DRN-6147618

Financial Ombudsman Service

The complaint

Mr M says Mitsubishi HC Capital UK Plc ('The Lender') has unfairly declined his claim under section 75 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 15 March 2012, Mr M purchased a timeshare membership – which I'll call 'Fractional Club' membership – from a timeshare provider (the 'Supplier'). It included 2,988 fractional points. The membership was asset backed – which means it gave Mr M 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 balance on the purchase agreement was £6,097 (including fees). And it appears that Mr M traded in his existing Timeshare towards the cost. Mr M borrowed £6,097 from the Lender to pay for it. The loan was repaid in August 2012. Although Mr M referred to purchasing further Fractional Club points, it is this sale and the associated lending that is the subject matter of this complaint.

On 12 March 2018, Mr M – using a professional representative ('PR1') – wrote to the Lender (the 'Letter of Claim') to make a claim under section 75 of the CCA. And it referred to the unfairness of the relationship of the debtor- creditor relationship between Mr M and the Lender.

In summary, the Letter of Claim said that the Supplier made misrepresentations to Mr M. Firstly, it told him that the only way he could 'exit' his existing timeshare membership was to purchase Fractional Club membership, which wasn't true. And promises the Supplier made to Mr M didn't match the product he received.

- It went on to say that there had been a breach of contract as Mr M had no control over the sums incurred in respect of the maintenance fees charged.
- 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 M's financial position and whether he could afford the loan, which rendered the creditor-debtor relationship unfair to him.
- The Supplier applied 'undue' pressure on Mr M to procure his agreement to the loan.
- It didn't think the claim was time-barred even though one of the finance agreements was entered into more than six years previously.

The Lender dealt with the Letter of Claim as a complaint and issued its final response letter on 1 May 2018. It said the letter of complaint had been received on 3 April 2018 and rejected the complaint on every ground.

PR1 then referred the complaint to our service. In February 2023, Mr M changed his professional representative to 'PR2'. In January 2024, one of our investigators issued a view, which didn't uphold the complaint. PR2 asked that an ombudsman make a final decision.

And it provided a statement made by Mr M and his partner which set out their recollections of the Timeshare purchases they made.

The case was passed to me for review. I issued a provisional decision (PD) explaining why I didn't think the complaint should be upheld. PR2 didn't agree with my decision. In summary it said:

- The unfairness arose from vulnerability, imbalance of power, and misleading inducement;
- Section 140 claims accrue from the end of the credit relationship, not the transaction date;
- The timeshare was marketed as an investment contrary to Regulation 14(3) of the
- Timeshare Regulations 2011;
- The client's evidence is credible, sworn, and consistent with widespread industry practice; and
- Similarities in witness statements reflect systemic mis-selling, not fabrication.

The legal and regulatory context

When considering what is, in my opinion, fair and reasonable in all the circumstances of the complaint, I'm required by DISP 3.6.3R of the Financial Conduct Authority ('FCA') Handbook to take into account:

'(1) relevant:
(a) law and regulations;
(b) regulators' rules, guidance and standards;
(c) codes of practice; and
(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time.'

The legal and regulatory context that's relevant to this complaint is, in many ways, no different to that shared in several hundred decisions by ombudsmen on very similar complaints – which can be found on our website. I therefore don't think it's necessary to set out that context in detail here. But I'd add that the following regulatory rules/guidance are also relevant:

The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

• Paragraph 2.2
• Paragraph 2.3
• Paragraph 5.5
The OFT's Guidance for Credit Brokers and Intermediaries – 24 November 2011
The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

• Paragraph 2.2

- Paragraph 3.7
- Paragraph 4.8

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.

Having done so, I remain of the opinion that this complaint shouldn't be upheld. I've set out my reasoning again 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. Also, although the purchase agreement was taken out in Mr M and his partner's joint names, the loan was taken out in Mr M's sole name. So, I will just refer to him throughout this decision.

Section 75 of the CCA

As both sides may already know, a claim against the Lender under section 75 essentially mirrors the claim Mr M 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 M 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 15 March 2012. The claim letter from PR1 is dated 12 March 2018, just a few days before the six-year anniversary of the sale. The Lender has said the letter of complaint was only received on 3 April 2018. I find it surprising that given the proximity of the deadline, that PR1 didn't take steps to expedite filing the claim, to ensure it reached the lender on or before 15 March 2018, and to have trackable evidence of this. No such evidence has been provided to me. So, in the absence of such evidence, I am satisfied that it's plausible that the Lender didn't receive the claim until 3 April 2018. And I've noted that the complaint letter received by the Lender appears to be date stamped, and although I can't read the date stamp on the copy letter provided to me, I think given this, it's likely that the date is as stated by the Lender. Afterall, the Lender could have said it received the claim on the 16 March 2018, to achieve the same position and had no reason to delay it until 3 April 2018.

At the time the Lender received notification of PR1's claim, in April 2018, 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 in this case, would have expired in March 2018, 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. And it 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 M.

Also, in their statement, Mr M and his partner, refer to a number of concerns that they became aware of shortly after purchasing their Timeshare. And in particular, they refer to the lack of availability of the accommodation, the quality of it and its lack of exclusivity. So, my understanding is that they believed the Timeshare was misrepresented because they couldn't holiday in the way they say they were led to believe by the Supplier. But that would have been clear to them soon after the Time of Sale. So, even if it could be said that section 32(1) is likely to have postponed the limitation period until they first discovered that the availability and quality of holidays was not what they thought it would be (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.

Mr M has also said in his witness statement he could not holiday where and when he wanted to – which, on my reading of the complaint, suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.
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 M 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.

Mr M has also raised concerns about how the management charges operated and that they weren't fully explained. And PR1 submitted that this constituted a breach of contract and was an unfair contract term. I think that argument is one that is relevant to the unfairness of the relationship between Mr M and the Lender, and I'll address that later on in this decision. Overall, therefore, from the little evidence I have seen, I'm not persuaded that there was a misrepresentation or a breach of contract by the Supplier for which the Lender is legally answerable. It follows that I don't think it was unfair for the Lender to decline the claim under section 75.

Section 140A

In response to my PD, PR2 said it appeared the original claim made by PR1 had been made beyond the statute of limitation under the section it had been brought under. It asked that I consider the claim under Section 140 of the CCA. As I explained above, I consider that Mr M's claim in respect of misrepresentation under Section 75 of the CCA would be time barred. In the original letter of complaint, PR1 also raised concerns regarding the unfairness of the relationship between Mr M and the Lender. And I considered in my PD whether the relationship was unfair between Mr M and the Lender in the context of Section 140A. For the avoidance of any doubt, I remain of the opinion that this aspect of the complaint can be considered. I say this because the complaint was first raised by PR1 in March 2018. Mr M's relationship with the Lender didn't end until August 2012, when the loan was repaid. So, I'm

satisfied the complaint was made within six years of the relationship between the Lender and Mr M ending.

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.

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

There are several reasons why PR1 and PR2 say Mr M'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 M 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 says Mr M was subject to undue pressure in order to procure his agreement to the loan. I appreciate that Mr M may have felt weary after a sales process that went on for a long time. In Mr M's statement provided by PR2, he mentions sales being high pressured. But Mr M was also given a 14-day cooling off period after entering into the Purchase agreement, and he's not provided a credible explanation for why he did not cancel the membership during the cooling off period.

Moreover, he went onto increase his fractional points after the initial purchase – which I find difficult to understand if the reason he went ahead with the first purchase was because he was pressured into it. And it seems that Mr M was aware that his timeshare contract could be cancelled during the cooling off period, as according to the Supplier's records he had done so on two previous occasions before making this purchase. In the circumstances, I've seen insufficient evidence to conclude that Mr M made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr M's credit relationship with the Lender were rendered unfair to him under Section 140A for any of the reasons above. However, PR2 says the Fractional Club membership was sold and/or marketed as an investment in

breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), and that this renders the relationship unfair under section 140A.

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

I'm satisfied that the Fractional Club membership meets the definition of a 'timeshare contract' and is a 'regulated contract' for the purposes of the Timeshare Regulations. Regulation 14(3) of the Timeshare Regulations says a supplier must not market or sell a proposed timeshare contract as an investment.

The term 'investment' isn't defined in the Timeshare Regulations. But I'll adopt the same definition that was used in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*'), which says it's a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

The Fractional Club membership clearly included an investment component in that Mr M's share of the proceeds of the deferred sale offered the prospect of a financial return – whether or not, like all investments, that return was more, less or the same as the sum invested. But it's important to note that the fact that the Fractional Club membership included an investment component did not, in itself, transgress the prohibition in Regulation 14(3). Regulation 14(3) prohibits the marketing or selling of a timeshare contract as an investment. It doesn't prohibit the existence of an investment component in a timeshare contract or the marketing and/or selling of such a contract per se. In other words, the Timeshare Regulations didn't ban products like the Fractional Club – they simply regulated how they were marketed and sold.

To conclude, therefore, that the Fractional Club membership was marketed or sold to Mr M as an investment in breach of Regulation 14(3), I must 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 competing evidence in this complaint as to whether the Fractional Club membership was marketed and/or sold by the Supplier as an investment in breach of Regulation 14(3). On the one hand, it's clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective members, such as Mr M, the financial value of their share in the net sales proceeds of the Allocated Property, along with the investment considerations, like the associated risk and reward. And whilst PR2 has said there was systemic mis-selling of Timeshares, it hasn't provided any evidence of that. And I have considered the evidence that is available to me in respect of this case.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's also possible that Fractional Club membership was marketed and sold to Mr M as an investment in breach of Regulation 14(3). However, as I explained in my PD, whether there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome for this complaint for reasons I'll explain, so it's not necessary for me to make a formal finding on this particular issue.

Would the credit relationship between the Lender and Mr M 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 M 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 M when he decided to purchase the membership.

As I've explained above, PR1 didn't provide any direct, first-hand testimony from Mr M. In fact, PR1 doesn'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 I would have expected it to have specifically mentioned this if it was important to Mr M, and a motivating factor in him purchasing Fractional Club membership.

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 M as to what he was told during the sales process.

As I've said above, in February 2024, PR2 provided Mr M's witness statement which set out his recollections about the timeshare purchases he had made over a number of years. And whilst it is signed by Mr M and his partner, it was provided after our investigator rejected the complaint and explained why. This causes me some concern. I say this because by that time, the High court had handed down its judgment in the case of Shawbrook v Financial Ombudsman Service, and it had been nearly 12 years since the events complained about and nearly six years since the Letter of Claim. Experience tells me 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.

Indeed, as there's no evidence on file to corroborate the summary of Mr M's recollections, I think there's a real risk that their recollections were influenced by the judgment in Shawbrook v Financial Ombudsman Service. This all 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 M wasn't given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership, and how they were operated and explained. The PR also says that the relevant terms were unfair contract terms.

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 M 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 or that the relevant terms led him to behave in a certain way to his detriment

And as neither Mr M nor PR1 have persuaded me that Mr M 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.

And taking into account everything that I have been provided with, 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 M'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 M to accept or reject my decision before 11 March 2026.

Simon Dibble
Ombudsman