DRN-5116720

The complaint

The Estate of Mr S's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with Mr S under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

The timeshare in question here was bought in the joint names of Mr and Mrs S, so I will refer to both of them where appropriate in this decision. However, Mr S has sadly died since this complaint was made, so his complaint is now being brought on behalf of his estate as the finance agreement was in his sole name.

What happened

Mr and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 12 June 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 850 fractional points at a cost of £17,844 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £13,849 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs S 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 S paid for their Fractional Club membership by taking finance of £17,511 from the Lender in his sole name (the 'Credit Agreement'). This loan also consolidated the outstanding balance of a previous loan taken out to purchase their original membership.

Mr S – using a professional representative (the 'PR') – wrote to the Lender on 15 July 2020 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

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

- Told them that Fractional Club membership had a guaranteed end date when that was not true.
- Told them that they were buying an interest in a specific piece of "real property" when

that was not true.

- Told them that Fractional Club membership was an "investment" when that was not true.

Mr S said that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to him.[1]

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

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

- Mr and Mrs S were either not given the contractual documentation at the time of the purchase, or if they were, they were not given sufficient time to read them.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- The features of the agreement which may have made it unsuitable for Mr and Mrs S were not clearly explained.
- There was a lack of availability and the Supplier's resorts were not exclusive to members.
- The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.

The Lender, other than acknowledging receipt of Mr S's complaint, did not send a substantive response to it, and so on 28 September 2020, the PR referred his complaint to the Financial Ombudsman Service.

Mr S's complaint (which by that point was being made by the estate of Mr S as he had sadly died) was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits. He didn't think the credit relationship between Mr S and the Lender was unfair to him, and he thought that the Lender would have had a defence under the Limitation Act 1980 (the 'LA') to Mr S's Section 75 claim, as he had made it more than six years after the event that he had concerns about.

[1] Since Mr S has now sadly died, the Lender is, with the Supplier, jointly and severally liable to the estate of Mr S.

The PR, now representing the estate of Mr S, disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Having considered everything that had been submitted, I found myself agreeing with the outcome reached by the Investigator, but thought the reasons for rejecting the complaint ought to be expanded on. As such I set out my initial thoughts in a provisional decision to allow all parties the opportunity to respond with any new evidence or arguments that they wished to. In my provisional decision I said:

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.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The UTCCR.*
- *The CPUT Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*
    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

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

And having done that, I do not 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 is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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.

Mr and Mrs S entered into a contract with the Supplier at the Time of Sale that was financed by a debtor-creditor-supplier agreement. So, I am satisfied that Section 75 of the CCA applies here and the Lender doesn't dispute this.

Section 75 says that, in certain circumstances, the borrower (Mr S) under a credit agreement has an equal right to claim against the credit provider (the Lender) if there's either a breach of contract or misrepresentation by the supplier of goods or services (the timeshare membership in question). And, once a claim is made, the creditor must properly consider it and pay compensation if needed. Mr S's, and now the estate of Mr S's complaint, is that the Lender did not do that.

The LA imposes time limits for people to start legal proceedings – and there are different time limits for different types of claims. Essentially, this means that if someone waits too long to make a claim, the court will usually say it's 'time-barred'. For this reason, if a consumer makes a claim after the relevant time-limit has expired, we'd usually say it was fair for the creditor to rely on the LA to decline the claim.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim a consumer could make against the Supplier. A claim for misrepresentation against the Supplier, like that made by Mr S here, would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued. But a claim, like the one in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

This sale occurred on 12 June 2014, and Mr S has made a claim to the Lender under Section 75 of the CCA on 15 July 2020. He said that he and Mrs S made this purchase based on the alleged misrepresentations of the Supplier, which Mr S says they relied on. And as a credit agreement from the Lender was used to help finance this purchase, it was when Mr S entered into the credit agreement that he suffered a loss – which means it was at that time he had everything he needed to make a claim.

So, in relation to the Time of Sale, Mr S needed to notify the Lender of his claim by 12 June 2020 at the latest. But Mr S first notified the Lender of his claims of misrepresentations by the Supplier on 15 July 2020. As that was more than six years after he entered into the credit agreement and related purchase agreement, although the Lender did not specifically rely on

this defence, I don't think it would have been unfair or unreasonable for it decline Mr S's claim for that reason.

As such I do not think the Lender needs to do anything further in relation to this aspect of the complaint.

Section 75 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 S, and now the estate of Mr S 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.

Although not expressed explicitly as a breach of contract, Mr S said in the Letter of Complaint that he and Mrs S could not holiday where and when they wanted to, and the resorts were not exclusive to members – which, on my reading of the complaint, suggests that he considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs S states that the availability of holidays was/is subject to demand. I accept that they may not have been able to take certain holidays, but I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

I have also not seen any evidence that the Supplier promised Mr and Mrs S either verbally or in the Purchase Agreement that the resorts were exclusive to members of the Fractional Club. And in any event, I have not seen that a lack of exclusivity meant that Mr and Mrs S didn't receive what they were entitled to under the Purchase Agreement.

Mr S also said that there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that he was saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay the estate of Mr S any compensation for a breach of contract by the Supplier.

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 S, and now the estate of Mr S, ought to have had a successful claim for misrepresentation by the Supplier, or that the contract entered into by Mr and Mrs S was breached by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr S also said that the credit relationship between him and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that he had concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr S, and now the estate of Mr S, and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't 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 and Mrs S's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

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

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in Plevin made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

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

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

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

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

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

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and*

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

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 the above on the fairness of the credit relationship between Mr S and the Lender.

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

Mr S's complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision.

The PR says that the right checks weren't carried out before the Lender lent to Mr S. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender 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 S was actually unaffordable before also concluding that he lost out as a result, and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr S. If there is any further information on this (or any other points raised in this provisional decision) that the estate of Mr S wishes to provide, I would invite it to do so in response to this provisional decision.

The misrepresentations I've described previously could also be something that led to an unfair debtor-creditor relationship[3], so I've considered what Mr S had to say with this in mind. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs S were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs S's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

The PR also said in the letter of complaint that the Supplier told Mr and Mrs S that Fractional Club membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mr and Mrs S's membership plainly did have an investment element to it.

The Letter of Complaint also includes the allegation that the Supplier misled Mr and Mrs S and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons Mr S gave for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

I'm not persuaded, therefore, that Mr S's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he said his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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[3] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr and Mrs S'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 Mr and Mrs S said that the Supplier did that at the Time of Sale, saying in the witness statement:

> *"We were told fractional ownership was an investment. They said after the 19 years we would get some of our money back." And this is repeated in the Letter of Complaint from the PR.*

So, that is what I have considered next.

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

Mr and Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract <u>as an investment</u>. 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 and Mrs S in a manner that breached Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs S as an investment.

For example, in the Member's Declaration document it states:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that the Supplier makes no representation as to the future price or value of the Fraction."

And in the Information Statement, it states:

"Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." And: "The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. The Supplier makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorised by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers to determine their own specific investment needs; (D) no warranty is given as to any future values or returns in respect of an Allocated Property."

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the sale of the Allocated Property weren't guaranteed.

Yet I think it would be fair to say, that while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

And in addition, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So I accept that it's possible that Fractional Club membership was marketed and sold to Mr and Mrs S as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

So, I have taken all of that into account.

But even if the Supplier did breach Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club membership to Mr and Mrs S, it is not necessary to make a finding

on this point. That is because, given Mr and Mrs S's recollections of the sales process at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

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

I have considered what impact any potential breach had on the fairness of the credit relationship between Mr S and the Lender under the Credit Agreement and related Purchase Agreement.

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

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] 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. […] 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. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] 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. […]*

[…] 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. […]"

So, it seems to me, that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr S and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[4] led Mr and Mrs S to enter into the Purchase Agreement and Mr S into the Credit Agreement is an important consideration.

Mr and Mrs S's initial recollections show that they thought that the sale of the Allocated Property would mean that they would get some of their money back. So as I've already said, there was no suggestion in Mr and Mrs S's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Fractional Club membership was

[4] which, having taken place during its antecedent negotiations with Mr S, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender)

an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis.

Mr and Mrs S had a trial membership of a timeshare from the Supplier which allowed them to take five weeks of accommodation in the course of three years. Mr and Mrs S traded this in on their first holiday, and the Fractional Club membership that they bought allowed them holidays for the following 19 years. And they said in their witness statement that: "We were told with 850 points we could trade 1 week for 2 if we went out of season." So, I think Mr and Mrs S's motivation to purchase the Fractional Club membership was for the holiday rights it afforded them over the following 19 years. And my view is strengthened by what they said in their witness statement:

"Since we cancelled our Lanzarote holiday [in February 2015] with [the Supplier] we have not used our points because we can't afford to and don't want to use them as we have decided that we want out of our ownership. We have now realised that this is not the type of holiday we like as the [Supplier] resorts are in the middle of nowhere."

There simply isn't sufficient evidence to persuade me that Mr and Mrs S were motivated to purchase their Fractional Club membership by any potential profit from it.

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 and Mrs S's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr S and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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

The PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR.

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/are 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 didn't 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 Section 140A of the CCA.

However, as I've 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 Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Regarding the duration of the membership, the Information Statement made clear to Mr and Mrs S that the membership lasted for 19 years. I acknowledge that the sale of the Allocated Property could be postponed at the Supplier's discretion, but it could only be postponed for up to two years in limited circumstances which don't seem unusual or unreasonable. So, I don't think the term in relation to the mere duration of the membership is likely to be unfair for the purpose of the UTCCR.

Similarly, I don't think the term relating to the mere obligation to pay an annual management charge is likely to be unfair for the purpose of the UTCCR. The Information Statement explains that the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the scheme, which doesn't seem unreasonable. And, while I acknowledge that such an increase could be greater than what had been set out, this would be in exceptional circumstances, where there had been an extraordinary increase in costs directly related to the Resort which could not previously have been foreseen.

And therefore, I don't think either of these terms created an unfairness in the relationship between Mr S and the Lender.

Mr S also says that they weren't given adequate time to review the contractual documentation before entering into the Purchase Agreement. But, from what I've seen, they were given this. I have seen the Purchase Agreement, and the Right of Withdrawal document. These have been signed as having been received by Mr and Mrs S. There is also the Member's Declaration form which sets out 15 points. Each of these points is initialled as having been read, and the form is signed again by both Mr and Mrs S. So, I am not persuaded that Mr and Mrs S were not given the required documents, nor that they were unable to read them. And as they signed to say they were aware of the 14-day recission period, I'm not persuaded that they were not made aware of this either.

The letter of complaint also says Mr and Mrs S weren't given a transparent explanation as to the features of the agreements which may have made them unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age and high interest and total charge for the credit provided.

But they haven't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Mr and Mrs S. Mr S also hasn't described what he feels should have been explained or what information should have been given about these points that wasn't. The PR has mentioned the length of the loan, his age and the interest rate but hasn't given any reason as to why these are unfair in this particular case or why these cause Mr S's credit relationship with the Lender to be unfair.

But even if I were to acknowledge the possibility that there were information failings on the part of the Supplier, I don't think this makes a difference here anyway. I can't see that there's been any detriment to Mr and Mrs S or that any of these points are likely to have prejudiced their purchasing decision at the Time of Sale and rendered Mr S's credit relationship with the Lender unfair to him for the purposes of Section 140A of the CCA.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr S was unfair to him because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr S was unfair to him for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it did not accept Mr S's Section 75 claim, and I

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

The responses to my provisional decision

The Lender responded and said it had nothing further to add. But neither the estate of Mr S nor the PR responded.

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.

As there has been no further evidence and argument in response to my provisional decision, I see no reason to depart from my findings as set out above. I do so however, having reconsidered everything before making this final decision.

My final decision

I do not uphold this complaint against Clydesdale Financial Services Limited trading as Barclays Partner Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr S to accept or reject my decision before 28 November 2024.

Chris Riggs
Ombudsman