DRN-5159490

The complaint

Ms K'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 claims under Section 75 of the CCA.

I recognise that Ms K purchased the timeshare with other family members. But, the complaint is only in Ms K's name as only she is named on the Credit Agreement so for clarity, I'll only refer to her throughout.

What happened

Ms K purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 27 June 2017 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £25,005 (the 'Purchase Agreement'). But after trading in her existing timeshare, she ended up paying £14,475 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Ms K more than just holiday rights. It also included a share in the net sale proceeds of a property named on her Purchase Agreement (the 'Allocated Property') after her membership term ends.

Ms K paid for her Fractional Club membership by taking finance of £14,475 from the Lender in her sole name (the 'Credit Agreement').

Ms K – using a professional representative (the 'PR') – wrote to the Lender on 17 May 2022 (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

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

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

Ms K 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 Ms K.

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

The Letter of Complaint set out several reasons why Ms K 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. She did not receive a copy of the Information Statement prior to entering into the Purchase agreement or, if she did, she didn't have adequate time to review it.
2. The contractual terms setting out (i) the duration of her Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of her membership were unfair contract terms under the Consumer Rights Act 2015 (the 'CRA').
3. She was pressured into purchasing Fractional Club membership by the Supplier.
4. 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.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. No adequate explanation was given 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, high interest rate and total charge for credit.

The PR also raised the following, more general, concerns with the Fractional Membership:

1. There was a lack of availability.
2. The standard of accommodation was poor and was different to what had been shown at the Time of Sale.
3. There was a lack of exclusivity.

The PR referred the matter to the Financial Ombudsman Service at the same time as the Letter of Complaint.

The Lender was provided with the opportunity to look into the complaint but ultimately did not issue a final response letter within the eight weeks timeframe required by the regulator.

So, the complaint was assessed by an Investigator at the Financial Ombudsman Service who, having considered the information on file, rejected the complaint on its merits.

Ms K 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 dated 4 November 2024. In that decision I said:

"***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 Ms K 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 Ms K at the Time of Sale, the Lender is also liable.

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 Fractional Club membership had been misrepresented by the Supplier because Ms K was told that she was 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. Ms K'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 she acquired such an interest.

Ms K also said she was told the Fractional Club membership was an investment, when that was not true. But, for reasons I'll go on to explain below, Ms K's membership plainly did have an investment element to it.

Regarding the rest of the Supplier's alleged pre-contractual misrepresentations, Ms K also said she was told that Fractional Club membership had a guaranteed end date when that was not true. The more general concerns she's raised about exclusivity and the standard of accommodation also appear, on my reading of them, to be allegations of misrepresentation as Ms K suggests promises were made in relation to these points about the membership at the Time of Sale which have turned out not to be true.

While I recognise that Ms K has concerns about the way in which her Fractional Club membership was sold, I'm not persuaded that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons she alleges. And I say that because beyond the bare allegations, little evidence has been provided to support them, including in Ms K's testimony about what happened at the Time of Sale.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Ms K 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 Ms K any compensation for the alleged misrepresentations of the Supplier. 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 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 Ms K 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.

As outlined above, one of Ms K's more general concerns about Fractional Club membership was the availability of holidays which, on my reading of what she's said, suggests that she considers the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. So, although not expressed in those exact terms, I think this is best addressed as an allegation of a breach of contract.

Ms K says that she could not holiday where and when she wanted to. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. And I'm aware that some of the standard sales paperwork given to prospective members states that the availability of holidays was/is subject to demand. I accept that she (and her family) may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Ms K any compensation for a breach of contract by the Supplier. 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 Ms K 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 Ms K also says 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 Ms K 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 Ms K'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.

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

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 Ms K 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 Ms K and the Lender.

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

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

They include the allegation that the Supplier misled Ms K and carried on unfair commercial practices which were prohibited under the CPUT Regulations including the same reasons they gave for her 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 Ms K. 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 Ms K was actually unaffordable before also concluding that she lost out as a result, and then consider whether the credit relationship with the Lender was unfair to her for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Ms K. If there is any further information on this (or any other points raised in

this provisional decision) that Ms K wishes to provide, I would invite her to do so in response to this provisional decision.

Ms K says that she was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that she may have felt weary after a sales process that went on for a long time. But I don't think the testimony provided sufficiently supports that any malicious or undue pressure was applied to her during the sale, such as to cause her to buy something she otherwise wouldn't have done.

In terms of a description of the conversation(s) which took place which Ms K says put her under pressure, she has said they were asked questions about their employment, what kind of holidays they liked to take and how often. And they were given a lot of information.

Ms K doesn't describe any further exactly what was said during these conversations, apart from that she was asked questions about their lives and finances, as well as being given a lot of information, which isn't unusual or inappropriate for such a purchase. So, from the evidence provided, whilst I accept the sales process was lengthy, I'm not sufficiently persuaded the sale was so pressured it caused her to buy something she otherwise wouldn't have done, nor do I think this created an unfair relationship that requires a remedy.

I note that, in my view, the main reasons Ms K says she's unhappy with the membership relate to the availability and exclusivity of holidays and the quality of the accommodation. So, it would seem likely that she made the purchase due to wanting to take holidays, rather than because she was pressured into it.

She was also given a 14-day cooling off period and she has not provided a credible explanation for why she did not cancel her membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Ms K made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

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

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

The Lender does not dispute, and I am satisfied, that Ms K's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But PR says 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.

Ms K's share in the Allocated Property 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 Ms K 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.

I'm aware from the paperwork usually provided to prospective members that this Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms K, 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, usually disclaimers in the paperwork provided at the Time of Sale that state that Fractional Club membership was not sold 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 membership as an investment. And, given this along with 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, I accept that it's possible that Fractional Club membership was marketed and sold to Ms K as an investment in breach of Regulation 14(3).

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

Was the credit relationship between the Lender and Ms K 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 Ms K 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 Ms K, 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 to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

No witness statement from Ms K was provided at the outset of the complaint, but the Letter of Complaint seems to reflect her recollections at that time. I acknowledge that Ms K has now sent a witness statement, drafted in December 2023 and I've taken this into account too. But, I don't place as much weight on that as I do on the Letter of Complaint, as that was drafted much closer to the Time of Sale and therefore is in my view more likely to be an accurate reflection of Ms K's recollections, given the way memories can change over time. I also think that given when the witness statement was drafted, there is a risk this has been coloured by the judgment given in Shawbrook & BPF vs FOS.

It's possible Ms K was interested in both holidays and the investment element, which wouldn't be surprising given the nature of the product at the centre of this complaint. But, even if she was, having taken the opportunity to set out what affected her enjoyment of the Fractional membership and her reasons for wanting to relinquish her membership, Ms K did not mention the investment potential of the membership. Instead, in the Letter of Complaint, she said she was unhappy with availability, particularly in relation to availability during school holidays as they have children of school-going age. The letter said (my emphasis): "They say that if they had been told this at the presentation, <u>they never would have bought the product</u>, as the whole idea was that they would have somewhere to go on holidays with the children". Ms K also said she was unhappy with the quality of the accommodation they received as it did not have a large balcony, or hot tub and was "quite dingey", and that she was unhappy with the lack of exclusivity. So, in my view, her purchase was largely motivated by the prospect of holidays, rather than the investment element.

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 Ms K'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 Ms K 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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Ms K when she purchased membership of the Fractional Club at the Time of Sale. But she and the PR say that the Supplier failed to provide her with all of the information she needed to make an informed decision.

The PR also says that the contractual terms governing the duration of Fractional Club 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)

Ms K says 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 Ms K and the Lender unfair to her, I'd have to see that the term was unfair under the CRA and that term was actually operated against Ms K in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Ms K, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (Link Financial v Wilson [2014] EWHC 252 (Ch)) 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 Ms K have led to any unfairness in the credit relationship between her 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 Ms K, let alone unfairly. The PR hasn't explained why exactly they feel 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 Ms K in any event.

The provision of information at the Time of Sale

Ms K also says that she wasn't given adequate time to review the standard Information Statement before entering into the Purchase Agreement. But, from what I've seen, she was given this document to review at the same time as all of the other sales documentation.

The letter of complaint also says Ms K wasn't given a transparent explanation as to the features of the loan agreement which may have made it 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 high interest and total charge for the credit provided.

But the PR hasn't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Ms K. They also haven't described what they feel should have been explained or what information should have been given that wasn't. They've mentioned the length of the loan, her age and the interest rate but haven't given any reason as to why these are unfair in this particular case or why these cause the credit relationship to be unfair.

So, while it's possible the Supplier didn't give Ms K 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 Ms K's credit relationship with the Lender unfair to her.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Ms K 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 Ms K 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."

So, for the reasons set out above, my provisional decision was that Ms K's complaint ought not to be upheld.

Neither party responded to my provisional decision, nor did they provide any further evidence or comments they wished to be considered.

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 neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion 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.

My final decision

For these reasons, I do not uphold Ms K's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 18 December 2024.

Fiona Mallinson
Ombudsman