DRN-4844440

The complaint

Mr M complains that Mitsubishi HC Capital UK Plc trading as Novuna ('Novuna')[1] is liable to pay him compensation following a complaint made about a timeshare bought using credit provided by Novuna.

Although the purchase that is connected to this complaint was made in the joint names of Mr and Mrs M, the finance agreement was in Mr M's sole name. As such Mr M is the complainant here, but I shall refer in this decision to both Mr and Mrs M where appropriate.

What happened

Since 2008 Mr and Mrs M had been members of a timeshare arrangement provided by a timeshare provider (the 'Supplier'). In 2013, whilst on holiday, Mr and Mrs M became members of an asset-backed timeshare arrangement, again with the Supplier, called the Fractional Property Owners Club ('FPOC').

Under the terms of the FPOC, Mr and Mrs M bought Fractional Points, and these could be exchanged each year for holidays. And at the end of the projected membership term, they also had a share in the net sales proceeds of a property tied to their membership.

On 27 April 2017, whilst on holiday as part of their FPOC membership, Mr and Mrs M attended a sales presentation by the Supplier. As a result of this presentation, they traded in their existing FPOC membership in order to upgrade and purchase a new FPOC membership. They bought 2,280 Fractional Points at a cost of £30,424 but after trading in their existing membership, they paid £8,615 for their new membership of the FPOC. Those 2,280 points entitled them to take three weeks of holidays each year. And like their previous arrangement, this new FPOC membership also meant they were entitled to a share in the net sales proceeds of a property tied to the new 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.

Mr and Mrs M paid for their latest FPOC membership by taking finance from Novuna in Mr M's name. He entered into a five-year restricted use Fixed Sum Credit Agreement for £8,615 with the total amount repayable after interest and administration charges being £10,161.60 (the 'Credit Agreement')[2].

From the information available, in 2018 Mr and Mrs M chose to partially surrender their FPOC membership to the Supplier, keeping only one of the three Fractions (i.e. holiday weeks) they held.

Mr M, using a professional representative ('AS') wrote to Novuna on 1 September 2022. He made a claim under Section 75 of the Consumer Credit Act 1974 (the 'CCA') for a refund of all monies paid to Novuna under the Credit Agreement. He also complained that the credit relationship between him and Novuna was unfair to him, for the purposes of Section 140A of

[1] At the time of the complaint the respondent business was trading under the name 'Hitachi'. However, for ease of reference I will refer to it as 'Novuna' throughout.
[2] The Credit Agreement was cleared by a lump-sum payment on 22 May 2019

the CCA.

He said there had been actionable misrepresentations made by the Supplier at the time of sale which had induced him to enter into the contract. These were, in summary:

- He had been told that he had purchased an investment and his timeshare would considerably appreciate in value when that wasn't true.
- He was told he would have a share in a property and its value would increase considerably, therefore he was promised a considerable return on the investment when that wasn't true.
- He was told he could sell the timeshare back to the resort or easily sell it for a profit when that wasn't true.
- He was made to believe he would have access to the holiday apartment at any time all year when that wasn't true.

In addition to these alleged misrepresentations, Mr M cited further reasons why he thought the credit agreement with Novuna was unfair to him. In summary:

- The credit intermediary listed as broking the credit agreement was not authorised to do so.
- No affordability assessment had been carried out, so the lending was irresponsible.
- The Supplier had gone into administration, so Mr M would be unable to recover any amount awarded by the Spanish court.
- The FPOC membership was sold as an investment.
- Clause D of the Purchase Agreement Terms and Conditions (membership would be defaulted after 14 days of non-payment) was an unfair contract term.

On 22 September 2022 Novuna sent its final response to Mr M's complaint, which it did not uphold. It said, in summary:

- The timeshare was not sold as an investment.
- Mr M had not been told he would have a share in a property. He was told he was purchasing the rights to hold Fractions which would be exchanged for points on an annual basis to be used for holidays in the resort portfolio.
- Neither the Supplier nor the resort manager had a resale programme, and this was made clear in the Information Statement given to Mr and Mrs M.
- Reservations were subject to availability, and this was made clear in the Owners Guide and Information Statement.
- The Supplier was authorised by the Financial Conduct Authority ('FCA') for credit broking.
- Credit checks carried out at the time showed that the decision to lend to Mr M was responsible as the monthly payments were affordable to him, and it had taken steps to verify the information Mr M had provided on the application.
- The decision by the Spanish court had no bearing on the purchase contract as it was governed by UK Law. The Supplier had also confirmed that there had been no court action in any case.
- Clause D related to payment for the membership once the recission period had

ended and is not unfair.

Mr M did not agree and AS referred his complaint to our Service where it was considered by an Investigator. The Investigator asked AS if Mr and/or Mrs M had provided a written statement about what had happened, and AS confirmed they had not.

Having considered everything that had been submitted, the Investigator didn't think Mr M's complaint ought to be upheld. She didn't think there was sufficient evidence to show that the credit relationship between Novuna and Mr M was unfair to him, and she wasn't persuaded that there had been any actionable misrepresentations made by the Supplier.

In response to the Investigator's view, AS, on behalf of Mr M, did not agree. Mr M said that the FPOC membership had been marketed and sold to him and Mrs M as an investment. Mr M went on to say he and Mrs M had been told they were buying a fraction of a property, which at the end of the 19-year term of the contract would be bought back at a higher price. AS also produced a 'witness statement' signed (but apparently undated) by Mr and Mrs M, which said the following:

"We were approached in Tenerife on the street {2006} and told we had won a prize and that we had to collect it at the [Supplier's] office. We took out a trial membership of 3 years and 1 year later {2007} upgraded to a full membership {in Malaga}. Every time we went on holiday to Tenerife we had to attend a promotional talk where we were encouraged to upgrade. On one holiday we were persuaded to change to fractional membership and were told it was a 19 year contract and at the end of this time it would be bought back at a higher price. To purchase the fraction we had to take out FINANCE WITH HITACHI BANK. We told them that we didn't want the finance but were told that it wouldn't complete unless it was Financed. We didn't have the option of a cooling off period and had to sign up there and then. When we came home from that holiday we immediately paid off the "LOAN" as we do not like Finance."

As no agreement could be reached the matter came to me for a decision.

On 13 May 2024 I issued a provisional decision setting out why I didn't think Mr M's complaint ought to be upheld. In my provisional decision I said the following:

<u>Mr M's Section 75 CCA Complaint</u>

Section 75 CCA says that, in certain circumstances, the borrower (Mr M) under a credit agreement has an equal right to claim against the credit provider (Novuna) if there's either a breach of contract or misrepresentation by the supplier of goods or services (the FPOC membership). And, once a claim is made, Novuna needs to properly consider the claim and pay compensation if needed. Mr M's complaint is that Novuna did not do that.

However, there are certain limitations to bringing a claim under Section 75. One of these is the price of the goods or service. The purchase price must be more than £100 but no more than £30,000.

The purchase price of Mr and Mrs M's FPOC membership, bought on 27 April 2017, was £30,424. And although the actual amount paid, when taking into account the trade-in of Mr and Mrs M's existing FPOC membership was only £8,615, what was actually paid or the amount of credit taken is immaterial under Section 75. It is the purchase price of the product or service that needs to be taken into account. So as the purchase price was in excess of £30,000 a claim under Section 75 cannot succeed.

Where the purchase price is in excess of £30,000, a claim can be considered under Section

75A CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included.

And having considered Mr M's claim closely, it is, in my view, clear that it only relates to misrepresentations, not a breach of contract. He said in his initial claim that he was induced into making the purchase by misrepresentations. And he has adduced no evidence to show that he has tried to do something he was entitled to do under his purchase agreement yet was unable to. So, I'm satisfied that there is no breach of contract claim here.

Overall therefore, although Novuna did not reject his claim under Section 75 CCA because the FPOC membership cost more than £30,000, as I do not think he had a valid claim under Section 75, I do not think Novuna's decision to reject it was unfair or unreasonable.

Mr M's Complaint of Unfairness in his Credit Relationship with Novuna

Mr M's complaint to Novuna, and then to our Service, was that there were elements of unfairness in the 27 April 2017 sales process, during which he purchased the FPOC membership. I have dealt with each element below.

- *The FPOC Membership was sold to Mr and Mrs M as an investment*

In response to the Investigator's view, Mr M maintained that the FPOC membership had been sold to him and Mrs M on 27 April 2017 as an investment, and that this rendered his credit relationship with Novuna unfair. Mr and Mrs M did recently provide a written statement to support this assertion, but as I go on to explain, I am not persuaded that their statement is material to the outcome of this complaint on this occasion.

Mr and Mrs M's recollections, of their initial purchase of a trial membership and then their purchase of a full membership, laid out in the statement I was recently provided with, is consistent with some of the other evidence I've seen.

But what is also apparent is that the statement Mr and Mrs M provided appears to be referring to their initial FPOC membership purchase, in November 2013, and not the purchase in April 2017 to which this complaint refers. I say this because Mr and Mrs M say in their statement that they took finance to pay for the FPOC membership, and "When we came home from that holiday we immediately paid off the "LOAN" as we do not like Finance." But the loan associated with the April 2017 FPOC membership purchase was not cleared until May 2019, more than two years later, which is not the common understanding of the word "immediately". And further, in their statement they also say the membership term of the FPOC was 19 years. But having looked closely at the FPOC membership to which this complaint relates, including Mr and Mrs M's signed Member's Declaration, I can see the membership term is 15 years, not 19. So given there were four years between the two purchases, it seems likely that the 19-year membership term applied to the November 2013 FPOC purchase, and not the latter.

So given all of the above, on balance, I am not satisfied that the statement provided by Mr and Mrs M relates to the April 2017 FPOC purchase complained about, and as such I am unable to place much reliance on it.

Regulation 14(3) of the Timeshare Regulations prohibit the Supplier from marketing or selling membership of the FPOC 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 complaint made by Mr M to both Novuna and our Service, and reiterated in his request for an Ombudsman's decision, was that the Supplier did exactly that at the time of sale. So, I have gone on to consider whether, on the balance of probabilities, that was the case.

I have already explained how Mr and Mrs M's statement does not assist me in understanding what was said at the time of the FPOC membership sale in April 2017. And other than in the letter of complaint sent by AS on Mr M's behalf, which was very general in nature, he hasn't described what was said to him during that April 2017 sale, by whom, and in what circumstances, to justify the assertion that the FPOC membership was sold as an investment.

Having considered the nature of the FPOC membership, I can see it meant that Mr and Mrs M could exchange their Fractional Points for holidays. But in addition to this, at the end of the projected membership term, they also had a share in the net sales proceeds of the Allocated Property tied to their membership. So, Mr and Mrs M's share in the Allocated Property clearly constituted an investment in a share of the net sale proceeds of a specific property in a specific resort.

But the fact that the FPOC membership included an investment element did not, in itself, transgress the prohibition in Regulation 14(3). That prohibition prohibits the marketing and selling of a timeshare contract as an investment. It does not prohibit the mere existence of an investment element in a timeshare contract or the marketing and selling of such a product. In other words, the Timeshare Regulations did not ban the sale of products such as the FPOC, they just regulated how such products were sold.

So, to conclude that the FPOC membership was likely to have been sold to Mr and Mrs M as an investment, and therefore in breach of Regulation 14(3), I would have to be persuaded that the Supplier led them to believe that FPOC membership offered them a prospect of a financial gain, and used that fact to induce Mr and Mrs M into the purchase.

I am aware that some of the Supplier's training material, when taken with other oral representations during the sales presentation, might suggest in some circumstances that FPOC Membership was sold as an investment. But without any supporting evidence to suggest what was said, by whom and in what circumstances, I am not persuaded that this was the case when Mr and Mrs M were sold their FPOC membership on 27 April 2017. But even if I'm wrong to find in this complaint that the Supplier didn't breach Regulation 14(3) at the time of sale, I am not currently persuaded that makes a difference to the outcome in this complaint anyway. I do not think the investment element was likely to be the main driver for Mr and Mrs M in this FPOC purchase.

I say this as I can see that the purchase in question was Mr and Mrs M's second FPOC membership, having upgraded their previous membership. So, it seems to me likely that the April 2017 purchase was primarily made with the intention of improving the availability and quantity of holidays. And my view on this is strengthened by the fact that Mr and Mrs M decided to surrender two of their three Fractions to the Supplier in 2018, as they were no longer in a position to take so many holidays. And as surrendering those Fractions did not involve a refund of what Mr and Mrs M paid for them, I think it more likely than not that, if the investment element of FPOC membership had been important to them, they would have retained all of their Fractions, even if they were unable to use them fully.

So, given the facts and circumstances of this complaint, I'm not persuaded that the Supplier is likely to have breached the prohibition on selling timeshares as investments. But even if I'm wrong about that, I haven't seen enough evidence to persuade me that the investment element of FPOC membership was important enough to Mr and Mrs M's purchasing decision

to render Mr M's relationship with Novuna unfair to him had the FPOC membership, in fact, been sold as an investment.

- *Mr and Mrs M were told they could sell the FPOC Membership back to the resort or for a profit*

I can see from the Member's Declaration document that Mrs M has written her initials next to fifteen statements to confirm that she and Mr M have read and understand them. They include:

> *"4. We understand that [the Supplier], the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions…or act as an agent in the sale…"*

And further, under heading 4. Resale, Rental and Re-purchase:

> *"There is no resale, rental or re-purchase of Fractional Rights in place operated by the Vendor or the Management Company, although Owners are entitled to sell their Fractionals on the open market if they wish to do so."*

So, this shows me that under the purchase agreement it was possible to sell or transfer the FPOC membership prior to the end of the 15-year contract term. And as I've said, Mr M has not told our Service what he was told about their ability to sell their FPOC membership, so I don't know what misrepresentation(s) he is saying were made here. So, I have not seen enough evidence to say, on balance, that any alleged false statements of existing fact were made by the Supplier in this regard.

- *Clause D of the Purchase Agreement was unfair*

Mr M has said that Clause D of the Purchase Agreement Terms and Conditions (membership would be defaulted after 14-days of non-payment) was an unfair contract term.

For me to conclude that Clause D caused any unfairness to Mr M in his credit relationship with Novuna, I'd have to see that Clause D was applied in a way that was unfair to Mr and Mrs M.

Yet, having considered everything that has been submitted, it seems unlikely to me that Clause D has led to any unfairness in the credit relationship between Mr M and Novuna for the purposes of Section 140A CCA. I say this because I cannot currently see that Clause D was actually operated against Mr M, let alone unfairly, whilst he was party to the Credit Agreement.

- *The Credit Intermediary was not authorised to broker credit*

The Credit Intermediary listed as broking the finance agreement was named as the Supplier. Having checked with the FCA's register, I'm satisfied that the Supplier was duly regulated and authorised by the FCA at the time of the sale. So this complaint point is unfounded.

- *The lending decision was irresponsible*

Mr M says no affordability assessment was carried out in relation to the loan he took out. In response, Novuna said in its final response to the complaint that it did do such checks, taking steps to verify the information Mr M put in his application.

But, even if no affordability assessment or checks were carried out, I'm not currently

persuaded that would make a difference to the outcome in this complaint anyway. The reason I say this is that there has been no evidence provided by Mr M which shows that the loan was actually unaffordable for him at the time of sale. And for that reason, I can't say that Mr M lost out, even if Novuna didn't do all of the checks it should have done, or that this caused any unfairness that requires a remedy in this case.

Mr M's other Complaint Points

As I've set out previously in this decision, Mr M made several complaint points to Novuna, and then to our Service, all of which were considered by our Investigator and none upheld. And in response to the Investigator's view Mr M only argued that the FPOC membership was sold as an investment, so it is unclear whether Mr M accepts that his remaining complaints should not be upheld.

For completeness, I have considered them all closely, and having done so, I do not think any part of Mr M's complaint ought to be upheld. I will briefly summarise my thoughts on why:

- *He was made to believe he would have access to holidays he wanted at any time all year.*

Mr M has not provided any evidence of what he was told about availability of holidays when he purchased the FPOC membership in 2017. And he has not said when he was unable to book what he wanted when he wanted it. But having seen the list of holidays that Mr and Mrs M have taken as part of their FPOC membership, I can see they had three weeks of holidays between March 2018 and September 2019. So on balance, I am not persuaded he was told anything that was untrue.

- *The Supplier has gone into administration, so Mr M would be unable to recover any amount awarded by the Spanish court.*

Mr M has not been to court in Spain, so it cannot be said that any unfairness has occurred here. And in any case, the fact that Mr M may not recover any money cannot be relevant to an assessment of unfairness under Section 140A.

Conclusion

Given the facts and circumstances of this complaint, I do not currently think Mr M had a valid claim under Section 75 CCA, and as such I do not think that Novuna acted unfairly or unreasonably when it declined it. I am also not currently persuaded that Novuna was party to a credit relationship with Mr M under the Credit Agreement (and related purchase agreement) that was unfair to him for the purposes of Section 140A CCA.

Having taken everything into account, I currently see no reason why it would be fair or reasonable to direct Novuna to compensate Mr M.

The response to my Provisional Decision

Novuna did not respond, but Mr M, through AS, did. It sent a comprehensive response, including some additional testimony, setting out why Mr M did not agree with my findings in relation to both his Section 75 CCA and Section 140A CCA complaints.

Mr M's Section 75 CCA complaint

AS, on Mr M's behalf, said that the £30,000 limit for claims to be made under Section 75 related to *single items*, and as Mr and Mrs M had bought three weeks, these should be

treated as three single items, and as such were under the £30,000 limit for claims. So AS said Mr M's claim under Section 75 was valid, and Novuna was unfair when it rejected it.

Mr M's Complaint of Unfairness in his Credit Relationship with Novuna

AS felt that my unwillingness to place much reliance on the witness statement Mr and Mrs M provided following the Investigator's assessment was unfair, as I was influenced by it being short and not detailed. Following my provisional decision AS said asked Mr and Mrs M the following question:

"When you purchased on 27 April 2017 your existing timeshare with [the Supplier] was upgraded. How was the fractional ownership described by the sales representatives of [the Supplier]? Which were the benefits that you liked and convinced you to go ahead with the purchase?"

In response, Mr and Mrs M said:

"When we were on holiday in Tenerife in April 2017 we attended another presentation about the Fractional ownership. We were told that upgrading would be a better investment as at the end of the term [the Supplier] would sell the property and we would make a profit as the properties normally increase in value."

AS reiterated that the FPOC membership was marketed or sold to Mr and Mrs M as an investment in breach of Regulation 14(3). And further, in my provisional decision AS said I had incorrectly interpreted the Court's decision in *Shawbrook v FOS [2023] EWHC 1069.* For me to say that the investment must have been the main reason for which the consumers purchased the FPOC, or that the consumers purchased primarily for investment reasons was wrong. It did not need to be the primary factor in the purchasing decision. The court made clear that the investment element of the FPOC membership cannot be marketed or sold as an investment.

And AS went on to say that in Mr and Mrs M's case, the investment element did play an important part in the sales process, and convinced Mr and Mrs M to purchase. They purchased a more luxurious property which was supposed to have a better value at the end when sold. This marketing promoted the investment element, and because of this breach of Regulation 14(3) the associated credit relationship between Mr M and Novuna was unfair. AS also asked Mr and Mrs M about their decision to surrender two of their three Fractions:

"In 2018 you surrendered two of your three weeks with [the Supplier]. Why? What was the reason for that?"

Mr and Mrs M responded:

"In 2018 we were forced to surrender two of our Fractions as I had to give up work to look after my aging mother-in-law and could no longer afford the maintenance fees.
We have not used our Fraction since."

So AS disagreed that Mr and Mrs M surrendering of two of their three weeks without refund was evidence that the investment element of the membership wasn't important to them.
In summary, AS said it was clear from the documentation provided, and the updated witness statement from Mr and Mrs M, that the FPOC membership was marketed and sold to them as an investment, in breach of Regulation 14(3). And that breach caused the loan to be entered into, which created an unfair credit relationship pursuant to Section 140A CCA

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And when doing that, the Financial Conduct Authority's (FCA) Handbook of Rules and Guidance requires that I take into account the following under Rule 3.6.4 of the Dispute Resolution Rules ('DISP'): relevant law and regulations; the regulator's rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

AS, on Mr M's behalf, has made a number of detailed points, both in its earlier submissions to our Service and in response to my provisional decision, and has submitted further testimony from Mr and Mrs M. I have considered everything that has been submitted. And I do not agree that my unwillingness to place much weight on the first witness statement provided by Mr and Mrs M is unfair. Having considered it again in light of what AS has said, I remain satisfied that the statement does not relate to the FPOC purchase in question here, for the reasons I set out in my provisional decision. So as it is not relevant to the complaint under consideration, I do not think I am being unfair in not placing much weight on its contents. We're an informal dispute resolution service, set up as a free alternative to the courts. In deciding this complaint I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to either party, rather it reflects the informal nature of our Service, its remit, and my role in it.

Where I have found evidence is incomplete, inconclusive, incongruent or contradictory, I have made my decision on the balance of probabilities – what I think is more likely than not to have happened – given the available evidence and wider circumstances.

Mr M's complaint is in two parts. Firstly, he made a claim under Section 75 CCA to Novuna, who rejected it. Mr M's complaint to our Service is that Novuna was not fair and reasonable in its rejection of his claim. He has also said there were elements of the sale of the FPOC membership on 27 April 2017 that rendered his credit relationship with Novuna unfair to him. This is a complaint pursuant to Section 140A CCA. Although I have considered all of Mr M's complaint points and evidence cumulatively, for ease I will deal with his Section 75 and Section 140A complaints separately

Mr M's Section 75 CCA Complaint

As I have set out above, AS thinks that the FPOC membership ought to be considered as three separate items, as it afforded Mr and Mrs M three weeks of accommodation. But having considered this, I don't agree.

Section 75 (3) (b) states: *Subsection (1) does not apply to a claim so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000.*

So I agree that the price of a *single item* purchased must be less than £30,000 for a valid claim under Section 75. Mr and Mrs M bought a FPOC membership, consisting of a number of Fractional Points (in their case 2,280 points). It is the price of the actual membership in question here, not the number of points or the number of weeks accommodation the membership provided. The points purchased equated to three weeks of accommodation, and they nominally relate to 3/52ths of the proceeds of the sale of the Allocated Property. But it was one membership purchased, and as such it was a single item that cost in excess of £30,000.

So I am satisfied that the FPOC membership that Mr and Mrs M purchased on 27 April 2017 was a single item, and it cost £30,424. As this is more than £30,000 I do not think Mr M had a valid claim under Section 75 CCA. Therefore, I remain satisfied that Novuna's decision to reject Mr M's claim was fair and reasonable.

Mr M's Complaint of Unfairness in his Credit Relationship with Novuna

AS has referred to *Shawbrook v FOS [2023] EWHC 1069*, which was a judicial review against two Ombudsman's decisions that had found FPOC memberships to have been sold and marketed as investments. When assessing any complaint, the role of an Ombudsman is to assess the evidence, to come to a fair and reasonable outcome on the merits of the specifics of that complaint. Whilst trying to be consistent with previous decisions, the outcome will always be specific to the individual complaint as all circumstances are different. And the outcome I have reached in this case is specific to the circumstances of the sale of the FPOC membership to Mr and Mrs M.

It's also important to note that the judgment in the Judicial Review didn't find that FPOC Memberships, such as Mr and Mrs M'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).*

Was the FPOC membership sold and marketed to Mr and Mrs M as an investment?

When Mr M's complaint was referred to our Service, neither he nor Mrs M had described in any way other than in general terms that the April 2017 FPOC membership was sold as an investment. They had not described what was said to them, by whom and in what circumstances to justify this assertion.

The Investigator explained why he didn't think Mr M's complaint ought to be upheld, and it was only after this that Mr and Mrs M sent in their first statement, and provided any explanation as to why they thought the FPOC was sold as an investment. But as I've already explained in my provisional decision, I have not placed much weight on Mr and Mrs M's initial statement. And as set out above I see no reason to depart from that position – the statement does not relate to the FPOC membership purchase in question here. It relates to their previous FPOC membership purchase. But following my provisional decision, AS asked Mr and Mrs M to say how the Supplier described the FPOC membership to them in April 2017, what the Supplier said the benefits were, and what convinced them to buy it. And Mr and Mrs M's answer as set out above indicate that they thought the upgraded FPOC membership was a better investment, and that they would make a profit from the eventual sale.

Having considered what Mr and Mrs M have said here, I can see it provides some detail of their current recollections of the sales processes.

As I've said previously, I am aware that some of the Supplier's training material, when taken with other oral representations during the sales presentation, might suggest in some

circumstances that FPOC Membership was sold as an investment. And Mr and Mrs M's latest answers seem to suggest this may be the case. But I explained in my provisional decision that I did not think that this is what happened here, and Mr and Mrs M's further submissions have not persuaded me I was wrong in coming to that conclusion. I'll explain.

The allegation that the FPOC membership was sold as an investment was made at the outset, but in only very general terms. There was no substance to the allegation, and no detail of who said what, where, when and in what circumstances. Yet it was only after the judgement in *Shawbrook & BPF v FOS* was handed down, and after my provisional decision was issued to Mr M, that any detail to support the complaint was provided. I acknowledge that AS says it asked Mr and Mrs M the questions without them seeing my provisional decision, to try and prevent their answers being influenced by my findings, but I still think there is a real risk their memories have been influenced by the widespread reporting of the judgment in *Shawbrook & BPF v FOS.* So I do not feel I can fairly place much weight on their latest statement.

So, I remain satisfied that there is insufficient evidence to say, on the balance of probabilities, the April 2017 FPOC membership was likely to have been sold to Mr and Mrs M as an investment, contrary to Regulation 14(3).

But as I said in my provisional decision, even if I'm wrong to find in this complaint that the Supplier didn't breach Regulation 14(3) when it sold the FPOC membership to Mr and Mrs M, I was not persuaded that makes a difference to the outcome in this complaint anyway. And I remain of that view. As the Supreme Court decision in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 makes clear, it does not automatically follow that regulatory breaches create unfairness 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. And it seems to me, that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr M and Novuna that was unfair to him and warranted relief from that unfairness, whether or not the breach caused Mr and Mrs M to enter into the FPOC Purchase Agreement and/or Mr M to enter into the Credit Agreement is an important consideration.

In my provisional decision I set out how I didn't think the investment element of the FPOC was important to Mr and Mrs M, and that I thought the FPOC purchase was primarily made by Mr and Mrs M to enable them to take more holidays, as it was an upgrade from their previous arrangement. And my view on this was strengthened by the fact that Mr and Mrs M had voluntarily surrendered two of their three weeks, and I said this was because they were unable to take as many holidays.

In response to a question put to them by AS, they have said that they did this as Mrs M had to give up work to care for an aging relative, and they could not afford the maintenance fees. But I am not persuaded that this makes a difference here. I maintain that I think it likely that had Mr and Mrs M felt the investment element of the FPOC was important they would probably have looked to either keep all three weeks, or if as they are saying, they were finding it hard to afford the fees, enquired with the Supplier if they could sell them – at least in that way they could have looked to recover at least some of their initial outlay. And as they set out in their initial complaint to Novuna, they say they were told when they bought the FPOC that they could sell it back to the resort, or for a profit. But there is no evidence to say they made any enquiries about doing this.

So, because of this I remain of the opinion that it is most likely that Mr and Mrs M chose to upgrade their FPOC membership in April 2017 so that they could take more holidays.

So, I find that I cannot say that the alleged breach of Regulation 14(3), even if true, was

something that warrants relief given the circumstances of this complaint.

Mr M's other Complaint Points

As set out in my provisional decision, Mr M made several other allegations which he said also rendered his credit relationship with Novuna unfair to him. I explained that I did not think that was the case.

No further evidence has been adduced to disagree with my provisional findings, so I see no reason to depart from them.

So, having reconsidered everything, including what Mr and Mrs M have said in their latest statement, alongside all of AS's submissions, I remain satisfied that Novuna was not party to a credit relationship with Mr M under the Credit Agreement (and related purchase agreement) that was unfair to him for the purposes of Section 140A CCA.

Conclusion

Given the facts and circumstances of this complaint, I do not think Mr M had a valid claim under Section 75 CCA, and as such I do not think that Novuna acted unfairly or unreasonably when it declined it. I am also not persuaded that Novuna was party to a credit relationship with Mr M under the Credit Agreement (and related purchase agreement) that was unfair to him for the purposes of Section 140A CCA.

Having taken everything into account, I also see no other reason why it would be fair or reasonable to direct Novuna to compensate Mr M.

My final decision

My final decision is that I do not uphold Mr M's complaint against Mitsubishi HC Capital UK Plc trading as Novuna.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 6 August 2024.

Chris Riggs
Ombudsman