DRN-5883972

The complaint

Mr L's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance (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.

What happened

I issued a provisional decision on Mr L's complaint on 25 September 2025, which set out the background to the complaint and my provisional findings on it. A copy of that provisional decision, along with an associated appendix, is appended to, and forms part of, this final decision. As a result, it's not necessary to go over all the details again, but to summarise the relevant events briefly:

- Mr L purchased, jointly with his wife, a timeshare from a timeshare provider (the "Supplier") on 22 September 2016 (the "Time of Sale") for £14,065 (the "Purchase Agreement"). The purchase was financed by a loan from the Lender (the "Credit Agreement") of the same amount. The loan was arranged by and paid to the Supplier.

- The timeshare Mr L purchased was a membership of the Supplier's "Fractional Club". This was a type of timeshare that could be used to take holidays but also came with the benefit of a share in the net sale proceeds of a specific named apartment (the "Allocated Property") when the membership came to an end.

- Mr L, using a professional representative ("PR"), complained to the Lender in January 2022 that, in essence, the timeshare and associated loan had been mis-sold. The grounds on which he sought to hold the Lender responsible or liable were Sections 75 and 140A of the CCA.

In my provisional decision, I said that I was minded to uphold Mr L's complaint. My detailed findings can be found in the appended document, however again to summarise briefly:

- I noted that it had been prohibited under *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010* (the "Timeshare Regulations") for the Supplier to have marketed or sold timeshares as an investment. This did not prohibit investment features (such as the share in the net sale proceeds of the Allocated Property) from being included in a timeshare product. But it did ban the marketing or sale of the product *as* an investment. I further noted that had the Supplier breached this prohibition, and this had been material to Mr L's purchasing decision, then it would have rendered the credit relationship between him and the Lender unfair to him under Section 140A of the CCA.

- I observed that Mr L had said the following in a witness statement which I was satisfied dated to around June 2021, and was likely to be representative of his authentic recollections of the Time of Sale:

"We did decide to buy as we were told we would be buying an actual share in a property and, when they were sold in 19 years, property prices would have risen with inflation and we would receive some remuneration back upon the sale."

I concluded this was an allegation that the Supplier had sold or marketed the product to Mr L as an investment – meaning a transaction in which there was a hope or expectation of a financial gain or profit. I further concluded that Mr L's witness statement indicated this had been an important factor in his purchasing decision.

- Taking into account Mr L's recollections of what he was told about the Fractional Club membership, alongside an analysis of the materials the Supplier used to train its representatives how to sell this product, I thought it was more likely than not that the Supplier had breached the prohibition on marketing or selling the product as an investment, to Mr L. As this wrongful action by the Supplier had been a material factor in his purchasing decision, I concluded this had rendered his credit relationship with the Lender unfair to him, and this warranted relief.

I went on to set out what I considered to be fair compensation. Again, full details of this can be found in the appended provisional decision, but broadly speaking it involved putting Mr L back in the position he would have been in, as far as practicable, as though he had not made the purchase.

I invited the parties to the complaint to comment on my provisional decision. Mr L, via PR, accepted the provisional decision. The Lender said it disagreed with the provisional decision. I think it would be fair to summarise its arguments as follows:

- It had concerns about Mr L's witness statement. These included the following:
    - The part of the statement where Mr L recalled the product being sold to him as what I had described as an investment, lacked detail and context compared to the rest of the statement, which had been more colourful.
    - The lack of detail about this aspect of the sales process suggested that it was not a focus during the sales presentation. Far more detail was given in the statement to the holiday-related features of the product, suggesting this had been the focus and/or more important to Mr L.
    - There were parts of the witness statement which matched, word for word, other witness statements received from PR on behalf of other complainants, calling into question its credibility.

- It considered my interpretation of Mr L's words was too strained. He hadn't said the Supplier had described the product as an investment. It appeared, based on what he'd said, that the Supplier had simply described how the product worked, in a way that didn't breach the Timeshare Regulations. Additionally, Mr L had not referred to expecting a profit. It would be expected that Mr L would have been clearer about this, had it been the case that this was how the Supplier had sold the product to him. "Remuneration" didn't imply making a financial gain or profit, it just meant getting some money back.

- When Mr L had entered into an agreement around 18 months later to upgrade to the Supplier's "Signature" membership (this purchase was cancelled in the cooling off period), the Supplier had assigned a trade-in value to the Fractional Club membership which was much less than what he'd paid for it. If he had thought the product was an investment, would he not have questioned this loss of value?

The case has now been returned to me to decide.

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.

Having done so, I've arrived at the same set of conclusions as set out in my provisional decision, and for essentially the same reasons. However, it's important to address the Lender's submissions.

Concerns over generic content in the witness statement

I recognise the Lender's concerns about the similarity of aspects of the witness statement to others received via PR, but I don't think this necessarily damages the credibility of the witness statement as a whole. There is one paragraph, which speaks of Mr L having been subjected to high pressure sales techniques, which the Lender has demonstrated has appeared in other witness statements in more or less the same words. I accept this paragraph is very similar across multiple statements and it could be, for example, a standard form of wording used by the legal firm which prepared the statement initially, when allegations of pressure had been made by clients. However, the Lender has not identified any other parts of the statement which seem to be duplicated in other complainants' statements including, importantly, the part I referenced in my provisional decision.

I said in my provisional decision that there were aspects of the witness statement which appeared to be confirmed by, or consistent with, evidence much closer to the Time of Sale. For example, the account of Mr and Mrs L's cancellation of the Signature upgrade, matches the notes the Supplier made of this conversation at the time. More broadly, Mr L's statement is one which seems to me, having seen a very large number of such statements, to have the kind of personal detail and colour which identifies it as being driven by the complainant's own recollections. Overall, I remain of the view that the statement as a whole is representative of what Mr (and Mrs) L recalled of the Time of Sale as of 2021 when the statement was taken and that, given the corroborating details, the recollections are more likely than not to be accurate.

Lack of detail in the relied-on parts of the witness statement

The Lender has questioned the relative lack of detail to Mr L's recollections of the Time of Sale when referring to the matter of the Fractional Club membership being an investment.

While it's true that other matters take greater prominence in the witness statement, given the nature of these other things I don't find that too surprising, or take it to mean that things which were assigned less prominence weren't important or didn't happen. By far the most detailed parts of the recollections of Mr L (or rather Mrs L, who appears to have been the statement's primary author) relate to unpleasant personal experiences they said they had during and after the sales process. These included a hypoglycaemic episode which Mrs L said occurred as a result of the length of the sales process and delays in the Supplier providing suitable food; and what Mrs L considered to be a struggle to persuade the Supplier to cancel the Signature upgrade within its cooling-off period, on account of Mr L having developed significant heart problems. I don't find it surprising that Mr and Mrs L would recall more vividly, and devote more time to describing, what they considered to be incidents where they were treated badly or unfairly by the Supplier's staff. Indeed, the Supplier noted that Mrs L had been "very emotional" when trying to cancel the upgrade. I don't consider, in the circumstances, that the extra detail in some parts of the witness statement is a reason to attach much less weight to other things mentioned in it which are described in less detail.

Interpretation of Mr L's words

In my provisional decision, I acknowledged there could be multiple interpretations of Mr L's words, stating:

> *"While I can see there could be potentially different interpretations as to what was meant by "some remuneration back upon the sale", I think in the circumstances, where an interest in property was being purchased, which it was said would increase in value, this should most sensibly be taken to mean money back on top of the initial outlay."*

The Lender has taken the view that a more reasonable interpretation of Mr L's words is that the Supplier had simply described to him how the sale of the fractional asset operated: the property would be sold and he would get some money back, without any suggestion that this would lead to a financial gain or profit. The Lender noted that "remuneration" is not a word associated with these things.

Remuneration does seem an odd choice of word in the circumstances, as by definition it refers to being paid for work done or services performed. Clearly that is not the kind of arrangement Mr L was entering into. He wasn't doing work for the Supplier or performing any services, so it's probable that the literal sense of the word was not what he meant.

As I said in my provisional decision, I think the context in which the word appeared implies that Mr L was referring to a financial gain – something back on top of what he had put in. He had said that he was told he was buying a share in a property, and that the property would rise in value. In the circumstances, this still appears to me to be the most sensible interpretation of what Mr L meant. The interpretation is also consistent with my analysis of how the Supplier sold Fractional Club membership, which I note the Lender has not seriously challenged.

The failure to challenge the loss of value at the time of the Signature upgrade

The Lender points out that the trade-in value assigned to Mr L's Fractional Club membership at the time of the cancelled upgrade to the Signature membership, was less than what he'd paid for it. I can see from a printed "pricing sheet" that Mr L was offered £10,140 for his existing membership, which he'd paid £14,065 for about 18 months earlier.

It's not clear if Mr L was shown the pricing sheet which set out how much he was being offered for his existing membership. The document isn't signed, and it isn't covered in handwritten notes outlining various incentives to purchase, unlike the copy of the pricing summary Mr L received for the Fractional Club purchase. I'm also aware that the signed purchase agreement for the Signature upgrade would *not* have shown the trade-in value, so if Mr L did not see the pricing sheet at the time of the upgrade, he'd likely have been unaware of the trade-in value he was being offered. That said, I accept the pricing sheet is something Mr L may have seen at some point during the sales process. While I take the Lender's point that it might be expected that Mr L would raise concerns about a loss of value if he thought what he'd purchased was an investment, I would make two observations.

Firstly, to appreciate he was being offered less than he'd paid for the membership, Mr L would have needed to recall what he had paid for it around 18 months previously. Secondly, assuming Mr L did recall how much he'd paid previously, this was a long-term investment that was due to mature in 19 years. At the point Mr L may have been shown the trade-in value, there were still over 17 years left to run – which would have been plenty of time for property prices to have risen and resulted in an overall gain. So a failure to raise concerns at this point was not necessarily inconsistent with a belief that the product was an investment

or this having been an important part of a person's purchasing decision, though I accept that in some circumstances it could be.

Considering all of the evidence again, I remain of the view that, firstly, the Supplier likely breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale in September 2016, by marketing or selling the Fractional Club membership as an investment and, secondly, Mr L's purchasing decision was materially affected by this, rendering his credit relationship with the Lender unfair to him.

Putting things right

What I consider to be fair compensation has not changed since my provisional decision. I've reproduced my directions to the Lender below:

Having found that Mr L would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided he and Mrs L agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done to compensate Mr L with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr L's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the annual management charges Mr L paid as a result of Fractional Club membership.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr L used or took advantage of; and
ii. The market value of the holidays* Mr L took using his Fractional Points.

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

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

(5) The Lender should remove any adverse information recorded on Mr L's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr L's Fractional Club membership is still in place at the time of this decision, as long as he and Mrs L agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been

available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr L took using his Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect his usage.

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

My final decision

For the reasons explained above, and in the appended provisional decision, I uphold Mr L's complaint and direct Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance to take the actions set out in the "Putting things right" section of this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before **13 November 2025**.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to arrive at a different set of conclusions to our Investigator, so I'm issuing this provisional decision to give the parties to the complaint a further opportunity to provide further submissions before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **8 October 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance accepts my provisional decision, it should let me know. If Mr L also accepts, I may arrange for the complaint to be closed as resolved at this stage without a final decision.

The complaint

Mr L's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance (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.

What happened

Mr L purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 22 September 2016 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 780 fractional points at a cost of £14,065 (the 'Purchase Agreement'). Mr L bought the membership jointly with his wife, Mrs L. The points could be exchanged annually for holiday accommodation within the Supplier's portfolio.

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

Mr L paid for the Fractional Club membership by taking a loan of £14,065 from the Lender (the 'Credit Agreement'), arranged by the Supplier.

Mr L – using a professional representative (the 'PR') – wrote to the Lender on 2 January 2022 (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) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

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

1. told him that Fractional Club membership was an “investment” and that it included a share in property which would considerably increase in value, when that was not true.
2. told him that he could sell the Fractional Club membership back to the Supplier or sell it at a profit, when that wasn’t true.
3. led him to believe that he would have access to the “holiday’s apartment” at any time all around the year, which was also not true.

Mr L 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 him.

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

The Letter of Complaint set out several matters which I’ve interpreted as reasons why Mr L 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:

1. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the ‘Timeshare Regulations’).
2. Some of the contractual terms of the Purchase Agreement were unfair terms under the Consumer Rights Act 2015 (“CRA”).
3. The decision to lend was irresponsible because the Lender didn’t carry out the right creditworthiness assessment.

PR also argued that, while the entity named as the credit intermediary on the relevant paperwork was authorised by the FCA, the individual self-employed sales representatives had not been, meaning the Credit Agreement had been arranged by an unauthorised credit broker. This, the PR argues, made the Credit Agreement unenforceable.

The Lender dealt with Mr L’s concerns as a complaint and issued its final response letter on 4 March 2022, rejecting it on every ground.

Mr L then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, did not uphold it.

Mr L disagreed with our Investigator and appealed against his assessment. The case was subsequently passed to me to decide.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators’ rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the ‘Appendix’) which is attached to, and forms part of, this decision.

What I’ve provisionally decided – and why

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the

Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr L as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and the Lender unfair to him for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr L's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Fractional Club membership was misrepresented to him, or that the right checks weren't carried out into whether the loan was affordable. And that's because, even if the other parts of the complaint ought to succeed, the redress I'm currently proposing puts Mr L in the same or a better position than he would be if the redress was limited to what would be fair and reasonable were any of his other concerns upheld.

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

Having considered the entirety of the credit relationship between Mr L and the Lender along with all of the circumstances of the complaint, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

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

The Lender does not dispute, and I am satisfied, that Mr 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 Mr L says that the Supplier did exactly that at the Time of Sale. While the allegations made in PR's Letter of Complaint were rather generic in nature, Mr L's[1] witness statement, which was provided later on, says the following:

"We did decide to buy as we were told we would be buying an actual share in a property and, when they were sold in 19 years, property prices would have risen with inflation and we would receive some remuneration back upon the sale."

[1] The witness statement appears to have been drafted mainly by Mr L's wife, but recounts both of their experiences.

Mr L therefore alleges that he was told or led to believe that, over the membership term, the value of the underlying Allocated Property he was purchasing a share of the net proceeds of, would increase. While I can see there could be potentially different interpretations as to what was meant by "some remuneration back upon the sale", I think in the circumstances, where an interest in property was being purchased, which it was said would increase in value, this should most sensibly be taken to mean money back *on top* of the initial outlay.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" at [56]. I will use the same definition.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint 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 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was primarily for the purpose of holidays, and the Supplier made no representations as to the future value of the share in the Allocated Property.

On the other hand, the contractual paperwork also contained a section titled "11. Investment advice", which warned that *"all information [provided by the Supplier's representatives] has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice…"* This appears to anticipate that the Supplier's representatives would have spoken about the product with potential customers like Mr L, in the context of a discussion which covered the topic of financial investment. Otherwise, it would have been unnecessary to include such a disclaimer. Overall, I think the paperwork contained some mixed messages.

In any event, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr L or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives at various periods during which it sold the Fractional Club product. Based on the date Mr L purchased his membership, I think the following documents are relevant:

1. a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');
2. screenshots of a Electronic Sales Aid (the 'ESA'); and
3. a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')

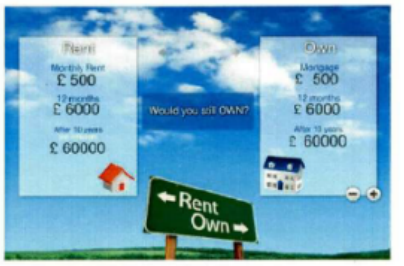
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

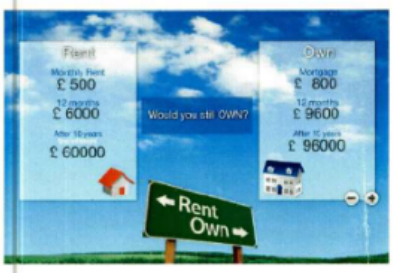
(1) the training the Supplier's sales representatives would have got before selling Fractional Club membership; and

(2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr L.

The "Game Plan" on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of the Fractional Club worked and what it was intended to achieve.

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:





- Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return
- Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for
- Ask: "if it cost a little more to own rather than rent would they be happy to pay the extra to own?" *(increase amount of owning and continue to do this for a couple of times until they don't agree.*

CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

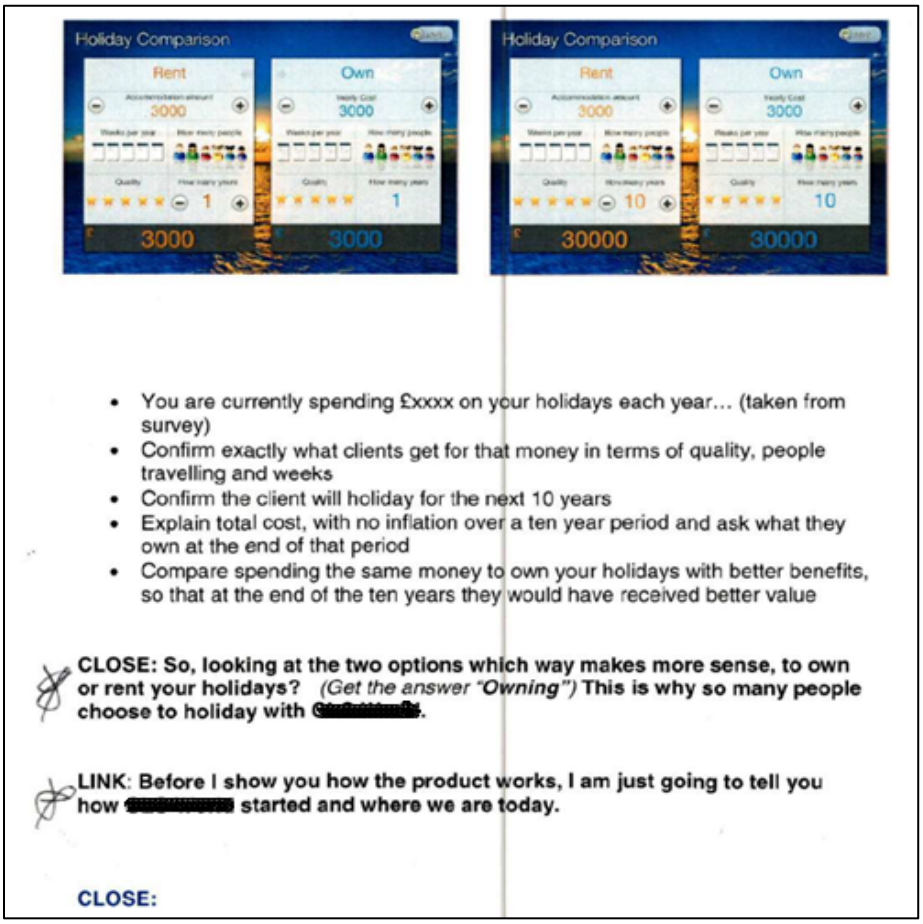
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners *"are building equity in their property"*. And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth over time.

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership. This is broadly consistent with Mr L's recollection of being told that after 19 years of inflation the value of the Allocated Property would have increased, while not being told *explicitly* that the product was an investment.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



- You are currently spending £xxxx on your holidays each year… (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

CLOSE: So, looking at the two options which way makes more sense, to own or rent your holidays? *(Get the answer "**Owning**")* **This is why so many people choose to holiday with [redacted].**

LINK: Before I show you how the product works, I am just going to tell you how [redacted] started and where we are today.

CLOSE:

With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how Fractional Club membership worked. And, on pages 41 and 42 of the Fractional Club Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar***
>
> *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*

SUMMARISE LAST SLIDE:

FPOC equals a passport to fantastic holidays for 19 years ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***

[…]

LINK: Many people join us every day and one of the main questions they have is ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*

[…]

*"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……..****Would you mind explaining to them how their interest will be protected over the next 19 year[s]****?"*

(My emphasis added)

The Fractional Club Training Manual doesn't give any immediate context to what the manager would have said to prospective members in answer to the question posed by the sales representative at the handover. Page 43 of the manual has the word "script" on it but otherwise it's blank. However, after the Manual covered areas like the types of holiday and accommodation on offer to members, it went onto "resort management", at which point page 61 said this:

"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.

[…]

CLOSE: ***I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.*** *So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*

(My emphasis added)

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn't entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a "return".

For example, on page 69 of the Fractional Club Induction Training Manual, it included the following screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:

[…]

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

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the

return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

(1) The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus

(2) A significant financial return at the end of the membership term.

And to consumers (like Mr L) who were looking to buy holidays anyway and were familiar with how holiday clubs worked in general[2], the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr L the financial value of the proprietary interest he was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

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

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of S*hawbrook & BPF v FOS* when, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

---

[2] Mr L had been a previous member of a different kind of holiday club.

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

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."*

I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And as the Fractional Club Training Manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr L to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find him either implausible or hard to believe when he says he was told the value of the Allocated Property would increase over the membership term. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr L was led by the Supplier to believe at the relevant time. I think the Supplier at least implied that Mr L was likely to make a financial gain from the Fractional Club product. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found 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 L and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

Before I continue, I think it's important to consider the nature of the evidence as to Mr L's state of mind at the Time of Sale, when he made his purchasing decision (and of what the Supplier told him). In this case, it's the witness statement sent to us by PR in August 2023. This pre-dates our Investigator's unfavourable assessment of the complaint, so it could not have been influenced by the content of that assessment. However, it dates to after the judgment in the High Court case of *Shawbrook & BPF v. FOS*, which would have given an indication of what kind of arguments might be successful in a complaint about a fractional timeshare. In my view there's a significant risk that any statement produced after that judgment could have been influenced by it. On balance, however, I think Mr L's statement was produced *before* the judgment. I'll explain why.

PR has provided a screenshot from the system of a legal firm which originally took Mr L's statement, apparently showing when it was uploaded to that system. The entry is dated "2021/06/17". The statement was provided to this service as a PDF from which it has been possible to extract and examine the metadata. This indicates that it originated in November 2020 as a Microsoft Word file titled *"20201110 [Supplier] Misrep Letter".* By the time it had been uploaded to the legal firm's system in June 2021, it had become a PDF named "B.SOM_[Mr L].pdf". It then appears the PDF was renamed "SOM 17.06.21" before being emailed to the Financial Ombudsman Service. The most recent modification to the file took place 2-3 minutes prior to it being sent by email.

It's not possible to be certain, given the various changes which have taken place to the filename, when the version received by the Financial Ombudsman Service was written. The modification date would generally be the last time the file had been saved, but I think PR saved the statement under a filename consistent with its own naming practices, causing a "last modified" date to appear shortly before it was sent to this service. I think it's most likely the statement was "complete" by June 2021 when it was uploaded as a PDF, and that it is unlikely PR or some other actor has changed the content since then. I think it's an authentic document dating to before the judgment referenced above.

There are still around five years between the Time of Sale and the June 2021 statement. This is a significant time gap, so I've considered whether this affects the weight I can attach to it. I observe there are some parts of the recollections which are corroborated by more contemporaneous sources of evidence. These include details of a later sales pitch by the Supplier which resulted in a cancelled purchase from Mr and Mrs L – the details recalled by Mr L closely follow what the Supplier recorded in its own notes at the time. Overall I think it's reasonable to consider Mr L's recollections as being an accurate account of what was said and what his motivations were at the Time of Sale.

I think it's apparent from how the statement is worded that, while Mr L was interested in the holiday-related benefits of the Fractional Club membership, the prospect of remuneration at the end of the term (which I've interpreted as meaning money back *on top* of the initial outlay) was a material factor which led to him proceeding with the purchase. He doesn't say or suggest that he would have proceeded if he'd not been presented with the prospect of the membership being a product that could lead to a financial gain in the future.
And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made, rendering the credit relationship between him and the Lender unfair to him.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr L under the Credit Agreement and related

Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr L would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided he and Mrs L agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done to compensate Mr L with that being the case – whether or not a court would award such compensation:

(7) The Lender should refund Mr L's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(8) In addition to (1), the Lender should also refund the annual management charges Mr L paid as a result of Fractional Club membership.

(9) The Lender can deduct:

iii. The value of any promotional giveaways that Mr L used or took advantage of; and
iv. The market value of the holidays* Mr L took using his Fractional Points.

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

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

(11) The Lender should remove any adverse information recorded on Mr L's credit file in connection with the Credit Agreement reported within six years of this decision.

(12) If Mr L's Fractional Club membership is still in place at the time of this decision, as long as he and Mrs L agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

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

My provisional decision

For the reasons explained above, I'm minded to uphold Mr L's complaint and direct Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance to take the actions set out in the "Fair Compensation" section.

I now invite the parties to respond to my provisional decision, by **8 October 2025**.

Will Culley
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*') 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."[4]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

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

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

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

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.[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.

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

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
- 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').

Will Culley
Ombudsman