DRN-4644510

The complaint

Miss O's complaint is, in essence, that Honeycomb Finance Limited ("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 her claim under section 75 of the CCA.

Background

In July 2018, at a sales presentation (the "Time of Sale"), Miss O and her husband purchased membership of a timeshare ("the Fractional Club") from a timeshare provider ("the Supplier"). They entered into an agreement with the Supplier to buy 1,380 fractional points at a cost of £18,131 ("the 2018 Purchase Agreement").

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

Miss O financed that purchase with an interest-free loan from the Lender, in her sole name ("the 2018 Credit Agreement").

On 8 April 2019 (the "Time of Upgrade"), Mr and Miss O entered into another agreement with the Supplier to buy 1,820 fractional points and upgraded membership at a cost of £13,679 ("the 2019 Purchase Agreement"). Miss O paid for this by taking another loan with the Lender, also in her sole name ("the 2019 Credit Agreement"). That loan also consolidated the 2018 loan. At the time, the outstanding balance under that earlier loan was £12,843. After paying a cash deposit of £5,000 (it was agreed that this would be paid after the 14-day withdrawal period had ended), the total amount borrowed under the 2019 Credit Agreement was £21,522 (also interest-free).

In December 2019, Miss O asked the Lender to cancel the 2019 Credit Agreement, but this request was declined because the 14-day withdrawal period had long since expired. Miss O then complained to the Lender that the timeshares and the loans had been mis-sold, alleging that misrepresentations made by the Supplier in 2018 and in 2019 gave her a claim against the Lender under section 75 of the CCA, which the Lender had failed to accept and pay.

The Lender dealt with Miss O's concerns as a complaint and issued its final response letter on 28 January 2020, rejecting it on every ground. Miss O then brought this complaint to our service.

Subsequently, in August 2022, and while this complaint was still open, the 2019 loan was acquired by another firm ("the Purchaser"). The Purchaser accepted responsibility for Miss O's complaint about the 2019 purchase, but not for the 2018 purchase, on the ground that it had not taken over liability for the 2018 Credit Agreement. Although the 2018 Credit Agreement had been consolidated by the 2019 one, that consolidation had brought the original agreement to an end. So Miss O's complaint about the 2019 sale is being treated as a separate complaint against the Purchaser.

This complaint (about the 2018 sale) was assessed by an investigator who, having considered the information on file, rejected the complaint on its merits.

Miss O disagreed with the Investigator's assessment, and she wrote further submissions in which she argued that the Lender (and subsequently the Purchaser) had been party to an unfair credit relationship under the Credit Agreements and the related Purchase Agreements for the purposes of section 140A of the CCA. She asked for an ombudsman's decision – which is why this complaint was passed to me.

I wrtoe a provisional decision which read as follows.

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 set out in an appendix at the end of my findings – which forms part of this decision.

What I've provisionally 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 having done that, I am currently minded to uphold this complaint.

But 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.

<u>Miss O's allegations of misrepresentation, misleading practices, and unfairness</u>

The misrepresentations which Miss O alleges were made by the Supplier in 2018 were:

1. The Fractional Club was not a timeshare, but something else (she says she was told it was "a fraction") – but it is indeed a timeshare.
2. The Supplier would sell it for them – but when she asked it to do that it said it does not offer this service and she would have to sell it herself.
3. This product was in high demand, it would only go up in value, and she and her husband could sell it for a profit at any time. But there is no market for resales.

Miss O says she has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore under section 75 of the CCA she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to her.

Miss O also says that misleading sales practices are prohibited by the CPUT Regulations, and those breaches of regulations have resulted in an unfair relationship between her and the Lender. In other words, each alleged misrepresentation is also relevant under section 140A of the CCA. And in connection with the third allegation listed above, I will also consider

a possible related breach of regulation 14(3) of the Timeshare Regulations, which prohibits the selling or marketing of a timeshare as an investment.[1]

A breach of any of those regulations is capable of making a credit relationship unfair for the purposes of section 140A. But as the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness. It depends on whether the Supplier's breach of a regulation was important to the decision Miss O made to enter into the Credit Agreement and the related Purchase Agreement.[2]

1. Not a timeshare

Miss O says the Supplier told her that the Fractional Club was not a timeshare, when it was. In a phone call with the Lender, she said:

"I've heard about timeshares, I said to my husband [inaudible] *never invest in a timeshare. And repeatedly me and my husband asked is this a timeshare? "No no no, it's not a timeshare, it's a fraction." … It clearly is a timeshare. … I feel that we've been misled."*

The implication is that Miss O would not have bought the product if she had been told it was a timeshare. However, she has not explained what feature of timeshares made her not want one, or what she thought the difference was between a 'standard' timeshare, as she understood it, and Fractional Club membership which persuaded her to buy the latter. I think it's likely (based on what I've seen of the training materials which the Supplier used to train its staff, and on the length of the sales presentation, which lasted for four hours) that the salesperson explained to her what the Fractional Club was and how it worked, whatever they chose to call it. So at the moment I am not persuaded to uphold this part of her complaint, but I will reconsider this if she provides further explanation about how she was materially misled by what she was told about the product (other than in relation to points 2 and 3 below).

2. The Supplier would sell it for them

Paragraph 7 of the Member's Declaration, which was initialled by Miss O to show that she had read it, says:

"We understand that [the Supplier] … does not and will not run any resale programmes and will not repurchase Fractional Rights … or act as agent in the sale…"

That does not conclusively prove that the salesperson did not say what Mrs O recalls him saying, but it does seem unlikely to me that a salesperson would have told her one thing and then on the same occasion asked her to read and sign a declaration saying the opposite. So on the balance of probabilities, I am not persuaded that this was said. (I do however accept that she was told she could sell it herself – but that was true.)

3. It could be sold for a profit etc.

In a phone call on 6 January 2020, Miss O told the Lender:

"When I first got introduced to [the Supplier], we were told [inaudible] *the product was in high demand."*

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[1] See the Appendix.

[2] The position is similar in the case of misrepresentation, which is only actionable if the misrepresentation caused Miss O to enter into the contract.

Miss O was first introduced to the Supplier in December 2014 or January 2015, and so that statement – if taken literally – would only be her description of what happened on that occasion. She didn't buy anything then, so the Lender would not be responsible for what was said then. However, since the context of that phone call was her complaining about the 2018 and 2019 sales, I have taken her to mean that this was said when she was first re-introduced to the Supplier in 2018.

Miss O went on to say it was sold as if it was *"gold dust."* And then she said:

"We were told that if at any point we didn't want to continue with it or we wanted to sell it, they could sell it for us, and it would be sold with a profit … We were told it would go up in value."

She says that turned out to be untrue, as she found that there was no market for resales.

Neither of the first two statements I have quoted above say anything about the fractional points being sold for a profit. The third one clearly does, but I note that Miss O mentioned that in the context of describing the Supplier telling her that it would sell the timeshare for her, and since I have already found that this was not said, I don't think I can rely exclusively on her recollection of what else was said about that by the salesman (because I have already found her to have been mistaken about what she was told) – unless of course it is corroborated by other evidence. I shall return to this point later.

Later on in the call, Miss O said she was told that the Supplier would sell her timeshare for her, for a profit, and that *"it would be a lucrative deal."* It isn't clear whether she was talking about the 2018 sale or the one in 2019. But even if I assume that she was talking about the 2018 timeshare, the same difficulty arises which I described in the previous paragraph – that statement is mixed with another statement which I do not believe was said, and I think that can potentially undermine the credibility of that allegation, unless it is corroborated.

More than four years later, in March 2024, in a written statement, Miss O said this about the 2018 sale:

"I think the singular most profound statement made by the sales representative was that the Timeshare was a financial investment which will only appreciate and we were asked to imagine how this investment could set our children up for life."

However, I think that Miss O's recollection of what she was told is likely to have been far less reliable nearly six years after the Time of Sale than only eighteen months later. I think that by 2024 her memory would have been distorted by the passage of a considerable length of time. I therefore do not think that her evidence in 2024 is persuasive.

I am therefore not entirely persuaded by the evidence I have described above, taken by itself, that the Supplier misled Miss O at the Time of Sale into thinking that the Fractional Club membership being sold on that occasion was an investment.

But that is not the only evidence in this case. There is also written evidence in this complaint which is relevant 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.[3]

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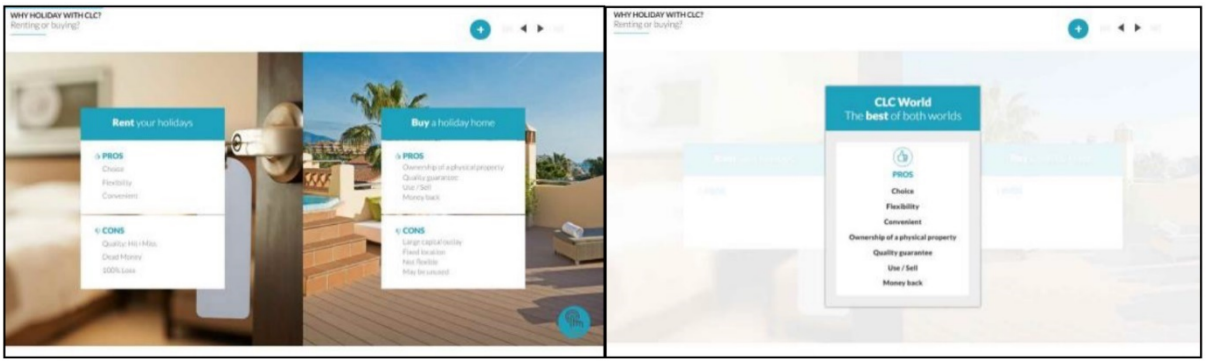
[3] The term "investment" is not defined in the Timeshare Regulations, but in *Shawbrook & BPF v FOS* (see the Appendix for the citation), the parties agreed that, by reference to the decided authorities, *"an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit"* (at paragraph 56), and I have used the same definition.

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 Miss O, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Miss O as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to her as an investment in breach of regulation 14(3).

On the other hand, there is also material which tends towards the opposite conclusion, and which supports Miss O's recollection (in 2020) of how the fractional points were sold. This is the *"Fractional Property Owners Club Fly Buy Manual 2017"* ("the Manual"). As I understand it, this Manual was used from November 2017 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Miss O and her husband appear to have purchased. It isn't entirely clear whether Miss O would have been shown the slides included in the Manual. But they seem to me to be reasonably indicative of (1) the training the Supplier's sales representatives would have got before selling Miss O Fractional Club membership; and (2) how the sales representatives would have framed the sale of Fractional Club membership to Miss O.

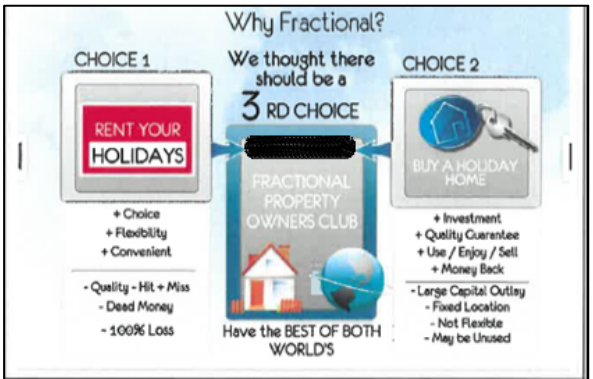
Having looked through the manual, my attention is drawn to page 19, which includes two slides called *"Why holiday with [the Supplier]? Renting or buying?"*.



They were the first slides in the Manual that seem to me to set out any information about Fractional Club membership (albeit without expressly referring to the Fractional Club), because they suggest that sales representatives were likely to have made the point to Miss O that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of the Fractional Property Owners Club:



All three indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

(1) “Rent Your Holidays”
(2) “Buy a Holiday Home”
(3) The “Best of Both Worlds”

I acknowledge that the slides incorporated into the Manual don’t include express reference to the ‘investment’ benefit of Fractional Club membership. But they allude to much the same concept.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the “ownership of a physical property”. And as an owner’s equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as follows:

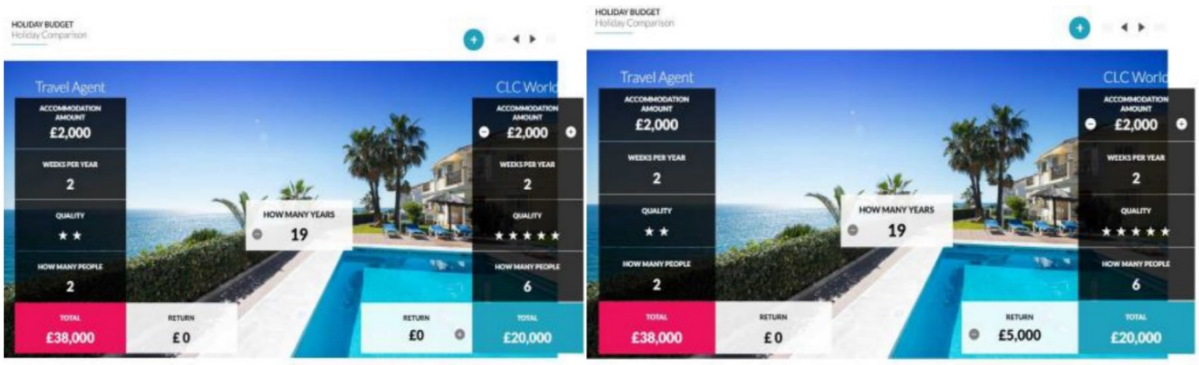
“A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds…”

Immediately above that (and next to some similar text) is an image of three piles of coins, increasing in size from left to right. That image implies that the value of the property will increase over time, so it’s likely that this is what Miss O was told, but I think that much is true and was not a misrepresentation.

The next page mentions *"a return at the end of that period"* and *"money back"*.

After discussing some of the other aspects of membership, page 54 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (*i.e.*, the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 54 included the following slides and accompanying notes:



"We aren't only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spent over £… with no return.

However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.

We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only say £5,000, it would still be more than you would get renting your holidays from a travel agent wouldn't it?"

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the 2017 Fractional Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

(1) The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus
(2) A significant financial return at the end of the membership term.

And to consumers (like Miss O) who were interested in buying holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership and referring to the prospect of a "return". And with that being the case, I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Miss O the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in regulation 14.

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *"A trader must not market or sell a timeshare or long term holiday product as an investment. For example there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3))*."[4] And in my view that must have been correct because it would defeat the consumer-protection purpose of regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

So, overall, I think the Supplier's sales representative was likely to have led Miss O to believe that fractional membership was an investment that may lead to a financial gain (*i.e.*, a profit) in the future. And with that being the case, I don't find her either implausible or hard to believe when she says she was told she was buying shares in property and she could sell her shares for a profit, notwithstanding that I have found that she was mistaken about something else she says she was told at the time (namely that the Supplier would sell them for her). The difference is that while it is not plausible that the Supplier told her it would sell

[4] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)"*, page 14. https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

her shares for her, it is plausible that it said or implied that they were an investment. So in the absence of evidence to persuade me otherwise, I think that's likely to be what Miss O was led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and Miss O rendered unfair to her?

As the Supreme Court's judgment in *Plevin* 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. So I have considered whether the Supplier's breach of regulation 14(3) led Miss O to enter into the 2018 Purchase Agreement and the Credit Agreement.

On my reading of Miss O's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when she decided to go ahead with her purchase. That doesn't mean she was not interested in holidays – her own testimony demonstrates that she quite clearly was, and that is not surprising given the nature of the product at the centre of this complaint. But as Miss O says (plausibly in my view) that Fractional Club membership was marketed and sold to her at the Time of Sale as something that offered her more than just holiday rights, on the balance of probabilities I think her purchase was motivated by her share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to her. I also note that she had previously declined to buy a fractional timeshare in 2015 following another lengthy sales pitch, which suggests to me that she would not have been easily persuaded to buy one in 2018 either. So I think it is unlikely that holiday benefits alone would have been enough to convince her to purchase in 2018 – the additional investment element was probably crucial to the salesman's success. And with that being the case, I think the Supplier's breach of regulation 14(3) was material to the decision she ultimately made.

So I am currently persuaded that the breach of the Timeshare Regulations caused Miss O's relationship with the Lender to be unfair from the Time of Sale.

But before I can decide that I should uphold this complaint on that basis, I next have to consider whether that unfairness continued beyond Miss O's purchase of an upgrade in 2019. But I am currently not persuaded that the unfairness was put right by the upgrade. And I think that for two reasons.

Firstly, although formally the agreement entered into in 2019 was a new contract that superseded the old one, its purpose was to continue and supplement the membership agreed in 2018. It wasn't a fresh start. And when Miss O purchased her membership in 2018 it had always been likely that she would upgrade her membership in this way, because it was the Supplier's normal practice to invite its customers, while they were on holiday, to another sales presentation for the purpose of selling further fractional points. So it was foreseeable that Miss O would upgrade her membership during the original term of the 2018 agreement.

Secondly, the 2019 upgrade was sold in a similar way as the original sale. Miss O has described the 2019 sale in which she was told that it was *a "fantastic investment",* and this evidence is supported by the relevant training manual (a different one), which mentions *"superb investment opportunities."*[5] Whether or not this is what induced her to buy the upgrade, she would not have been at that sales presentation but for her purchase in 2018. So the 2018 purchase still continued to have ongoing financial consequences for her.

[5] *"Induction Training Manual"*, page 103. And there is more about investments on page 105.

So for both of those reasons, I do not think that the 2019 purchase wipes out the unfairness brought about by the 2018 one.

My provisional decision

I think it would be fair and reasonable to put Miss O back in the position she would have been in had she not purchased the Fractional Club membership (*i.e.*, not entered into the 2018 Purchase Agreement), and therefore not entered into the 2018 Credit Agreement.

However, as I don't currently think that the effects of the unfairness in question ended when Miss O upgraded her membership in April 2019, and as I think that her original 1,380 points were rolled over into her upgrade and had ongoing financial consequences for her, the compensation needs to reflect that. So, in my view, the Lender also needs to refund the proportion of the annual management charges she paid after 8 April 2019 that relates to those 1,380 Fractional Points – which is 76% of the 1,820 she ended up with.

So with that being the case, here's what I think needs to be done to compensate Miss O (whether or not a court would award such compensation):

(1) The Lender must refund Miss O's repayments to it under the 2018 Credit Agreement, including any sums paid to settle the debt.

(2) In addition to Step (1), the Lender must also refund (i) the annual management charges Miss O paid as a result of her Fractional Club membership during the term of the 2018 Credit Agreement, and (ii) 76% of the annual management charges she has paid under the 2019 Credit Agreement so far.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Miss O used or took advantage of before the 2019 Credit Agreement was sold to the Purchaser; and
ii. The market value of the holidays* Miss O took using her Fractional Points up to that date.

(I'll refer to the output of Steps 1 to 3 hereafter as the 'Net Repayments'.)

(4) Simple interest** at 8% *per annum* must be added to each of the Net Repayments from the date each payment was made until the date the Lender settles this complaint.

(5) The Lender must remove any adverse information it has recorded on Miss O's credit file in connection with the 2018 Credit Agreement.

* I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Miss O took using her Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreements seems to me to be a practical and proportionate alternative in order to reasonably reflect her usage.

** HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Miss O a certificate showing how much tax it's taken off if they ask for one.

Responses to my provisional decision

Miss O accepted my provisional decision. The Lender did not respond to it. So there is no reason for me to depart from my provisional findings, and I confirm them here.

My final decision

My decision is that I uphold this complaint. I order Honeycomb Finance Limited to put things right in the way I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss O to accept or reject my decision before 16 July 2025.

Richard Wood
Ombudsman

Appendix: The Legal and Regulatory Context

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA, provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent negotiations
Section 75: Liability of creditor for breaches by a supplier
Sections 140A: Unfair relationships between creditors and debtors
Section 140B: Powers of court in relation to unfair relationships
Section 140C: Interpretation of sections 140A and 140B

Case law on section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*'), which remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship, or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in which Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *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*').

My understanding of the law on the unfair relationship provisions

Under section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms “antecedent negotiations” and “negotiator”. As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by section 12(b) of the CCA as *“a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]”*. And section 11(1)(b) says that a restricted-use credit agreement is a regulated credit agreement used to *“finance a transaction between the debtor and a person (the ‘supplier’) other than the creditor […] and “restricted-use credit” shall be construed accordingly.”*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by section 12(b). That made them antecedent negotiations under section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per section 56(2). And such antecedent negotiations were *“any other thing done (or not done) by, or on behalf of, the creditor”* under s.140A(1)(c).

Antecedent negotiations under section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

“[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are “deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity”. The result is that the debtor’s statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor’s agent.’ […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor’s responsibility would be engaged only by its own acts or omissions or those of its agents.”*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

“*By virtue of the deemed agency provision of s.56, therefore, acts or omissions ‘by or on behalf of’ the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in ‘antecedent negotiations’ with the consumer*”.

In the case of *Scotland*, the Court of Appeal said, at paragraph 56, that the effect of section 56(2) meant that “*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law”* before going on to say the following in paragraph 74:

“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate,

they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[6]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship, or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by section 140A is the consequence of all of the relevant facts.

<u>The law on misrepresentation</u>

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts* (33rd edition), a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

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[6] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key information
- Regulation 13: Completing the standard information form
- Regulation 14: Marketing and sales
- Regulation 15: Form of contract
- Regulation 16: Obligations of trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[7]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of unfair commercial practices
- Regulation 5: Misleading actions
- Regulation 6: Misleading omissions
- Regulation 7: Aggressive commercial practices
- Schedule 1: Paragraphs 7 and 24

[7] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015.

Part 2 of the CRA is the most relevant part as at the relevant time.

Relevant Publications

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

Richard Wood
Ombudsman