DRN-6165565

The complaint

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

What happened

Ms B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 6 February 2012 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 1 week of Fractional Rights for £13,694 (the 'Purchase Agreement').

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

Ms B paid for her Fractional Club membership by taking finance of £13,694 from the Lender (the 'Credit Agreement').

Ms B – using a professional representative (the 'PR') – wrote to the Lender on 1 July 2019 (the 'Letter of Complaint') to raise a number of different concerns. Since then the PR has raised some further matters it says are relevant to the outcome of the complaint. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Ms B's concerns as a complaint and issued its final response letter around February 2020 rejecting it on every ground.

I issued a provisional decision on 3 February 2026 setting out why I didn't plan to uphold Ms B's complaint. 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 do not currently think this complaint should be upheld.

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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

Ms B's complaint about the Lender's handling of her Section 75 Claims

The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 (the 'LA') as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Ms B's Section 75 claim for misrepresentation was time-barred under the LA before she put it to the Lender.

As I mentioned above, a claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim Ms B could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim, like the one in question here, under Section 75 is also 'an action to recover any sum by virtue of any enactment' under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because Ms B entered into the purchase of her timeshare at that time based on the alleged misrepresentations of the Supplier – which she said were relied upon. And as the loan from the Lender was used to help finance the purchase, it was when she entered into the Credit Agreement that she suffered a loss.

Ms B first notified the Lender of her Section 75 claim on 1 July 2019. And as more than six years had passed between the Time of Sale and when that claim was first put to the Lender, I don't think it was unfair or unreasonable of the Lender to reject Ms B's concerns about the Supplier's alleged misrepresentations.

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

There are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Ms B and the Lender along with all of the circumstances of the complaint, I don't 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 standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and 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. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
5. *The inherent probabilities of the sale given its circumstances; and*
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 Ms B and the Lender.

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

The main reason why the PR now says the credit relationship with the Lender was unfair to Ms B is the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of prohibition against selling timeshares in that way.

The Lender does not dispute, and I am satisfied, that Ms 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 the PR and Ms B say that the Supplier did exactly that at the Time of Sale.

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.

A share in the Allocated Property clearly constituted an investment as it offered Ms B 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.[1]

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 Ms 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her 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 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.

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[1] The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment 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).

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 Ms 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.

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 equally possible that Fractional Club membership was marketed and sold to Ms B 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's 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 Ms B have been rendered unfair to her had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found that it was possible 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 Ms 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 Ms B and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Ms B decided to go ahead with their purchase.

The PR provided notes it said were taken from a telephone conversation it had with Ms B in April 2019. These notes record that Ms B told the PR that:

"in 19 years time you will get some money back. Not all the money back but a lump sum"

The PR also provided a written statement from Ms B which is signed and dated on 1 March 2021 which includes the following statements:

"The main reason why I decided to purchase this fractional is that they said it was an investment and we would get all our money back when it was sold in 19 years…"

"They told me that after 19 years I would get £21,000 when the property is sold"

There are clearly contradictions between the PR's notes and Ms B's written statement as to what Ms B thought she would receive at the end of the membership term. One said she didn't expect to receive all of her money back, the other said she did. This inconsistency in the evidence makes it difficult for me to conclude that Ms B was motivated by the prospect of a profit or financial gain because at one point Ms B effectively said she went ahead with the purchase with no hope or expectation that she would get back more than what she had put in. I don't find in this particular case that I can give more weight to Ms B's written statement than I can to the PR's notes. Ms B's recollections changed significantly in the two years that passed between those pieces of evidence and I cannot rule out that this was the result of any outside influence given what was originally recorded in the PR's notes.

That doesn't mean Ms B wasn't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Ms B doesn't persuade me that her purchase was motivated by her share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision she ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Ms B's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests she would have pressed ahead with her purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Ms B and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

The PR disagreed with my provisional decision and submitted further comments and evidence.

The Lender did not respond.

The complaint has therefore been given back to me for a final decision.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is, 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 Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010</u>

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

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.

As outlined in my provisional decision, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn't make any further comments in relation to those in their response to my provisional decision. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my provisional decision. So, I'll focus here on the PR's points raised in response.

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

I've carefully considered the PR's comments in response to my provisional decision, which I address below.

The PR said that Regulation 14(3) does not require that the consumer was motivated by profit, rather it prohibits presenting timeshare or fractional products as an investment or *"as a means of obtaining financial benefit or return".* It said my provisional decision incorrectly collapses financial return, capital recovery and profit into a single concept and rejects the complaint because Ms B did not articulate an expectation of receiving more than she paid. It said a representation that capital would be returned at the end of the term and/or the property would be sold and the proceeds distributed and/or the consumer would get their money back are investment representations regardless of whether it exceeds the original purchase price.

In addressing this point I think it's important to again revisit Regulation 14(3) of the Timeshare regulations which says:

(3) 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.

As I explained in my provisional decision, the word investment is not defined in the Timeshare Regulations. But it is accepted by decided authorities[2] that an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit. So, when I'm looking at whether Fractional Club membership was marketed as an investment, crucial to that consideration is whether it was marketed as having the prospect of a financial gain or profit. This can of course be express or implied, but either way to breach the prohibition in Regulation 14(3), Fractional Club membership needs to have been marketed as an "investment" within the accepted boundaries of that term. To my mind, that boundary does not extend as far as the PR is suggesting it does to simply getting something back at the end of the membership term, if there is no implication that a financial gain or profit could be achieved. By the PR's logic, a suggestion by the supplier that a consumer could get back up to, let's say, £500 but no more, against an outlay in the thousands would lead to a breach of Regulation 14(3) and an unfair relationship under Section 140A of the CCA if it was relied upon. To my mind that cannot be right.

I agree with the PR that Regulation 14(3) does not require that a consumer is motivated by profit for it to be beached. However as has been explained countless times in other decisions, the case law on Section 140A of the CCA 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. So even if Fractional Club membership was marketed as an investment in breach of Regulation 14(3), that by itself is not enough to automatically render Ms B's relationship with the Lender as unfair.

It remains important therefore to consider whether any potential breach of Regulation 14(3) by the Supplier i.e. marketing or selling a timeshare contract as an "investment" (within the accepted boundaries of that word) led Ms B to enter into the purchase contract. And for the reasons I explained in my provisional decision, and which I'll elaborate on further below, I still don't think this was the case in this complaint.

The PR also said that the contradictions I highlighted in my provisional decision between Ms B's written statement and the notes the PR said it took from a conversation with her two years earlier are not material contradictions. It said both accounts are consistent with the core allegation that Fractional Club membership was presented as having a financial return linked to the sale of the property and that this feature was a motivating factor in the purchase.

I am deciding a complaint here where a large part of it turns on Ms B's testimony. It is important therefore that the testimony is both consistent and plausible. I accept that Ms B didn't necessarily need to use the words profit or financial gain in all of her testimony to demonstrate she was motivated by such things to make her purchase. However, Ms B's testimony as to whether any potential breach of Regulation 14(3) by the Supplier led her to enter into the contract is not consistent. In one account she says she relied on a statement by the Supplier that she could get some but "not all" of her money back, and another account, two years later, said she relied on a statement she could get all of her money back.

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[2] See also the judge's comments at paragraph 56 in (R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin)).

One of those statements suggests Ms B was willing to go ahead with her purchase on the basis she would get no more back than what she put in, or in other words on the basis she wouldn't make a financial gain or profit and the other suggests quite the opposite. So, I disagree with the PR this inconsistency was not material in light of what I've said in the preceding paragraphs and remain of the view her testimony is not persuasive enough to demonstrate she was motivated by the prospect of a profit or financial gain.

Ultimately therefore, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Ms B's purchasing decision. And for that reason, I do not think the credit relationship between Ms B and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

Section 140A conclusion

Given all of the factors I've looked at in this part of my decision, including the relevant relationships, arrangements and payments between Ms B, the Lender and the Supplier and having taken all of them into account, I'm not persuaded that the credit relationship between Ms B and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

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 Ms B's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

My final decision

For the reasons I've explained above, I do not uphold Ms B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 19 March 2026.

Michael Ball
Ombudsman