DRN-5036749

The complaint

Miss O's complaint is, in essence, that Tandem Personal Loans Ltd (trading as Oplo), 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 to the complaint

In July 2018, at a sales presentation, 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 ("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 a loan from a third party ("the original lender"), in her sole name ("the 2018 Credit Agreement").

On 8 April 2019 (the "Time of Sale"), Mr and Miss O entered into another agreement with the Supplier to buy 1,820 fractional points at a cost of £13,679 ("the 2019 Purchase Agreement"). Miss O paid for this by taking another loan with the original 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. This was a zero-interest loan to be repaid over two years.

In December 2019, Miss O asked the original 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 original lender that the timeshare and the loan had been mis-sold, alleging that misrepresentations made by the Supplier in 2018 and in 2019 gave her a claim against the original lender under section 75 of the CCA, which it had failed to accept and pay.

The original 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 (which was still open) was acquired by Oplo. Oplo 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, and the 2019 loan was an entirely new agreement. One of our investigators therefore set up a new complaint against Oplo, in respect of the 2019 loan only. The 2018 loan

remains the subject of a separate complaint against the original lender, but – as I shall explain later – evidence about how that loan was sold still remains relevant to this complaint.

This complaint 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 Oplo was 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 wrote 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.

I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened, given the available evidence and the wider circumstances.

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

Before I turn to the allegations made by Miss O, I will explain why I think that evidence about both credit agreements and both purchase agreements is relevant to this complaint, even though Oplo only purchased the 2019 loan.

<u>Oplo's responsibility for the 2018 agreement</u>

As I've said, the 2018 Credit Agreement was consolidated by the 2019 Credit Agreement, and later on the 2019 agreement was acquired by Oplo.

Under section 140A(1) of the CCA, a debtor-creditor relationship can be found to have been or to be unfair to the debtor because of one or more of the following: (a) the terms of the credit agreement or of any related agreement; (b) how the creditor exercised or enforced its rights under the agreement or under any related agreement; and (c) *"any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or of any related agreement)."*

The meaning of "related agreement" is given in section 140C(4), which (so far as relevant here) reads:

"(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to—

> *(a) a credit agreement consolidated by the main agreement;*
>
> *(b) a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a); …"*

A "linked transaction" is defined in section 19. In the context of Miss O's case, it means a purchase agreement financed by a regulated credit agreement. So the definition of a "related agreement" in section 140C(4) (that is, one related to the 2019 Credit Agreement) includes the 2018 Credit Agreement (under paragraph (a)) and also the 2018 and 2019 Purchase Agreements (under paragraph (b)).

Section 140C(7)(b)(ii) says that a consolidated credit agreement doesn't count as a related agreement unless *"at <u>any time prior</u> to the later agreement being entered into the parties to the earlier agreement included … the creditor under the later agreement…"* (my emphasis). Since the original lender was originally the creditor under both agreements, the fact that Oplo took over the 2019 Credit Agreement years after it was entered into does not prevent section 140C(4)(a) from applying to the 2018 loan.

Section 56 of the CCA is also important, because it makes a creditor liable for negotiations conducted by a supplier in relation to a transaction financed by a credit agreement of the kind that Miss O entered into in 2018 and 2019. So when section 140A is combined with section 56(2), a finding that an unfair relationship exists or existed may also be based 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. Such "antecedent negotiations" (as they are called in section 56) therefore amount to *"any other thing done (or not done) by, or on behalf of, the creditor"* under s.140(1)(c) of the CCA.

In other words, any assessment of whether the relationship between Miss O and Oplo is unfair must have regard to not only the 2019 Credit Agreement, but also to the 2018 Credit Agreement, and to the two related purchase agreements, and to what was said by the Supplier at the sales meetings not only in 2019 but also in 2018.

Therefore misrepresentations made by the Supplier at either sales presentation may cause a resulting credit relationship to be unfair under section 140A, because the credit relationship which began in 2019 may be unfair as the result of pre-existing unfairness under the previous credit relationship which began with a mis-sale in 2018.

However, I don't think that section 75 makes Oplo liable for any misrepresentations that may have been made by the Supplier in 2018. That is because Oplo did not buy the 2018 Credit Agreement, and section 75 does not make Oplo responsible for it just because it was consolidated by the 2019 agreement.

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

The misrepresentations which Miss O alleges were made by the Supplier 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 resale.

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 Oplo, 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 Oplo. In other words, each alleged misrepresentation (in 2018 and in 2019) is also relevant under section 140A. And in connection with the third allegation listed above, I will also consider possible related breaches 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 (among other things) whether the Supplier's breach of a regulation led Miss O 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 original 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 it was about timeshares that made her not want one, or what she thought the difference was between a traditional timeshare 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 may reconsider this (although I may not need to) 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 initialed 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.)

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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.

3. It could be sold for a profit etc.

I will begin with the 2019 sale, as that is the main issue in this case.

In January 2020, Miss O told the original lender in a phone call:

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

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 Oplo 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 the product 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 Miss O also said in the same sentence that the Supplier had told 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 on her recollection of what else was said in that part of the sale because I have already found her to have been mistaken about what she was told.

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 whichever one it was, 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 undermines the credibility of that entire allegation.

In 2024, Miss O wrote that the Supplier persuaded her to upgrade her timeshare in 2019 by telling her the following:

"He advised me what a fantastic opportunity to invest…" (sic)

"[W]e were told that it would be a fantastic investment for us and our three children."

"We were told we would get a share back from our investment after a number of years, I think it was about 10 or 15 years during our discussion with the sales representative. I remember thinking that it would be something to look forward to down the line. The sales representative said we would get nice holidays and still get our money back from the investment. It felt like a win win situation."

I note that none of those statements expressly mention a profit, but I think that the phrases "fantastic opportunity" and "fantastic investment" are strong enough to imply it, and they could be interpreted that way by a reasonable consumer. ("Get a share back" and "get our

money back" are less suggestive of a profit.) However, I think that Miss O's recollection of what she was told is likely to have been far less reliable nearly five years after the Time of Sale than only nine 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 the evidence she gave in 2024 is persuasive.

But that is not the only evidence in this case. The contemporaneous paperwork is relevant too. And there is evidence that there were disclaimers to the effect that Fractional Club membership was not sold to Miss O as an investment. Nevertheless, I also acknowledge the possibility that the sales representative in 2019 *may* have positioned Fractional Club membership as an investment, given the difficulty of marketing and selling asset-backed timeshares without breaching the relevant prohibition. So, I accept that it's equally possible that Fractional Club membership *was* marketed and sold to Miss O as an investment in breach of regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier in 2019 is not ultimately determinative of the outcome in this part of this complaint. As I've said before, the case of *Plevin* means that a breach of regulation 14(3) doesn't necessarily mean that a resulting credit relationship must be unfair as a result of that breach. And with that being the case, it is not necessary for me to make a formal finding on that particular issue for the purposes of this decision. I will explain why.

In her written statement, Miss O also said the following about the 2019 sale:

"[The salesman] said that we should upgrade because it was a hundred times better than what we had already purchased and told me the benefits of the upgrade."

"We were told that we would get heavily discounted holidays if we upgraded..."

"…we were convinced to upgrade … which would afford us even more benefits."

So Miss O's decision to purchase Fractional Club membership at the 2019 sales presentation was probably not motivated mainly by the prospect of financial gain. There is also evidence to suggest that she had other reasons to buy – more important reasons – and that she therefore would probably still have pressed ahead with her purchase whether or not the opportunity to profit was mentioned. Overall, this evidence tends to suggest that any breach of regulations in 2019 did not cause her to buy something she would otherwise not have bought. And for this reason, I am not persuaded that the credit relationship between her and Oplo was unfair because of anything that happened in 2019.

The 2018 agreement

As I've said, the new credit relationship which began in 2019 may have been unfair as the result of pre-existing unfairness from the previous credit relationship continuing into it.

In the complaint against the original lender, I have provisionally decided that the Supplier breached regulation 14(3) of the Timeshare Regulations in 2018, and that this made the credit relationship between Miss O and the original lender unfair. I do not need to set out my reasons for making those findings here, because I am not minded to uphold this complaint (for reasons I will come to later), but I will share that decision with Oplo if it asks for it.

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, or if it was cured by the upgrade.

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 sold 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.

Furthermore, 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."*[3] 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.

However, because the 2019 agreement was not mis-sold, I do not think it would be fair or proportionate for me to require Oplo to unwind the whole agreement and refund all of the payments made (the usual remedy for a mis-sale). Instead, the normal redress in this scenario would only be to order Oplo to refund a proportion of the interest which Miss O paid under the 2019 Credit Agreement (the proportion being based on the size of the payments made under the 2018 agreement – about 76%). But the 2019 loan was interest-free (even when defaulted on), so there would be nothing for Oplo to refund. For that reason, I think that there was no continuing unfairness under the 2019 Credit Agreement.

(Even if I took a different view about continuing unfairness, I would still be of the opinion that there is no remedy I can award against Oplo for that, and that fair and sufficient compensation will be paid by the original lender. So for those reasons I would not uphold this complaint.)

I am therefore satisfied that the compensation I propose to order the original lender to pay in the other complaint will be fair compensation overall, without requiring Oplo to do anything else. And it is for that reason that I do not propose to uphold this complaint.

Other allegations

Miss O also complains that in 2019 the Supplier advised her not to use her fractional points in that year, so that she could gain more points to use in the following year. It has not been suggested that this was incorrect or misleading, only that this was bad advice. But I don't think that sections 75 or 140A would make Oplo liable for that. Section 75 only applies to misrepresentations and breaches of contract by the Supplier, and section 140A does not make a creditor liable for anything said by the Supplier after the Time of Sale (having regard to the scope of section 56, which applies only to *antecedent* negotiations).

Finally, in her response to the investigator's opinion, Miss O said that in 2019 the Supplier had taken her deposit less than 14 days after the Time of Sale; that is, during the withdrawal period, which was prohibited by regulations. She says that the withdrawal period began on 11 April 2019, and the Supplier asked for the deposit on 23 April, twelve days later. As that was not part of her original complaint, I am unable to consider it now.

My provisional decision

I am not minded to uphold this complaint.

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[3] *"Fractionals at CLC Signature Collection: Induction Training Manual"*, page 103. And there is more about investments on page 105.

Responses to my provisional decision

Miss O did not accept my provisional decision. She asked for the agreement to be unwound for a number of different reasons. On the subject of why she bought the 2019 timeshare, she said this:

"I want to make it very clear here that the sole reason for entering the … contract was not for the holidays because we were going on luxury holidays before this time and we knew where we could book such holidays. It was more to do with the fact of purchasing a property abroad, having an investment as this was how it was sold to us and being able to leave this investment to our children. The fact that we were able to invest our money into property is something that we have always wanted to do for our children. We saw it as an opportunity to set them up for life and to get them on the property ladder. Also, we were happy that should we wish to sell our investment in the future it would only appreciate over the years. This was the reason that we decided to purchase the Fractional Ownership. It was an opportunity we felt we could not miss out on because of what we were told was up for offer."

She added that several different people had told her that this was a good investment, and that upgrading would mean a better ("*life-changing*") investment.

That is clear and emphatic testimony, but I think it has the same shortcomings that I described in relation to her evidence in 2024, due to the passage of time. And I am reinforced in that view by the fact that Miss O went on to say that the reason she attended the 2019 sales meeting was because the Supplier told her that her 2018 timeshare was about to expire, and she has not mentioned that before now. So I am afraid that I do not find this recollection to be reliable.

Miss O has also described how she was put under pressure to buy the upgrade by the sales representative, by means of various tactics. Assuming that this is all true, however, I note that there was a 14-day cooling-off period during which she could withdraw from the purchase and the loan which financed it, and during which she would not have been under that pressure. So I don't think that was a cause of unfairness in the relationship between her and the Lender.

Miss O says that she was in fact not given the full 14 days. She says the sales paperwork was signed on 11 April 2019, and her payment was taken on 23 April, after only twelve days. In my provisional decision I said that I could not consider this issue because she had not raised it until after the investigator gave her decision, which was much too late. But Miss O has now argued – and I agree – that this issue is not a free-standing part of her complaint, but can instead be considered as simply part and parcel of the overall unfairness of the credit relationship under section 140A, and therefore within my jurisdiction after all. However, the credit agreement is dated 8 April, and so I think she did receive the 14 days. Furthermore, she did not attempt to withdraw from the agreement on 24 or 25 April (the thirteenth and fourteenth days by her own counting). She first tried to cancel the agreement in December 2019, eight months later. So even if I am wrong about when the 14 day period began, that would be a moot point, because she did not try to exercise the right to withdraw during the relevant period.

Miss O says that there was a misrepresentation at the Time of Sale, to the effect that at the end of her club membership the Allocated Property would be sold for her; she says this was untrue because each individual timeshare owner would have to independently sell their own fraction. However, that is not how it works. The Fractional Club rules state that the property will be sold by the Trustee which owns it on behalf of the club members. So this was not a misrepresentation, because it was true.

Miss O says that the fraction has no resale value. But since the sale date is 2038, I think it is too soon to say that this is the case, especially as real property usually appreciates in value.

Miss O has gone into more detail about her allegation that she was told that the product she was buying was not a timeshare but a fraction. In her statement she says:

"I was also brought up to understand that timeshares are scams and one should steer clear from them and not to invest in one because you will never own it. It was somewhat like renting – wasted money. On the other hand, I was told that the Fraction we would own and that it was not a timeshare hence I purchased it. Again, I feel that we were purposefully misled.

Furthermore, I refer to [another document which states] - What is the loan for? The two answers are Timeshare ownership or Fractional ownership. Fractional ownership is the one that is circled so in my mind they are two separate entities and as previously stated I was told a fractional ownership is NOT a timeshare."

And further down she added:

"I was bought up to understand not to invest in timeshares because they are not a good investment, they are scams. That was the extent to which I knew about time shares. I explained this to the sales representative, and he reassured me that it was not a timeshare."

I agree that the document to which she refers does make it appear that timeshare ownership and fractional ownership are two different things, and since the latter was circled that suggested that the product was not a timeshare; and of course it certainly was a timeshare. So that was capable of being misleading. However, Miss O says she understood the distinction to be that a timeshare is like renting something you will never own, while a fraction is something you do own, and I think this was accurate. So I don't think she was misled about what she was buying.

Finally, Miss O also said that the loan repayments had been too expensive and she had struggled to meet them. But the loan agreement made it clear how much the repayments would be, and there is no suggestion that proper creditworthiness checks were not carried out by the Lender, so I do not uphold that complaint point.

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 Miss O to accept or reject my decision before 29 August 2025. But apart from that, this final decision brings to an end our service's involvement in this complaint.

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 Oplo 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."[4]

So, the Supplier is deemed to be the creditor'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.

The law on misrepresentation

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

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

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.[5]

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

[5] 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 section as at the relevant times.

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