DRN-4489253

The complaint

Mr L's complaint is, in essence, that Clydesdale Financial Services trading as Barclays Partner Finance (the 'Lender') acted unfairly and unreasonably under the Consumer Credit Act 1974 (as amended) (the 'CCA').

Background to the complaint

On 9 April 2011, Mr L and his partner purchased a trial membership with a timeshare provider (the 'Supplier') for £3,995. This purchase doesn't appear to have been funded using finance from the Lender and doesn't form part of the complaint.

On 14 August 2011, Mr L and his partner traded the trial membership towards the purchase of a timeshare with the Supplier, giving them 1,100 points which could be exchanged for holiday accommodation. According to the information I've received during the course of this complaint, this purchase appears to have been funded using a loan taken out in Mr L's partner's name. This purchase doesn't form part of the complaint.

On 16 April 2012, Mr L traded that timeshare towards the purchase of a fractional timeshare with the Supplier, this time giving him 1,494 points and a share in an allocated property. Mr L appears to have funded this purchase using finance from the Lender.

Finally, on 22 July 2014 (the 'Time of Sale'), Mr L and his partner traded their existing timeshare towards the purchase of a Fractional Club membership with the Supplier, giving them 2,220 points at a cost of £30,784.

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

Mr L paid for the Fractional Club membership by trading the existing timeshare, which was given a value of £19,422, and paying the remaining balance of £11,362 using finance provided by the Lender. Although the Purchase Agreement is in joint names with Mr L's partner, the Credit Agreement was taken out in his sole name, so I will mainly refer to him throughout as he is the eligible complainant.

Mr L – using a professional representative (the 'PR') – wrote to the Lender on 19 October 2019 (the 'Letter of Complaint') to complain about the events that happened at the Time of Sale. In short, the PR says that Mr L and his partner were persuaded to enter the Purchase Agreement because:

- they were told that the only way to exit their points-based membership was to upgrade to the Fractional Club membership, but this was not true as they could have simply handed the points-based membership back.
- they would receive a return on their money after 19 years, but the Supplier should not have sold the Fractional Club as an investment as this was illegal.
- they struggled to book holidays as there was limited availability of the holidays they

wanted to take.

The Lender acknowledged the letter but has not responded to Mr L's complaint to date.

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

The PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I set out my thoughts in a provisional decision (the 'PD'). In short, I agreed with the Investigator but wanted to give both parties the opportunity to consider what I said, and provide any further evidence and arguments, before I set out my final decision.

I set out my provisional findings, as follows:

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I don't currently think this complaint should be upheld.

But 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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

I would also like to set out my thoughts on the information provided to me by the PR during the course of this complaint.

The PR has not provided any direct testimony from Mr L or his partner.

Direct testimony from the consumer, in full and in their own words, is important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. Here, that simply isn't possible. It's also important that the decision-maker can see that the Letter of Complaint genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case.

With all this considered, I'm unable to place much, if any, evidentiary weight on the Letter of Complaint. So, I have relied on the paperwork that's been provided from the Time of Sale, and the particular circumstances of the case.

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

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr L could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including the condition that the cash price of the purchase must exceed £100 but not exceed £30,000. So, if the purchase price of the product is in excess of £30,000, irrespective of the value of any trade-in, a claim under Section 75 cannot succeed.

As I have seen from the purchase documents, Mr L's Fractional Club membership had a cash price of £30,784, which is greater than the upper limit covered by Section 75. So, I am satisfied that Mr L's claim under Section 75 for misrepresentation cannot succeed for this reason.

Section 75A of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives Mr L a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

The PR says in the Letter of Complaint that Mr L and his partner are finding it "extremely difficult" to book holidays using their Fractional Club membership. By this, I understand the PR is alleging that there was a breach of the Purchase Agreement by the Supplier as a result of something it has done or not done.

Section 75A CCA makes further provision for a creditor to be liable for breaches by the Supplier, in the event that certain conditions are met. One of these conditions is that the cost of the goods or service is over £30,000 and the linked Credit Agreement is for credit which does not exceed £60,260. One of the following conditions must also be met:

- *The Supplier cannot be traced.*
- *The Debtor has contacted the Supplier, but the Supplier has not responded.*
- *The Supplier is insolvent.*
- *The Debtor has taken reasonable steps to pursue his claim against the Supplier but has not obtained satisfaction for his claim.*

I have not seen sufficient evidence to satisfy me that one or more of those conditions have been met. However, in Mr L's case, I don't think this matters as I have not seen enough evidence that he and his partner were unable to use their Fractional Club membership to take holidays in the same way they could initially. And I'm aware they requested to relinquish their membership with the Supplier, and it confirmed it had completed this request on 12 September 2016. With this being the case, I'm not surprised to hear that Mr L cannot take holidays using his membership any longer, and the reason for this is that he is no longer a member, not because of any breach of contract by the Supplier.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr L any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75A claim in question.

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

I have already explained why I am not persuaded that Mr L had a successful claim under Sections 75 and 75A of the CCA. But, the PR also says the Fractional Club membership was sold to Mr L as an investment when it was not supposed to be as it says:

"This gave them an option to sell the Fractional in 19 years and get a return on their money."

The PR has suggested in its response to the Investigator's findings that the contract signed by Mr L is a collective investment scheme. But 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 membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

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

But the PR says that the Supplier did exactly that at the Time of Sale as the PR says Mr L and his partner were told they could expect to make a profit. So, for completeness, that is what I have considered here.

However, as a possible breach of Regulation 14(3) does not fall neatly into a claim under Sections 75 of the CCA, I must turn to another provision of the CCA if I am to consider this aspect of the complaint and arrive at a fair and reasonable outcome. And that provision is Section 140A.

Having considered the entirety of the credit relationship between Mr L and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

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

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr 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 competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr L, the financial value of his share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr L as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mr L rendered unfair?

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

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr 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.

On my reading of the evidence provided, I'm not persuaded that was what is more likely than not to have happened at the Time of Sale. I'll explain why.

As I've said before, there is simply no direct evidence from Mr L about what happened at the Time of Sale which supports his allegation.

As such, there is no evidence to suggest that Mr L was motivated to purchase his Fractional Club membership at the Time of Sale because he was told he would make a profit upon the sale of the Allocated Property. Because of this, I just don't think that was likely to have been what happened.

Mr L also purchased a fractional timeshare in April 2012, and he appears to have financed it using a loan from the Lender. That loan was consolidated into the Credit Agreement. In order to properly consider if the credit relationship between Mr L and the Lender was rendered unfair for any reason, I must also consider whether anything happened as a result of Mr L entering into the earlier loan agreement Mr L took out with the Lender in April 2012. This is because Section 140C (4) CCA sets out that the provisions under s.140A and B also apply to a credit agreement consolidated by the main agreement. Further, s.140C (7) sets out that a consolidated agreement is one whereby the parties to the earlier agreement are the debtor and the creditor under the later agreement.

The PR's Letter of Complaint does not provide any information about the sale that took place between Mr L and the Supplier in April 2012. And I've not received any testimony from them about that sale. So, I'm unable to agree that anything done or not done at that time might have given rise to a credit relationship between Mr L and the Lender that was unfair to Mr L.

Given that Mr L was at the Supplier's resort on a holiday, I think he was interested in taking holidays, and specifically, the type of holidays the Supplier could give him with the points he gained through the Purchase Agreement.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr L's decision to purchase his Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I don't think the credit relationship between Mr L and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

My provisional decision

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

Responses to the PD

The Lender did not provide anything further for me to consider.

The PR sent two separate replies on behalf of Mr L. I don't think it's necessary to repeat most of these comments, but have summarised what I think are the key points from the first response below:

- Section 75 does apply to the purchase as I ought to only consider the financed portion of the transaction towards the upper limit of £30,000 for such claims.
- The Fractional Club membership was misrepresented to Mr L.
- The lack of direct testimony should not undermine the documentary evidence.
- The Supplier breached the contract as Mr L experienced a lack of availability of holidays, and this is why he relinquished his membership.
- The Supplier breached Regulation 14(3) of the Timeshare Regulations, and this caused an unfair debtor-creditor relationship.
- The Financial Ombudsman Service regularly upholds complaints in the absence of direct oral testimony and the PR can provide a signed witness statement from Mr L if I require one.

The PR sent a second response, which it says included "*contemporaneous or near contemporaneous evidence"*, including personal testimony, handwritten notes provided to Mr L and his partner by the Supplier at the Time of Sale, and the original Letter of Complaint – but there was nothing attached to its email. Following a query from our Service, the PR sent a document titled "*Client Onboarding Questionnaire",* without providing any further commentary. This questionnaire is headed by the PR's letterhead and explains to the client that *"[b]efore we can do anything, we need to get an understanding of your potential claim, and therefore we ask that you complete this questionnaire so that we can assess whether we are able to help."* The PR did not send me the handwritten notes or anything else.

In summary, Mr L says in the questionnaire that:

- He was keen to benefit from holidays around the world and was told accommodation would always be available for members, but it turned out to be scarce.
- He was told he would receive a share of the proceeds of the sale after 19 years but later found out that the agreement was in place in perpetuity.
- The Supplier didn't explain the maintenance fees and they nearly doubled in three years.

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 considered everything again, I still reject Mr L's complaint for the reasons I set out in the PD.

I will also deal with the matters raised by the PR in response. In doing so, I remind both parties that my role as an Ombudsman is not to respond to every point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this specific complaint. So, while I have read the PR's response in full, my findings are confined to what I think are the most salient points.

I'm surprised and somewhat disappointed that the PR did not provide a copy of the completed questionnaire sooner than it has done. Also, I think this document was produced long after the Letter of Complaint. I say this because, firstly, the document file name includes the date 4 December 2023 – which was shortly after the investigator rejected Mr L's complaint. Secondly, the document says that the PR was the recipient of an award in 2023, so it must have been produced during or after that year. The Letter of Complaint was dated 19 October 2019, so it remains unclear to me what the PR had taken from Mr L to inform its Letter of Complaint. So, I have thought about what Mr L says with this in mind.

Perhaps most importantly, Mr L's testimony as presented in the questionnaire does not persuade me that his decision to purchase the Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think his evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of Regulation 14(3). Most of the testimony he's given is about the sale that took place in June 2011, which does not form part of the complaint as it was funded using a loan that was not taken in Mr L's name. He says very little, if anything at all, of the specific events at the Time of Sale.

I haven't seen sufficient evidence to support the allegation that Mr L and his partner were unable to use the Fractional Club membership to take the holidays they were promised, or that they didn't receive any of the other benefits that they were promised under the Purchase Agreement. I appreciate he may not have always been able to secure his desired dates and locations, but the Purchase Agreement makes it clear that availability is limited and on a first come first served basis. The PR says that Mr L relinquished his contract because of non-performance, and it says this is evidenced by repeated complaints and requests for redress, but it has not produced any evidence of these complaints or requests for me to consider.

Mr L says in the questionnaire that the maintenance fees were positioned as being "*consistently very low*" but they "*had almost doubled*" within three years. But this is not surprising to me, as Mr L increased his points allocation from 1,100 to 2,220 within that time, so I would expect the associated costs to have also increased proportionally, which they appear to have done.

I remain unpersuaded that the protection available to consumer under Section 75 CCA is available to Mr L here, as the cash price of the Fractional Club membership exceeds £30,000. The PR says that the limit should apply to the "*net consideration paid out-of-pocket",* not to the headline purchase price. But if it were the intention of that legislation to set the upper limit based on the net consideration, the legislation would say that. Instead, it says the "cash price" must not exceed £30,000 and in this case, the cash price does exceed that limit. So, I maintain that Mr L's claim under Section 75 of the CCA cannot succeed for this reason.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I don't think that the Lender acted unfairly or unreasonably when it dealt with Mr L's claims under Sections 75

and 75A, and I'm not persuaded that the Lender was party to a credit relationship with Mr L under the Credit Agreement that was unfair to him for the purposes of Section 140A-C of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

My final decision

I do not uphold Mr L's complaint against Clydesdale Financial Services Limited trading as Barclays Partner Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 12 September 2025.

Andrew Anderson
Ombudsman