DRN-4290318

The complaint

Mr L says that Barclays Bank UK PLC trading as Barclaycard ("Barclaycard") acted unfairly in not upholding his claim under Section 75 of the Consumer Credit Act 1974 ("the CCA") in relation to a timeshare product he purchased using his credit card with them.

The claims, which are the subject of this complaint, are Mr L's to make because they stem from a credit card agreement in his name only. However, as they relate to purchases made by him and his wife, I may refer to Mr and Mrs L at times throughout this decision.

What happened

In or around October 2013, Mr and Mrs L attended a meeting and presentation with a company who I'll refer to as "CH". During that meeting, Mr and Mrs L agreed to purchase a timeshare product from CH at a cost of £7,950. They paid an initial deposit of £2,500 using a credit card (issued by Barclaycard) in Mr L's sole name.

In or around September 2017, using a professional representative ("the PR"), Mr L submitted a claim to Barclaycard under Section 75 of the CCA ("S75"). Within the claim, the PR alleged that CH had made various misrepresentations about the product purchased which Mr and Mrs L had relied upon when making their decision to complete the purchase. And under the provisions of the CCA, Mr L is able to make a like claim for those misrepresentations against Barclaycard. In particular, the PR allege Mr and Mrs L were told:

- they would benefit from a *"huge amount* [sic] *of benefits"*;
- they'd be able to access any apartment within the resort where the meeting was held;
- they could bank their timeshare week with CH;
- they could use any apartment in any resort at any time;
- the product included two years membership with a timeshare exchange company (nominated by CH) with whom they could also bank their timeshare week under the same conditions; and
- they would receive points that could be used against holidays with another travel club.

During the meeting and sales presentation, the PR allege:

- Mr and Mrs L were pressured in to entering the purchase agreement;
- CH used aggressive sales tactics
- Mr and Mrs L were made to feel anxious;
- Mr and Mrs L spoke to a number of sales representatives causing confusion and upset.

The PR thought CH had failed to reach the standard of conduct required in most relevant financial codes of conduct.

In response to Mr L's claim, Barclaycard said that despite requests, they hadn't *"received copies of the contracts, terms and conditions etc"* that applied to Mr L's purchase. They also weren't able to clearly identify a transaction to CH from Mr L's credit card account with them.

Barclaycard said they weren't able to write to the PR as they didn't hold the required authority to do so.

Mr L wasn't happy with Barclaycard's response. So, the PR referred his complaint to this service. Whilst considering the circumstances of Mr L's complaint, our investigator was able to provide further information to Barclaycard – as provided by Mr and Mrs L and the PR.

Having considered this information, Barclaycard didn't think Mr L had a valid claim under S75. Whilst the purchase contract was agreed with CH, the credit card payment had been made to another company (who I'll refer to as "F"). And because of that, they weren't able to establish a valid debtor-creditor-supplier ("DCS") agreement under the CCA, thus rendering Mr L's S75 claim invalid.

Having considered all the information available, our investigator didn't think Barclaycard had acted unfairly or unreasonably in turning down Mr L's claim. Our investigator was also unable to establish the necessary DCS relationship. However, having also considered the alleged misrepresentations, out investigator didn't think there was any evidence from the time to support them. They also didn't think it likely a court would find that an unfair relationship existed under Section140A ("S140A") of the CCA.

The PR didn't agree with our investigator's findings. In summary, they:

- didn't agree Mr and Mrs L hadn't been pressured by CH;
- said CH had marketed and sold the timeshare product as an investment with assurances they were guaranteed their money back on sale;
- the travel club points didn't deliver what was promised;
- thought an unfair debtor/creditor relationship existed under S140A as a result of breaches of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs");
- believe CH used aggressive commercial practices in breach of the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT")

As an informal resolution couldn't be reached, Mr L's complaint has been passed to me to consider and reach a final decision. Having done so, while I reached the same outcome as our investigator, I'd considered some issues which I didn't feel were previously fully addressed. Because of that, I issued a provisional decision ("PD") on 12 July 2023 – giving the parties involved the opportunity to respond to my findings before I reached a final decision.

In my provisional decision, I said:

> When considering what's fair and reasonable, DISP[1] 3.6.4R of the Financial Conduct Authority ("FCA") Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
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> S75 provides protection for consumers for goods or services bought using credit, subject to the necessary DCS arrangement being in place. Mr L says he paid a £2,500 deposit for the timeshare product with a credit card issued by Barclaycard. So, it appears that S75 could apply here, provided the necessary DCS arrangement can be established. This means that Mr L would be afforded the protection offered to borrowers like him under those provisions. As a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

[1] The Dispute Resolution Sourcebook

It's important to stress that this service's role as an Alternative Dispute Resolution Service (ADR) is to provide mediation in the event of a dispute. The complaint being considered here specifically relates to whether I believe Barclaycard's treatment of Mr L's claim was fair and reasonable given all the evidence and information available. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Mr and Mrs L's timeshare product experience

I think it's relevant to acknowledge Mr and Mrs L's previous experience with timeshare products. In their statement, they confirmed they'd previously purchased a timeshare product from another supplier in 2008. As I'll explain later, I believe this was ultimately traded in against the product purchased from CH. They also say they'd previously had a similar timeshare experience in 2003. More recently, Mr and Mrs L had already purchased a trial membership with CH earlier in 2013, which it also appears was traded in towards the product later purchased from CH.

Based upon this information, I think it's reasonable to conclude Mr and Mrs L had a reasonable awareness about the products purchased, how they might operate and any associated ongoing cost.

Misrepresentation

Despite the PR's submission and Mr and Mrs L's recollections, the documents provided don't appear to support the stated purchase price paid here. It appears Mr and Mrs L had originally purchased a trial membership from CH earlier in 2013 at a cost of £1,495. I would add that this particular sale doesn't appear to form part of any claim here.

The actual price of the product purchased in October 2013 appears to have been £25,345. Against which there was a trade in allowance of £2,495. Presumably for the aforementioned trial membership which, it appears, hadn't been used. Further, there appears to be a further trade in allowance of £14,900 in relation to a timeshare product Mr and Mrs L already held with another timeshare supplier. The net difference appears to be £7,950 – the amount Mr and Mrs L say the product cost.

For me to conclude there was a misrepresentation by CH in the way that has been alleged, generally speaking, I would need to be satisfied, based on all the available evidence, that CH made false statements of fact when selling the timeshare product in 2013. In other words, that they told Mr and Mrs L something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr and Mrs L to enter the contract. This means I would need to be persuaded that Mr and Mrs L reasonably relied on those false statements when deciding to buy the timeshare membership.

The PR have provided limited documentation from the time of the sale. I've seen some handwritten calculations on headed note paper and a copy of a CH membership certificate in Mr and Mrs L's name, together with some handwritten notes it's said were made by Mr and Mrs L. There is a document headed "Deed of Trust". But this appears to relate to a different timeshare company. Although not determinative of the matter, I've not seen any other documentation or evidence from

the time of the sale, such as marketing material or purchase documentation terms and conditions, which supports what Mr and Mrs L say they were told or that what was said amounted to misrepresentation.

On this basis, I can't reasonably conclude that the product was misrepresented. And because of that, I can't say that Barclaycard's response was ultimately unfair or unreasonable.

S140 – Unfair Relationship

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (Barclaycard) and the debtor (Mr and Mrs L) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

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

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

In deciding whether to make a determination under S140A, the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

It's important to acknowledge that only a court can make a determination under S140A. But as this is relevant law, I need to take it into account in reaching my decision – where appropriate.

The PR's letter of claim alleges that CH used aggressive sales tactics and Mr and Mrs L were pressured into entering the agreement. That said, I can't see that a specific claim has been made to Barclaycard under S140A. And because of that, I don't believe they've been given opportunity to consider such a claim.

That said, I acknowledge what Mr and Mrs L says in their testimony about the length of the sales presentation they attended. So, I can understand why it's argued that the prolonged nature of the presentation might have felt like a pressured sale – especially if, as they approached the closing stages, they were going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

However, against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr and Mrs L agreed to the purchase at the time of the sale when they simply didn't want to. I haven't seen any evidence to demonstrate that they went on to say something to CH, after the purchase, to suggest they'd agreed to it when they didn't want to. And as they haven't provided a credible explanation for why they didn't subsequently seek to cancel the purchase within the usual 14-day cooling off period permitted, if they only agreed to the purchase because they were pressured, I find this aspect difficult to reconcile with the allegations in question. I haven't seen anything substantive to suggest Mr and Mrs L were obviously harassed or coerced into the purchase. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr and Mrs L made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

Given Mr L's previous experience, I think it's reasonable to conclude that they were likely to have attended timeshare sales meetings previously. And because of that,

they benefitted from a growing level of experience about what they could expect from those meetings and sales presentations.

In deciding whether to make a determination under S140A, *the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor* [Barclaycard] *and matters relating to the debtor*[2] [Mr L]*)*.

Whilst there might be potential for a court to decide that some of the allegations might have led to an unfair debtor-creditor relationship here, I think such a decision is likely to be taken within the context of Mr L's overall experience. In any event, while it appears no overt claim has been made under S140A, I think it unlikely a court would determine there was sufficient imbalance to deem the debtor-creditor relationship as unfair here.

Was the right arrangement in place?

Under Section 75 of the CCA, a "debtor-creditor-supplier agreement" is a precondition to a claim under that provision.

As it appears that payments under the purchase agreement were made to a third party rather than to CH directly, it's possible that there was no such agreement in place. Particularly following a recent High Court judgment in the case of Steiner v National Westminster Bank PLC [2022].

However, as I understand it, the claimant there sought permission to appeal that decision. And, in any event, given the overall outcome I've reached, I don't think it's necessary to make a formal finding on the debtor-creditor-supplier arrangement for the purpose of this decision because I don't currently think the complaint should succeed under S75.

Summary

Ultimately, my decision must be based upon the supporting evidence that is available for the allegations made. And as I've already said, there is very little supporting documentation from the time. Barclaycard told this service as much. And there's evidence they explained this to Mr L in writing. So, as it stands, I can't say that Barclaycard's response to Mr L's claim appears unfair or unreasonable. Because of that, I don't currently intend to ask them to do anything more.

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.

It doesn't appear this service has received a response from Barclaycard to my provisional decision.

In their response, the PR confirmed that they're no longer representing Mr L with his complaint.

In acknowledging receipt of my provisional decision, Mr L didn't agree with my findings. In doing so, he's provided further explanation of the circumstances of his claim and complaint together with copies of various documents which he believes are relevant.

Mr L has further explained how the purchase was constructed in terms of products that were part exchanged and payments made using different credit cards. In providing his explanation, Mr L says:

- CH offered a more flexible holiday platform together with the option to close membership after two years through an assisted exit route (with a nominated

[2] CCA section 140A (2)

timeshare relinquishment company); and

- they were not given a 14-day cooling off period;

Mr L also gave a detailed explanation of his rationale (at the time) for exchanging his existing timeshare interest for the CH product purchased.

The claim against CH

Mr L points out that his purchases from CH involved payments made using different credit cards with different financial businesses which he believes all form part of the overall claim. Because of this, Mr L thinks this service should *"review our case as a whole"*.

I'd like to again clarify this service's role in considering Mr L's complaint here. Some of which I previously explained in my provisional decision. The powers afforded to this service allow us to consider complaints relating to the provision of financial services and products by businesses regulated by the FCA. In this case, I'm considering Mr L's complaint against Barclaycard which relates to their treatment of his claim under S75. Any complaint against another financial business would need to be considered separately, as each one involves a different respondent. And I understand these have already been raised and either have been or are being considered separately by this service.

Mr L's claim is underpinned by alleged breaches of various legislation and regulations. So, for example, part of this includes a claim for alleged misrepresentations made by CH which would fall under the Misrepresentation Act 1967. S75 allows Mr L to make a 'like' claim against Barclaycard, which is what he's done. But Barclaycard didn't uphold that claim. And as I previously explained, this service isn't afforded powers to consider and make findings on legal claims. However, the assessment and treatment of Mr L's claim by Barclaycard is undertaken as a benefit of his credit card account with them – which is a financial service. And it's the treatment of the claim by Barclaycard that forms the basis of Mr L's complaint I'm considering here.

The sale and provision of timeshare contracts is not something that's regulated by the FCA. They're not financial services or products that can be considered under this service's powers. Because of that, this service isn't able to consider Mr C's claim *"as a whole".* Only his complaint against Barclaycard. And that's what I've done here. As I understand, any claim against CH could only be considered *"as a whole"* by a court under civil proceedings.

In explaining the events leading up to his purchase in October 2013, it's clear Mr L sees his earlier purchase of a trial membership with CH (in March 2013) as part of the overall transaction. However, this was a separate purchase subject to separate contract documentation. Mr L has provided copies of some of that documentation which confirms that to me. And as this was a separate transaction, I can't see it forms part of the complaint made to Barclaycard. So, I'm not able to consider that in this particular case. Only the purchase in October 2013, as it was the outcome of this claim that was the subject of the complaint referred.

Alleged regulatory breaches

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("TRs") applied to Mr L's purchase. These set out various requirements including the provision of a statutory 14-Day cooling off period before any purchase contract can be completed. Mr L says CH told him there wasn't a 14-day cooling off period associated with his purchase. If that were the case, it's possible the sale here breached the TRs. However, while I acknowledge Mr L says that's what he was told, I haven't seen any evidence to corroborate this claim. And from the information I've seen, it appears the subsequent completing payments weren't made until 10 November 2013 – after the 14-day cooling off period. So, I can't reasonably say with any certainty that the TRs were breached here.

One of the main aims of the various regulations that applied was to enable consumers to understand the financial implications of their purchase so that they are put in a position to make an informed decision. If CH's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Mr L ultimately lost out or almost certainly stands to lose out from having entered into a contract, the financial implications of which he didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

However, given the limited documentation provided, I haven't seen any evidence to support the breaches alleged here. And as the Supreme Court decision in Plevin[3] makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. In other words, if I were to find there'd been regulatory breaches – and I make no such finding - they are only likely to lead to unfairness where there's evidence Mr L suffered loss as a consequence. I also haven't seen any evidence that CH enforced any of the terms within the product agreement to such an extent that they caused loss or resulted in unfairness.

Mr L also alleges that CH told him he would be able to close his membership after two years using a nominated timeshare relinquishment company. However, I haven't seen any documentation from the time of the sale that supports this. Or any of the terms and conditions that might be associated with such a feature. So again, I can't say with any certainty that the product did offer this feature. Or that CH represented this as a feature of the product purchased.

Summary

I want to reassure Mr L I've considered everything he's said and provided. Including the various allegations around availability and subsequent holiday/accommodation pricing. But without any detailed documentation from the time of the sale which clearly sets out the product features and benefits Mr L was told he would receive, or evidence that what CH provided varied from these, I can't reasonably conclude there was misrepresentation. Or that a court is likely to find then any breaches resulted in the relationship being unfair under S140A. And because of that, I can't say the outcome of Mr L's claim to Barclaycard was ultimately unfair or unreasonable.

My final decision

For the reasons set out above, I don't uphold Mr L's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 7 September 2023.

Dave Morgan
Ombudsman

[3] *Plevin vs Paragon Personal Finance Ltd [2014] ('Plevin')*