

The complaint

Mr M's complaint is, in essence, that The Co-operative Bank Plc (the 'Lender') acted unfairly and unreasonably by (1) deciding against paying a claim under Section 75 of the Consumer Credit Act 1974 – as amended - (the "CCA") and (2) participating in an unfair credit relationship with him under Section 140A the CCA.

What happened

On 30 April 2013 (the 'Time of Sale') Mr M was on holiday using an existing timeshare product. At that time, he says he made the decision to surrender ownership of that timeshare and relinquish any and all liabilities he had in respect of it by using an 'opt-out clause' he says he'd been told was included within his existing timeshare agreement. However, having requested a meeting with the timeshare provider (the 'Supplier') he was informed there was no such opt-out clause.

Following further discussions, Mr M (together with his wife) agreed to purchase an upgrade to their existing timeshare membership (the 'Timeshare Upgrade') which provided an additional 22,500 points at a cost of £5,800 (the 'Purchase Agreement'). In addition, Mr M says the Supplier included a clause within the Purchase Agreement which allowed him to surrender his entire membership and any associated points after five years.

Mr M paid £5,000 towards the Timeshare Upgrade using his existing credit card with the Lender (the 'Credit Agreement'). The balance of £800 was paid by other means.

On 30 August 2018, Mr M wrote to the Supplier to relinquish his timeshare membership and points and enclosed the completed and signed 'Right to Surrender' form included with the Purchase Agreement.

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 16 November 2023 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA ('s.75'), which the Lender failed to accept and pay. In particular alleging:
 - the Supplier told him that purchasing the Timeshare Upgrade was the only way he could surrender his existing timeshare membership sooner than it currently permitted;
 - the Timeshare Upgrade didn't provide any increased flexibility or access to the resorts booking system operated by the Supplier; and
 - the Timeshare Upgrade wasn't an investment.
2. 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 ('s.75'). In particular, Mr M alleges:
 - The misrepresentations made by the supplier unduly influenced him into the Purchase Agreement creating unfairness pursuant to s.140A; and
 - The management fees escalated faster than they were initially told increasing his financial burden.

Following a number of written exchanges between the Lender and the PR, the Lender issued its final response letter on 13 May 2024, rejecting Mr M's complaint on every ground.

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

Mr M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. In doing so, the PR (on Mr M's behalf) explained in detail why it disagreed with the investigator's findings. In particular:

- requesting clarity on the marketing materials and sales practices of the Supplier referred to by the investigator;
- highlighting its belief that the Supplier was acting as an agent of the Lender;
- Stating that Mr M purchased the Timeshare Upgrade on the basis it would be an investment, and also on the basis it believed the Supplier had marketed and sold the Timeshare Upgrade as an investment, in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.
- Mr M was not given key information about the contract term;
- Mr M was not told that the Supplier was selling something it was not lawfully entitled to sell (i.e. an investment);
- Mr M was highly pressured to believe that all the information provided was true and accurate; and
- the time permitted for Mr M to bring his claim / complaint may be postponed pursuant to section 32 of the Limitation Act 1980 (the 'LA') as there was nothing that alerted Mr M to the facts raised until he sought professional advice.

Having considered the relevant information about this complaint, whilst I was currently inclined to reach the same conclusion as our investigator, in some parts I did so for slightly different reasons, and in other's I took the opportunity to expand upon the reasoning. So, I issued a provisional decision ('PD') on 9 April 2024 giving Mr M and The Co-operative Bank Plc the opportunity to respond to my findings before I reach a final decision.

In my PD I said:

Relevant considerations

When considering what's fair and reasonable, DISP 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

The CCA introduced certain protections that afforded consumers (like Mr M) a right of recourse against lenders (like the Lender here) that provide the finance for the acquisition of goods or services (like the Timeshare Upgrade purchased) from suppliers.

The concerns Mr M has about the sale of the Timeshare Upgrade he purchased only constitute a complaint that the Financial Ombudsman Service has the authority to consider if those concerns are considered with at least one of those provisions of the CCA in mind.

S.75 provides protection for consumers for goods or services bought using credit. Mr M paid for the Timeshare under an existing credit card agreement with the Lender. The PR has provided a copy of Mr M's credit card statement confirming a transaction of £5,000 was debited to his credit card account on 17 May 2013. So, it appears s.75 applies here – subject to any restrictions and limitations. So, where the requirements

of the CCA are met, it means Mr M is afforded the protection offered to borrowers like him under those provisions. As a result, I've taken this section into account - together with any related provisions within the CCA - when deciding what's fair in the circumstances of this case.

S.140A looks at the fairness of the relationship between Mr M and the Lender arising out of the credit agreement (taken together with any related agreement). As the Timeshare Upgrade purchased was funded under the Credit Agreement, they're deemed to be related agreements. Only a court has the power to make a determination under s.140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

Given the facts of the Mr M's complaint, relevant law also includes the Limitation Act 1980 (the "LA"). This is because the original transaction - the purchase funded by the Credit Agreement with the Lender - took place in April 2013. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered any effect this might also have.

I want to make it clear that I've based my decision on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. When doing that, my role isn't to address every single point that's been made. So, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided by both sides.

It's also relevant to point out that whilst the Timeshare Upgrade was purchased in the joint names of Mr M and his wife, the payment was made using a Credit Card in Mr M's sole name. So, only he is an eligible claimant under the CCA and consequently, the only eligible complainant. So, throughout my decision I may refer to Mr M only.

Mr M's timeshare experience

For clarity, I think it's useful to summarise Mr M's timeshare experience up to the Time of Sale. The Letter of Complaint confirms that Mr M first became involved with the Supplier in 1986 when he (and his wife) purchased their first timeshare contract. As this purchase wasn't fulfilling their needs, this was upgraded in 1988.

The PR says that in 1993 Mr M *"purchased 'Perpetuity Rights after being told this would be a beneficial investment as they would be able to pass this down to their family'".* At this point, I want to make clear that this (and the previous purchases) do not form part of the complaint submitted. And as far as I can see, there's no suggestion that the Lender provided any funding for any of those purchases. So, I can't reasonably hold the Lender responsible for any alleged misrepresentations (or otherwise) made by the Supplier up to this point.

In 2008, it's alleged Mr M was encouraged to *"sign up to a new points scheme" which "would allow them to get up to 5 weeks holiday"*. It's also at this point it's alleged that Mr M first *"wanted to end their ownership..."*. It's further alleged that the Supplier told Mr M that this new product included an opt-out clause. Again, I want to make clear that this particular sale does not appear to form part of the claim or complaint submitted. And I've also seen no evidence, and there's no suggestion, that the Lender provided any funding for this purchase either. So, like the earlier purchases, I can't reasonably hold the Lender responsible for any alleged misrepresentations (or otherwise) made by the Supplier as part of this particular transaction.

The Letter of Complaint then goes on to describe the circumstances that led to the Timeshare Upgrade purchased at the Time of Sale which is ultimately what Mr M's complaint relates to.

Mr M's misrepresentation complaint under s.75 CCA

S.75 creates a financial liability that the creditor (the Lender) is bound to pay. Liability under s.75 isn't based upon anything the lender does wrong. Rather upon misrepresentations and breaches of contract by the Supplier. S.75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid s.75 claim, it should pay its liability. And if it fails or refuses to do so, that can give rise to a complaint to this service.

However, I don't think it would be fair or reasonable to uphold Mr M's complaint for reasons relating to the s.75 misrepresentation claim. As a general rule, creditors can reasonably reject s.75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr M's s.75 claim was time-barred under the LA before it was put to the Lender.

As I've explained, a claim under s.75 is a "like" claim against the creditor. It essentially mirrors the claim Mr M could make against the Supplier. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim under S75, like this one, is also "*an action to recover any sum by virtue of any enactment*" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued here was the Time of Sale. I say this because Mr M entered into the purchase of the Timeshare Upgrade at that time based upon the alleged misrepresentations of the Supplier – which Mr M says he relied upon. And as the Credit Agreement with the Lender provided funding to help finance that purchase, it was when he made the purchase under the Credit Agreement that he allegedly suffered the loss.

The PR first notified the Lender of Mr M's s.75 complaint in November 2023. And as more than six year had passed between the Time of Sale and when the complaint was first put to the Lender, I don't think it was ultimately unfair or unreasonable for the Lender to reject their concerns about the Supplier's alleged misrepresentations.

Could the limitation period be postponed?

The PR argue that the limitation period should be postponed under Section 32 of the LA ('s.32') because facts relevant to Mr M's claim were deliberately concealed and it suggested the Supplier had fraudulently misrepresented the Timeshare Upgrade.

Section 32(1)(b) applies when "*any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant*" [my emphasis]. But the PR haven't provided me with any persuasive evidence to demonstrate that the Supplier deliberately concealed anything in relation to the various allegations that Mr M wouldn't have realised well before he submitted the claim.

Again, I should emphasise that here, s.32 can only be applied to the circumstances relating to the Purchase Agreement in 2013. I'm unable to consider the circumstances of any previous purchases or any of the allegations relating to them as there's no evidence the Lender had any involvement in funding them.

Based upon my findings above, I'm not persuaded that there's any reason why a court might decide time should be extended in keeping with the provisions of the s.32 of the LA.

Mr M's unfair relationship complaint under s.140A CCA

The court may make an order under s.140B CCA in connection with a credit agreement if it determines that the relationship between the creditor (the Lender) and the debtor (Mr M) is unfair to the debtor because of one or more of the following (from s.140A CCA):

- a) any of the terms of the agreement or of any related agreement;
- b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;
- 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 any related agreement).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

Only a court has the power to make a determination under s.140A. But as it's relevant law, I've considered it when looking at the various allegations.

A claim under s.140A is a claim for a sum recoverable by statute – which is also governed by Section 9 of the LA. As a result, the time limit for making such a claim is also six years from the date on which the cause for action accrued.

However, in determining whether or not the relationship complained of was unfair, the High Court's decision in *Patel v Patel (2009)* decided this could only be determined by "*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*". In that case, that was the date of the trial or otherwise the date the credit relationship ended.

So, having considered this, I believe the trigger point here is slightly different. Any relationship between Mr M and the Lender continues while the Credit Agreement remains live. So, that relationship only ends once the Credit Agreement ends and any borrowing under it has been repaid.

In a later letter to the Lender, the PR said that "*the relevant credit card account expired in 2021*", albeit it's unclear whether the account with the Lender had been fully repaid and closed. And the Lender has not provided any clarification on that point. Either way, it appears the Credit Agreement remained live at least up to that point. As Mr M's complaint was submitted to the Lender in November 2023, this is within six years of when the Credit Agreement was still active. Based upon this, I think Mr M's complaint under s140A was made in time. So, it is those concerns I will explore next.

- Misrepresentation

In determining if the relationship is unfair under s.140A (under the points detailed above), I think the alleged misrepresentations are relevant here. Further, even though I think it likely they couldn't be considered under s.75 CCA due to the effects of the LA, I think they could still be considered under s.140A CCA¹. So, in trying to establish whether I think a court would likely find that an unfair relationship existed, I've considered the alleged misrepresentations further in addition to the various other points raised in this complaint.

For me to conclude there was misrepresentation by the Supplier in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the Timeshare Upgrade to Mr M. In other words, that the Supplier told Mr M something that wasn't true in relation to the allegations raised. I would also need to be satisfied

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

that any misrepresentation was material in inducing Mr M to enter into the Purchase Agreement. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the Timeshare Upgrade.

From the information available, I can't be certain about what Mr M was specifically told (or not told) about the benefits of the Timeshare Upgrade he purchased at the Time of Sale. While the PR has listed what Mr M says was represented to him by the Supplier, I haven't seen any evidence to substantiate those allegations. It was, however, indicated that he was told those things. So, I've thought about that alongside the evidence that is available from the Time of Sale.

I think it would be helpful to clarify things at this point. Some of the allegations referred to in the Letter of Complaint appear to be directly attributed to earlier purchases. In particular:

- *"In 1993 [Mr M] purchased Perpetuity Rights after being told that this would be a beneficial investment as they would be able to pass this down to their family".* As I've already explained, there's no suggestion or evidence that the Lender was involved with the funding of this transaction. So, I'm unable to consider further any of the allegations relating to that purchase.
- *"In 2008 [...Mr M was] encouraged to sign up to the new points scheme [...which] had an 'optout clause' which would be beneficial [for him]".* It is then alleged that at the Time of Sale (in 2013), Mr M was *"told that there was no such clause"*. So once again, whilst Mr M may have only discovered this at the Time of Sale, this relates to an alleged misrepresentation made in 2008. Again, there's no suggestion or evidence that the Lender was involved with the funding of that transaction. So, I'm unable to consider further that particular allegation.

So, I will now consider the allegations that do appear to relate specifically to the Timeshare Upgrade Purchase in 2013.

- The Timeshare Upgrade didn't provide any increased flexibility or access to the resorts booking system operated by the Supplier; and
- Purchasing the Timeshare Upgrade was the only way he could surrender his existing timeshare membership sooner than it currently permitted;

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr M's complaint, such as marketing material or any of the wider purchase documentation from the Time of Sale that echoes what the PR suggests in the Letter of Complaint.

Mr M hasn't provided any evidence to support his suggestion that the Timeshare Upgrade did not offer increased flexibility, or that he couldn't access the Supplier's booking system. And in any event, the documentation I've seen makes no reference to these benefits. So, I can't reasonably say that the Supplier did misrepresent the product in this way.

The Purchase Agreement did include a document headed 'Appendix to the Purchase Agreement [...] – Right to Surrender', which clearly allows Mr M to surrender the Timeshare Upgrade and *"all [his] previous [...] Purchase Agreements [...] on the condition that your Annual Points Fees are paid up to date"*. Mr M completed and submitted this form to the Supplier with a covering letter on 30 August 2018. So, it appears the Purchase Agreement did allow Mr M to surrender his existing timeshare membership.

As to the question of whether this was the only way he could do that, in the absence of seeing the wider purchase documentation, I can't reasonably conclude that was

not true. In response to the investigator's findings, the PR references regulation 20(4) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') suggesting Mr M could've used this provision to surrender his membership.

Regulation 20 refers to the requirement (upon the Supplier) to allow the consumer to withdraw from the Purchase Agreement during the "*withdrawal period*". That period is defined in regulation 21 of the Timeshare Regulations as being a period of 14 days after the start date. In other words, 14 days from the Time of Sale. So, I can't see how this particular argument helps Mr M's case given that the withdrawal period (for the purchase in 2008) had clearly expired long before Mr M contracted in 2013 and was no longer an option.

Having considered everything available, I haven't seen anything to support the allegations here. And because of that, I can't reasonably say, with any certainty, that the Supplier did misrepresent the Timeshare Upgrade Mr M purchased in the ways alleged.

I've then gone on to consider the other allegations, some of which were raised and / or expanded upon in response to the investigator's findings.

- The pressured sale and process

The PR suggests at various points that Mr M was pressured or coerced into entering into the Purchase Agreement. I acknowledge what the PR has said about this and understand that Mr M may have felt weary after a sales process that may have continued for a long time. But he doesn't say anything about what was said and / or done by the Supplier during the sales presentation that made him feel as if he had no choice but to purchase the Timeshare Upgrade when he simply did not want to.

Furthermore, I understand that the Purchase Agreement usually includes a right to cancel it within 14 days (as required under the Timeshare Regulations). However, Mr M has not provided a credible explanation for why he did not cancel (or even attempt to cancel) his Timeshare Upgrade during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr M made the decision to purchase the Timeshare Upgrade because his ability to exercise that choice was – or was likely to have been - significantly impaired by pressure from the Supplier.

- The annual maintenance/membership charges

The PR alleges the annual charges that Mr M was contractually obliged to pay under the Purchase Agreement he entered into either weren't highlighted or weren't adequately explained to him. And further, that they increased unreasonably.

From the information available, I've seen reference to the requirement to pay annual charges within the Purchase Agreement. Furthermore, Mr M already held a Timeshare product with the Supplier at the Time of Sale and had done so for many years and I understand he had been paying annual charges under those agreements. So, I think it's reasonable to conclude he was aware that such charges would be payable. It's also relevant that the PR hasn't demonstrated how and if the charges paid differ from what was contractually included within the wider Purchase Agreement.

It's not unusual for such agreements to include provisions for recalculation of those charges each year. So, I wouldn't consider increases to be out of the ordinary in themselves. Furthermore, and in the absence of any further supporting evidence, I don't think it's possible to reasonably assess the fairness (or otherwise) of their calculation and application here. And as I have not seen any evidence to suggest that the requirement to pay those charges operated in such a way as to cause unfairness in Mr M's case, I can't reasonably conclude that they did.

As I final point, I think it's relevant to highlight the letter that Mr M sent to the Supplier accompanying his completed 'Right to Surrender' form wherein he requested that all his club memberships and agreements be cancelled. In particular, Mr M included, *"May I take this opportunity to thank you for over 40 years of wonderful holidays and we hope that you continue to prosper in the future"*. Whilst I accept that this predates the complaint by a little over five years, it appears Mr M felt he had benefitted from his ongoing timeshare membership with no suggestion of any dissatisfaction.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr M's s.75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes s.140A. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

If there is any further information on this complaint that Mr M wishes to provide, I would invite him to do so in response to this provisional decision.

As the time given for any comment, new information and evidence has now passed, Mr M's complaint was passed back to me.

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.

The Lender has acknowledged receipt of my PD, and in doing so, confirmed it has no further comments to make.

Despite follow up by this service, neither Mr M nor the PR have responded or provided me with anything new to consider.

In these circumstances, I've no reason to vary from my provisional findings. And for the reasons explained above, I will not be asking the Lender to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr M's complaint about The Co-operative Bank Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 May 2025.

Dave Morgan
Ombudsman