationship between the Lender and Mr V have been rendered unfair to him had there been a breach of Regulation 14(3) of the Timeshare

Regulations?

As I think it's possible the Supplier breached Regulation 14(3) at the time of sale, I now need to decide what impact it might have had on the fairness of the relationship between Mr V and the Lender. I say this because in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61* ('Plevin'), the Supreme Court said:

'Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair.'

What this means is that a breach of Regulation 14(3) doesn't automatically mean the credit relationship is unfair 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. For me to conclude that a breach of Regulation 14(3) led to an unfair relationship, I need to see sufficient evidence to conclude, on the balance of probabilities, that the prospect of a financial gain was an important and motivating factor for Mr V when he decided to purchase Fractional Club membership.

PR1 didn't provide any direct, first-hand testimony from Mr V. And I've noted that it didn't say anything in its Letter of Claim about the Supplier marketing or selling the Fractional Club membership as an investment, despite making several other detailed allegations. And if that had been an important and motivating factor which led Mr V into purchasing Fractional Club membership, I would have expected it to have specifically mentioned this when the complaint was originally made.

I've thought carefully about what PR2 has said about the information regarding the Fractional Club membership being positioned to Mr V as an investment, that would provide him with a profit, was communicated to PR1 by Mr V, but omitted by it in the original complaint. I can understand that taking into account what they've said, Mr V and PR2 are frustrated with the omissions they say PR1 made in presenting the case. And it's regrettable that all of Mr V's recollections, weren't articulated fully in the original complaint. But unfortunately, I don't have any evidence of what Mr V told PR1, so I simply don't know what he told it. And as the decision maker, I have to consider the complaint that has been made on Mr V's behalf by PR1, and the evidence provided in support of that complaint, not the complaint that Mr V and PR2 think ought to have been made. So, I'm not persuaded to change my opinion on this point from what I've set out above.

In my provisional decision, I noted that PR2's submissions in August 2023 (not the witness statement that it referred to in its response to my provisional decision) are identical to the submissions it's made in other cases, so when it says, for example, 'Our Client [sic] was told that Fractional Ownership would be a 'good investment'…'. And the clearly generic nature of the submission provides me with very little insight from Mr V as to what he was told during the sales process.

In February 2024, Mr V provided his recollections about the sale in the form of a witness statement, and it's apparent it was prepared after the complaint was rejected. And it was after the High Court had handed down its judgment in Shawbrook v Financial Ombudsman Service, and it had been approximately 9 years since the events complained about and nearly three years since the Letter of Claim.

I remain of the opinion informed by my own experience, that the more time that passes between a complaint and the events complained about, the greater the risk that the consumers' recollections will be vague and inaccurate and potentially influenced by

discussions with others, and even the complaint process itself. Mr V has said in his statement that he upgraded to Fractional Club membership in January 2015, and this was partly because of the concerns he had about his existing membership being "in-perpetuity," and the maintenance fee obligations that would place on his children. But the Supplier has said that Mr V traded in his previous membership to purchase Fractional Club membership in July 2012. So, when he upgraded his membership again in 2015, he was already an existing Fractional Club member. It seems to me therefore that Mr V's recollections are in relation to his first Fractional Club purchase in 2012.

Indeed, as there's no evidence on file to corroborate the summary of Mr V's recent recollections, I think there's a real risk that his recollections were influenced by PR2's submissions and/or the judgment in Shawbrook v Financial Ombudsman Service. This means that I can't give them the weight necessary to conclude that the credit relationship in question was unfair because of a breach of Regulation 14(3).

The information provided by the Supplier at the time of sale

PR1 says that Mr V wasn't given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that, because some of the terms of the Purchase Agreement weren't individually negotiated, they were unfair contract terms as were the terms governing the ongoing costs of membership.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr V sufficient information, in good time, on the various charges he could have been subject to as a Fractional Club member in order to satisfy the requirements of Regulation 12 of the 2010 Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice.

And as neither Mr V nor PR1 have persuaded me that Mr V would not have pressed ahead with his purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mr V in practice, nor that any such terms led him to behave in a certain way to his detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy, even if they could be said to be unfair contract terms, which I make no formal finding on.

Overall Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr V's Section 75 claims. I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement and related Purchase Agreement that was unfair to him for the purposes of Section 140A of the CCA.

And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

My final decision

For the reasons set out above, my decision is not to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 3 March 2026.

Simon Dibble
Ombudsman