DRN-6082848

The complaint

Mr B's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal 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.

Although the timeshare in question was bought jointly by Mr and Mrs B, the loan used to finance the purchase was in Mr B's sole name. As such he is the only eligible complainant here. I will, however, refer to both Mr and Mrs B where it is appropriate for me to do so.

What happened

Mr and Mrs B were existing members of a timeshare called the Vacation Club ('VC') from a timeshare provider (the 'Supplier'). This was a points-based timeshare, whereby every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 9 June 2010, Mr and Mrs B bought a property from the Supplier at the Supplier's Kusadasi resort. This cost them £130,000 and was paid for by taking a mortgage with another lender.

Then, on 21 February 2012 (the 'Time of Sale') Mr and Mrs B purchased membership of a different type of timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 2,898 fractional points, and after trading in their existing VC points, they ended up paying £12,554 (the 'Purchase Agreement') for their Fractional Club membership.

Unlike their VC membership, the Fractional Club was asset backed – which meant it gave Mr and Mrs B 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 B paid for their Fractional Club membership by taking finance of £12,554 from the Lender in his sole name (the 'Credit Agreement').

In February 2013 Mr and Mrs B traded in their Fractional Club membership towards a new fractional membership, and as such gave up their rights to the proceeds of the sale of the Allocated Property.

Mr B – using a professional representative (the 'PR') – wrote to the Lender on 4 July 2018 (the 'Letter of Complaint') to raise a number of different concerns about their Fractional Club membership and the associated Credit Agreement. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to

[1] At the time the loan was agreed the Lender was trading as Hitachi Capital Consumer Finance.

repeat them in detail here beyond the summary above.

The Lender dealt with Mr B's concerns as a complaint and issued its final response letter on 8 August 2018, rejecting it on every ground.

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

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

The provisional decision

Having considered everything, I thought Mr B's complaint ought to be upheld. This was because I thought it likely, on the balance of probabilities, that Mr and Mrs B's Fractional Club had been sold and/or marketed to them as an investment in breach of Regulation 14(3) of the 'Timeshare Regulations'[2], and this breach had been material to their purchasing decision rendering the associated credit agreement unfair. So, I set out my initial thoughts in a provisional decision (the 'PD'). In this I said:

"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 and Mrs B as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr B 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 B 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 B 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.*

[2] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

I have then considered the impact of these on the fairness of the credit relationship between Mr B 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 B's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr and Mrs B say that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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

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

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

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 B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs B as an investment.

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

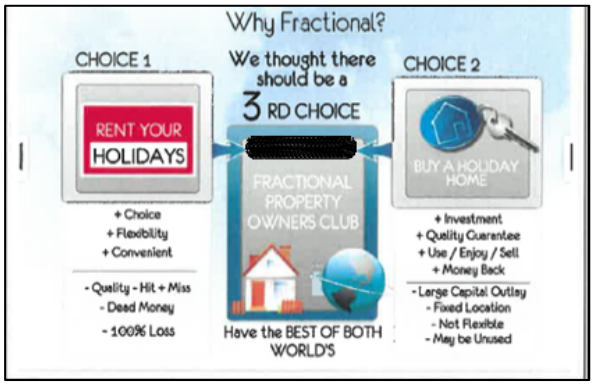
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

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. It isn't entirely clear whether Mr and Mrs B 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 B's Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs B.*

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 and Mrs B 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 and Mrs B that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back. And here it is important to note that Mr and Mrs B already owned one of the properties sold by the Supplier. So the Fractional Club offered them the opportunity to make a further purchase without having to lay out the cost of the entire property.

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

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract

would be recoupable at a profit in the future (see regulation 14(3)).”[3] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

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

And Mr and Mrs B say as much in their testimony. As regards their fractional membership purchases (as I said, they upgraded their membership in 2013 and then again in 2014) they said:

> *“We purchased our first Fractional Rights in March*[4] *2012…and subsequently upgraded – probably in 2013. We was [sic] told this was an investment into our future as we would own a fraction of a property and then at the end of the term we would be able to sell for a profit whilst enjoying great holidays, they advised it would mean that the membership would come to an end and we would walk away with a profit on our share, seemed like a great retirement plan to us.”*

So, Mr and Mrs B say, in their own words, that the Supplier positioned membership of the Fractional Club as an investment to them. 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 and Mrs B. And as the slides clearly indicate that the Supplier’s sales representative was likely to have led them 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 them either implausible or hard to believe when they say they were told “…then at the end of the term we would be able to sell for a profit…”. On the contrary, in the absence of evidence to persuade me otherwise, I think that’s likely to be what Mr and Mrs B were 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.

<u>Was the credit relationship between the Lender and the Consumer rendered unfair?</u>

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

On my reading of Mr and Mrs B’s testimony, the prospect of a financial gain from Fractional

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

[4] This appears to be an error, as the purchase was in February 2012.

Club membership was an important and motivating factor when they decided to go ahead with their purchase. They have been specific about that:

> *"…they advised it would mean that the membership would come to an end and we would walk away with a profit on our share, seemed like a great retirement plan to us."*

I think it is also relevant to take into account here their previous purchase of real estate from the Supplier. As I've said, in June 2010 Mr and Mrs B bought an entire property in one of the Supplier's resorts. This was while they held their VC points. Then, within two years they traded in their entire VC points holding towards their purchase of the Fractional Club. So, I think this is evidence of Mr and Mrs B's interest in property ownership, more so than in a membership which only provided holidays.

That doesn't mean they were not interested in holidays - their own testimony, purchase and reservation history demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs B say (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, and taking into account their previous purchasing history and how I think the Fractional Club was presented to them, 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 membership.

Mr and Mrs B have 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 Mr B 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.

<u>Did the unfairness caused by the purchase of the Fractional Club end when it was traded in for a further purchase?</u>

As I've said, on 13 February 2013, Mr and Mrs B traded in their Fractional Club, paying an additional £5,147 for the purchase of 3,105 fractional points in a new fractional membership, thereby 'upgrading' and replacing their original Purchase Agreement. This was paid for by a new credit agreement with a different lender.

As a result of their purchase of this new 'upgraded' membership, it is necessary to consider whether the unfairness caused to Mr B from the purchase of the Fractional Club at the Time of Sale continued, and if it did continue, whether there were ongoing consequences that I need to take into account.

I think there was some unfairness carried over into the new credit agreement as their 2,898 fractional points were traded in for the new membership, and that would normally be taken into account when considering redress. But a complaint about the sale of the subsequent 'upgraded' fractional memberships and the new credit relationships between Mr B (and Mrs B in those cases) and the lender relating to those purchases has been made, and is also being considered by me. And I intend to uphold that complaint, and as part of my proposed redress in that case I am minded to direct the lender that funded the 'upgraded'

membership purchases to refund the loan payments and the annual management charges that Mr and Mrs B actually paid that relate to those 'upgraded' fractional membership.

Conclusion

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

I then set out how I thought the Lender should calculate and pay fair compensation to Mr B:

"Fair Compensation

Having found that Mr and Mrs B would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr B was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore had he not entered into the Credit Agreement, provided Mr and Mrs B both agree to assign to the Lender their 2,898 fractional points, or hold them on trust for the Lender if that can be achieved.

Mr and Mrs B were existing VC members, and their membership was traded in against the purchase price of Fractional Club membership. Under their VC membership, they had a number of VC points. And, like Fractional Club membership, they had to pay annual management charges as VC members. So, had Mr and Mrs B not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs B from the Time of Sale as part of this particular Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing VC members.

On 13 February 2013 (the 'Time of Upgrade'), Mr and Mrs B upgraded their Fractional Club membership by trading in their existing fractional points, paying an additional £5,147 and entering a new purchase agreement for a total of 3,105 fractional points ('FC Membership 2'). And the Credit Agreement remained in place after the upgrade.

Although I think there was likely to be some ongoing unfairness caused to Mr B in relation to the fractional points that were rolled into the FC membership 2, as this will be accounted for in the redress in the other complaint, it does not need to be considered here.

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

(1) The Lender should refund Mr B's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs B's Fractional Club annual management charges paid between the Time of Sale and the Time of Upgrade, and what their VC annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

i. *The value of any promotional giveaways that Mr and Mrs B used or took advantage of at the Time of Sale;*

ii. *Before the Time of Upgrade, the market value of the holidays* Mr and Mrs B took using their fractional points if the Points value of the holiday(s) taken amounted to more than the total number of VC points they would have been entitled to use at the time of the holiday(s) as ongoing VC members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.*

For example, if Mr and Mrs B took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 VC 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 they would have been entitled to use 2,600 VC 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 B's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) I am aware that Mr and Mrs B traded in their FC Membership 2 towards 'FC membership 3' in February 2014, purchasing 3,240 points at a further cost of £4,978. So if Fractional Membership 3 is still in place at the time of this decision, the Lender must ask the Supplier to reduce the number of Fractional Points they hold by 2,898 fractional points.

However, if in response to this provisional decision the Supplier doesn't agree to reduce the number of fractional points Mr and Mrs B hold, 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 and Mrs B took using their fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

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

The responses to the provisional decision

The PR, on Mr B's behalf, accepted the provisional outcome with no further comment, but the Lender did not. It didn't think that Mr and Mrs B's membership had been marketed and sold as an investment, and it didn't agree that any alleged breach of Regulation 14(3) was material to their decision to purchase.

It said, in summary:

- The witness statement submitted to this Service in November 2023 was neither signed nor dated.

- The statement was claimed to have formed part of a bundle received in 2018, but the original bundle received by it was not date-stamped as it now appears. This inconsistency raises serious doubts regarding the timing and authenticity of the document. It suggests the statement may have been created closer to its submissions to this Service, and likely after the Judicial Review (‘*Shawbrook & BPF v FOS’)*[5] which could have influenced the recollections presented.
- The initial letter of complaint makes no reference to Mr and Mrs B expecting to profit or gain financially from the Fractional Club membership. It only includes broad allegations that the membership was sold as an investment. The term “profit” appears for the first time in the witness statement. This casts doubt on whether the PR possessed the witness statement when the complaint was submitted.
- The letter also raises claims which are absent in the statement, such as being told that if they didn’t purchase the Fractional Club, they were at risk of leaving the product to their estate.
- Mr B and the PR initially complained that the membership was a long-term holiday product. It was only after being advised that this was not the case did the complaint evolve to include allegations of investment. This raises concerns about credibility and consistency.

As the deadline for further submissions has now passed, the matter has come back to me for further consideration.

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.

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 reconsidered everything in light of the Lenders submissions in response to the PD, I remain satisfied that it is fair and reasonable to uphold this complaint for broadly the same reasons as set out in the PD.

Again, my role as an Ombudsman isn’t to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven’t commented on, or referred to, something that either party has said, this doesn’t mean I haven’t considered it. Rather, I’ve focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

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[5] 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)

The Lender's further comments in response to the PD only relate to the reliability and credibility of the testimony from Mr and Mrs B. And it says that this casts doubt on whether the Fractional Club was sold to them as an investment, and so breaching Regulation 14(3). And it also says that it does not think that any breach of the regulations was material to Mr and Mrs B's purchasing decision in any event.

As regards the testimony submitted in evidence, I agree that it is undated. But it does appear to have been signed by both Mr and Mrs B, so I think it is likely to be a representation of their recollections of their relationship with the Supplier, including what they say happened at the Time of Sale.

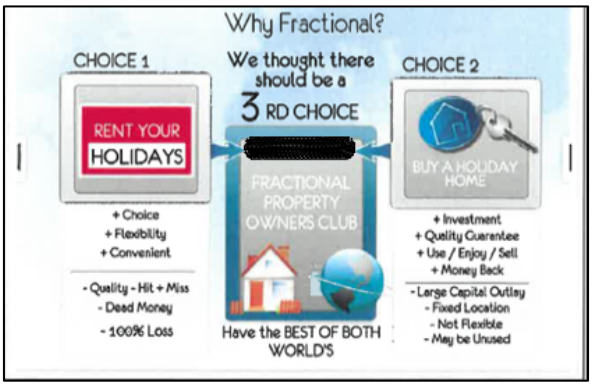
So, given when it was submitted in evidence, there is a possibility, as set out by the Lender, that it was written later than has been said, and even after the outcome of *Shawbrook & BPF v FOS.* And if that is the case, then the Lender suggests that what has been written may have been influenced by the judgement.

When coming to my provisional findings, I thought about how much weight I could place on the statement when considering the merits of Mr B's complaint. And I thought I could place weight on its contents.

I have reconsidered this in light of what the Lender has said. I cannot say for certain when the statement was written, but the PR has said it was sent to it in the bundle of documents originally submitted. I have thought about what the Lender says about the date-stamp not appearing on the documents sent to it, but on balance, and in the specific circumstances here, I think it is more likely than not that the statement pre-dates the complaint submission, so has not been influenced by the outcome in *Shawbrook & BPF v FOS.* As for what is said in it, the statement appears to be Mr B's genuine recollections of his timeshare purchasing history, and sets out, in a way that I find persuasive, that he and Mrs B were attracted to the Fractional Club membership because it was presented to them as an investment.

So, having reconsidered it in light of what the Lender has said, I remain satisfied that I am able to place weight on what Mr and Mrs B have said in this testimony.

And I have also reconsidered what I know about how the Supplier was likely to have presented this particular type of membership to them. And I repeat what I said in the PD in relation to this:



This slide titled "Why Fractional?" indicates that sales representatives would have taken Mr and Mrs B 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”

As I said, this 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 and Mrs B that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, **an investment** they could use, enjoy and sell before getting money back.

What Mr and Mrs B have said in their testimony is reflective of what I know about how the Supplier was likely to have sold this particular product. So, I remain satisfied that it is likely that the Supplier sold and/or marketed the Fractional Club membership in a way that breached Regulation 14(3) of the Timeshare Regulations.

But, as I set out in the PD, having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I must consider what impact that breach had on the fairness of the credit relationship between Mr B and the Lender under the Credit Agreement and related Purchase Agreement. Did the Supplier’s breach of Regulation 14(3) actually lead Mr and Mrs B to enter into the Purchase Agreement and Mr B into the Credit Agreement, or would they have done this anyway?

And, having reconsidered everything, Mr and Mrs B say, plausibly in my view, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. They have been specific about that:

> *“…they advised it would mean that the membership would come to an end and we would walk away with a profit on our share, seemed like a great retirement plan to us.”*

This, in my view, sets out that Mr and Mrs B saw the purchase of the Fractional Club as something that would provide them with a profit and assist them in their retirement planning. And this sits squarely with the definition of an investment that I have used:

‘An investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.’

The Lender has said that the Letter of Complaint sets out a different reason why Mr and Mrs B decided to make the purchase – that they were concerned that their existing membership was held in perpetuity and could be passed on to their dependents. But having considered this, whilst I agree the significant reduction in the membership term may have been attractive to them, I don’t think this was the only reason they made the purchase.

The judgment handed down in *Shawbrook & BPF v FOS* asserted that the relevant question in this circumstance is whether the breach of Regulation 14(3) was a material factor in the decision to purchase, not whether it was the only factor or principal one. So, while the shorter membership term was probably a consideration, I am persuaded from the testimony that Mr B has adequately demonstrated that the promise of profit was a motivating factor in their decision to move ahead with the purchase.

And with that being the case, I am satisfied that the Supplier’s breach of Regulation 14(3) was material to the decision they ultimately made, so Mr B’s associated credit relationship with the Lender was unfair to him for the purposes of Section 140A of the CCA.

As such, I remain satisfied that it is fair and reasonable to uphold this complaint.

Putting things right

Neither the Lender nor the PR made any representations regarding my proposed fair compensation, so I see no reason to depart from what I set out in the PD. For clarity, this is what I am directing the Lender to do, and why:

Fair compensation

Having found that Mr and Mrs B would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr B was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore had he not entered into the Credit Agreement. This is on the proviso that Mr and Mrs B both agree to assign to the Lender their 2,898 fractional points, or hold them on trust for the Lender if that can be achieved.

Mr and Mrs B were existing VC members, and their membership was traded in against the purchase price of Fractional Club membership. Under their VC membership, they had a number of VC points. And, like Fractional Club membership, they had to pay annual management charges as VC members. So, had Mr and Mrs B not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs B from the Time of Sale as part of this particular Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing VC members.

On 13 February 2013 (the 'Time of Upgrade'), Mr and Mrs B upgraded their Fractional Club membership by trading in their existing fractional points, paying an additional £5,147 and entering a new purchase agreement for a total of 3,105 fractional points ('FC Membership 2'). And the Credit Agreement remained in place after the upgrade.

Although I think there was likely to be some ongoing unfairness caused to Mr B in relation to the fractional points that were rolled into the FC membership 2, as this will be accounted for in the redress in the other complaint, it does not need to be considered here.

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

(1) The Lender should refund Mr B's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs B's Fractional Club annual management charges paid between the Time of Sale and the Time of Upgrade, and what their VC annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs B used or took advantage of at the Time of Sale;

   ii. Before the Time of Upgrade, the market value of the holidays* Mr and Mrs B took using their fractional points if the Points value of the holiday(s) taken amounted to more than the total number of VC points they would have been entitled to use at

the time of the holiday(s) as ongoing VC members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.

For example, if Mr and Mrs B took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 VC 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 they would have been entitled to use 2,600 VC 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 B's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) I am aware that Mr and Mrs B traded in their FC Membership 2 towards 'FC membership 3' in February 2014, purchasing 3,240 points at a further cost of £4,978. So, if Fractional Membership 3 is still in place at the time of this decision, the Lender must ask the Supplier to reduce the number of Fractional Points they hold by 2,898 fractional points.

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

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

My final decision

I uphold this complaint, and direct Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance to calculate and pay fair compensation to Mr B as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 13 February 2026.

Chris Riggs
Ombudsman