DRN-5173076

The complaint

Mrs W'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 her 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.

What happened

In May 2007, Mrs W (together with another – Mr W) purchased a timeshare product (the 'Trial Membership') from a timeshare provider (the 'Supplier').

In December 2007, Mr and Mrs W agreed to upgrade their Trial Membership to a full membership with an allocation of points each year to be used to book accommodation and experiences from a portfolio provided by the Supplier.

On 22 July 2008 (the 'Time of Sale 1'), Mr and Mrs W agreed to purchase additional membership points from the Supplier at a cost of £4,399 ('Purchase Agreement 1'). They paid for the additional points by taking finance of £4,399 from the Lender in Mr W's sole name ('Credit Agreement 1').

On 5 January 2009 (the 'Time of Sale 2'), Mr and Mrs W agreed to purchase further additional points from the Supplier at a cost of £11,209 ('Purchase Agreement 2'). Those additional points were paid for by taking further finance of £11,209 from the Lender, again in Mr W's sole name ('Credit Agreement 2').

On 11 November 2012 (the 'Time of Sale 3'), Mr and Mrs W purchased membership of a timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 6,924 fractional points at a cost of £87,823 ('Purchase Agreement 3'). But after trading in their existing timeshare, they ended up paying £10,999 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs W 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 and Mrs W paid for their Fractional Club membership by taking finance of £10,999 from the Lender. But on this occasions, the finance was in Mrs W's sole name ('Credit Agreement 3').

On 29 October 2013 (the 'Time of Sale 4'), Mr and Mrs W upgraded their Fractional Club membership with the Supplier. In doing so, they entered into a new agreement with the Supplier to purchase 7,090 fractional points at a cost of £94,596 ('Purchase Agreement 4'). But after trading in their existing Fractional Club membership, they ended up paying £4,584 for the Fractional Club membership upgrade. Mrs W paid for their Fractional Club membership by taking further finance of £4,584 from the Lender, again in her sole name ('Credit Agreement 4').

Mr and Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 30 May 2018 (the 'Letter of Complaint') to complain about the timeshare purchases made on 5 January 2009, 11 November 2012 and 20 October 2013. The letter of complaint read (in full):

"Our clients bought into [the Supplier's] *Fractional Points in 2009 using your Loan to complete the purchase. He then upgraded in 2012 & 2013 using your Loan facility.*

They were told on several occasions that the Resort would be sold in 19 years and that they would make a substantial profit when it was sold. They were also told that they could book holidays with full disabled access but, as you can see from the enclosed paperwork, this was definitely not. a permanent arrangement and cauaed (sic) *them considerable distress on occasion.*

The maintenance fees are also climbing steadily every year and last year they had risen to 1200 euros per annum.

Our clients feel they were very badly misled by [the Supplier] *and request a return of their monies under Section 75 of thr Consumer Credit Act 1974* (sic)*"*

The Lender dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter in July 2018 rejecting it on every ground.

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

Mr and Mrs W disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. In the meantime, the PR subsequently added (in full):

"We would like to take into consideration relating to the recent Judicial Review the circumstances that our clients entered into the Fractional Owners Club Scheme.

These new upgraded contracts did not offer aby (sic) *additional benefits to our clients and only continued the rights they already had but with a shortened duration, our clients would have the Fractional Rent allocation should they wish to rent out within the asset backed investment, with a shortened term to sell at the end of the term for a large profit.*

With this taken into consideration this cannot be viewed as a "timeshare contract" as the terms did not fall within the definition of a timeshare contract but as a collective investment scheme, which they were neither qualified nor authorised to give advice on or sell to our clients.

This would deem the contract as an unfair relationship therefore as this applies to this particular case we would appreciate our clients are reviewed under S140/a and S56 of the Consumer Credit Act, to be put back to the position that they had not been sold into this CIS which linked the Loan".

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, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR').
- The Consumer Protection from Unfair Trading Regulations ('CPUTR').
- 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').

Having considered Mrs W's complaint, I reached a similar outcome to that of our investigator. But as I'd expanded somewhat on the reasons given, I issued a provisional decision ('PD') on 5 November 2024 giving Mrs W and the Lender the opportunity to respond to my findings before I reach a final decision.

Despite follow up by this service, none of the parties to Mrs W's complaint have acknowledged or provided any further comments or information for me to consider. So, Mrs W's complaint was passed back to me in order to reach a final decision.

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.

For completeness, in my PD I said:

> I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I 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.

While the purchases referred to above were made in the joint names of Mr and Mrs W, the associated finance provided by the Lender under Credit Agreements 1 and 2 were in Mr W's sole name, while Credit Agreements 3 and 4 were in in Mrs W's sole name. So, under the provisions of the CCA, only Mr W is an eligible claimant under Credit Agreements 1 and 2. And because of that, only he is an eligible complainant under those agreements. Likewise, only Mrs W is an eligible claimant under Credit Agreements 3 and 4. And because of that, only she is an eligible complainant under those agreements.

As a consequence, Mr and Mrs W's claim(s) (and resultant complaints) need to be considered separately. So, for the purpose of this decision, I've focussed only upon Mrs W's claims and complaints as far as they relate to the Purchase and Credit Agreements in her sole name. Mr W's claim (and complaint) in relation to Purchase Agreement 2 and Credit Agreement 2 must be considered separately.

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 Mrs W could make against the Supplier. As far as it relates to Mrs W Credit Agreements, the complaint submitted specifically references Purchase Agreements 3 and 4.

Mrs W's Section 75 claim in relation to Purchase Agreements 3 and 4

Certain conditions must be met if the protection afforded to consumers is to be engaged and the Lender has not suggested that the relevant conditions aren't met in this complaint. However, having considered the evidence and information provided, I don't think the relevant conditions have been met as far as Purchase Agreements 3 and 4. Section 75(3)(b) says:

Subsection (1) does not apply to a claim … So far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000 […]

Within the evidence provided are two single page documents headed *"Fractional Property Owners Club Pricing Summary".* The first of these relates to Purchase Agreement 3 and confirms the following:

(1) Purchase Price: GBP 87823.00
(2) Trade in Value. GBP 76824.00

(3) Amount due GBP 10999.00

The second relates to Purchase Agreement 4 and confirms the following:

(1) Purchase Price. GBP 94596.00
(2) Trade in Value GBP 90012.00
(3) Amount due GBP 4584.00

Based upon this evidence, I think the Supplier has attached a cash price to those timeshare product purchases, each one of which exceeds £30,000. Because of that, the condition above has not been satisfied. And for that reason, I cannot see why Section 75 applies to Mrs W's claim for alleged misrepresentation(s) by the Supplier at the Time of Sales 3 and 4 in relation to Purchase Agreements 3 and 4.

However, such claims could be considered under Section 140A as a misrepresentation could lead to an unfairness, so I will briefly deal with the allegations.[1] Having considered everything, I am not persuaded that the Supplier is likely to have misrepresented Fractional Club Membership to Mrs W at those times anyway. This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that under the Fractional Club membership, Mrs W could book holidays with full disabled access. However, it's alleged that this wasn't a permanent arrangement causing Mrs W distress.

In response, the Lender confirmed that the Supplier did add a special note to their file in relation to Mrs W's requirement for disabled access. The Supplier confirmed that such facilities are always offered in priority to those that require them albeit this is not a permanent arrangement.

I've seen a number of documents relating to Purchase Agreements 3 and 4. Having considered them in detail, I can't reasonably conclude that the Supplier provided any guarantee that Mrs W's requirement for disabled access could be always met. And I think it was clear that all bookings are subject to availability and confirmed on a first come first served basis. So, I can appreciate why the Supplier wouldn't be able to give such an assurance on a permanent basis.

Furthermore, the Supplier has provided details of Mrs W's booking and timeshare usage from November 2007 until October 2017. This includes evidence of more than 50 successfully completed reservations, generally for periods of a week or more on each occasion. And there is also evidence that Mrs W made a further 50 reservations that were subsequently cancelled. So, based upon the evidence, it appears Mrs W has consistently been able to book and complete reservations to her satisfaction on a regular basis. So, I can't reasonably conclude that the Supplier misrepresented the timeshare products to such an extent that it meant Mrs W was unable to use them as anticipated.

I also note that Mr and Mrs W did complain in 2009 about a holiday they took not being suitable for a disabled person. But between then and the Time of Sale 3, they booked and took several holidays using their membership. On that basis, it appears they were satisfied that the holidays they booked by the Time of Sales 3 and 4 were suitable for them.

[1] See the judgment in *Scotland and Reast* and the law on this area set out further below

Further, Mrs W has said she was told that her membership was an investment. For the reasons I'll come to explain, if that was said to her, that would not have been untrue (although I make no finding such a representation was made).

So, while I recognise that Mrs W has concerns about the way in which the Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sales 3 and 4.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mrs W any compensation for the alleged misrepresentations of the Supplier on the basis that they would've led to an unfair debtor-creditor relationship. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with 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 Mrs W 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 Mrs W also provides reasons which could suggest that the credit relationship between her 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 she 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 the Mrs W 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 Agreements) 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 agreements or any related agreements.

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 Mrs W'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 Mrs W 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 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;
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 Mrs W and the Lender.

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

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

Mrs W's complaint about the Lender being party to an unfair credit relationship was made by the PR on the basis that the Fractional Club membership had been sold to her as an investment. This allegation was mentioned in the Letter of Complaint but was expanded on in December 2023 after our Investigator had issued their initial view. I have considered that further.

Was Fractional Club membership marketed and sold at the Time of Sale 3 and 4 as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The PR initially alleged that Mrs W was told that she would make substantial profits when the Allocated Property was sold. And following our Investigator's view, the PR subsequently argued that the Fractional Club membership cannot be viewed as a timeshare contract as the terms did not fall within the definition of a timeshare contract but as a collective investment scheme ('CIS').

However, Mrs W acquired holiday rights when joining the Fractional Club and subsequently upgrading her Fractional Club membership. So, it met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. And it also meant it was exempt from giving rise to a CIS. So, the PR is mistaken in its argument on this point (see paragraphs 39-54 in Shawbrook & BPF v FOS).

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 in alleging that Mrs W was told she would make a substantial profit, the PR suggests 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 paragraph 56, 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". I will use the same definition.

Mrs W's share in the Allocated Property sold at the Time of Sales 3 and 4 clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs W as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to her as an investment, i.e. told her or led her to believe that Fractional Club membership

offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

In the initial complaint and subsequent submissions, the PR has not set out in any greater detail why Mrs W's Fractional Club membership and upgrade was sold as an investment or what she was specifically told that led her to believe it was an investment. So, I have also considered, amongst other things, the paperwork from the Time of Sale 3 and 4, as well as what I know about how the Supplier sold memberships at that time.

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 Mrs W the financial value of her 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 Mrs W as an investment.

In particular, the documentation includes the following:

- Note 5 of the Members Declarations for Purchase Agreement 3 and 4 (both signed by Mrs W) says, *"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".*

- Part 6, note 5 of the Information Statement says, *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor 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".*

With that said, 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. And I accept that it's *possible* that Fractional Club membership was marketed and sold to her 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. However, I am not currently persuaded that would make a difference to the outcome in this complaint anyway. The concerns, detailed in her original letter of complaint to the Supplier are predominantly focussed upon the annual management charges and booking fees.

Was the credit relationship between the Lender and Mrs W rendered unfair?

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 Mrs W and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mrs W 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) lead her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

Here, I do not have any evidence directly from Mrs W, so it's difficult for me to say for sure what she was told and why she and Mr W went on to take out the two fractional memberships. However, I've considered a letter that Mrs W sent to the Supplier in November 2013, shortly after the Time of Sale 4. At no point did she say or suggest that the Supplier led her to believe that her Fractional Club membership would lead to a financial gain (i.e., a profit). In fact, Mrs W seems to have been concerned with whether she was paying a booking fee to take holidays. If she had been sold something as an investment and that was an important consideration for her, I would have expected this to have been mentioned when she was raising her dissatisfaction with the Supplier. And acknowledging the PR made that allegation in the complaint, I've seen no supporting testimony from Mrs W to explain how that particular allegation came about or specifically what was said to her.

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 Mrs W'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 she would have pressed ahead with her 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 Mrs W and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

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

The PR also mentioned in the Letter of Complaint that maintenance fees are climbing steadily every year and, by the time of the complaint, they had risen to 1,200 Euros per year.

Her complaint to the Supplier in November 2013 centres upon assurances that she alleges the Supplier gave about the level of annual maintenance fees payable. And further, that the supplier suggested that by entering into Purchase Agreement 4, those charges would reduce. So, I have thought about what information she was given about the fees at the Time of Sale 3 and 4 and whether a lack of information provided then could have caused an unfair debtor-creditor relationship.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs W when she purchased membership of the Fractional Club and upgraded that membership at the Time of Sale 3 and 4. One of the main aims of the Timeshare Regulations 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 being breached, and potentially the credit agreement being found to be unfair under Section 140A of the CCA.

I can see that Mrs W's signed Information Statements for both Purchase Agreements 3 and 4 explained that a management fee is charged each year, is budgeted annually and is subject to increase or decrease as determined by the costs of managing the scheme and are payable annually in advance each year. From her original complaint letter to the Supplier, it suggests that maintenance fees were discussed in some detail. But importantly, she didn't suggest she was told explicitly, or was led to believe that those fees wouldn't rise. So, I can't see that she was misled about the fees nor that the information she was given led to an unfair debtor-creditor relationship.

Furthermore, Mrs W also hasn't provided details of all the management fees she has had to pay under the purchase agreement and how much these were each year.

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. As I've mentioned, Mrs W has not set out what, if any, increases there have been or why, given her personal circumstances, such increases caused unfairness. So, I am unable to make any assessment of the impact of any increase on her.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's provision of information about maintenance fees at the Times of Sales 3 and 4 are likely to have prejudiced Mrs W's purchasing decisions and rendered her credit relationship with the Lender unfair to ger 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 Mrs W was unfair to her 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 Mrs W was unfair to her 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 Mrs W's Section 75 claim(s), and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

Having received nothing more to consider from any of the parties to this complaint, I've no reason to vary from my provisional findings. So, while I appreciate Mrs W is likely to be very disappointed, I will not be asking the Lender to do anything more here.

My final decision

For the reasons set out above, I do not uphold Mrs W'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 Mrs W to accept or reject my decision before 26 December 2024.

Dave Morgan
Ombudsman