

The complaint

Mr S's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Novuna Consumer Finance¹ (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

The purchase in question was bought in the joint names of Mr S and Ms L, but as the associated credit agreement was in Mr S's sole name, he is the only eligible complainant here. I will, however, refer to both Mr S and Ms L where it is appropriate to do so.

What happened

On 27 January 2018, Mr S and Ms L purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier') for £4,395. This allowed them to take five weeks of holiday accommodation from the Supplier's portfolio of resorts over the following three years, and in addition they were given a further free week of accommodation – the 'prelude' week.

Whilst on the 'prelude' week, Mr S and Ms L purchased membership of a timeshare (the 'Fractional Club') from the Supplier on 10 December 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points (the 'Purchase Agreement') and after trading in their trial membership, they paid £18,988 for membership of the Fractional Club.

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

Mr S paid for their Fractional Club membership by taking finance of £18,988 from the Lender (the 'Credit Agreement') in his sole name.

Mr S – using a professional representative (the 'PR') – wrote to the Lender on 18 August 2021 (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, which the Lender failed to accept and pay.
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.
3. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

Mr S says that the Supplier made a number of pre-contractual misrepresentations at the

¹ At the time of sale, the trading name of the Lender was Hitachi Personal Finance.

Time of Sale, all of which were untrue – namely that the Supplier:

- Told them that they had purchased an investment that would “considerably appreciate in value”.
- Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.
- Told them that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.
- Made them believe that they would have access to “the holiday apartment” at any time all year round.

Mr S says that he 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, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr S.

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

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

- Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the ‘Timeshare Regulations’).
- The contractual term (namely Clause D) setting out that their Fractional Club membership could be forfeit upon non-payment of the relevant fees due was an unfair contract term under the Consumer Rights Act 2015 (‘CRA’).
- The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the ‘FCA’) to carry out such an activity.
- The Purchase Agreement was in breach of Spanish Law

As a result of a separate legal case in which the PR had taken the Supplier to court in Spain, on 19 November 2021 a Spanish court ruled that the Purchase Agreement was null and void along with any other annexes to the contract (which did not include the Credit Agreement) and ordered the Supplier to pay Mr S the Euro equivalent of £18, 608².

The Lender did not respond to the Letter of Complaint, so the PR referred the matter to the Financial Ombudsman Service where it was assessed by an Investigator.

As part of the PR’s submissions, we were sent testimony from Mr S which set out his recollections of his entire relationship with the Supplier. As far as is relevant to the complaint being considered here, he said:

“We did have reservations about having to go to the Full Membership Meeting as we were on a promo holiday “try before you buy” and wanted to enjoy the holiday but felt very pressured in having to go. We were told it would be a free breakfast but again this was included in our bill.

² It does not appear that the Supplier has complied with this and has not paid Mr S any compensation.

We had decided that we would not go for the full membership as it didn't suit our lifestyle. We did explain this to the sales representative when we was [sic] eating breakfast. However, he said wait and see what they have to offer during the whole day of spending with him even though we wanted to get away and enjoy the sunshine.

We went on a tour with him around the whole complex. He could see that we enjoyed a bit of luxury when we go on holiday and I believe he played on this showing us the difference between the low end and the high end. After the tour we were taken to the sales office with other people invites [sic] into purchasing a full membership.

We went through exactly the same process of the first meeting in Cheltenham, with the incentives, the pressurised sales tactics and offers. We reiterated our previous statement that we don't have the time to go on these holidays due to family commitments. We then asked sales representative; "is this timeshare", as it appeared to be.

His response;

- No, the old ways of timeshare in Spain is illegal. Selling 2 weeks in high session and low session.*
- This was not the same as it is a holiday club with fractional shares secured on the property.*
- This is the big difference; like a "brick" you buy the brick and then you more [sic] bricks, you are then building up equity in the same way you building [sic] or buying a property. But you get a free holiday, to take anytime you want.*
- Let me work out some figures, as I can tell you would like luxury holidays.*

We were currently paying about 260 pound [sic] sterling per month and if we was [sic] to consider it we would want to pay about the same. When he came back with the figure it worked out at twice as much. Still not happy with going ahead with it. I then went off spoke to his manager as she came over and said, "if you could pay around the same price would you be interested?"

She then went through changing the figures "Giving us entry level and no maintenance, with including out [sic] free trail [sic] money as we had not taken any holidays in that scheme". Felt like she was doing us a favour or that how she made felt [sic]. With more incentives and gifts (iPad, Champaign [sic] and bottles of wine). It came to 261 Sterling per month and it would give us entry level in building capital with waiving the maintenance. No mention of any future maintenance. By this time we just wanted to get out off [sic] there and go and enjoy the rest of the holiday."

Having assessed everything that had been submitted, the Investigator didn't think Mr S's complaint ought to be upheld. Mr S did not agree and asked for his complaint to be considered by an Ombudsman, which is why it was passed to me.

The provisional decision

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that I didn't think the complaint ought to be upheld, but I expanded on the reasons for not doing so. I set out my initial thoughts in a provisional decision (the 'PD') and asked all parties to respond with any new evidence or arguments that they wished me to consider.

In the PD I began by setting out what I considered to be the legal and regulatory context and then moved on to the merits of the complaint. I said:

"I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

Mr S has made a number of detailed points and provided a lot of evidence, and I have looked at it all. We're an informal dispute resolution service, set up as a free alternative to the courts, so in deciding what is fair and reasonable in the circumstances of this complaint, I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to Mr S, but it rather reflects the informal nature of our Service, its remit and my role in it.

And having considered everything, I do not think this complaint should be upheld. I understand this will come as a disappointment to Mr S, so I shall explain why I have come to the provisional conclusions that I have.

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr S and Ms L were:

- Told that they had purchased an investment that would "considerably appreciate in value".*
- Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.*
- Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.*
- Made to believe that they would have access to "the holiday apartment" at any time all year round.*

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). 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. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's possible that Fractional Club membership was misrepresented at the Time of Sale for one or both of those reasons, I don't think it's probable. They're given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. And as there isn't

any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I don't think it was.

So, while I recognise that Mr S - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr S and the Lender along with all of the circumstances of the complaint, I don't 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 standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
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; and
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 Mr S and the Lender.

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

Mr S's complaint about the Lender being party to an unfair credit relationship was made for several reasons.

These include the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr S knew, amongst other things, how much he was borrowing and repaying each month, who he was borrowing from and that he was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for him, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mr S's financial loss – such that I can say that the credit relationship in question was unfair to him as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate him, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr S and Ms L in practice, nor that any such terms led them to behave in a certain way to their detriment, I'm not persuaded that any of the terms governing Fractional Club membership

are likely to have led to an unfairness that warrants a remedy.

Overall, therefore, I don't think that Mr S's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to Mr S and Ms L as an investment in breach of prohibition against selling timeshares in that way.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr S and Ms L'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 Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr S and Ms L were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

A share in the Allocated Property clearly constituted an investment as it offered Mr S and Ms L the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that 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 Mr S and Ms L 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 them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them 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 Mr S and Ms L, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process 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 Mr S and Ms L 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's 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 the Consumer rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr S and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr S and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Mr S into the Credit Agreement is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when they decided to go ahead with their purchase. For example, when considering the testimony that Mr S has submitted, it does not persuade me that Mr S and Ms L made the purchase because of a potential profit. I acknowledge he has said that the membership was described by the salesperson as buying a "brick" and by buying more bricks you build up equity, but he has also said that he was persuaded to make the purchase after the price was reduced by a substantial amount and after the incentives, such as Champagne, an iPad and wine. That doesn't mean they weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But his testimony does not make me think the potential profit offered by the membership was what made them buy it. It seems to me that Mr S and Ms L were attracted to the potential luxury holidays the membership could provide at an affordable cost.

So as Mr S himself doesn't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision Mr S and Ms L ultimately made.

On balance, therefore, 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 Mr S and Ms L'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). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not

think the credit relationship between Mr S and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

The Supplier's alleged breach of Spanish Law and its implications on the Credit Agreement

*The PR argues that, because the Purchase Agreement was unlawful under Spanish law in light of certain information failings by the Supplier, I should treat that Agreement and the Credit Agreement as rescinded by Mr S and award him compensation accordingly – in keeping with the judgment of the UK's Supreme Court in *Durkin v DSG Retail* [2014] UKSC 21 ('Durkin').*

However, as the Lender hasn't been party to any court proceedings in Spain, it seems to me that there is an argument for saying that the Purchase Agreement is valid under English law for the purposes of Durkin.

*I also note that the Purchase Agreement is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in *Diamond Resorts Europe and Others* (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract was governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.*

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, and given the facts and circumstances of this complaint, I'm not persuaded that it would be fair or reasonable to uphold Mr S's complaint for this reason.

Other matters

Over the time that this complaint has been with this Service, Mr S has raised various other complaints about the actions of the Lender and also linked parties. However, I'd like to make clear that this Service can only consider complaints about regulated businesses, and only about regulated activity carried out by those regulated businesses. It seems to me that the supplementary complaints about the Lender here are about how it has handled his existing complaint, and complaint handling in such circumstances is not a regulated activity.

As such, whilst having considered everything that has been submitted, I have restricted my provisional findings to what I consider to be the crux of the matter – the actions of the Supplier at the Time of Sale and whether the associated credit relationship between Mr S and the Lender was rendered unfair as a result.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not currently think that the Lender acted unfairly or unreasonably when it dealt with Mr S's Section 75 claim, and at this time 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 of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mr S."

The responses to the provisional decision

In response to the PD Mr S provided a considerable amount of information and argument which I will summarise below. I would like to assure Mr S that although the information he provided was voluminous, I have read and considered it all closely. Mr S also made it clear that he no longer wished to be represented by the PR and wanted all correspondence sent to him directly.

Mr S said, in summary:

- The enforceability of a UK loan which was tied to an annulled Spanish contract should not be upheld without full legal scrutiny.
- The Lender (and other connected parties) have not properly acknowledged Data Subject Access Requests for extended periods.
- Debt collection activity (by a third party) has continued despite the complaint being assessed by the Financial Ombudsman Service.
- The Limitation Act 1980 means any enforcement action regarding the debt is time-barred.
- He is a disabled individual and the continued harassment and delays in the resolution of this complaint have caused him undue stress and harm, which contradicts the FCA's vulnerability guidance.

In addition to this Mr S provided examples where this Service had found both for and against the Lender in similar timeshare complaints, and also examples of Spanish court cases where the timeshare contract was declared null and void.

The Lender did not provide anything in response to the PD.

As the deadline for responses has now passed, the complaint has come back to me to consider and make a final decision.

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 as follows:

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*') 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 and Reast*') 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 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) of the CCA 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) CCA.

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 & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA 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.”³

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

However, an assessment of unfairness under Section 140A isn’t limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the

³ The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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 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 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.⁴

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

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 when 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

⁴ See Recital 9 in the Preamble to the 2008 Timeshare Directive.

- 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 Unfair Terms in Consumer Contracts Regulations 1999.

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

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').

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 so, and having considered everything that has been submitted in response to my PD, I remain satisfied that this complaint ought not to be upheld, for broadly the same reasons set out in the PD. I will however address the points raised by Mr S, but in doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I have read Mr S's responses in full, I will confine my findings to what I think are the salient points.

Mr S has provided no further arguments to rebut my provisional findings on his claim of misrepresentation or breach of contract under Section 75 of the CCA. He also has made no further arguments that there was an unfairness (under Section 140A of the CCA) to his credit relationship with the Lender relating to either an alleged breach of Regulation 14(3) of the Timeshare Regulations, that the credit intermediary was unauthorised to broker the credit, nor that there were unfair terms in the Purchase Agreement. So, having considered these aspects of his complaint afresh, I see no reason to depart from my provisional findings on these issues.

However, Mr S's present concerns are focussed on the enforceability of the debt by the third party, which he says is unfair and unlawful for several reasons.

Mr S maintains that because the original Purchase Agreement was found to be null and void by a Spanish court, this then makes the associated Credit Agreement unenforceable.

But for the same reasons as I set out in the PD, I don't agree with him here, and other than reiterating the arguments made before my PD, no new evidence has been provided. The Lender in this case has not been party to any court proceedings in Spain, so it seems to me that there is an argument for saying that the Purchase Agreement is valid under English law

for the purposes of Durkin⁵.

And again, I note that the Purchase Agreement is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in *Diamond Resorts Europe and Others* (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract was governed by English law, it was English law that applied, not Spanish. This was even though the latter was more favourable to the claimant in ways that resemble the matters that the PR, and now Mr S, is seemingly relying on.

So, I maintain, that in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, and given the facts and circumstances of this complaint, I'm not persuaded that it would be fair or reasonable to uphold Mr S's complaint for this reason.

Mr S has also provided examples of both Ombudsman decisions and Spanish judicial findings, that he says were of similar facts and circumstances to his complaints. But while the complaints and cases he cites may have been similar, either involving the Lender (in relation to Ombudsman decisions) or the Supplier, they were each decided on their own merits and particular circumstances. And that is what I am doing here.

Mr S also says that the debt is unenforceable by the third party because he has not seen a Deed of Assignment showing the debt has been passed to the third party, and that the provisions of the Limitation Act 1980 means that the debt can no longer be enforced due to it being time barred.

But as I said in the PD, this Service can only consider complaints about regulated activities by financially regulated businesses. And the complaint being considered here, as set out at the start of this decision, is about the Lender and its actions in providing the loan under the Credit Agreement. It is not about the actions of a third party.

So, having considered everything again, and having fully considered what Mr S has submitted in response to the PD, I am not upholding his complaint against the Lender.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 18 September 2025.

Chris Riggs
Ombudsman

⁵ *Durkin v DSG Retail* [2014] UKSC 21