DRN-6226858

The complaint

Mr H's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

The loan in question was taken out in Mr H's sole name and as such, he is the only eligible complainant here. However, as the timeshare purchased using the loan was bought in the joint names of Mr H and Mrs H, I'll refer to them both throughout where appropriate.

What happened

Mr and Mrs H were members of a timeshare provider (the 'Supplier') – having purchased from it previously. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 19 January 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 900 fractional points at a cost of £13,617 (the 'Purchase Agreement'). But, after trading in their existing membership, they ended up paying £5,400 for their Fractional Club membership.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs H 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 their membership term ends.

Mr and Mrs H paid for their Fractional Club membership by taking finance of £19,182 from the Lender (the 'Credit Agreement') in Mr H's name only. This loan also consolidated the outstanding balance of their existing loan, used to pay for their previous purchase.

Mr H – using a professional representative (the 'PR') – wrote to the Lender on 16 April 2024 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr H's concerns as a complaint and issued its final response letter on 29 May 2024, rejecting it on every ground.

The complaint was then referred 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 H disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I considered the matter and issued a provisional decision. In that decision, I said:

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

Having considered the entirety of the credit relationship between Mr H 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, when relevant*
6. *Any existing unfairness from a related credit agreement.*

I have then considered the impact of these on the fairness of the credit relationship between Mr H and the Lender.

The Supplier's sales & marketing practices at the Time of Sale

Mr H's complaint about the Lender being party to an unfair credit relationship was and is made for a few different reasons.

The PR has also suggested that the Supplier made one or more misrepresentations at the Time of Sale.

In particular, they've said Mr and Mrs H were told that by purchasing the product they would have no problems in booking holidays wherever they chose. But they say that, in reality, holidays couldn't be booked outside of Tenerife and Spain and only then with limited success, in terms of when and where they could get availability, if at all.

I'm aware that in the Information Statement generally provided to consumers it explains that bookings are subject to availability and seasonal demand as well as being on a first-come, first-served basis. I can't see that any other guarantees were made.

I note that Mr H has said in his witness statement that they had been told on each occasion that "the share we were purchasing would enable us to have a holiday at any of the resorts whenever we wanted. This obviously was never the case as highlighted by each subsequent sales pitch". But, Mr H hasn't elaborated on this as to what exactly they were told, by whom and in what circumstances to add colour and context to their allegation here.

Mr H has also said they were told that the annual maintenance fees would be kept at the same level, but says this hasn't been the case as these fees have increased each year. Similarly, I'm aware that the Information Statement explained that these fees could increase or decrease as determined by the costs of managing the project. And I think for that reason such an alleged statement by the Supplier at the Time of Sale is inherently unlikely to have been made. But again, beyond the bare allegation provided, little is provided by way of colour and context to support it.

These alleged misrepresentations are also in a section where Mr H is describing all of their purchases, so it's unclear what exactly was said at this specific Time of Sale and how those statement(s) proved to be untrue following this particular purchase.

In short, therefore, I have not seen enough evidence to say, on balance, that any alleged false statements of fact were made to Mr and Mrs H by the Supplier.

I acknowledge that Mr and Mrs H may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs H made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

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

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 H'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 says 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 Mr and Mrs H 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 H 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.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, 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 Mr and Mrs H 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.

Was the credit relationship between the Lender and Mr H rendered unfair?

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 Mr H 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 H and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him and Mrs H to enter into the Purchase Agreement and him to enter into the Credit Agreement is an important consideration.

Mr H has provided a witness statement which is signed and dated 16 April 2024. In this statement, he's described his purchasing history with the Supplier, leading up to the Time of Sale.

He then goes on to describe what happened at the Time of Sale and I note he has said:

> *"Again, we were invited to a breakfast meeting and then taken to the sales suite. We were met by representatives again and subject to a computer presentation about fractional ownership.*
>
> *This was not what we wanted and again made it clear that we had no intention of changing what we already had. We were told that the points we held as a fractional owner were not enough to secure any worthwhile holiday and of little value.*
>
> *We were told that if we increased our share there would be greater benefits and added benefits. We again made it clear that we had not intended to upgrade as we had previously been told that our points were sufficient.*

The benefits of upgrading were then presented to us as facts. We were told again that it was a good investment where there was a profit to be made, it would be easy to sell and could also be bought back by Club La Costa at the end of the agreement term. It was emphasized that we would definitely make a profit on resale as property prices in Spain would increase over the time period. The representative was adamant that we would make a profit, and not just break even.

We were not told that CLC would retain a share in the property and that they effectively had a veto when the time came to sell. We were told our family could benefit as there would be an asset in our estate if anything happened to us in view of our age. We were assured that it was the way to go and that if we didn't upgrade, we would get very little benefit out of what we had. This was not a product that we would want to pass on but in the event of our passing we believed there may have been some financial benefit to our children as it was sold as an investment.
So again, after being pressured for several hours, offered inducements which included the first year of free maintenance and £60 for 12 months to offset the finance, we were forced to believe that the only way of getting anything out of the fractional ownership was to upgrade. We did not query the payment to offset the finance. This sum was simply paid to our bank account each month.

Having agreed to upgrade in order to maximise and retain our investment we were again taken to an office where the paperwork was quickly produced, the finance company, Hitachi, were contacted by telephone and I spoke to them. The finance documents were also sorted out in this time where I signed them. We were not given any time to read through the documentation before signing it all."

Part of my assessment of the testimony provided is to consider when it was written. I'm conscious that it was drafted after 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) ('Shawbrook & BPF v FOS') was handed down.

The PR has referenced this and so I think it's clear they and Mr H were aware of a case with similar circumstances which was upheld, as well as the reasons for that. So, I think there's a real risk that Mr H's recollections were influenced by that such that I can't place much, if any, weight on it.

And overall, 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 Mr and Mrs H decided to go ahead with their purchase. That doesn't mean they weren'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 Mr H himself doesn't persuade me that their purchase was motivated by their 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 they 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 Mr and Mrs H'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). And for that reason, I do not think the credit relationship between Mr H and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

The PR says that Mr and Mrs H were not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership.

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 failures 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 and Mrs H sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the 2010 Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr H nor the PR have persuaded me in this particular case that they would not have pressed ahead with their purchase had those details 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."

In conclusion, I was not persuaded that the Lender was party to a credit relationship with Mr H under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA – nor could I see any other reason why it would be fair or reasonable to direct the Lender to compensate him.

Neither party responded to my PD, nor did they provide any further comments or evidence they wished to be considered.

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.

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

My final decision

For the above reasons, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 15 April 2026.

Fiona Mallinson
Ombudsman