DRN-5148171

The complaint

Mr M'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 him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

As the credit agreement which is the subject of this complaint was in Mr M's sole name, he is the only eligible complainant here. However, as the timeshare in question was purchased in the joint names of Mr M and Mrs R, I shall refer to them both where applicable.

What happened

Mr M and Mrs R purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier') after attending a sales presentation in London in July 2014.

As part of this trial membership, Mr M and Mrs R were given a free 'Prelude' holiday in one of the Supplier's resorts, and during this holiday they attended a further sales presentation by the Supplier.

At this presentation, Mr M and Mrs R purchased membership of a timeshare (the 'Fractional Club 1') from the Supplier on 11 March 2015. They bought 1,220 fractional points at a cost of £23,170 but after trading in their trial membership, they ended up paying £19,175 for membership of the Fractional Club 1. This purchase, with the associated credit agreement in Mrs R's sole name, is the subject of a separate complaint being considered by this Service and is included here for background information only.

Fractional Club membership was asset backed – which meant it gave Mr M and Mrs R more than just holiday rights. It also included a share in the net sale proceeds of a property named on their purchase agreement after their membership term ends.

On 22 September 2016 Mr M and Mrs R traded in their membership of Fractional Club 1 for a new membership (the 'Fractional Club 2') giving them a total of 1,660 fractional points, and the rights to a share in the net sales proceeds of a new named property (the 'Allocated Property'). This purchase was paid for by Mr M taking finance of £7,989 from the Lender in in his sole name.

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 5 May 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA (which the Lender failed to accept and pay).
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. 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.

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

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

- Told them that Fractional Club 2 membership had a guaranteed end date, specifically after 19 years, after which they would have no further legal liability to the Supplier under or in respect of the Scheme, when that was not true.
- Told them that membership of the Fractional Club 2 meant that they were buying an interest in a specific parcel of "real property" when that was not true.
- Told them that Fractional Club 2 membership was an "investment" when that was not true.

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

(2) Section 75 of the CCA: the Supplier's breach of contract

Although not set out in these exact terms, Mr M says that the Supplier breached the Purchase Agreement because they found it difficult to book the holidays they wanted, when they wanted, and the accommodation they did manage to book was of poor standard. The resorts were also not exclusive to members.

Mr M also says that the maintenance fees associated with the membership have gone up by more than they ought to have.

As a result of the above, Mr M says that he has a breach of contract claim against the Supplier, 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.

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

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

- The contractual terms setting out (i) the duration of their Fractional Club 2 membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Consumer Rights Act 2015 ('CRA').
- They were pressured into purchasing Fractional Club 2 membership by the Supplier.
- 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 decision to lend to Mr M was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- No adequate or transparent explanation was given to them of the features which may have made the Credit Agreement unsuitable for him.

The Lender, other than acknowledging Mr M's complaint, did not send him a final response, so the PR, on Mr M's behalf, referred his complaint to the Financial Ombudsman Service,

where it was assessed by an Investigator. The PR also submitted a statement from Mr M, signed and dated 5 April 2022, which set out his recollections of the Time of Sale.

Having considered all of the information on file, the Investigator rejected the complaint on its merits.

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

On 20 November 2024 I sent all parties a Provisional Decision (the 'PD') setting out my initial thoughts on what I considered to be a fair and reasonable outcome to this complaint. I agreed with the outcome reached by the Investigator in that Mr M's complaint ought not to be upheld, but expanded somewhat on the reasons given. In my PD I first set out the legal and regulatory context:

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 CRA.*
- *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').*
    - *Link Financial v Wilson [2014] EWHC 252 (Ch) ('Link Financial')*
    - *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 then went on to the merits of Mr M's complaint:

What I've provisionally decided – and why

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

And having done that, I 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.

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

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. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr M and Mrs R at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons which I set out at the start of this decision. They include the suggestion that Fractional Club 2 membership had been misrepresented by the Supplier because what Mr M and Mrs R were told about it having a guaranteed end date was untrue. But I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Mr M and Mrs R are included.

Mr M says that their Fractional Club 2 membership had also been misrepresented by the Supplier because they 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 M and Mrs R'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.

Mr M also makes an allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had they been told their Fractional Club 2 membership was an investment (and I make no finding on that point here), that would not have been untrue.

What's more, as there's nothing else on file that persuades me that there were any false statements of existing fact made to Mr M and Mrs R by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons alleged.

Therefore, I do not think the Lender is liable to pay Mr M any compensation for the alleged misrepresentations of the Supplier. And with that being the case, although it did not respond to Mr M's claim, I do not think the Lender acted unfairly or unreasonably when it did not accept the Section 75 claim in question.

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 M 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.

Mr M says that they could not holiday where and when they wanted to – 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 M and Mrs R states that the availability of holidays was/is subject to demand. And Mr M has not actually said when he and Mrs R tried to book a holiday and were unsuccessful. But in any event, even if I were to accept that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr M also says that the quality of the accommodation was not what they were led to believe it would be, and that the resorts were not exclusive to members. But I have not seen any evidence to say that the Supplier has breached the contract in this regard. And from what I can see, whenever Mr M and Mrs R had concerns about the standard of the accommodation relating to this Fractional Club 2 membership, the Supplier addressed those concerns. And I've seen no evidence which suggests that any lack of exclusivity has prevented Mr M and Mrs R from doing anything under the terms of their contract that they would otherwise have been entitled to do.

Mr M also says that the maintenance fees that they've had to pay have gone up more than they were led to believe they would. In his statement he says that they were told what the fees were for, and about increases due to inflation costs on labour and upgrades to accommodation and across campus. But on my reading of this there is no indication that fees would only increase by Inflation. And this is supported by what is written in the Standard Information Form under the heading Management and fees:

"…Charges will be budgeted annually and will be subject to increase or decrease as

determined by the costs of managing the Project…"

So I am not persuaded that there has been a breach of contract by the Supplier in this regard.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr M any compensation for a breach of contract by the Supplier. And with that being the case, although it didn't respond to Mr M's claim, I do not think the Lender acted unfairly or unreasonably when it did not accept the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr M and Mrs R was misrepresented (or 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 M also says 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 has 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 M 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 M and Mrs R's membership of the Fractional Club 2 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."[1]

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

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

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

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

"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 M 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;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

Mr M'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.

They include the allegation that the Supplier misled Mr M and Mrs R, and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they 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.

The PR says that the right checks weren't carried out before the Lender lent to Mr M. 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 M 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 M. If there is any further information on this (or any other points raised in this provisional decision) that Mr M wishes to provide, I would invite him to do so in response to this provisional decision.

Mr M says that they were pressured by the Supplier into purchasing Fractional Club 2 membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But having considered Mr M's statement, he says little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club 2 membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time, if, as is set out in the Letter of Complaint, they only made the purchase due to pressure. Moreover, this was their second Fractional Club purchase and third timeshare

purchase overall from the same Supplier, so I think it is a fair assumption that they would have had a reasonable understanding of how the sales process worked. And Mr M says as much in his statement. And with all of that being the case, there is insufficient evidence to demonstrate that Mr M and Mrs R made the decision to purchase Fractional Club 2 membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr M'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 says his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club 2 membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

Was Fractional Club 2 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 M and Mrs R's Fractional Club 2 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 2 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 M in his statement, and the PR in the Letter of Complaint, say that the Supplier did exactly that at the Time of Sale. 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 M and Mrs R'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 2 membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club 2. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club 2 membership was marketed or sold to Mr M and Mrs R in a way 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 Mr M and Mrs R, or led them to believe that Fractional Club 2 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 2 as an 'investment' or quantifying to prospective purchasers, such as Mr M and Mrs R, 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 2 membership was not sold to Mr M and Mrs R as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club 2 membership as an investment. So, I accept that it's possible that Fractional Club 2 membership was indeed marketed and sold to Mr M and Mrs R 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 2 membership without breaching the relevant prohibition.

So, I have taken all of that into account. However, on my reading of the evidence provided and Mr M's initial recollections of the sales process at the Time of Sale, I don't think I need to make a finding on whether there was a breach of Regulation 14(3). This is because I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

<u>Was the credit relationship between the Lender and Mr M rendered unfair?</u>

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 M and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[2] led them to enter into the Purchase Agreement, and Mr M into the Credit Agreement, is an important consideration.

As I've said, Mr M completed a written statement setting out his recollections of the Time of Sale. And although this related to their Fractional Club 1 purchase, he describes what he remembered the Supplier saying about how the Fractional Club worked:

> *"We were told all about [the Supplier's] fractional property owners club, which we were told involved purchasing shares in a property, which will be sold after 19 years, and the proceeds split between all the owners.*
>
> *In the meantime, we could have luxury holidays every year, either in our apartment or in exchange apartments for holidays somewhere else..."*

So I think it is a fair assumption to make that Mr M and Mrs R went into the sales process of Fractional Club 2 with an understanding of how it worked. This, on the face of it, is an accurate description of the way Fractional Club 2 worked. And Mr M wrote further (in relation to Fractional Club 1):

> *Our understanding of fractional points, as informed by the [Supplier] sales team, was that the fractional system offered a flexible system for taking luxury holidays, without being tied to a specific apartment in a specific location on specific dates. This is what we were seeking from a holiday membership."*

So this makes me think that Fractional Club membership gave them what they wanted – being able to take flexible luxury holidays.

Mr M says that they went into the meeting at the Time of Sale feeling dissatisfied with their current membership, as they had seemingly found that their 1,220 fractional points were insufficient for them to take the holidays they needed. He wrote:

> *"The supplier tailored the presentation and calculated that an additional 440 points was required to allow us to take two holidays per year. As at the second presentation, we were again told this would be sufficient."*

So this makes me think that Mr M and Mrs R bought the Fractional Club 2 membership as a way to enable them to take the holidays they wanted. I acknowledge that Mr M went on to write:

> *"We were told that an additional 440 points that were available for us to purchase, had been obtained from sale of somebody's timeshare property, it was stated in Florida, thereby suggesting that points were sellable and an investment.*
>
> *… as we were now full members and deeply financially involved in [the Supplier] we brought the extra 440 points to realise our full expectations of our investment."*

This doesn't suggest to me that it was the Supplier that said the newly available points meant that they were sellable, or even implied as much. It seems from what Mr M has said here that it was him that assumed this.

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[2] which, having taken place during its antecedent negotiations with Mr M, 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)

And in any event, nowhere in Mr M's statement does it say that the Supplier said or implied to them that they would make a profit when the Allocated Property was sold, and that was what motivated them to make the purchase. I agree that he and Mrs R may have felt that as they had already made a previous purchase, they ought to make the second one, but I can't see that this was done for anything other than improving their ability to take the sorts of holidays they wanted.

And my view on this is strengthened by what is said later in the statement, when Mr M sets out the problems they had experienced with the membership, and why they wanted to cancel it:

> *"We are seeking cancellation now because we feel that we have been misled and misinformed about the cost, accommodation and location availability of our timeshare membership, and in addition, due to recent medical and financial circumstances."*

There is no mention of the investment element or prospect of a financial gain here, nor that this was something that they were concerned about. Their concerns were based on the holidays they wanted and were seemingly unable to get and due to more recent changes in their circumstances following the Time of Sale. This is, in my view, a strong indication of their motivation to purchase Fractional Club 2 membership.

So, there was no suggestion in Mr M's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Fractional Club 2 membership was 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.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club 2 membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr M and Mrs R's decision to purchase Fractional Club 2 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 M 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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr M and Mrs R when they purchased membership of the Fractional Club 2 at the Time of Sale. But Mr M and the PR said that the Supplier failed to provide them with all of the information they needed to make an informed decision.

The PR also says that the contractual terms governing the duration of Fractional Club 2 membership and the obligation to pay management charges for that duration were unfair contract terms under the CRA.

One of the main aims of the Timeshare Regulations and the CRA 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 CRA 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.

Unfair term(s)

Mr M said that the Purchase Agreement contains unfair contract terms (under the CRA) in relation to the duration of membership and the obligation to pay management charges for that duration.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr M and the Lender unfair to him, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mr M and Mrs R in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr M and Mrs R, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mr M have led to any unfairness in the credit relationship between him and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against Mr M and Mrs R, let alone unfairly. The PR hasn't explained why exactly it feels these term(s) cause an unfairness, and as I've said, I can't see that these term(s) have been operated in an unfair way against Mr M and Mrs R in any event.

The provision of information at the Time of Sale

The letter of complaint also says Mr M and Mrs R weren't given a transparent explanation as to the features of the loan agreement which may have made it unsuitable for him, or have a significant adverse effect which he would be unlikely to foresee, especially given the length of the term, his age and high interest and total charge for the credit that was provided.

But the PR hasn't explained what the particular risks or features are that it is referring to here, or why these would have had an adverse effect on Mr M. It also hasn't described what it feels should have been explained, or what information should have been given that wasn't. The length of the loan, Mr M's age, and the interest rate and charges have been mentioned. But no reason has been given as to why these are unfair in this particular case, or why these cause the credit relationship between Mr M and the Lender to be unfair.

So, while it's possible the Supplier didn't give Mr M and Mrs R sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't currently seen enough to persuade me that this, alone, rendered Mr M's credit relationship with the Lender unfair to him.

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 M 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 M 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 dealt with Mr M's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with Mr M 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 him.

If there is any further information on this complaint that Mr M wishes to provide, I would invite him to do so in response to this provisional decision.

Neither Mr M, the PR nor the Lender responded to my PD and there were no further submissions, evidence, or arguments made.

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 no further submissions were made in response to my PD, and having considered everything afresh, I see no reason to depart from my provisional findings as set out above.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 3 January 2025.

Chris Riggs
Ombudsman