

## The complaint

Mr B's complaint is that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance ('Mitsubishi') acted unfairly and unreasonably when deciding against paying his claim under Section 75 of the Consumer Credit Act 1974 (the 'CCA').

The complaint is only in Mr B's name as only he was named on the Credit Agreement. But, I will refer to both Mr and Mrs B throughout this decision as the timeshare in question was in both of their names.

## What happened

Mr and Mrs B purchased membership of an asset-backed timeshare called the Fractional Property Owners Club ('FPOC') from a timeshare provider (the 'Supplier') on 21 July 2013 (the 'Time of Sale'). They bought 1,080 Fractional Points at a cost of £14,451.

Mr and Mrs B paid for their FPOC membership and their first year of annual management charges by taking finance from Mitsubishi in Mr B's name. He entered into a 15-year loan for £15,250 and the total amount repayable after interest and charges was £43,097.40 (the 'Credit Agreement').

Under the terms of the FPOC, Mr and Mrs B could exchange their Fractional Points for holidays. And, at the end of the projected membership term, they also had a share in the sale proceeds of a property tied to their membership (the 'Allocated Property'). As their interest in the Allocated Property was limited to a share in its net sale proceeds, they didn't have any preferential rights to stay in the Allocated Property or use it in any other way.

Mrs B called Mitsubishi on 22 August 2019 to complain and said they felt they had been mis-sold the FPOC Membership and the loan.

Mitsubishi asked by email on 21 September 2019 for more detail as to why Mr and Mrs B felt this was the case. Mrs B responded by email on 31 October 2019 and at this stage explained they wanted to make a Section 75 claim and also briefly mentioned Section 140A (a provision that deals with unfair debtor-creditor relationships). They listed the following points:

- They were sold an unaffordable product.
- The product was advertised as holidays via a website but turned out to be a timeshare.
- The Supplier received payment upfront and has refused to allow the sale or surrender of the timeshare or a refund.
- Finance has been provided which can't be re-financed through a high street bank because it relates to a property for which they don't have the deeds.
- Mitsubishi received commission.
- There have been excessive service charges for a property they don't own.
- Mitsubishi put the borrowing into Mr B's name as he is a public sector worker and there was a high level of interest applied even though they had previously had a loan

from Mitsubishi for a kitchen which was interest free.

- They were detained for excessive hours by the Supplier trying to sell them more.
- They had difficulty in making bookings and were paying for a premium service they can't have.
- Mitsubishi used their details from the finance agreement for their kitchen to invite them to the Supplier's sales presentation in order to endure a hard sell approach.

Mitsubishi dealt with Mr and Mrs B's concerns as a complaint and issued its final response letter on 26 May 2020, rejecting it.

Mr and Mrs B then referred their complaint to the Financial Ombudsman Service on 4 June 2020. They didn't add any further comments to their complaint at that stage.

The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits on 9 November 2023.

Mr and Mrs B disagreed with these findings and asked for the matter to be referred to an Ombudsman for a final decision to be made. They added the following points to their complaint at that stage in addition to what they'd previously said (as above):

- The sales process involved separating Mr B from his family and continually visiting them while on their promotional holiday trying to entice them to upgrade their FPOC membership.
- They referred to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') which prohibited the Supplier from marketing or selling the FPOC membership as an investment. And, they also referred to the judgment in a Judicial Review of one of the lead decisions previously issued by this Service (*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) (the 'Judicial Review')).
- They've spoken to the Financial Conduct Authority (FCA) regarding the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT regulations') relating to Mitsubishi's unfair commercial practices misleading them by confirming the product on the loan agreement as fractional ownership.
- Mr B's income is shown on the loan agreement as £53,000 gross per year, but Mrs B says this was their combined household income. And, she provided a screenshot from his public sector employer's website to show the pay band Mr B's role had during 2012 to 2013, along with a list of household expenses.
- In 2014, Mr B defaulted on debts with several credit card companies.
- Proportionate checks were not completed in relation to the loan, and it had unaffordable levels of interest.
- Mitsubishi confirmed in their final response letter that they believed the settlement of the finance agreement would come from Mrs B's inheritance from her late mother's estate and not through repayment by Mr B.
- They have another complaint with Mitsubishi relating to a payment holiday during the COVID-19 pandemic in 2020.

As agreement on the outcome could not be reached, the complaint has been referred to me to make a final decision.

## 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.

When making my decision, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's handbook to take into account the:

“(1) *relevant:*

(a) *law and regulations;*

(b) *regulator's 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.”*

Where evidence is incomplete, inconclusive, or contradictory, I make my decision on the balance of probabilities i.e., what I think is more likely than not to have happened based on the evidence available and the wider circumstances of the complaint.

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.

### Mr B's complaint about the Supplier's misrepresentations

I'll firstly address Mr B's Section 75 complaint involving alleged misrepresentations at the Time of Sale.

When a complaint is referred to our Service following an unsuccessful Section 75 claim, the act or omission which engages our jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentations.

Creditors can reasonably reject Section 75 claims that they're first informed about after the claim has become time-barred under the Limitation Act 1980. The reason being, that 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.

Having considered everything, I think it is quite possible that Mr B's claim was made too late under the provisions of the Limitation Act 1980, which mean it would have been fair for Mitsubishi to have turned down a Section 75 claim for this reason. However, misrepresentations could also be something that led to an unfair debtor-creditor relationship<sup>1</sup>, so I have considered everything said by Mr and Mrs B with that in mind.

In addition, there are other points which have been raised which aren't allegations of misrepresentation but are either allegations of unfairness and/or are complaint points which can be considered by this Service in their own right, such as whether the loan granted was affordable for Mr B. The Investigator therefore considered these other points in their view and Mitsubishi haven't raised any objection to that.

### Mr B's other points of complaint

I've already explained why I think it was fair for Mitsubishi to reject Mr B's Section 75 claim.

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<sup>1</sup> See *Scotland & Reast v. British Credit Trust Limited* [2014] EWCA Civ 790

But there are other aspects that, being the subject of Mr and Mrs B's dissatisfaction, I need to explore in more detail. Some of these matters, such as the question of whether the loan was affordable, can be considered as points of complaint in their own right. But some of these concerns could give rise to an unfair debtor-creditor relationship as set out in section 140A of the CCA. So, I have also considered whether the problems raised led to an unfairness that requires a remedy.

### *Affordability of the loan*

Mr and Mrs B say the loan was unaffordable for them. Mitsubishi said in their final response to the complaint that they did do relevant affordability checks. They also provided a detailed explanation regarding what affordability checks were carried out in relation to Mr and Mrs B, and what these showed.

I haven't been provided with evidence of these checks or what they showed to support what Mitsubishi has said. But, I'm not currently persuaded it makes a difference in this case. The reason I say this is that there hasn't been sufficient evidence provided by Mr and Mrs B that the loan actually was unaffordable for them at the Time of Sale. Rather, what they've said indicates that the loan may have become difficult for them to afford some years after the sale due to changes in personal circumstances at that later stage. I empathise with what Mr and Mrs B have said in this regard as it's clear they've experienced some difficult circumstances in the last few years, but this doesn't automatically mean the loan was unaffordable for them at the Time of Sale.

We asked Mr and Mrs B for further information regarding their wider circumstances at the Time of Sale, including their bank statements from the time but they weren't able to provide this information.

I note that Mrs B has said that the £53,000 figure noted on the finance application wasn't what Mr B himself earned but rather, was their combined household income. With £26,000 of this being Mrs B's annual income (as noted on the finance agreement), this would mean Mr B earned £27,000 per year at the Time of Sale. But, Mrs B has then gone on to provide a screenshot from Mr B's employer's pay structure for 2012/2013 and said he would be in a pay band earning more than this - between £38,851 to £46,621. She hasn't confirmed how much exactly Mr B did earn at the Time of Sale or explained how exactly this made a difference to whether it was affordable for them.

I note that Mrs B has said that Mr B defaulted on debts he had with several credit card companies. But, she's said this happened in 2014 i.e. after the Time of Sale and hasn't provided any further detail beyond that.

Lastly, Mrs B said Mitsubishi confirmed in their final response letter that they believed the settlement of the finance agreement would come from an inheritance she was due to receive from her late mother's estate and not through repayment by Mr B. But, having read the final response letter, this isn't what Mitsubishi have said. Rather, they explained that Mrs B had told the Supplier directly in 2016 that this is how she was intending to pay for some outstanding maintenance fees (not the finance agreement).

So, on the basis of the evidence and information I do have from both parties, I've not seen sufficient evidence to suggest the loan wasn't affordable for Mr and Mrs B at the Time of Sale. It follows, I can't say Mr and Mrs B lost out, even if Mitsubishi didn't do all of the checks it should have done, or that this caused an unfairness that requires a remedy in this case.

### *The Supplier's sales and marketing practices at the Time of Sale*

Mr and Mrs B have told our Service that they were detained for excessive hours by the Supplier and the sales process involved separating Mr B from his family and the sales representatives continually visiting them while on their promotional holiday.

From what I know of the Supplier's general sales practices at this time, I don't doubt that the sales process Mr and Mrs B attended was lengthy. But I don't think the testimony provided sufficiently supports that any malicious or undue pressure was applied to them during the sale, such as to cause them to buy something they otherwise wouldn't have done.

And, I don't see anything inherently wrong in the sales representatives visiting them while on a holiday which was specifically designed to be promotional.

Mr and Mrs B don't describe any further exactly how they were pressured. So, from the evidence provided, I'm not sufficiently persuaded the sale was so pressured it caused them to buy something they otherwise wouldn't have done, nor do I think this created an unfair relationship that requires a remedy.

It is also important to note that Mr and Mrs B were also given a 14-day 'cooling off' period following the sale, during which time they could cancel the purchase and the associated Credit Agreement without penalty.

I don't therefore think this is a reason to uphold this complaint given its circumstances.

#### *Sale of the product as an investment*

In response to our Investigator's view, Mr and Mrs B raised the effect of the Judicial Review judgment on their complaint. And, they referred to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), which prohibited the Supplier from marketing or selling the FPOC membership as an investment. At the Time of Sale, the provision said:

*"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 regulate contract."*

However, Mr and Mrs B haven't described in any detail what was said to them, by whom and in what circumstances to support the suggestion in question. And, from what's been said it appears they only suggest that the membership had an investment element to it, which it plainly did as they were entitled to a share of the sale proceeds of the Allocated Property.

It's important to note that the judgment in the Judicial Review didn't find that FPOC Memberships, such as Mr and Mrs B's, were inevitably sold as investments. In fact, the judge held (at 66):

*"My necessary starting point is the ombudsman's explicit acceptance that a fractional ownership timeshare does not inevitably or inherently – purely by virtue of its fractional ownership component – transgress the prohibition in Reg.14(3). That is a point of some importance. Reg.14(3) prohibits the marketing or selling of a timeshare contract as an investment. It does not prohibit the existence of an investment component in a timeshare contract or the marketing or selling of such a product per se."*

The judge went on to say (at 71) it would be an error of law to say that the intrinsic design of FPOC Membership led to a breach of Reg.14(3).

And with that being the case, I don't think it's likely the Supplier breached the prohibition on selling timeshares as investments. Even if I'm wrong about that, based on what I've seen,

I'm not persuaded by what's been provided that the investment element of the FPOC membership was important enough to Mr and Mrs B's purchasing decision(s) to render his relationship with Mitsubishi unfair to him if the membership had, in fact, been sold as an investment.

#### *Commission*

Mr and Mrs B said one of the reasons they wanted to complain was that Mitsubishi was paid commission.

But, generally it would be the Supplier who might be paid any kind of commission for a sale – Mitsubishi has confirmed it was not paid anything by the Supplier. And, I don't think the fact that Mitsubishi might have paid the Supplier commission was incompatible with its role in the transaction. The Supplier wasn't acting as an agent of Mr and Mrs B but as the supplier of contractual rights they obtained under the Purchase Agreement. And, in relation to the loan, based on what I've seen so far, it doesn't look like it was the Supplier's role to make an impartial or disinterested recommendation or to give Mr and Mrs B advice or information on that basis. What's more, as I understand it, the amounts of commission paid by Mitsubishi to suppliers (like the Supplier) was, on average, 5.94% and unlikely to be much more than 10%. And on that basis, I'm not persuaded that any payment of commission rendered Mr B's credit relationship with Mitsubishi unfair for the purposes of Section 140A given the circumstances of this complaint.

Mitsubishi provided the Financial Ombudsman Service with information on its commission rates – which I accept in confidence under DISP 3.5.9 [R]. But, in keeping with that rule, one of Mitsubishi's Managing Directors (who is a FCA Approved Person) confirmed, in summary, the information I included in the paragraph above.

#### *Level of interest on the loan*

Mr and Mrs B also said there was a high level of interest applied to the loan and they felt this was unfair as they'd previously been offered interest free finance from Mitsubishi.

It seems likely to me that Mr and Mrs B were told this information at the Time of Sale. For example, I can see in their signed Credit Agreement that it clearly states the applicable interest rate and the duration of the agreement. It also explained the total amount they'd be repaying after interest and charges.

Being charged interest when borrowing money is normal, and I do not see that charging interest would have led to an unfairness in this case. I acknowledge that Mr and Mrs B have said they feel the interest rate was high but again, the interest rate was set out on the face of the loan agreement, so it would have been clear to Mr and Mrs B. Further, I've not been provided with any reason why such a rate was unfair given Mr and Mrs B's circumstances, so I can't say the level of interest led to an unfairness that requires a remedy in this case.

#### *Other points*

I acknowledge Mr and Mrs B have made other points, which for the avoidance of doubt are:

- The product was advertised as holidays via a website but turned out to be a timeshare.
- The Supplier received payment upfront and has refused to allow the sale or surrender of the timeshare or a refund.
- Finance has been provided which can't be re-financed through a high street bank

because it relates to a property for which they don't have the deeds.

- There have been excessive service charges for a property they don't own.
- They had difficulty in making bookings and were paying for a premium service they can't have.
- Mitsubishi used their details from the finance agreement for their kitchen to invite them to the Supplier's sales presentation in order to endure a hard sell approach.
- They've spoken to the Financial Conduct Authority (FCA) regarding the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT regulations') relating to Mitsubishi's unfair commercial practices misleading them by confirming the product on the loan agreement as fractional ownership.
- They have another complaint with Mitsubishi relating to a payment holiday during the COVID-19 pandemic in 2020.

But, it's not clear from what they've said what they believe went wrong in regard to these points at the Time of Sale in 2013 or why they believe these issues to have caused an unfairness in Mr B's credit relationship with Mitsubishi.

Even if the membership was advertised via a website in the way Mr and Mrs B have said, it's difficult to see how this would cause any unfairness in the credit relationship between Mr B and Mitsubishi given the product they were purchasing was explained during the sales process they attended and in the documentation they received.

It also seems likely to me that Mr and Mrs B were told by the Supplier at the Time of Sale that the annual maintenance fees could go up each year and it was explained why this was. And, that re-sale of the FPOC membership wasn't possible. For example, I can see in their signed Information Statement that it states the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the project. This also states that there is no re-sale, rental or re-purchase of the Fractional Rights in place operated by the Supplier or management company, but owners are entitled to sell their membership on the open market if they wish to do so. From the information available, surrendering the membership was an option, and Mrs B was provided with this option by the Supplier in 2017 when she asked them about it but ultimately didn't choose to go ahead with it.

Mr and Mrs B have also said they had difficulty in making bookings and were paying for a service they couldn't have, but from the information available, they did make use of their Fractional Rights to holiday multiple times.

Mr and Mrs B raised the point that Mitsubishi used contact details they already held for them in order to invite them to the Supplier's sales presentation. But, given there was no obligation on Mr and Mrs B to accept such an invitation, nor to purchase following that presentation, I don't see that this would cause an unfairness in the credit relationship.

I also don't see how it would be misleading for Mitsubishi to state the product being purchased on the loan agreement as fractional ownership when this is what Mr and Mrs B were buying. Regarding re-financing, I can't see any evidence has been provided in relation to this point and I also don't see how it would cause an unfairness in the credit relationship between Mitsubishi and Mr B if other lenders aren't willing to finance an FPOC purchase.

What Mr and Mrs B have said doesn't suggest they were told something inaccurate by the Supplier in the lead up to the Time of Sale or that they were not told something that they should have been told. There also isn't any suggestion from Mr and Mrs B that they have concerns about the terms of the contract governing any of these points.

So, I haven't seen enough to persuade me that any of these points, alone, rendered Mr B's credit relationship with Mitsubishi unfair to him.

Lastly, I'm aware that Mr and Mrs B have another, separate complaint against Mitsubishi relating to a payment holiday in 2020. But, this is a separate matter to this complaint and we've explained to Mrs B how they can refer that other complaint to our Service if they wish to do so.

### **Conclusion**

Overall, taking into account all facts and circumstances of this complaint, I don't think that Mitsubishi acted unfairly or unreasonably when it declined Mr B's Section 75 claim and I'm not persuaded that Mitsubishi was party to a credit relationship with Mr B under the Credit agreement that was unfair to him. And, having taken everything into account, I see no other reason why it would be fair or reasonable to direct Mitsubishi to compensate Mr B.

### **My final decision**

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 17 June 2024.

Fiona Mallinson  
**Ombudsman**