DRN-4782773

The complaint

Mr C has complained that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under s.140A of the Consumer Credit Act 1974 ("CCA") and (2) deciding against paying a claim under s.75 CCA.

What happened

I issued a provisional decision on Mr C's complaint on 17 October 2024, in which I set out the background to this complaint and my provisional findings on the merits. An extract of my provisional decision reads:

> **"What happened**
>
> 2. Mr C, alongside his wife, were members of a timeshare scheme run by a timeshare supplier ("the Supplier"). By the end of October 2009, they had around 4,500 'points' that they were granted every year to exchange to stay at the Supplier's holiday accommodation.
>
> 3. On 16 September 2012, Mr and Mrs C purchased membership of a different type of timeshare from the Supplier called 'Fractional Ownership'. This membership cost £62,899 and provided them 4,450 'fractional points' ("the 2012 Purchase Agreement"). This type of membership was asset backed, which meant as well as giving Mr and Mrs C holiday rights, it also included a share in the net proceeds of a property ("the 2012 Allocated Property").
>
> 4. Mr and Mrs C paid for the 2012 Purchase Agreement by trading in their existing timeshare membership and taking a loan from BPF for the balance of £6,717 ("the 2012 Credit Agreement"). The loan was in Mr C's sole name, so only he is eligible to make a complaint to BPF. This loan was repaid in full on 1 July 2013.
>
> 5. On 6 October 2013, Mr and Mrs C traded in their first Fractional Ownership for a second, similar timeshare. This cost £60,385 and granted them 4,450 fractional points ("the 2013 Purchase Agreement") and a share in the sale proceeds of a different property ("the 2013 Allocated Property"). Again, Mr C took out a loan in his sole name for the balance of £6,565 ("the 2013 Credit Agreement"). At the time of this decision, this loan remains open.
>
> 6. Mr C, using a professional representative ("PR"), wrote to BPF on 10 October 2019 to complain about both the 2012 and 2013 purchases ("the Letter of Complaint"). With respect to both purchases, PR argued[1]:
>
>   i. Misrepresentations by the Supplier at the times of sale gave Mr C a claim against BPF under s.75 CCA, which BPF failed to accept and pay.

[1] PR did not say which complaint related to which purchase, so I have treated the complaints as relating to both.

ii. BPF being party to unfair credit relationships under the Credit Agreements and related Purchase Agreements for the purposes of s.140A CCA.

7. BPF did not respond to Mr C's complaint, so in December 2019, PR referred it to this service.

8. One of our investigators considered the complaint, but rejected the complaint on its merits. With respect to the complaints that BPF had not properly considered the claims under s.75 CCA, he said that the price of the two memberships were such that s.75 did not apply. And he did not think there was the evidence to show there was an unfair debtor-creditor relationship.

9. After our investigator gave his view, BPF responded to say that Mr C had made his complaint about the 2012 purchase too late. Our investigator considered the complaint again and agreed that the complaint that Mr C's relationship with BPF arising out of the 2012 Credit Agreement was unfair fell outside of our jurisdiction due to the time that had passed since the loan was repaid. But he reiterated his conclusions on the rest of the parts of the complaint that we could consider.

10. PR, on Mr C's behalf, disagreed with our investigator, and so the complaint has been passed to me.

11. I issued a decision explaining why the Financial Ombudsman Service does not have the power to consider the complaint that BPF was a party to an unfair debtor-creditor relationship with respect to the 2012 Credit Agreement. So this decision deals with the remainder of Mr C's complaint.

What I have provisionally decided – and why

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

13. When deciding complaints, I am required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

> *"(1) relevant:*
>
> > *(a) law and regulations;*
> > *(b) regulators' rules, guidance and standards;*
> > *(c) codes of practice; and*
>
> *(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."*

14. Where I need to make a finding of fact based on the evidence, I make my decision on the balance of probabilities. In other words, when I make a finding that something happened, that is because I think it is more likely than not that that thing did happen.

15. PR has provided substantial submissions. I have not dealt with every matter raised, rather I have focused on what I consider material to reach a fair and reasonable decision on 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.

The evidence in this compliant

16. I will start by setting out the evidence I have been provided by both of the parties.

Mr C's evidence

17. In January 2024, PR provided a statement from Mr and Mrs C that was signed by them in January 2018.[2] With respect to the 2012 sale, the statement read:

> *"28. We were taken to see the new show apartments. We were told as [Fractional Ownership] owners we would get better accommodation. We do not think this made any change to our ownership.*
>
> *29. We were told this was an "investment in property". We would be converting our CV points into an asset, a physical property. This "would be sold" in 19 years' time and we would get our money back and make a profit. We have this in writing the estimated average price when sold would be £43,269 per week. This would be a large profit.*
>
> *30. We like the idea that our membership would finish in 19 years. We liked this ideas as your holiday needs change when you get older and this would bring our membership to an end.*
>
> *31. We decided to convert our points as this was a clever idea and we could see an end to our membership.*
> *…*
> *34. We were not aware of the option to give back out points in the VC. We were not offered this option when we converted to [Fractional Ownership]."*

18. With respect to the 2013 sale, Mr and Mrs C said:

> *"41. We were back in Tenerife in October 2013.*
>
> *42. We went to the usual free breakfast and meeting. We were advised by the sales people to trade in our existing [Fractional Ownership] where we had to pay fees per holiday to [the 2013 membership] where there were no user charges.*
>
> *43. We decided to go ahead and went through the usual sign up process."*

The Fractional Ownership sale documents

19. Neither party has provided much documentation from the time of sale, but I have seen some of the documents from the 2013 sale and loan statements from the 2012 Credit Agreement. However, both parties are familiar with the Supplier's sale processes and are aware of the documentation normally provided during a sale like these. If either party wish to produce any further evidence they think is relevant to the outcome of this complaint they can do so in response to this provisional decision.

The legal framework

20. Mr C said that BPF was liable to pay compensation due to the operation of the CCA. Specifically it was said that BPF was party to an unfair debtor-creditor relationship, as defined by s.140A CCA, caused by the sale of the Fractional Ownership and that BPF was jointly liable for the Supplier's misrepresentations under s.75 CCA. As

[2] This statement also says it was the evidence of two other people who did not sign the statement

those provisions are relevant law, I have to think about them when coming to what I think is a fair and reasonable outcome to this complaint (DISP 3.6.4 R).

21. The CCA introduced a regime of connected lender liability under s.75 CCA 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.

22. In short, a claim against BPF under s.75 CCA essentially mirrors the claim Mr C could make against the Supplier.

23. Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. One of those conditions was that the purchase price of the goods or services bought had to be under £30,000. But in this case, both of Mr and Mrs C's purchases were over that limit and therefore s.75 CCA cannot apply to either sale. However, for reasons I will come on to explain, I will consider the alleged misrepresentations when thinking about whether BPF was a party to an unfair debtor-creditor relationship.

24. Under s.140A 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 2013 Purchase Agreement)[3] and, when combined with s.56 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.

25. S.56 CCA 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 s.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.

26. A debtor-creditor-supplier agreement is defined by s.12(b) 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 s.11(1)(b) 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.*"

27. BPF does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr C's 2013 Fractional Ownership were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by s.12(b). That made them antecedent negotiations under s.56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for BPF as per s.56(2).

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[3] As noted above, this decision will only consider the fairness of the relationship arising out of the 2013 Credit Agreement as I do not have the power to consider the earlier relationship.

And such antecedent negotiations were "*any other thing done (or not done) by, or on behalf of, the creditor*" under s.140(1)(c) CCA.

28. Antecedent negotiations under s.56 CCA cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin v. Paragon Personal Finance Limited [2014] UKSC 61 ("Plevin")* at para 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."*

29. This was recognised by Mrs Justice Collins Rice in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; 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*"") at para 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".*

30. In the case of *Scotland & Reast v. British Credit Trust* [2014] EWCA Civ 790 ("*Scotland & Reast*"), the Court of Appeal said, at para 56, that the effect of s.56(2) 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 at para 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]

31. So, the Supplier is deemed to be BPF's statutory agent for the purposes of the pre-contractual negotiations.

32. However, an assessment of unfairness under s.140A is not 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 v. Patel* [2009] EWHC 3264 (QB) ("*Patel*")[5], that determining whether or not the relationship complained of was unfair

[4] The Court of Appeal's decision was recently followed in *Smith v. The Royal Bank of Scotland plc* [2023] UKSC 34 ("Smith").

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.

33. The breadth of the unfair relationship test under s.140A, therefore, is stark. But it is not 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 para 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.*"

34. Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by s.140A is the consequence of all of the relevant facts. The impact of this on Mr C's complaint is discussed more fully below.

35. Finally, I think the following judgments, amongst others, help to set out the approach to take when thinking about unfair debtor-creditor relationships in the context of this complaint:

    i. *Plevin*
    ii. *Carney v. NM Rothschild & Sons Ltd* [2018] EWHC 958 *("Carney")*
    iii. *Kerrigan v. Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) *("Kerrigan")*
    iv. *Shawbrook & BPF v. FOS*
    v. *Patel*
    vi. *Smith*
    vii. *Scotland & Reast*[6]

36. In addition to the CCA, the regulatory requirements of particular importance to this complaint include the Timeshare Regulations, The Unfair Terms in Consumer Contracts Regulations 1999 ("the UTCCR") and The Consumer Protection from Unfair Trading Regulations 2008 ("the CPUTR").

37. The sale of timeshares like Mr C's was regulated by The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). Of particular importance was Reg.14(3), which read:

> *"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."*

38. 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. In this complaint, that includes the Resort Development Organisation's Code of Conduct dated 1 January 2010.

39. Bearing all of that in mind, I will now set out how the courts have approached the assessment of whether there is an unfair relationship and what that means in the

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[5] This was also recently approved by the Supreme Court in *Smith.*

[6] The judgment in *Scotland & Reast* also makes clear that a supplier's misrepresentations are something that can be considered when determining whether there is an unfair debtor-creditor relationship.

context of a complaint about a loan used to purchase a timeshare like Mr and Mrs C's.

S.140A CCA – relevant unfair relationship case law

40. The judgment in the case of *Plevin* provides the leading judgment on unfair debtor-creditor relationships, in which it was held that the level of commission paid in respect of an insurance policy, paid for by a loan, was so high it created an unfair relationship due to the extreme inequality of knowledge and understanding between the creditor and the debtor, Mrs Plevin. In *Plevin*, the Court held that the standard of commercial conduct was something to consider when determining the fairness of any debtor-creditor relationship, and relevant rules can be evidence of what that standard was. But whether a creditor (or someone acting on their behalf) had broken a rule is not determinative to the question asked by s.140A CCA. Lord Sumption held at para 17:

> *"…Section 140A, by comparison, 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 the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty..."*

41. The *Plevin* case concerned the duty to disclose certain information under the Financial Services Authority's (as it was then) rules for financial firms conducting certain business, in particular the Insurance Conduct of Business ("ICOB") rules. It was further held at para 17:

> *"…The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages.* ***Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion.*** *The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment.* ***It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules.*** *They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters." (emphasis my own)*

42. It is apparent that the question of 'fairness' in s.140A CCA is broader than simply considering whether the supplier or the lender (or its agent) has breached a rule or other obligation during the course of relevant dealings. And Lord Sumption went on to explain at para 18:

> *"…A sufficiently extreme inequality of knowledge and understanding is a classic*

source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree…"

43. Paragraph 10 of the judgment made clear that there will normally be large differences of financial knowledge and expertise between a debtor and a creditor, and this unequal relationship is not necessarily unfair. Rather it was when the inequality of knowledge and understanding was "*sufficiently extreme*".

44. Finally, it was held at para 20:

> *"On that footing, I think it clear that the unfairness which arose from the nondisclosure of the amount of the commissions was the responsibility of Paragon [the lender]. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."*

45. Here, the Court found that it was enough that Mrs Plevin would have questioned whether the insurance provided good value for money when considering the question of the fairness of the relationship. It was the non-disclosure that caused the unfairness. The Court made no finding whether Mrs Plevin would have made a different purchasing decision had she known more, but that did not prevent it finding unfairness.

46. So the breach of a legal duty does not automatically mean a credit relationship is unfair. It is necessary to consider the impact of any breach on the debtor – would they have entered into the agreement in any event?

47. I am mindful of the judgment in *Carney* where HHJ Waksman QC (as he then was) held, in relation to s.140A CCA, at para 51:

> *"Causation is perhaps less straightforward. In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. And thus in Plevin, while the unfairness was said to be the failure to disclose the commission, there was at least a finding that the debtor would have "certainly questioned this" the size of the commission being of "critical relevance" – see paragraph 18 of the judgment. However, the Supreme Court then remitted the case back to the Manchester County Court to decide what relief, if any, under s140B should be awarded. But in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. See also the case of Graves v CHL [2014] EWCA Civ 1297 at paragraph 22 of the judgment of Patten LJ where it was held (among other things) that the impugned conduct of the LPA receivers was not causally related to the loss complained of by Mr Graves."*

48. And of the judgment in *Kerrigan*, where HHJ Worster held, at paras 213 and 214:

"Having considered which relationships are likely to be unfair, I turn to the question of relief. The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. The order must be from the menu of orders provided for under section 140B in connection with the credit agreement, but otherwise there is very little in the way of guidance in the section. As Mr Justice Hildyard put it in his judgment in McMullon v Secure the Bridge Limited [2015] EWCA Civ 884 @ [13]:

> *'Suffice it to say as to the powers of the court that considerable discretionary latitude is supplied.'*

That is not to say that the court is free to do anything. Having determined that the relationship is unfair to the debtor, the court will look to relieve that unfairness by making an order or orders under section 140B(1). Whilst HHJ Platts emphasised that his decision as to remedy in Plevin turned on the particular facts of that case and was no precedent, it is a helpful illustration of how the jurisdiction works on well known facts. There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. If the court decides to make an order, then it "should reflect and be proportionate to the nature and degree of unfairness which the court has found": Patel v Patel [2009] EWHC 3264 (QB) George Leggatt QC at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, to the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place…"

The timeshares judicial review - *Shawbrook & BPF v. FOS*

49. Two decisions of the Financial Ombudsman Service, upholding complaints, were recently challenged by way of judicial review in the High Court in *Shawbrook & BPF v. FOS*. The Court considered two decisions, issued by me and another ombudsman, concerning the sale of fractional timeshares similar to Mr C's, paid for with loans provided by Shawbrook Bank Ltd and BPF. In each case, the ombudsman decided the timeshare package had been mis-sold and the contractual arrangement, including the associated loan, should be unwound. Broadly, Shawbrook Bank Ltd and BPF argued that the ombudsman had erred in law in each of the two decisions.

50. Mrs Justice Collins Rice held:

    i. The ombudsman in the first case did not err in law in his construction of, or approach to, Reg.14(3) of the Timeshare Regulations.

    ii. Both ombudsmen did not err in law in concluding that the deemed agency provisions of s.56 CCA, read together with s.140A(1)(c) CCA, meant that the acts and omissions of the timeshare companies in conducting negotiations with consumers antecedent to forming timeshare contracts fell to be regarded by a court as things done or not done by or on behalf of the

lenders, for the purposes of considering whether they caused the debtor/creditor loan relationship between lenders and consumers to be unfair.

iii. In these circumstances, both ombudsmen did not err in law in holding that an unfair relationship had been created for the purposes of s.140A CCA or in providing remedies having regard to the provisions of s.140B.

51. Overall, the claims were dismissed. The judge highlighted that the ombudsman's task was a "*fundamental case-by-case evaluative*" one, with a "*high degree of fact-sensitivity*" (at para 189). In finding there was a breach of Reg.14(3) the first ombudsman made an "*entirely fact-sensitive and evaluative decision. The ombudsman did not make a blanket or 'in principle' decision, referable to the inherent qualities and properties of fractional ownership timeshare contracts. It was a decision directed to finding, interpreting and evaluating the material facts and the communications which took place in this particular case*" (at para 73).[7]

52. In *Shawbrook & BPF v. FOS*, Mrs Justice Collins Rice considered the effect of a breach of Reg.14(3) on the question of assessing the fairness of the debtor-creditor relationship. It was held at para 185:

> *"Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness – in particular to whether they had regard to all relevant matters within the terms of s.140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in mind. Breaching Reg.14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial and the constituent conduct causative of the legal relations entered into: timeshare and loan. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair. It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations leading up to the contractual commitments. Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."*

53. To summarise, the passages in the judgment in *Plevin* set out above made plain that the breach of a legal duty, such as either the breach of the FCA's rules by a creditor or the breach of the Timeshare Regulations by a supplier on a creditor's behalf, is

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[7] In saying this I am also aware that the judge went on to say, at para 77:

> "*…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). It is a particularly acute challenge to do so by way of an 'upgrade' which does not confer new accommodation rights, when the fractional ownership component inevitably assumes more prominent proportions in the bargain. Getting the governance principles and paperwork right may not be quite enough.*"

neither a prerequisite for a finding of an unfair debtor-creditor relationship, nor is it an automatic gateway to such a finding.

54. Further, the judgment in *Plevin*, read alongside that in *Carney* and *Kerrigan*, makes clear that in a case such at Mr C's, an important consideration is whether the relevant misconduct impacted the debtor's decision to enter into the agreements. Further, in *Shawbrook & BPF v. FOS*, in dismissing the judicial review claims, including that each ombudsman had not erred in law in their approach to ss.56 and 140A CCA, the judge said at para 185:

> *"The ombudsmen held the breach [of Reg.14(3)] in each case to be serious/substantial* ***and the constituent conduct causative of the legal relations entered into****: timeshare and loan." (emphasis my own)*

55. For those reasons, for a breach of Reg.14(3) to lead to an unfair debtor-creditor relationship that requires relief from that unfairness, it is a relevant consideration whether the breach caused the debtor to enter into the timeshare and/or loan agreement. This accords with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

Conclusions on the legal framework

56. Having considered the above, I think the following principles can be drawn:

    i. the question of whether the relationship between Mr C and BPF is or was unfair is the central issue to determine in this complaint. The standard of commercial conduct is relevant, as is the difference in knowledge and understanding between the parties if sufficiently extreme.

    ii. the breach of a legal duty, such as the breach of the Timeshare Regulations by a supplier acting on a creditor's behalf (due to s.56 CCA), is neither necessary for a finding of an unfair debtor-creditor relationship, nor does it automatically lead to such a finding.

    iii. for a breach of Reg.14(3) of the Timeshare Regulations to lead to an unfair debtor-creditor relationship that requires relief from that unfairness, it is a relevant consideration in deciding whether the breach caused the debtor to enter into the timeshare and/or loan agreement. I think that accords with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

57. Further, and for the avoidance of doubt, a finding in a separate ombudsman's decision that a sale of a timeshare membership breached Reg.14(3) and that went on to cause an unfair debtor-creditor relationship, does not mean any ombudsman looking at the sale of a similar product must come to the same finding. Each complaint turns on its own facts: an ombudsman's decision on how one timeshare sale occurred does not determine his, or another ombudsman's, decisions about the facts of other sales at different times to different purchasers. The Financial Ombudsman Service is not a court, and its decisions do not have precedent value (as certain court judgments do). Here, I must determine Mr C's complaint on its

individual facts and make a decision as to what is fair and reasonable in all the circumstances of this case.

My assessment of the evidence and Mr C's points of complaint

58. As explained above, I do not think s.75 CCA could apply to either the 2012 or 2013 sale due to the cost of memberships. So the remainder of this decision is confined to the question of whether the relationship arising out of the 2013 Credit Agreement was unfair.

s.140A CCA – did BPF participate in an unfair debtor-creditor relationship?

59. I have considered the entirety of the credit relationship between BPF and Mr C along with all of the circumstances of the complaint. Having done so, I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of s.140A CCA. When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me from both parties, including the Supplier's sales process at the Time of Sale. I have then considered the impact of that on the fairness of the credit relationship between BPF and Mr C.

The Supplier's sales & marketing practices

60. PR, on behalf of Mr C, argued for a number of reasons why the relationship between BPF and Mr C was unfair as defined by s.140A CCA, including that there was a pressured sale by the Supplier.

61. PR pointed to the CPUTR, which applied to Mr C's sale. Those regulations prohibited specified unfair commercial practices, which included aggressive commercial practices (Reg.7). In short, a commercial practice was aggressive if it significantly impaired (or was likely to significantly impair) an average consumer's freedom of choice or conduct in relation to a product through the use of harassment, coercion or undue influence and caused them to take a transactional decision they otherwise would not have taken. As noted above, to cause an unfair debtor-creditor relationship, there need not be a breach of a specific regulation, so it may be that a pressured sale that did not go so far as to breach this regulation could still give rise to an unfair relationship.

62. However, Mr and Mrs C have provided their memories of sale in their statement. In particular (at paras 41 to 43 quoted above), they make no allegation of pressure and in fact give a clear reason for purchasing the 2013 Fractional Ownership – the ability to take holidays without paying fees. Far from saying it was pressured, Mr and Mrs C describe the sales event as "*the usual free breakfast and meeting*". So their own evidence does not reflect what was said in PR's Letter of Complaint.

63. I prefer the evidence contained within Mr and Mrs C's statement to what was said by PR in its Letter of Complaint. Having seen a number of complaints raised by PR, I can see that it makes similar allegations, in a similar way, for many of its clients. Given that, what Mr and Mrs C have said in their own words is, in my view, a more likely description of what actually happened. Based on their own recollections, I cannot see how the 2013 sale was either a pressured one or one in which the Supplier breached the CPUTR as alleged by PR.

64. PR says that the right checks were not carried out before BPF lent to Mr C. I have not seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that BPF failed to do everything it should

have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr C was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with BPF was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr C. If there is any further information on this (or any other points raised in this provisional decision) that he wishes to provide, I would invite him to do so in response to this provisional decision.

65. In the Letter of Complaint, PR has also set out a number of alleged misrepresentations that were made by the Supplier during the sale. These include that Mr and Mrs C were told that Fractional Ownership had a guaranteed end date when their liabilities to the Supplier would end, that they were buying an interest in real property and that if they did not take out Fractional Ownership their children would inherit the liability from their earlier membership. Again, I am aware that these allegations are often made by PR when bringing complaints on its clients' behalf, but these allegations are simply not referenced at all in Mr and Mrs C's statement. Further, the last alleged misrepresentation cannot apply to the 2013 sale as by this point they already held a Fractional Ownership. Given that Mr and Mrs C do not reference these allegations at all in their statement, I find it more likely than not that the Supplier did not make such statements.

66. Finally, PR has also alleged that the Supplier told Mr and Mrs C that Fractional Ownership was an investment. For the reasons I will come onto, if that was said by the Supplier (and I make no such finding), that would not amount to a misrepresentation as it would have been true.

Was Fractional Ownership marketed and sold as an investment in breach of Reg.14(3) of the Timeshare Regulations?

67. PR has alleged that Fractional Ownership was sold to Mr C in breach of Reg.14(3) of the Timeshare Regulations. Having considered everything, I think there is a possibility that the sale did breach that regulation but, for other reasons, I do not think it means BPF needs to do anything further.

68. It is not in dispute that Fractional Ownership met the definition of a "timeshare contract" for the purposes of the Timeshare Regulations, and therefore Reg.14(3) applied to the sale. That meant the Supplier would have breached Reg.14(3) by selling it to Mr C as an investment.

69. 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*" (para 56). I will use the same definition.

70. When considering whether the sale breached Reg.14(3), it is important to consider the way in which the Fractional Ownership was positioned by the Supplier when it was sold. Fractional Ownership plainly had an investment element to it – the interest in the sale proceeds of the Property that offered the potential of a financial gain. But merely selling such a membership did not breach the prohibition in Reg.14(3). Rather, that provision was only breached if the Supplier sold or marketed Fractional Ownership as an investment. In other words, for me to say there was a breach of Reg.14(3), I would need to be satisfied that it was more likely than not that the Supplier used the prospect of a financial gain as a way to sell or market Fractional

Ownership to Mr C, given the facts and circumstances of *this* complaint. Therefore, the Timeshare Regulations did not ban the sale of products such as Fractional Ownership. They just regulated how such products were marketed and sold.

71. Here, when determining what happened, I have to make findings on the balance of probabilities. In doing so, I have to consider what both parties said happened and weigh that up against the other available evidence. So the starting point is to consider what complaints were made and then consider the evidence to determine whether I find those complaints are made out.

72. I am aware from documents that were used by the Supplier when selling Fractional Ownership, that it tried to avoid describing Fractional Ownership as an 'investment' or giving any indication of the value of a purchasers share in the net proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. For example, in its Information Statements, the Supplier often said:

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate."*

But there was contradictory information also often provided in the Information Statement. For example, in the section of the same document titled "*Investment advice*", the Supplier normally explained that neither it nor the sales staff were licenced to provide investment advice and customers were advised to get their own investment advice. I think that the disclaimer was aimed at ensuring that prospective members do not take and rely on what they were told by the Supplier as investment advice or an assurance as to the future value of the Allocated Property. However, having said that, I note that the disclaimer suggested that (1) the "Vendor's" and "Manager's" experience as investors had fed into the information provided during the sales presentations and (2) prospective members might be wise to consult an investment advisor. And, in my view, both of those suggestions, particularly the latter, ran the risk of giving a prospective Fractional Owners the impression that there was investment potential to what was being sold.

73. Taken as a whole, in my view the documentation the Supplier normally provided its customers was ambiguous as to whether Fractional Ownership was to be seen as an investment. I think that fits with the inherent nature of Fractional Ownership, having an investment element contained within. In my view, the documentation used by the Supplier is not sufficient to conclude, one way or the other, whether the sale breached Reg.14(3).

74. It is also possible that the Supplier could have breached Reg.14(3) orally during Mr and Mrs C's sale. The Supplier used slides during the sales process around the time of Mr and Mrs C's sale, but in their witness statement they have not pointed to any slides they remember being shown (or made any allegation that they were sold or marketed the Fractional Ownership they bought in 2013 as an investment). However, I do think that the slides the Supplier used the following year when selling the same product that Mr and Mrs C bought, show a deliberate choice to highlight the potential monetary return available from fractional membership when selling it. It is possible they were shown something similar, leaving open the real possibility that fractional memberships were presented to customers as investments.

75. However, in this case, I do not need to decide whether Mr and Mrs C's *actual sale* breached Reg.14(3) of the Timeshare Regulations. I say that because, for the reasons I will explain, I do not think any breach, if one did occur, led to an unfair

relationship between Mr C and BPF that requires a remedy in the circumstances of this complaint.

If there was a breach of Regulation 14(3), was the credit relationship between BPF and Mr C rendered unfair?

76. Even if the Supplier had breached Reg.14(3), that is not an end of the matter. I have set out above the law on s.140A CCA and why, in my view, even if the sale in Mr C's case had breached Reg.14(3), it does not automatically lead to an unfair debtor-creditor relationship that required a remedy, nor did it do so in this case.

77. As noted above, to find there was an unfair debtor-creditor relationship that requires relief from the unfairness, it is relevant to consider whether the breach led the debtor to enter into the timeshare and/or the loan agreement. Further, as I set out above, this accords with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

78. In this case, PR prepared a witness statement on behalf of Mr and Mrs C, stating that it was prepared for proposed civil litigation against the Supplier. That meant it was designed to be Mr and Mrs C's evidence in those proceedings. But in that statement, Mr and Mrs C did not allege that the Supplier sold the 2013 Fractional Ownership as a way to make a financial gain or profit, which is something I would have expected to have been included if it was important to them or caused them to enter into the timeshare and/or the loan agreement.

79. I do note that in the Letter of Complaint, when setting out the factual background to the 2013 purchase, PR said:

> *"They were told that as they would have five fractions instead of four, the return on their investment would be greater, at the end of the term."*

However, that evidence is simply missing from the witness statement, so I do not make a finding that Mr and Mrs C were told that by the Supplier.[8]

80. But what was included in Mr and Mrs C's witness statement was a clear explanation why they went on to take out the 2013 Purchase Agreement, namely that by taking out a new membership they would not have to pay fees when booking holidays. Given that Mr and Mrs C did not suggest Fractional Ownership being sold or marketed as an investment was one of the reasons they chose to take it out, it follows, I cannot say that even if it was sold in that way, it had a causative effect on their decision to take it out. It follows, even if the alleged breach of Reg.14(3) was true, I cannot say it caused the debtor-creditor relationship between BPF and Mr C to be unfair to him, nor that it was something that warranted relief in the circumstances of this case.

81. So, for this reason, given all the circumstances of this complaint, I am not persuaded, on the balance of probabilities, that even if the Supplier did breach Reg.14(3) when selling the 2013 Purchase Agreement, that this led to a credit relationship that was unfair to Mr C for the purposes of s.140A CCA.

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[8] This is contrasted with Mr and Mrs C's evidence with respect to the 2012 sale, but I am not making any finding with respect to how that was sold.

The provision of information by the Supplier at the Time of Sale

82. PR has said that the terms surrounding the ongoing charges and duration of Fractional Ownership are unfair and breach the UTCCR, specifically Reg.5. However, I think that is based on an incorrect understanding of the terms and how they worked in practice.

83. One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they did not fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under s.140A CCA.

84. However, as I have said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of s.140A CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

85. PR alleged that Mr and Mrs C were misled in that they were told there was a guaranteed end date to Fractional Ownership, when that was not true, and that led to an ongoing obligation to pay maintenance fees for an indefinite period. PR said it was only the sales process that started at the end of the membership term, under which there was no guarantee the 2013 Allocated Property would be sold and Mr C would have still been responsible for maintenance fees until it was sold. Further, PR alleged that the Supplier retained control of the sales process by being able to vote not to sell the 2013 Allocated Property, therefore obtaining ongoing maintenance fees.

86. I am aware that the Supplier provided its customers with a document called a "*FRACTIONAL PROPERTY OWNERS CLUB INFORMATION STATEMENT*". At the time of Mr C's 2013 sale that document often said:

> *"Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when your Allocated Properly is sold. There is a provision for distribution of funds or assets to Owners at a future Sale Date after the payment of any taxes and all costs related to that Allocated Property as described in the Rules.*
> *…*
> *Each Allocated Property is or will be legally owned or controlled by a UK company (Owning Company) which will be controlled either directly or indirectly by the Trustee, operating in accordance with the Deed of Trust…The Owning Company will retain such Allocated Properly until the automatic sale date in 19 years time or such later date as is specified in the Rules or the Fractional Rights Certificate.*
>
> *The Trustee will manage the sales process of the Allocated Property and following a sale distribute the net proceeds among the Owners and the Vendor. Each Owner will be entitled to a distribution as set out on the Fractional Rights Certificate for each Weekly Period held under a Fractional Rights Certificate subject to being in good standing and up to date with Management Charges. The Vendor is entitled to use up to 4 weeks for maintenance (and Week 53 when it*

occurs) during the term of the Project and a similar fractional share for anything else held as if an Owner for any other Fractional Rights which are unsold or have been acquired by the Vendor. The Rules provide for mechanisms to postpone the sale date in certain circumstances…

…

Exact period within which the right which is the subject of the contract may be exercised and, if necessary, its duration:

…

Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when the Properties are sold."[9]

87. In my view, the information normally provided by the Supplier to its customers made it sufficiently clear that the membership ended when the Allocated Property was sold and not on the date the Allocated Property was put up for sale.

88. PR also said that the Membership Rules ("the Rules") meant that the Supplier had an interest in not selling the Allocated Property as it could then continue to charge maintenance fees on the unsold property. However, I disagree that is the right reading of the Rules. Part 9 of the Rules that applied to Mr and Mrs C's Fractional Ownership dealt with how the Property would be sold. A key provision is Rule 9.1:

> *"Each Allocated Property shall be sold on its respective Sale Date*[10] *which occurs on the date specified in the Fractional Rights Certificate for the Allocated Property, save that the Vendor may, in its absolute discretion, postpone the date of sale from the date proposed as the Sale Date for up to two years. By unanimous consent of the Owners in that Allocated Property given in writing, the sale may be postponed for such period as is agreed in such consent."*

89. PR is right that, until the Allocated Property is sold, members have to pay ongoing maintenance fees. However, although there is a clause that if the Allocated Property is not sold after eighteen months, a meeting would be called where "*all Owners shall decide whether or not to continue using the Property and under what terms*", Rule 9.1 makes clear that any decision to postpone the sale must be unanimous. So I cannot see how the Supplier could unilaterally postpone a sale indefinitely. That means that Mr and Mrs C would have to agree to the Allocated Property not to be placed for sale for them to be liable to pay maintenance fees for an indefinite period.

90. So I cannot say it was likely that Mr and Mrs C were either not told about how the Allocated Property was to be placed for sale or that the rules around charging maintenance fees whilst the Allocated Property was placed for sale were unfair in the way alleged. Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the UTTCR are likely to have prejudiced Mr and Mrs C's purchasing decision at the time of sale and rendered Mr C's credit relationship with BPF unfair to him for the purposes of s.140A CCA.

Conclusion

91. In conclusion, therefore, given all of the facts and circumstances of this complaint, I do not currently think the credit relationship between BPF and Mr C arising out of the 2013 Credit Agreement was unfair to him for the purposes of s.140A CCA. And taking everything into account, I think it is fair and reasonable to reject this aspect of

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[9] I have not seen the document used in Mr C's actual sale, but I think it likely it contained the same or similar. If PR disagrees with this, it can let me know in response to this provisional decision.

[10] This is defined as the date on which the sale process for an Allocated Property beings.

the complaint on that basis. Further, I do not think s.75 CCA applies to Mr C's complaints about either the 2012 or 2013 purchase due to the cost of the Purchase Agreements.

92. Having found that BPF are not a party to an unfair debtor-creditor relationship as defined by s.140A CCA, nor that it was jointly liable for any misrepresentation under s.75 CCA, and seeing no other reason why it would be fair to direct BPF to pay anything to Mr C arising out of the sale of the Fractional Ownerships, I do intend to uphold this complaint."

Response to my provisional decision

I asked the parties to provide anything further they wished me to consider by 31 October 2024, explaining that unless the new information changed my mind, the final decision was likely to be along the same lines as the provisional decision.

BPF responded to say it had nothing further to add. Neither PR nor Mr C responded.

What I have 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.

As I have not been provided with anything further to consider, I see no reason to depart from my provisional findings. So I reach the same conclusions for the same reasons as set out above in my provisional decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I am required to ask Mr C to accept or reject my decision before 29 November 2024.

Mark Hutchings
Ombudsman