DRN-4911925

The complaint

Mrs W'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'), (2) deciding against paying a claim under section 75 of the CCA, and (3) lending to her irresponsibly by failing to carry out proper creditworthiness assessment.

What happened

Mrs W and her husband purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 17 June 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,590 fractional points at a cost (after trading in their trial membership) of £17,530 (the '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.

Mrs W paid for their Fractional Club membership by taking finance of £17,530 from the Lender in her sole name (the 'Credit Agreement'). She is therefore the only eligible complainant under our rules. The loan was settled in July 2019. No commission was paid by the Lender to the Supplier in relation to that loan.

Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 31 January 2023 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving her a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA.
4. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mrs W says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told her that Fractional Club membership had a guaranteed end date when that was not true;
2. told her that they were buying an interest in a specific piece of "real property" when that was not true;
3. told her that Fractional Club membership was an "investment" when that was not true because it is worthless;
4. told her that the Supplier's holiday resorts were exclusive to its members when that was

not true.

Mrs W says that 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 Mrs W.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mrs W says that she found it difficult to book the holidays she wanted, when she wanted. As a result, she says that she has a breach of contract claim against the Supplier, 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 Mrs W.

(3) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mrs W says that the credit relationship between her and the Lender was unfair to her under section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to her as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out (i) the duration of her Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of her membership were unfair contract terms under Consumer Rights Act 2015 ('CRA').
3. She was pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mrs W's concerns as a complaint and issued its final response letter on 20 March 2023, rejecting it on every ground.

Mrs W then referred the complaint to the Financial Ombudsman Service. It was assessed by an investigator who, having considered the information on file, rejected the complaint on its merits.

Mrs W disagreed with the investigator's assessment and asked for an ombudsman's decision – which is why it was passed to me.

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 (the 'Appendix') at the end of my findings – which forms part of this 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.

And having done that, I do not think this complaint should be upheld.

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.

Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

A claim against the Lender under section 75 essentially mirrors the claim Mrs W could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint and I'm satisfied that they are.

This part of the complaint was made for several reasons that I set out at the start of this decision. But while I recognise that Mrs W has concerns about the way in which her Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons she alleges. And I say that for the following reasons.

The words and/or phrases allegedly used by the Supplier to misrepresent the Fractional Club for the reason given in point 1 above were set out by the PR in the Letter of Complaint, and they were limited to: "*the Fractional Property Ownership Scheme had a guaranteed end date, specifically after 19 years, after which the clients would have no further legal liability to [the Supplier] under or in respect of the Scheme."*

The PR says that such a representation was untrue because the Sales Process begins on the Sale Date as defined in the Fractional Club Rules, and under Rule 9, particularly Rules 9.2.9 and 9.2.12, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrase above would have been untrue at the Time of Sale even if it was said. It seems to me to reflect the main thrust of the contract Mrs W entered into. And while, under Rules 9.1 and 9.2.9 of the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor',[1] longer than that if there were problems selling and the 'Owners'[2] agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

Secondly, the PR has argued that Fractional Club membership had been misrepresented by the Supplier because Mrs W was told that she was buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mrs W's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a

[1] Defined in the FPOC Rules as "CLC Resort Developments Limited".
[2] Defined in the FPOC Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

specific property in a specific resort. And while the PR might question the exact legal mechanism used to give her that interest, it did not change the fact that she acquired such an interest.

Thirdly, telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue – nor was it untrue to tell prospective members that they would receive some money when the allocated property is sold.

Finally, I accept that the Supplier's holiday resorts were not exclusive to its members. But I've not seen evidence that Mrs W was told that they were exclusive and not open to the public. Indeed, no such allegation is made in Mr and Mrs W's witness statement. And the Supplier says that while its resorts are not exclusive to members, club members do receive benefits which are exclusive to members. I have no reason to doubt that. So I am not persuaded that the resorts were misrepresented as only being available to be booked by members.

For these reasons, therefore, I do not think the Lender is liable to pay Mrs W any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the section 75 claim in question.

Section 75 of the CCA: the Supplier's breach of contract

The PR says that Mrs W could not holiday where and when she wanted to – which, on my reading of the complaint, suggests that she considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mrs W states that the availability of holidays was/is subject to demand. I accept that she may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Furthermore, I do not see this allegation made in Mr and Mrs W's witness statement. The PR's Letter of Complaint describes a specific occasion when they tried to book a holiday in Florida but were unable to. But that isn't mentioned in their witness statement, which is surprising if it was really one of their concerns. The witness statement is also unsigned, undated, and does not even identify who wrote it; nor does it mention any dates or locations.

The PR has also alleged that the standard of accommodation Mr and Mrs W stayed in was poor, and that this is a breach of contract. But again, no such allegation was made in the witness statement. It's unclear where this allegation comes from, and I am unconvinced about it.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs W any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mrs W was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under section 75 of the CCA and outcome in this complaint. But Mrs W also says that

the credit relationship between her and the Lender was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that she has concerns about. It is those concerns that I explore here.

In its final response, the Lender argued that the Financial Ombudsman Service lacks jurisdiction to consider complaints concerning section 140A. Its reason for saying so was that the section says that an order under section 140B can only be made by a court. That much is true, but that does not affect our jurisdiction, which is set out in Part XVI of the Financial Services and Markets Act 2000 and in rules made under that Part by the FCA. Section 140A is one of the laws I am required to take into account when deciding what is fair and reasonable in a complaint. It is certainly relevant law in Mrs W's complaint, and so I've paid regard to it. (There is more detail about section 140A in the Appendix.)

So I have considered the entirety of the credit relationship between Mrs W and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

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

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

Mrs W's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mrs W and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mrs W. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. Indeed, I've seen evidence that during the loan application process Mrs W said that she was employed full time, had no mortgage, had a gross income from employer of £30,000 a year, and also received £2,500 each month from investments. That suggests that affordability checks were carried out.

But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mrs W was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship with the Lender was unfair to her for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mrs W.

Mrs W says that she was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that she may have felt weary after a sales process that went on for a long time. Buit she was given a 14-day cooling off period and she has not provided a credible explanation for why she did not cancel her membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs W made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mrs W's credit relationship with the Lender was rendered unfair to her under section 140A for any of the reasons above. But there is another reason why she says her credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment – which would be a breach of a regulatory prohibition against selling timeshares in that way.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mrs W's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club 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 PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, 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 [56]. I will use the same definition.

Mrs W's share in the Allocated Property clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs W as an investment in breach of regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of

regulation 14(3) of the Timeshare Regulations.

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 Mrs W, 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 Mrs W 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). For example, the Member's Declaration, which Mr and Mrs W both signed, says in paragraph 5:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] *makes no representation as to the future price or value of the Fraction."*

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mrs W as an investment in breach of regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint, for reasons I will come on to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mrs W 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.

And in light of what the courts had to say in *Carney* and *Kerrigan,* it seems to me that if I am to conclude that a breach of regulation 14(3) led to a credit relationship between Mrs W and the Lender that was unfair to her and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) lead her to enter into the Purchase Agreement and the Credit Agreement.

The 'witness statement' supplied in this case does assert that the promise of a good investment was a significant factor. But because of the manifest shortcomings in that document which I have already described above, I do not find it to be convincing evidence of anything it states, and I do not think that I can safely or fairly rely on it.[3]

So on balance, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs W's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). And so I do not think the credit relationship between Mrs W and the Lender was unfair to her even if the Supplier had breached regulation 14(3).

[3] A similar finding was made by our investigator, and the PR has had ample opportunity to respond to it, and so I have not found it necessary to issue a provisional decision as a precursor to this one.

In its response to our investigator's opinion, the PR argued that the opinion of the High Court in *Shawbrook & BPF v FOS* should be interpreted as meaning that every complaint about a breach of regulation 14(3) should be upheld, and that our service should follow that case as a precedent, with the result that I should uphold Mrs W's complaint. I have indeed had regard to that case, but it did not make a blanket finding that all products of the type Mrs W purchased were mis-sold in the way the PR appears to be suggesting – quite the opposite! In paragraphs 71 to 73 of her judgement, the judge made it clear that each individual case has to be decided on its own facts. So I can't just say that a complaint should be upheld because every sale of a fractional timeshare contravenes regulation 14(3) and therefore must have been mis-sold.

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs W when she purchased membership of the Fractional Club at the Time of Sale. But the PR says that the Supplier failed to provide her with all of the information she needed to make an informed decision. The PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the CRA.

One of the main aims of the Timeshare Regulations and the CRA was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached and, potentially, the credit agreement being found to be unfair under section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is possible that the Supplier did not give Mrs W sufficient information, in good time, on the various charges she could have been subject to as a Fractional Club member in order to satisfy the requirements of regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mrs W nor the PR have persuaded me that she would not have pressed ahead with her purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

The PR says that the contractual terms setting out the Supplier's ability to terminate Mrs W's membership in the event of non-payment of management fees or other fees were unfair contract terms under the UTCCR, which prohibit *"requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation"*. In support of this argument, the PR relies on the case of *Wilson.* In that case, the judge held that it was disproportionate to have a contractual term saying that fractional membership can be ended by the Supplier for non-payment of fees – however small the amount outstanding may be – without refunding any of what he paid for his purchase, because then the Supplier would not only receive a windfall (the purchase price paid for the timeshare) but can also re-sell the same allocated property to another consumer. The judge described this as *"wholly disproportionate and penal."*

I agree with that, but before I can accept that this means that the relationship between the creditor and the debtor thereby became unfair, as the judge went on to find in *Wilson,* I think I have to take into account how the clause has actually operated in practice in relation to Mrs W's agreement, not just how it could potentially operate hypothetically. The judge in *Wilson* said as much at paragraph [46] of his judgement:

"The fact that clause D can be regarded in the abstract as an unfair term is not however the end of the enquiry for the purposes of s.140A of the Act. In considering the fairness of the relationship, it is necessary to consider all other relevant matters, and (amongst other things) these necessarily include how the clause has been operated in practice."

In *Wilson* the clause had been used to terminate the defendant's timeshare. But Mrs W's membership has not been terminated, and she has not stopped paying the management fees. As the foreclosure clause has not been invoked, I do not think that its mere existence, by itself, amounts to grounds to find that an unfair credit relationship exists.[4]

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mrs W was unfair to her because of an information failing by the Supplier, I'm not persuaded that it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mrs W was unfair to her for the purposes of section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

My final decision

My decision is that I do not uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 3 March 2026. But this final decision concludes our service's involvement in this matter.

Richard Wood
Ombudsman

[4] Even if I took a different view about that, the remedy would not be to unwind the purchase agreements and the credit agreements. Regulation 8 of the UTCCR says that an unfair term is not binding, but the rest of the contract shall continue to be binding if it is capable of continuing without the unfair term.

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 Ltd* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').
9. *Link Financial v Wilson* [2014] EWHC 252 (Ch) ('*Wilson'*).
10. *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench*"), the Supreme Court's judgement about undisclosed commission.

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."[5]

So, the Supplier is deemed to be the 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.

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

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.

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 7: Timeshare contracts
- 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.[6]

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

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

- Regulation 6: Misleading omissions
- Regulation 7: Aggressive commercial practices
- Schedule 1: Paragraphs 7 and 24

Paragraph 7 prohibits *"Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice."*

And paragraph 24 prohibits *"Creating the impression that the consumer cannot leave the premises until a contract is formed."*

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015, after which they were replaced by the Consumer Rights Act 2015.

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

- Regulation 5: Unfair terms
- Regulation 6: Assessment of unfair terms
- Regulation 7: Written contracts
- Schedule 2: Indicative and non-exhaustive list of possible unfair terms

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 – replacing the UTCCR.

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

The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (the 'Collective Investment Schemes Order')

The Collective Investment Schemes Order sets out several exceptions to the general definition of a CIS. It says (in paragraph 13 of the Schedule), *"Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are rights under a timeshare contract…"*

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