DRN-4905208

The complaint

Mrs 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 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.

The complaint is only in Mrs S's name as only she was named on the Credit Agreement. But as she purchased the product in question in joint names with Mr S, I'll refer to them both throughout where relevant.

What happened

Mr and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 30 August 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £13,348 (the 'Purchase Agreement').

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 and Mrs S paid for their Fractional Club membership by taking finance of £13,348 from the Lender in Mrs S's name only (the 'Credit Agreement').

Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 19 March 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her 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.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true.

Mrs S says that she 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs S.

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

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

1. They weren't given a copy of the Information Statement at the Time of Sale or, if they were, they weren't given sufficient time to review it.
2. Mrs S didn't receive an adequate or transparent explanation as to the features of the agreement which may have made the credit unsuitable for her or have a significant adverse effect which she would be unlikely to foresee, especially given the length of the term, her age and the high interest rate.
3. 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').
4. They were pressured into purchasing Fractional Club membership by the Supplier.
5. 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.
6. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

Mrs S also raised the following, more general, concerns:

- They made no use of their holiday rights and experienced difficulties with their membership due to a lack of availability.

The Lender dealt with Mrs S' concerns as a complaint and issued its final response letter on 2 May 2018, rejecting it on every ground.

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

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

I considered the matter and issued a provisional decision on 14 June 2024. In that decision I firstly addressed Mrs S's complaint about the Lender's handling of her Section 75 claim for misrepresentations at the Time of Sale and said:

- Regarding the sale of the Allocated Property, and the associated end of the membership, there was nothing that made me think Mr and Mrs S were likely to have been given a guarantee by the Supplier that the Allocated Property would be sold at a specific time and, with it, their membership would end at that time too. I explained that from what I know about the Supplier's sales process and from the information I've seen, Mr and Mrs S were given a Standard Information Form (designed to give prospective members certain information about membership) that explained that the purchase agreement will expire when the Allocated Property is sold. And they would

have been given a Fractional Rights Certificate that explained the date that the Property will be put up for sale**.**

- I acknowledged that the sale of the Allocated Property looks like it could be postponed. But it could only be postponed by the Supplier for up to two years in limited circumstances. And if the owners of the Allocated Property (like Mr and Mrs S) wanted to postpone the sale, they could only do so if they all consented. So, I thought it was more likely that Mr and Mrs S were simply told that the Allocated Property would be *placed* for sale at a set time in the future and that the net sale proceeds would then be divided up, not that there was a guaranteed date on which the Allocated Property would actually sell. And as common-sense dictates that such a promise would've been an impossible one to keep, it seemed inherently unlikely to me that it would have been made. What's more, I said that as there's little evidence that the Supplier gave Mr and Mrs S a guarantee that the Allocated Property would be sold at the 19-year mark, ending their membership there and then, I didn't think membership was misrepresented by the Supplier for this reason either.
- The PR also said Mr and Mrs S were told they were buying an interest in a specific parcel of 'real property' and the product was an investment, but these statements weren't true because they didn't obtain an interest in real property. However, I said the membership plainly did have an investment element to it. And, I also said that 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 clearly constituted an investment in a share of the net sale proceeds of a specific property in a specific resort. And, I explained that while the PR might question the exact mechanism used to give her that interest, it doesn't change the fact that she did acquire such an interest.
- So, overall, I hadn't seen enough evidence to say that on balance, any alleged false statements of fact were made to Mr and Mrs S by the Supplier at the Time of Sale. And for this reason, I did not think it was unfair or unreasonable for the Lender to turn down Mrs S's Section 75 claim for misrepresentations.

Mrs S's complaint about the Lender being party to an unfair credit relationship under Section 140A of the CCA was made for several reasons, and I set out my responses to these in my provisional decision:

Mr and Mrs S say they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

- I acknowledged in my provisional decision that the sales process was likely lengthy, and the sales representatives were ultimately trying to be persuasive. But I didn't think her testimony sufficiently supported that any malicious or undue pressure was applied to them during the sale, such as to cause them to buy something they otherwise wouldn't have done.
- I did not have concerns regarding the Supplier's other sales practices the PR said were prohibited under the CPUT Regulations, such as offering limited time offers to customers. I noted from Mrs S's testimony that they were aware they could decline to purchase and that they said they did so at various points before changing their mind.
- I also noted that they were given a 14-day cooling off period. I acknowledged that Mrs S had said that since the documents were posted to their home, they didn't see the information about the 14-day cooling off period until after it had elapsed. But, I noted in her testimony Mrs S had said she was already aware during the sales process of such a period, albeit that she couldn't remember whether she already knew this from life experience, whether she had seen it in the documents they were given, or if they had been told this by one of the sales agents. Regardless of how

they came to know this, it seemed they were aware of it, and I said I couldn't see that they subsequently attempted to cancel the purchase within the 14-day cooling off period.

The PR also alleged that at the Time of Sale, the Supplier marketed and sold Fractional Club membership to Mr and Mrs S as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And this was also something which rendered the credit relationship between Mrs S and the Lender unfair to her under Section 140A.

- I explained that Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), prohibited the Supplier from marketing or selling the membership as an investment.
- Overall, based on the evidence available, I provisionally concluded that 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 was 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 thought the evidence suggested she and Mr S would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I did not think the credit relationship between Mrs S and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

I also noted in my provisional decision that the PR had raised various points in relation to the provision of information at the Time of Sale. They said Mr and Mrs S weren't given a copy of the Information Statement prior to entering into the purchase agreement, or if they were, they didn't have adequate time to review it.

- I explained that I'd seen a copy of the Information Statement for Mr and Mrs S's sale and it is signed by them, in the same way as all the other sales documentation they received at the Time of Sale. So, I thought it was likely they did receive it. And, that it didn't seem likely to me that they were given this document at a different time to the other sales documentation (about which there was no such allegation). And in any event, I noted no further detail had been provided by Mr and Mrs S as to when this document was provided in the sales process or why that didn't provide sufficient time to review it. Or, why, had they been given time to review the document they would have done anything differently, or why this made the credit relationship between Mrs S and the Lender unfair to her.

The PR also said Mrs S did not receive an adequate or transparent explanation as to the features of the agreement which may have made the credit unsuitable for her or have a significant adverse effect which she would be unlikely to foresee, especially given the length of the term, her age and the high interest rate. And, they said the risks Mr and Mrs S faced in relation to the rules governing the sale of the Allocated Property were not properly explained.

- In my provisional decision I said that the PR hadn't explained what the particular risks or features are that they were referring to here, or why these would have had an adverse effect on Mrs S. They also hadn't described what they feel should have been explained or what information should have been given about these points that wasn't. I noted they'd mentioned the length of the loan, Mrs S's age and the interest rate as well as the 'true effect' of the rules governing the sale of the Allocated Property, but hadn't given any reason as to why these are unfair in this particular case, or why these caused the credit relationship to be unfair.
- So, while I acknowledged it's possible the Supplier didn't give Mr and Mrs S sufficient information, in good time, on the various aspects of their membership in order to satisfy its regulatory responsibilities at the Time of Sale, taking this into account

alongside everything else provided, I hadn't seen enough to persuade me that this rendered Mrs S's credit relationship with the Lender unfair to her.

Mrs S also said the Lender didn't complete a proper affordability assessment in relation to the loan she took out.

- I explained that the Lender had said a credit check was done but hadn't provided any evidence of this or what the relevant check(s) showed. But, I explained that even if no affordability assessment or check was carried out, or these weren't done properly, I was not currently persuaded it makes a difference in this case. The reason I said this was that there had been no evidence provided by Mrs S that the loan was actually unaffordable for her at the Time of Sale. I acknowledged how her circumstances have changed, both personally and regarding her employment status since the Time of Sale, and noted that what Mrs S had said in this regard indicated that the loan may have become difficult for her to afford a couple of years after submitting her complaint to our Service, due to changes in personal circumstances which couldn't have been known at the Time of Sale. I explained that I empathised with what Mrs S had told us and the situation she is in. But, I explained this doesn't automatically mean the loan was unaffordable for her at the Time of Sale and this is ultimately what I have to consider in relation to this particular complaint. I explained I would review any further information or evidence provided by Mrs S in response to this provisional decision about her circumstances at the Time of Sale.
- But, on the basis of the evidence and information I had currently, I said that even if reasonable and proportionate affordability checks weren't completed by the Lender at the Time of Sale, I had to consider what difference it would have made to the Lender's lending decision if such checks had been carried out i.e., would such checks more likely than not have shown that Mrs S was likely to sustainably repay what she was being lent. And as I hadn't seen anything to suggest the loan wasn't affordable for her, it followed that I couldn't say the Lender's decision to lend to her caused an unfairness that requires a remedy in this case.

Mrs S also said they made no use of their holiday rights and there has been a lack of availability.

- I said it's unclear why she feels this causes an unfairness in the relationship between her and the Lender, particularly since she didn't seem to be alleging any misrepresentation was made by the Supplier in relation to availability of resorts or holidays. But, in any event, I explained I could see from the information provided that Mr and Mrs S did make a booking for July 2016 which they were intending to take, but they ended up cancelling the holiday due to a family bereavement. And, I could also see that they were offered a booking in February 2017 in Malaga, but by their own admission, she only didn't go on this holiday as they weren't happy with the temperature that an internet search said that particular area would be at that time. I noted that they said they then never attempted to make another booking. I explained it was therefore difficult to see that this caused an unfairness in the credit relationship between Mrs S and the Lender which requires a remedy.

Lastly, the PR said the duration of the scheme and the obligation to pay management charges for that duration are unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

- I said that even if I were to find that some of these terms may go against the requirements of the UTCCR it seemed unlikely to me that they led to any unfairness in the relationship between Mrs S and the Lender for the purpose of Section 140A. I

explained that as the Supreme Court decision in *Plevin* v *Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of Section 140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. As a result, I didn't think the mere presence of a contractual term that was/is potentially unfair was likely to lead to an unfair credit relationship unless it had been applied in practice. And as I couldn't see any evidence that the terms in question had actually been operated unfairly against Mr and Mrs S during their time as members, I didn't think they gave rise to an unfair relationship under Section 140A of the CCA.

So, I provisionally decided not to uphold the complaint as I did not think that the Lender acted unfairly or unreasonably when it declined Mrs S's Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with Mrs S 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 could see no other reason why it would be fair or reasonable to direct the Lender to compensate Mrs S.

The Lender responded to my provisional decision and confirmed they had nothing further to add. The PR also responded and provided further comments that they wished to be considered in relation to the alleged breach of Regulation 14(3) of the Timeshare Regulations.

The legal and regulatory context

As I explained in my provisional decision, 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').

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.

I want to reiterate 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.

As mentioned above, the further comments the PR has provided relate to whether membership was sold and/or marketed to Mr and Mrs S as an investment at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And, whether any such breach rendered the credit relationship between Mrs S and the Lender unfair.

Neither party has provided any new evidence in relation to the other complaint points I addressed in my provisional decision. So, I don't believe there is any reason for me to reach a different conclusion on those other points from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion in relation to those other points.

So, I will focus here on those points which appear to remain in dispute, those being whether the membership was sold to Mr and Mrs S as an investment, in breach of Regulation 14(3) of the Timeshare Regulations; and if so, whether that breach rendered Mrs S's credit relationship with the Lender unfair to her under Section 140A of the CCA.

In their further comments in response to my provisional decision, the PR has referred to various training and sales materials used by this Supplier, and they say, in summary, that they think this means the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale. They also said they think the investment element of the membership was important to Mr and Mrs S's purchasing decision and therefore the credit relationship was rendered unfair to Mrs S as a result.

I've considered what the PR has said, but it hasn't persuaded me that this complaint should now be upheld. I'll explain why.

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."[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):

"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.

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."

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.

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

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 as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs S 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 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.

But with that said, I recognised previously, and continue to do so, that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And, as I did previously, 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.

Nonetheless, it is not necessary to make a formal finding on that particular issue because, as I said in my provisional decision, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I remain unpersuaded that makes a difference to the outcome in this complaint anyway.

This is because even if the Supplier had breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, this is not the end of the matter or where the assessment of unfairness ends. And, I must stress here that it is for me to determine this complaint on its individual facts and circumstances – making a decision as to what is, in my opinion, fair and reasonable in light of them.

Was the credit relationship between the Lender and Mrs S 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 still seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs S 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 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) led her and Mr S to enter into the Purchase Agreement and her into the Credit Agreement is an important consideration.

The PR hasn't provided any new evidence to support their argument here. And, as I explained in my provisional decision, in Mr and Mrs S's first witness statement (which remains, in my view, the best evidence I have of what they remember of the sales process), there was no suggestion that they were induced into the purchase on the basis of it being an investment from which they would make a financial gain. Again, if the investment element of the membership was an important motivating factor for their purchasing decision, I'd have expected that to have been mentioned in their original witness statement from the time of making the original complaint.

I again acknowledge that Mr and Mrs S have said in their second witness statement that they went ahead with the purchase based on it being an investment, but this statement was only provided following our Investigator's view, several years after the original complaint was made. And, it was drafted after the judgment was handed down in *Shawbrook & BPF v FOS*. So, ultimately, I'm unable to place much weight on it.

What Mr and Mrs S have described in their original witness statement is that during the sales process they started to think they '*really did deserve more holidays*' and also that '*a large part*' of the decision to purchase was so that they could finish the lengthy sales process and leave.

And, as I noted in my provisional decision, having taken the opportunity to set out why they're unhappy with their membership now and the reasons for wanting to relinquish it, Mr

and Mrs S have referred to the increasing maintenance fees and that the product no longer works for them in terms of using it for holidays due to changes in their personal circumstances which have taken place in the years since the purchase.

Based on this evidence, given in Mr and Mrs S's own words, I don't think the share in the Allocated Property was an important and motivating factor when they decided to go ahead with their purchase at the Time of Sale. And with that being the case, having weighed up everything that has been said and/or provided by both sides throughout this complaint, I am not persuaded that the investment potential of Fractional Club membership was material to the purchasing decision Mr and Mrs S ultimately made.

In other words, given the facts and circumstances of this complaint, I am not persuaded on the balance of probabilities that Mr and Mrs S would have made a different purchasing decision to the one they made at the Time of Sale whether or not the Supplier breached Regulation 14(3) of the Timeshare Regulations. And for that reason, I remain satisfied that the credit relationship between Mrs S and the Lender was not rendered unfair to her, even if the Supplier had breached the relevant prohibition.

Conclusion

Given the facts and circumstances of this complaint, and for the reasons I set out above, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs S's Section 75 claim. And, I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement and related Fractional Club Purchase 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. So, I do not uphold this complaint.

My final decision

I do not uphold Mrs S'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 S to accept or reject my decision before 19 December 2024.

Fiona Mallinson
Ombudsman