DRN-3717661

The complaint

Mr L says Clydesdale Financial Services Limited, trading as Barclays Partner Finance (referred to throughout as "BPF"), unfairly turned down his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("CCA") – as amended by the Consumer Credit Act 2006 – in relation to a timeshare he purchased in September 2011 (the "Time of Sale").

Background to this complaint

Mr L was an existing customer of Club La Costa Leisure Limited (referred to throughout as "CLC") having purchased a Trial Membership in June 2011. The Trial Membership consisted of five weeks holiday accommodation to be taken in CLC's portfolio of resorts within a period of 34 months.

On 14 September 2011, Mr L traded in his Trial Membership for a full membership in CLC's Vacation Club ("The Membership") and 1,000 points. The total cost of The Membership was £14,694, which was paid for by way of trading in Mr L's Trial Membership and taking a loan for the balance with BPF. Mr L also refinanced an earlier loan, so in total he borrowed £12,110 and the loan was set to run for 15 years. The total amount to be repaid if the loan ran to term was £32,677.20.

Mr L was also required to pay fees and charges for The Membership to CLC. In 2012, Mr L paid a Vacation Club Membership Fee of €267.18 and Vacation Club Points Rights Dues of €895.70 (total €1,162.88). Both these fees continued to be levied annually, increasing each year. By 2016, Mr L's Vacation Club Membership Fee was €320.39, and the Vacation Club Points Rights Dues was €1,054.60.

Mr L has utilised the membership on several occasions including a promotional holiday in June 2012 and several further holidays in August 2012, August 2015 and August 2016.

In November 2016, Mr L (using a professional representative) made a claim against BPF under Section 140A of the CCA (the "Letter of Claim"). Several reasons for the claim were given and it isn't practical to repeat them all here. But in summary, the Letter of Claim said the following:

- CLC (on BPF's behalf) did not conduct a proper assessment of Mr L's financial position and ability to repay the loan. It cited the Finance and Leasing Association's ("FLA") Code, s.140A and case law when concluding that a "proper assessment" was not carried out to determine if Mr L could afford the loan.

- CLC applied *"considerable pressure"* on Mr L to agree to The Membership and connected finance during a sales presentation which lasted for several hours. Mr L says he was told that if he wanted to enter a contract with CLC he had to do so then and there, without taking time away to think it over. Mr L recalls the paperwork taking very little time to complete and believes various facts were "skipped over", including the rate of interest which was applicable to the loan.

- CLC breached EU law.

- Certain representations were made to Mr L which he says turned out to be untrue. Specifically, he says he was told he would be able to book holidays during the summer holidays and that he could end his membership at any time as CLC would buy back his points. After purchasing, Mr L says he found he was unable to book for the dates requested and *"certainly not in the school holidays"* and he has now been told that CLC does not offer a buy back scheme.

- Mr L says he is now saddled with significant maintenance fees, which continue to increase, and he has no prospect of booking any holidays.

- Mr L's representative also asked for further information, including confirmation about the level of commission paid between BPF and CLC.

In its conclusion, the Letter of Claim states CLC is in breach of its contract between itself and Mr L in that CLC did not conduct a proper assessment of Mr L's financial position and ability to repay the loan, and secondly, applied considerable pressure to him to procure his agreement to the loan and, finally, breached EU law. Mr L's representative set out that he is entitled to seek damages and compensation from BPF.

BPF responded to the Letter of Claim on 15 December 2016. It treated Mr L's claim under s.140A as a complaint and issued a response – considering both s.75 ands.140A of the CCA. It didn't agree there was a breach or misrepresentation by CLC (under s.75 of the CCA) and it also didn't agree with Mr L's arguments that there was an unfair relationship under s.140A of the CCA. In summary, it said:

- Mr L was under no obligation to upgrade his Trial Membership during the presentation in September 2011 and confirms he was offered a 14-day cooling-off period in the contractual agreement and in a separate *"notice of withdrawal form".*

- Mr L chose to take out the loan with BPF. He was under no obligation to do so and could have funded the timeshare through other means if that had been his preference.

- Full Pre-Contract Information was provided, reviewed and accepted based on the information Mr L provided. All pertinent information given, and documents presented at the point of sale are clear and concise and confirm all aspects of the loan. These documents were signed off by Mr L as being read and understood and again, a 14-day cooling-off period was offered by BPF.

- The finance offered was not pre-approved. Mr L had a substantial salary of £54,000 per annum at the application stage. It was deemed that Mr L sufficiently met BPF's lending criteria.

- Availability of the holidays is on a first come first served basis and a member can reserve holidays up to 24 months in advance. Mr L was offered accommodation in August 2014, travelled in August 2015 and again in August 2016. So BPF disagrees with the suggestion that Mr L has been unable to find availability during school holidays. It also highlighted Clause 4 (initialled and signed by Mr L) in the Member's Declaration which states CLC has no resale program.

- It found the representative's arguments relating to an unfair relationship to be generic, lacking points specific to Mr L.

- BPF considers it is under no legal or regulatory obligation to disclose payment or receipt of any commission in relation to Mr L's purchase.

Unhappy with the outcome of BPF's investigation into his claim, Mr L brought a complaint to our service that BPF had unfairly turned down the claim. In addition to the points raised earlier, Mr L's representative argued:

- The documentation between CLC & Mr L makes it clear that CLC is Mr L's agent and as such, there is a fiduciary relationship between CLC, as agent, and Mr L (citing the test set out in *Bristol & West Building Society v Mothew [1998] 1 Ch 1.).* It argues that CLC is under a duty to Mr L not to make a secret profit, as this would constitute a breach of fiduciary duty and could give rise to other issues and claims. It argues that if CLC made a secret profit, this is intrinsic to Mr L's claim under s.140A of the CCA.

- It cited *Wilson v Hurstanger Ltd [2007] EWCA Civ 299* and argues the court ruled that an unsophisticated buyer should be provided with a statement of the amount of commission the broker is due to receive from the lender so they can be aware of any potential conflict of interest. Mr L was not provided with the details of the commission received nor was he told commission would be paid (which wouldn't be sufficient following the ruling in *McWilliams v Norton Finance (UK) Limited (in liquidation) [2015] EWCA Civ 186).* This therefore creates an unfair relationship under s.140A of the CCA.

- It also references the Office of Fair Trading's (referred to as "OFT" throughout) guidance for credit intermediaries (November 2011). It is argued that the OFT questioned a broker's fitness to hold a CCA licence if the broker doesn't make the borrower aware of a commission fee, or other form of renumeration, payable by the creditor when appropriate to do so. It is said that this in turn impacts on the impartiality of CLC, therefore making the relationship between BPF and Mr L unfair under s.140A of the CCA.

Mr L also contacted our service directly and said that the reality of being a CLC member is not how it was described to him and has not lived up to the expectation given at the point of sale. He said there was no availability during school holidays despite this being promised and very important to him. He also explained that at the start of his membership, CLC gave extra points but these were soon "eaten up" as holiday costs (and therefore the points attributed to them) increased. Mr L explained that he is in arrears with his maintenance fees and he doesn't feel there is any way he can get them up to date.

The complaint was then looked at by an investigator who, having considered everything that had been said and provided so far, wasn't persuaded that there was a reason to uphold it. In summary he said:

- BPF considered and responded to a s.75 CCA claim which the investigator highlighted Mr L and his representatives did not raise. However, the investigator concluded that the nature of some of the points raised align with a claim for misrepresentation under s.75 of the CCA. So, he thought BPF was right to consider it.

- He had not been provided with documentation detailing the sales process CLC followed in Mr L's specific sale but he had reviewed other CLC documentation which he considered to be indicative of how CLC sold its products around the time Mr L made his purchase. In reaching his opinion, he noted Mr L had signed documents which detail that holidays are subject to availability and that CLC does not operate a resale programme. The investigator also highlighted that Mr L had travelled during school holidays on several occasions. So, he didn't think The Membership was misrepresented to Mr L and concluded that BPF hadn't acted unfairly in declining Mr L's claim for misrepresentation.

- In relation to Mr L's allegation of pressure, the investigator agreed it's likely the sales agents would continually highlight the positives of the product in the face of concerns and objections by the consumer to obtain a sale. But in the absence of any detail from Mr L about what it was that made him feel pressured during the sale, he wasn't persuaded Mr L felt he had no option but to go ahead with the product. And had Mr L been pressured into taking out The Membership, when he otherwise didn't want to, the investigator found he was given information about the right to withdraw from the agreement within 14 days and given a pre-populated form to complete if he wanted to take this course of action. The investigator felt this could have mitigated any potential unfairness.

- The investigator explored how Mr L could exit from the contract given his arguments that he was tied into The Membership, with fees that continue year on year, whilst he is unable to benefit or exit from it. The investigator concluded that there were several provisions within the contractual information which gave details on how to exit the agreement – specifically clauses 7,12 and 43 in the Articles of Association.

- Clause 43 addressed how the association could be wound up. However, as this related to winding up the association as a whole, he concluded this gave Mr L limited practical help to exit The Membership.

- The investigator thought Clause 7 was more relevant to Mr L's concerns. Clause 7 states the member will cease to be a member upon death or by giving notice under clause 7.2. Clause 7.5 allows for any outstanding fees and charges to be claimed from the member or his estate. But it is not made clear whether the member needed to pay all outstanding charges *before* they were eligible to terminate their membership by giving notice, or whether they could terminate and remain liable to pay any applicable fees and charges at a future date.

- The investigator thought it would be contrary to common sense that a member could be deprived of his or her ability to terminate by the fact of having any amount, however small, outstanding when notice to terminate is given. He also thought such a rule would set a trap for any consumers who fell into financial difficulties and needed to terminate their membership for that reason. He didn't think it likely that the parties intended to contract on terms that meant the less able a consumer was to meet the annual fees and charges due from members, the more difficult it would be for them to relinquish their membership.

- So, he interpreted clause 7.2 as allowing members to terminate an agreement with fees outstanding but their liability to pay any fees and charges, up to and including the full year fees for the year in which termination occurs, would be maintained. He asked BPF to confirm if his interpretation was correct and noted that this information was not set out in the Information Statement provided to Mr L at the time of sale.

- The investigator found clause 12, as it was at the time of sale, allowed for Mr L to be stripped of his membership rights and potentially his membership overall, essentially at CLC's discretion, if he failed to pay any of the charges due. A member could therefore lose all their membership rights if there was a small amount outstanding.

- In December 2015, several changes were made to the documents governing the contract. An indefinite *"suspension"* provision was added in circumstances where a member was in default (clause 12.2.7). There were also amendments to the Scheme Regulations ("8. PROCEDURES FOR REINSTATEMENT") and Article 4.4 in the Articles of Association (which now says that a member will lose voting rights or the opportunity to use The Membership until they are reinstated). The investigator

concluded that the changes were to remedy any potential unfairness that the original clause 12 could have created.

- The investigator didn't think that Article 4.4 was clear on whether fees and charges continue to accrue during suspension – as believed by Mr L. He concluded it would clearly be unfair if they did and found this contrary to the purpose for which the suspension provision was put in place in December 2015. He also noted that although Mr L's membership was suspended, CLC had not applied management charges or fees since his suspension. So, he thought the correct interpretation of these terms was that the fees and charges didn't continue to accrue after suspension and as such, he didn't think these terms operated in the way Mr L had suggested or that they created an unfair relationship.

- Again, the investigator asked BPF to confirm with CLC if his interpretation of the terms was correct.

- The investigator didn't agree that CLC was acting as Mr L's agent and didn't think there was a fiduciary relationship between the two parties. He also thought that if paid, the amount of commission charged was unlikely to be more than 10%. So, he didn't think that the courts would agree that non-disclosure and payment of commission at this level would have created an unfair relationship.

- In respect of Mr L's complaint that the loan was unaffordable, the investigator noted that Mr L had kept up with his regular monthly payments and then settled the loan in full after two years. And without any further information from Mr L as to why he thought the loan was unaffordable, he wasn't persuaded to uphold the complaint on this point.

BPF, after discussions with CLC, said it could not entirely agree with the investigator's analysis of CLC's contractual terms. However, it did accept that the practical reality for all customers, including those in financial difficulties, did align with the approach set out by the investigator. So, it did not consider it helpful to discuss the points any further.

It confirmed that if a management fee is not paid, then The Membership would be suspended, and fees would not continue to accrue – as thought by our investigator.

BPF set out that members who had been suspended following default in their membership fees, would be able to make payment of no more than one year's management fees to then terminate their timeshare. This was a departure from the investigator's conclusion that a member could terminate without payment.

Overall, BPF did not agree with the suggestion that timeshare customers like Mr L were trapped in their timeshare contracts, unable to use the product and with increasing amounts of outstanding membership fees.

Mr L and his representatives disagreed with the investigator's opinion without providing additional reasons. They asked for the case to be reviewed by an ombudsman. As an informal resolution of this complaint wasn't possible, it was passed to me for a decision.

I issued a provisional decision not upholding the complaint in August 2022. In summary, I reached the following provisional conclusions:

- A number of Mr L's complaint points give rise to a s.75 CCA claim, so I was satisfied BPF were right to consider it as such. However, I was not persuaded The Membership was misrepresented to Mr L, so I thought it was fair for BPF to decline

the claim.

- I was not persuaded Mr L purchased The Membership because he was pressured to do so. Instead, I thought it was more likely that Mr L went ahead with this purchase because he was interested in taking out the product.

- In the event commission was paid, I didn't think it was at a level which would have influenced Mr L's decision making when weighing up this purchase. And I didn't think it was likely the courts would conclude there was an unfair debtor-creditor relationship on this point.

- I was not persuaded that the loan was unaffordable for Mr L and I though the interest payable on the loan was set out clearly on the loan agreement.

- I had not seen any evidence to suggest BPF both breached EU law and that in turn, this led to an unfair debtor-creditor relationship.

I invited both parties to provide me with any further comments or evidence they wished me to consider before I issued my final decision.

BPF responded to my provisional decision to say it had nothing further to add.

Mr L's representative chose not to make any further submissions specific to Mr L or his original complaint. Instead, it submitted a report written by counsel which sets out that the submissions contained within, are *"generic…and… not for individual complainants…"*

As the deadline set for both parties to respond has passed, it is now appropriate for me to issue my 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.

In doing so, I am required by DISP 3.6.4R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

'(1) relevant:

(a) Law and regulations;
(b) Regulators' rules, guidance and standards;
(c) Codes of practice; and

(2) (where appropriate) what I consider to have been good industry practice at the relevant time.'
I also focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read everything that has been supplied to me, I may not address every point that has been raised.

When evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Having done all of that, I don't think this complaint should be upheld. I realise this will be disappointing for Mr L, but I hope he will understand why I have come to this conclusion.

I will note here that Mr L's representative chose not to submit a response to my provisional decision that was tailored to his complaint and the circumstances of his individual sale. Instead, it submitted a report commission for another professional representative which is titled *"Generic submissions on behalf of complainants"* before going on to say in its introduction that the *"submissions are generic…and are not for individual complainants…"*

Such a submission is not particularly helpful, and it is not a method through which Mr L's representative can seek to increase the ambit of the complaint via factual generalisations.

However, as the representative deems this report to be relevant to Mr L's complaint, I will take it into account but only in so far as it discusses points that are of direct relevance to this complaint and my provisional decision.

As set out above and in my provisional decision, I have to take account the relevant law and regulations. So, I have set out below the legal and regulatory context that I think is relevant to Mr L's complaint.

The Legal and Regulatory Context

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006)

Mr L took out a restricted-use fixed sum loan agreement that was regulated by the Consumer Credit Act 1974. As a result, the purchase was and is covered by certain protections afforded to Mr L by the CCA – provided the necessary conditions were and are met.

Section 11: Restricted-use credit and unrestricted credit

> *(1) A restricted-use credit agreement is a regulated consumer credit agreement - …*
>
> > *(b) to finance a transaction between the debtor and a person (the "supplier") other than the creditor…*

Section 12: Debtor-creditor-supplier agreements

> *A debtor-creditor-supplier agreement is a regulated consumer credit agreement being - …*
>
> > *(b) 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…*

Section 19: Linked transactions

> *(1) A transaction entered into by the debtor or hirer, or a relative of his, with any other person ("the other party"), except one for the provision of security, is a linked transaction in relation to an actual or prospective regulated agreement (the "principle agreement/2) if which it does not form part if - …*
>
> > *(b) the principle agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principle agreement…*

Section 25: Licence to be a fit person

(2) *In determining whether an applicant for licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things) -*

(d) Evidence of the kind mentioned in subsection ("A)

(2A) That evidence is evidence tending to show that the applicant, or any of the applicants employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has -

(e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether lawful or not).

(2B) For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.

Section 56: Antecedent negotiations

(1) In this Act "antecedent negotiations" means any negotiations with the debtor or hirer - …

(c) conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or
(c), and "negotiator" means the person by whom negotiations are so conducted with the debtor or hirer.

(2) Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity…

(4) For the purposes of this Act, antecedent negotiations shall be taken to begin when the negotiator and the debtor or hirer first enter into communication (including communication by advertisement), and to include any representations made by the negotiator to the debtor or hirer and any other dealings between them.

Section 75: Liability of creditor for breaches of supplier

(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor…

Section 140A: Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with

any related agreement) is unfair to the debtor because of one or more of the following –

> *(a) any of the terms of the agreement or of any related agreement;*
> *(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
> *(c) 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).*

(2) In deciding whether to make a determination under this section, the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended…

Section 140B: Powers of court in relation to unfair relationships

(1) An order under this section in connection with a credit agreement may do one or more of the following –

> *(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);*
> *(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;*
> *(c) reduced or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;*
> *(d) direct the return to a surety of any property provided by him for the purposes of a security;*
> *(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;*
> *(f) alter the terms of the agreement or of any related agreement;*
> *(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.*

(2) An order under this section may be made in connection with a credit agreement only –

> *(a) on an application made by the debtor or by a surety …*

(3) An order under this section may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person.

(4) An application under subsection (2)(a) may only be made –

(a) in England and Wales, to the county court…

(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

Section 140C: Interpretation of ss 140A and 140B

(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to –

(b) transaction in relation to the main agreement or to a credit agreement within paragraph (a);

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Timeshare Regulations")

The relevant rules and regulations the supplier in this complaint had to follow were set out in the Timeshare Regulations. It is not my role to decide whether the supplier (which is not a respondent to this complaint) is liable for any breaches of these regulations. But they are relevant to this complaint as they signal the standard of commercial conduct reasonably expected of the supplier when acting as the creditor's agent in the sale of Mr L's timeshare product.

The Consumer Protection from Unfair Trading Regulations 2008 (the "CPUT Regulations")

The CPUT Regulations put in place a regulatory framework to prevent unfair business practices in the context of consumer protection. It is only since October 2014 that they imposed civil liability for certain breaches – as above, I am not deciding whether the supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint when considering Mr L's claim that the debtor-creditor relationship was unfair as they also set out the standard expected of the supplier when acting as BPF's agent in marketing and selling CLC memberships.

The Unfair Terms in Consumer Contracts Regulations 1999 (the "UTCCR")

These regulations protected consumers against unfair terms in standard term contracts, such as CLC Membership terms.

Resort Development Organisation Code of Conduct 1 January 2010 (the "RDO Code")

This code of conduct says it was designed to establish industry "best practice" standards and "complement and reinforce all applicable laws".

The RDO Code is relevant to this complaint when taking into account what I consider was good industry practice at the time.

Regulatory guidance and codes – Granting Credit

Furthermore, I have considered relevant regulatory guidance and codes relating to affordability – specifically when granting credit. Of particular note are the following:

- Finance and Leading Association *"Lending Code"* (June 2006)

- OFT *"General guidance for licensees and applicants on fitness and requirements"* (January 2008)

- OFT *"Irresponsible Lending – OFT guidance for creditors"* (March 2010, updated February 2011)

Relevant case law

In addition to the cases cited by Mr L's representative, I have considered the following:

- The Supreme Court's judgement in *Plevin v Paragon Personal Finance Ltd [2014]* ('Plevin') remains the leading case on unfair debtor-creditor relationships.

- The judgement of the Court of Appeal in the case of *Scotland & Reast v British Credit Trust Limited [2014]* gives helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.

- In *Deutsche Bank (Suisse) SA v Khan and others [2013]* Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.

- It was held by the High Court in *Patel v Patel [2009]* 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 relationship or otherwise the date the relationship ended.

- In *Link Financial v Wilson [2014],* a timeshare was financed by a restricted-use loan and a challenge was launched by the owner under Section 140A. The timeshare had been forfeited for non-payment of management charges under a clause that stipulated the following:

  "In the event of the Applicant failing to make any payment due within 14 days of being given written notice to that effect by the Vendor Company or on its behalf, the Vendor Company may, at the Vendor Company's option, rescind this Agreement whereupon all monies paid by the Applicant will be forfeited to the Vendor Company and the Vendor Company shall be under no further liability to the Applicant. Time shall be of the essence in respect of any payments due from the Applicant under this agreement."

  The judge held that the term was unfair for the purposes of the UTCCR and that the debtor-creditor relationship was unfair – such that the claimant should have been relieved from making any further payments under the loan agreement.

The above represents a non-exhaustive list of my key considerations under DISP 3.6.4 R.

The claim under s.75 of the CCA

As set out above and in my provisional decision, because of the way The Membership was financed, BPF can be held jointly and severally liable under s.75 of the CCA for a claim for breach of contract or misrepresentation that Mr L may have against the supplier.

Mr L didn't submit a s.75 claim to BPF however some of his complaint points are grounded in misrepresentation. So, BPF chose to investigate some of his complaint under the

provision of s.75. Having done so, it did not find that the product had been misrepresented to Mr L or that there had been a breach of contract.
I set out in my provisional decision that I thought BPF's decision to investigate part of Mr L's claim as a s.75 claim was reasonable in the circumstances.

I explained that for a claim for misrepresentation to be successful, Mr L would have to demonstrate that there was a representation of fact made to him by the supplier, that the representation was untrue and that the representation induced him to take out the membership.

Mr L made two key complaint points that could be deemed as falling within a claim for misrepresentation. The first, was that he was told he would be able to travel during the school holidays. Mr L has told us this was very important to him and influenced his decision to enter the contract. But since purchasing The Membership, he says he hasn't been able to travel during this time.

Mr L has not been able to give any detailed recollections to support what he says he was told about travelling during the school holidays. But even if I was to find that Mr L was told he would be able to use The Membership during the school holidays, this would not lead me to conclude the product was misrepresented to him. I say this because I have been provided evidence to show Mr L travelled during the UK school holidays on several occasions. So, I do not agree with his allegation that this was a false statement of fact or that he has been unable to use his membership during this time.

Mr L's second complaint point was that he had been told CLC would buy back his points should he wish to exit the membership. Again, Mr L has not provided any detail to support what was discussed during the point of sale that led him to believe this was a scheme CLC offered or how this influenced his decision to enter the contract. As this sale took place in person, I am unable to know the specifics of what was verbally discussed. Instead, I must weigh Mr L's testimony, limited as it is, against the other information and evidence that has been provided.

In doing so, I can see Mr L was provided with and signed a document during the sale that explained CLC did not run a buy back scheme. And while Mr L has said he found the paperwork stage of the sale to have been rushed, this was a one page document and Mr L had initialled each of the 17 bullet points to indicate he had read and understood its contents. If Mr L had been told CLC ran a buy back scheme and this was an important factor for him when deciding whether to go ahead with The Membership, I would have expected him to have at least queried why the relevant paperwork contained contradictory statements. Taking everything into account, I am not persuaded Mr L has shown that he has a valid claim for misrepresentation.

Overall, therefore, while I recognise Mr L and his representative have concerns about the way in which The Membership was sold by CLC, for the reasons I have set out above and those in my provisional decision, I don't think BPF's investigation and ultimate response to Mr L's claim under s.75 of the CCA was unfair.

The claim under s.140A of the CCA

Mr L's representative has raised several points as to why it feels a court would determine the relationship between Mr L and BPF to be unfair. Specifically, it has argued:

- Mr L was pressured into contracting by CLC;

- The commission paid was not disclosed, nor was Mr L told commission would be paid (in breach of CLC's alleged fiduciary duty);

- Mr L is unable to exit the contract due to increasing maintenance fees which he cannot afford to pay.

Was Mr L pressured into the purchase

In the Letter of Claim, Mr L's representative says he was subjected to a long and high-pressured sales process which lasted many hours. The Letter goes on to say Mr L was told he had to complete the purchase on the day in question and that he was not permitted to take time at the end to consider the purchase.

BPF hasn't disputed that CLC's sales presentations could be lengthy. And in my provisional decision I accepted Mr L may have felt worn down by a sales process that went on for several hours and is likely to have included sales methods that continually highlighted the benefits of the product in response to objections raised. I acknowledged that being told he had to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date may also have contributed to Mr L's feelings that the sale and sales environment had an element of pressure.

I set out that in thinking about whether CLC's actions amounted to a pressured sale such that Mr L felt he had no choice but to go ahead, Regulation 7 of the CPR is of assistance. To be considered an aggressive commercial practice, it must significantly impair the average consumer's freedom of choice using harassment, coercion or undue influence such as to cause the consumer to buy something they otherwise would not have done.

Having reconsidered all of the available evidence, and in the absence of any new commentary on this point that is specific to Mr L, I am not persuaded there is enough to suggest Mr L was harassed, coerced or unduly influenced into this purchase. Nor am I persuaded that Mr L purchased The Membership when he simply did not want to.

Mr L has provided very limited details about the sales process that took place. To allege that he was effectively given no choice he would need to have provided details about what was said and why he felt this way. He has said the presentation was long and he wasn't provided with refreshments, but this isn't the same as not being given a choice.

I've considered the information available about how CLC sold its timeshare products and trained its staff. Although not specific to Mr L's sale, I consider this provides some insight into how a normal sale would proceed. As I set out in my provisional decision, that there is notable emphasis placed on the benefits of the products and the sales representatives are encouraged to secure a sale on the day. Staff are also trained on overcoming the key objections a customer may make. I acknowledge that all of this may lead to some consumers finding it harder to say no to the purchase. However, the material does also highlight the need to treat customers fairly and not pressure customers into a purchase.

I explained in my provisional decision that Mr L's credit agreement details that he had 14 days to withdraw from the agreement (thereby cancelling the loan). He also had a 14-day cooling-off period to cancel the membership agreement. Having reviewed this case again, I can't see that Mr L tried to cancel or enquired about cancelling the purchase during the 14-day cooling-off period or that he let CLC know after the purchase that he had felt pressured. It doesn't appear Mr L raised his concerns around the sale until five years later. I find this

difficult to reconcile with an allegation that he only purchased the product because he felt he was left with no other choice.

While I accept a lower level of pressure might render the underlying credit agreement unfair, given a particular consumer's circumstances, I haven't seen anything that would suggest Mr L was vulnerable or more susceptible to undue pressure. The evidence I have, suggests its more likely Mr L chose to take out The Membership as he was interested in the holiday benefits it provided, having already taken out a trial membership offering similar benefits.

Overall, taking everything into account, I do not think there is sufficient evidence to say this was a pressured sale or that it is likely a court would find this led to an unfair relationship with BPF under s.140A of the CCA.

Commission

In its letter to this service, Mr L's representative argues that commission was paid from BPF to CLC without Mr L being informed. It argues this was a breach of the fiduciary duty CLC owed Mr L and it's likely that the courts would conclude this created an unfair relationship.

I do not agree that CLC owed Mr L a fiduciary duty. CLC were not acting as agents for Mr L but as the supplier of the contractual rights he obtained under The Membership. I am not persuaded it was CLC's role to make an impartial or disinterested recommendation or to give Mr L advice or information on that basis. Nor do I believe CLC did anything to give Mr L the impression that it was acting on his behalf rather than its own. Instead, CLC was acting to sell Mr L one of its products and broker the loan between Mr L and BPF. As a result, I'm not persuaded by the representative's argument on this point.

Notwithstanding that I don't think the relationship between CLC and Mr L was as his representative describes, it's clear the courts may (and have) concluded that the payment of undisclosed commission can create an unfair relationship between the parties (see Plevin).

As I said in my provisional decision, based on the information I have seen, the typical amounts of commission paid by BPF to suppliers like CLC was unlikely to be more than 10%, if at all[1]. I don't think the fact that BPF might have paid CLC commission was incompatible with its role in the transaction or unexpected. I also think its unlikely such a low amount would have affected Mr L's decision to purchase The Membership. And on that basis, I am not persuaded it is likely that a court would find that the non-disclosure and payment of commission created an unfair debtor-creditor relationship under s.140A of the CCA given the circumstances of this complaint.

Given neither party has submitted any comments or evidence specific to Mr L in response to my provisional conclusions on this point, I see no reason to depart from them.

The ongoing costs of The Membership and the right to exit

Mr L complains that his annual membership fees keep accruing (at an increasing rate) despite his membership being suspended and that he is unable to exit or benefit from it.

I set out in my provisional decision that Mr L was able to access The Membership until 2016 when it was suspended due to non-payment. And BPF has shown Mr L was able to go on holiday within CLC's portfolio several times. So, I thought Mr L's comments related specifically to when he decided he no longer wanted to continue with The Membership or

[1] Our service can accept information in confidence (so that only an edited version, summary or description is disclosed to the other party) where appropriate (DISP 3.5.8 (2)).

pay the annual maintenance fees and instead chose to be represented by a professional claims handler in 2016 and raise a claim to BPF.

I explained that Mr L's membership could be ended (outside the 14-day cooling off period) in several ways. The detail on how this happens is spread out across several different membership documents and isn't expressed in a particularly clear way. So, I thought it unlikely that it was made clear to Mr L, at the point of sale, how he could exit his membership, after the 14-day cooling off period had passed.

I have included an extract of my provisional decision which forms part of my final decision below:

"The "Information Document" states:

> *"Your Membership will start on the date shown on your Acquisition Agreement and expires automatically on the date specified on the Agreement, or when you no longer hold Point Rights, or when the Scheme ends whichever is earlier."*

Having reviewed the Acquisition Agreement, it does not set out an end date for Mr L's membership. So, I've reviewed the other documentation I have available which governs Mr L's membership. This includes:

- *Memorandum and Articles of Association (October 2010 and December 2015 update)*
- *Deed of Trust*
- *Scheme Regulations*
- *Scheme Rules*

It is not clear whether Mr L had access to this documentation before he took out his membership. But if he did, the combination of these documents adds up to around 40 pages, so I think its unlikely Mr L would've had the time during the sale to properly read and understand these terms.

I'll address the key provisions which relate to how Mr L's membership could end or pause, and on what basis below.

Articles of Association (October 2010)

Article 7 Cessation of Membership

7.1 A Member shall cease to be a Member:

7.1.1 when he ceases to be the registered holder of Point Rights in the Point Rights Register; or
7.1.2 on his death.

7.2 A Member may at any time within the current year withdraw from the Association provided the Member both gives written notice before 1st September of that year to the Association and pays all Membership Fees and Management Charges due including those for the current year.

7.3 …

7.4 Upon the Member ceasing to be a Member, neither he nor any of his successors executors, personal representatives, trustees or liquidators shall, have any claim upon or interest in or rights to the funds or other property of the Association.

7.5 The Association shall be entitled to claim from any Member or his estate any Management Charges and other sums due from him, together with Interest from the date upon which such amounts are due and payable until the date of payment in full.

Article 7.2 allows a member to withdraw from their membership by providing written notice and paying all membership fees due. But the investigator didn't think it was clear whether this article should be interpreted as saying that payment of any outstanding fees or charges is a pre-condition to termination. Or whether, upon giving notice, Mr L could terminate his membership with CLC and remain liable to pay any outstanding fees and charges.

In setting out his analysis, the investigator pointed out that Article 7.5 provides for CLC to claim for any management charges and other sums due from the member or his estate, suggesting there may still be a liability on a living member after they terminate. In other words, Article 7, when read as a whole, could be interpreted to allow for termination to occur even though the management fees and charges have not been paid in full.

The investigator thought that it would be contrary to common sense that a member could be deprived of his ability to terminate by the fact of having any amount, however small, outstanding when notice to terminate is given. He also thought such an unbalanced rule would also set a trap for consumers in financial difficulty. He thought it unlikely that the parties intended to contract on terms that meant the less able a consumer was to meet the annual fees and charges, the more difficult it would be for them to relinquish their membership.

So, the investigator concluded that on balance, Article 7.2 should be read as allowing Members to terminate their membership by giving notice and remaining liable to pay their Membership fees and charges up to and including the full year's fees for the year in which termination takes place. And, under Article 7.5, if those monies were not paid, the Association could then claim the fees and charges from the member or their estate.

Article 43 also applies to the termination of The Membership, so our investigator considered whether this would assist Mr L in ending his membership:

Article 43. Dissolution of Membership

43.1 The Association shall continue in existence until either:

(a) the year 2078 when a Special Resolution shall be voted on to continue the Association's existence for a further term of 80 years (and following that successive terms of 80 years) and unless a Resolution is passed (the Founder Member and any of its associated companies agreeing not to exercise its vote) the Association shall be wound up; or

(b) a Special Resolution is passed to wind up the Association.

So, there was also the potential that Mr L's membership could end in 2078 (if he were to live that long) or upon a "Special Resolution" winding up the Association. The intention of this article is to address winding up the Association as a whole. So, our investigator concluded it offered no real or practical application for Mr L as an individual member to end his individual membership.

In light of his interpretation of the applicable terms, the investigator set out that Mr L would continue to be a member until the earliest of the following:

1. *Giving his notice under Article 7.2;*
2. *His death; or*
3. *The Association being wound up in 2078 or at an alternative date if a "Special Resolution" was passed.*

In his assessment, the investigator also highlighted that 'Article 12 – Security' was relevant to the concerns raised by Mr L.

Below is an extract of Article 12, as it was at the time Mr L took out his membership in 2011:

" *12.1 Each Member shall be deemed to have assigned to the Association by way of security all his rights to and arising out of his Point Rights for the due and punctual performance by him of his obligations under these Articles.*

12.2 Should any debt due from a Member to the Association be due and payable but unpaid despite demand for payment, the Association shall be entitled to exercise all rights pertaining to the Member's Point Rights to the extent necessary to recover such debt. More particularly, should a Member:

12.2.1 fail to pay any amount owing to the Association within twenty-eight days following the issue of a notice of demand by the Association to the Member to pay such amount; or

12.2.2 be in breach of any of his obligations where such breach is capable of being remedied and fail to remedy the same within twenty-one days following the issue of a notice of demand by the Association to the Member requiring him to remedy the breach; or

12.2.3 be in breach of any of his obligations, which breach is not capable of being remedied either within the period of notice contemplated above or at all, or

…

12.2.5 being an individual, go into bankruptcy, enter into any arrangement with his creditors or have a receiver or trustee appointed over some or all of his assets or become subject to any other form of insolvency proceedings; then the Association or Management Company on the Association's behalf shall be entitled, without prejudice to any other rights which it may have had subject only to any rights of the Vendor Company in terms of an Acquisition Agreement:

12.2.6 to declare all amounts owing by the Member to the Association, whether then due and payable or not, as being immediately due and payable and the Member shall in such event be liable to make immediate payment of such amounts; and/or

12.2.7 to obtain possession of the Point Rights Certificate from such Member and to remove his name as registered holder of Point Rights from the Point Rights Register in which case the provisions of Article 7.1 shall apply, provided that, should a Member fail or refuse to deliver the Point Rights Certificate, the Association or Management Company on its behalf shall be entitled to cancel the Certificate and to issue a new Certificate in replacement thereof; and/or

12.2.8 as agent for and on behalf of the Member, without being under an obligation to do so, to rent or let Scheme Accommodation during any relevant Time Module by redeeming the Member's Points for Occupancy Rights, and to collect all rental and monies payable under such rent or letting and to set off against or deduct from such monies any sums whatsoever that may be owed by the Member to the Association; and/or

12.2.9 to cancel or sell or dispose of or realise in any other manner an on such terms and conditions as the Board may in its discretion deem fit, the Member's Point Rights.

…"

Under these terms CLC had quite extensive powers to make any outstanding debts, no matter how small, immediately payable, remove a member's points and strip them of their membership altogether. The course of action taken was at CLC's discretion. So, in addition to Mr L's ability to terminate The Membership as detailed in Articles 7 and 43, CLC could unilaterally bring Mr L's membership to an end by applying Article 12 should he fall into arrears.

However, in December 2015, CLC updated several of its terms. Article 12.2.7 of the Articles of Association was updated to the following:

"12.2.7 to obtain possession of the Point Right Certificate from such Member and to remove his name as registered holder of Point Rights from the Point Rights Register in which case the provisions of Article 7.1 shall apply and from then on the Member is designated as Suspended and the Membership Register noted accordingly until such times as the Member is reinstated to active status by following all of the reinstatement procedures set out in the Scheme Regulations, provided that, should a Member fail or refuse to deliver the Point Rights Certificate, the Association or Management Company on its behalf shall be entitled to cancel the Certificate and to issue a new Certificate in replacement thereof; and/or"

This introduced the concept of membership suspension for a seemingly indefinite period.

Various other governing documents were also updated in light of this change:

The Scheme Regulations were amended to the following:

"8. PROCEDURES FOR REINSTATEMENT

The Association (or the Management Company on its behalf) acknowledges that there can be various reasons why a Member was unable to comply with the Management Charges payment obligations and therefore agrees to keep the status of the Member in suspense for an indefinite period from the date of default during which period the Member may apply to be reinstated to active status to be able to use Point Rights again subject to and provided that the Member;

(a) makes good immediately the sum of arrears and any reinstatement fees as apply at that time outstanding on his account;
(b) agrees to continue to be bound by the Articles;
(c) agrees to pay Management Charges from the date of reinstatement onwards;
…
(d) acknowledges that the Association (or the Management Company on its behalf) was under a duty to the other Members, who are paying Management Charges, to use

the Point Rights which used to be available for the Member as described previously above and confirms that the Member has no claims in respect of this."

Article 4 of the Articles of Association was also updated to the following:

"4. MEMBERSHIP / MEMBERSHIP REGISTER / MEMBERSHIP CERTIFICATES

4.4 Should a Member be suspended by the Board (Suspended) the Membership Register shall be noted accordingly and the Member shall cease to be entitled to use or cast votes in respect of Point Rights, until such a future date as he is reinstated in accordance with the procedures on reinstatement in the Scheme Regulations, provided that any continuing or other obligation including to the Association arising prior to such person entering into suspension as a Member, shall continue to bind the Member until such obligation is Extinguished."

Under the 2015 changes, a default could now result in the suspension of Mr L's membership rather than termination. Our investigator concluded that this change in the rules that govern Mr L's membership (and others like it) was to remedy any potential unfairness of a customer, like Mr L, losing all of their membership rights for what could have been a small amount of arrears not paid following demand for payment.

I agree with our investigator's conclusion here. A similar term was dealt with in Link Financial Limited v Wilson [2014]. In that judgement it was held that such a term was unfair under the UTCCR. Had Mr L's membership been terminated under the operation of the original Article 12, I would be minded to reach the finding that a court would likely consider the debtor-creditor relationship to be unfair. However, as this term has been amended, and was not applied to Mr L's membership while it was in force, I am not persuaded that the existence of this term in the rules that governed Mr L's membership prior to December 2015 would likely lead a court to find the debtor-creditor relationship was unfair.

While the amendments in 2015 appear to have improved Mr L's position, he is concerned that maintenance fees and charges continued to apply during suspension. This is not how the investigator interpreted the terms. Instead, he thought the effect of Article 4.4 was that only liabilities that existed prior to suspension were binding and that no further annual charges would apply. Having reviewed Article 4 and the other relevant documentation, I agree with the investigator's conclusion here. To interpret Article 4 in the opposite would be contrary to the purpose of the amendments in 2015 and those set out in the Scheme Regulations.

CLC responded to the investigator's analysis of the Articles detailed above and agreed that maintenance fees and charges would not continue to accrue once a membership had been suspended. But it disagreed with the investigator's interpretation of Article 7.2. It has set out that it does require the membership fees in the year of terminating to be paid as a prerequisite to ending the membership (together with giving notice).

CLC's preferred interpretation of Article 7.2 appears to me to be contrary to common and commercial sense, but I accept it is possible. So, the question I need to determine is whether the presence of Article 7.2 in the related agreement suffices to make the debtor-creditor relationship under the credit agreement, when taken together with the related contract, unfair for the purposes of s.140A. In doing so, it is necessary to look at all the circumstances, including the practical implications of Article 7.2 for Mr L.

I find Article 7.2 to be ambiguous, I am not persuaded it was explained to Mr L before he entered the contract and it should be regarded as an important term. If the term operates in the way CLC says it does, making termination conditional upon a member repaying any

arrears, no matter how small, then this would appear unbalanced and could be unfair. It could have the effect of locking in a customer who has difficulty paying into a very long-term contract that they need to exit by reason of their inability to pay. And this could lead to a court finding that the debtor-creditor relationship was unfair.

However, the main issue here, and key concern for Mr L, was the potential for the rolling up of arrears, year on year without the ability to terminate. And I consider this to have been negated by the introduction of the "suspension" regime in December 2015. So, although (on CLC's interpretation) it is possible for a customer to be locked into the membership by reason of non-payment, that won't result in the rolling up of annual charges.

CLC has confirmed that annual charges cease to accrue once a membership has been suspended and that to terminate a membership, a customer is only liable to pay one year's fees and charges – applicable to the year of termination. In this particular case, Mr L has had his membership suspended by CLC for non-payment of fees and he is not being required to pay rolled-up annual charges. The position, as has been explained by CLC, is that Mr L's membership will remain suspended indefinitely unless either party chooses to terminate, and that maintenance fees and charges have ceased to fall due since 2016.

So, even if I were to accept CLC's interpretation of Article 7.2 as correct, I'm currently of the opinion that the potential for unfairness represented by Article 7.2 in Mr L's specific case is very limited. Particularly when considered alongside the amendments introduced in 2015 and the practical application of the rules that govern Mr L's membership.

Overall, taking everything into account, I am not currently persuaded that the facts of this case would lead a court to find that the debtor-creditor relationship was unfair – most crucially because Mr L is not locked into his membership with fees continuing to accrue and compound on an outstanding balance in the way he has argued. Instead, Mr L has the option to leave his membership dormant, knowing he will not be pursued by CLC for any outstanding maintenance fees or charges."

Having reviewed the complaint in full again, and in the absence of any new information or commentary from the parties specific to Mr L, I see no reason to depart from my provisional conclusions on this element of Mr L's complaint.

While not specific to Mr L's complaint, the report submitted by his representative does provide comment on the terms I have discussed above and the maintenance fees more generally. As mentioned above, the report is lengthy, generic, and not a helpful submission when considering an individual's complaint. However, I have summarised some of the key points made in the context of the maintenance fees and charges as well as the rules that govern Mr L's membership below:

- *The option to withdraw provided for in clause 7.2 was not given any publicity by CLC and was unknown to borrowers. As the provision was unknown, it can be ignored for the purposes of determining the fairness or reasonableness of the initial transaction. Separately, this clause is of little benefit to a consumer in financial distress and it only mitigates the liability for maintenance charges. If exercised, the premium paid for the product is lost.*

- *Clause 12.5 imposes a liability for interest and the legal costs incurred in the recovery of sums due. This is widely worded, with no qualification over the amount or costs which might be recoverable. This falls within para 1(e) Sch2 UTCCR.*

- *The maintenance fee provisions are very widely drafted and could embrace any and all charges with no effective means of independent challenge.*

- *The Key Information document is opaque and does not accurately or clearly describe the liabilities which the borrowers enter when purchasing or the risks and conflict of interest in arranging the maintenance fee.*

- *The borrower's liability to pay existing and additional maintenance over the long term is not in plain and intelligible language.*

- *The documents do not make it clear to the consumer that the renumeration of the maintenance company or its delegates could be increased without any defined or specific criteria in the contractual documentation.*

- *The reserve fund is an open-ended commitment and shortfalls from previous years rolled up. These provisions create a significant imbalance between the parties and are contrary to the requirement of good faith.*

- *Information was not provided in good time to make an informed decision which is a breach of regulation 12(4) of the 2010 regulations. Taken with the various unfair terms and examples of unfair pressure, this breach points to the conclusion that the contractual documents and method of sale created an unfair debtor-creditor relationship.*

I accept that the method of calculation of the maintenance fees, including their amount and the scope of what may fall within them is inscrutable to members who do not appear to have any say over the matter. And the way in which the fees are calculated has a compounding effect given the long-term nature of the contract. This could undoubtedly expose a consumer to arbitrary and unwarranted maintenance fees over which they have no say. I also agree, as I set out in my provisional decision, that the documentation is unclear and it is unlikely that Mr L had the chance to read and digest all of the rules that govern his membership before agreeing to purchase.

However, while the fees did rise each year, I haven't seen any evidence that Mr L has been exposed to large and unexpected charges by virtue of the special management charge or the core maintenance charge itself. And should Mr L have thought the charges were becoming unreasonable or unaffordable for him, he could exit his membership at any time, by paying the fee that fell due on the year of exit. As this is a non-fractional product, Mr L would not be giving up any interest in property upon exiting, just his right to holidays.

The report submitted by Mr L's representative suggests that this analysis doesn't take into account that, by exiting The Membership, the consumer would lose the premium they paid for the product in the first place. I am not sure I agree with the description of 'losing the premium' as this suggests Mr L had an expectation that he would get back this back at some stage.

In agreeing to join The Membership, Mr L agreed to pay the premium, which essentially operated as a joining fee to join a membership that entitled him to holiday within CLC's portfolio of resorts, subject to him paying his annual maintenance fees and charges. If he no longer wished to be a CLC member, he could choose to leave. And I do not think it's reasonable to suggest Mr L thought, after having benefitted from the membership for several years, that he would be entitled to his premium being returned if he chose this course of action.

I note the comments regarding breaches of regulation 12 and the suggestion of terms falling foul of the UTCCR and accept there may well have been such breaches and that there is

potential for the terms to be operated unfairly which may in turn lead to an unfair debtor creditor relationship. But I do not need to make a finding on that in this case because, from the evidence I've been provided with, it does not appear as though the terms have been operated unfairly against Mr L to date.

I accept it's possible the terms could be operated unfairly in the future. But CLC has told us it has not and will not pursue Mr L for maintenance fees. It has also confirmed that while his account is suspended, he is not exposed to or liable to pay any additional maintenance fees unless he chooses to reinstate his membership.

Taking everything into account, I do not consider it likely a court would find there to be an unfair relationship on the facts of this case as they currently stand. So, I do not think BPF acted unfairly in turning down the s.140A claim on this basis and will not be instructing it to compensate Mr L.

Unaffordable lending complaint

Mr L, together with his representative, argue that the loan was unaffordable. Specifically, they've said BPF didn't complete proper checks before agreeing to lend and that perfunctory checks were not enough.

I have limited information about what checks were completed. BPF has said Mr L had a salary of £54,000 which it deemed was sufficient to discharge the loan and that he met its lending criteria, but there is limited information on what additional details may have been gathered.

Even if I were to accept that BPF hadn't completed proportionate checks before agreeing to lend, to uphold this aspect of Mr L's complaint, I would still need to be satisfied that the loan was unaffordable for him (and that proportionate checks would have uncovered this).

Mr L hasn't provided any information to demonstrate that the loan was unaffordable for him when he took it out or why he says his financial circumstances were such that he should not have been granted the loan. Without any evidence, I do not uphold this element of Mr L's complaint.

Mr L also argued the interest charged on the loan wasn't made clear to him. However, looking at his loan agreement (which he signed) I think the amount of interest charged was detailed clearly.

It is also important to highlight that an irresponsible lending complaint could also be considered under a s.140A CCA claim. If the lending was unaffordable, I think it's possible the courts could conclude this gives rise to an unfair relationship. However, as detailed above, I am not persuaded the lending was unaffordable for Mr L.

Breaches of EU Law

In The Letter of claim, Mr L's representative alleges BPF has breached EU law and that this is a ground for finding an unfair relationship existed. But neither Mr L nor his representative have set out what EU laws they think BPF has breached or why they consider this to have made the relationship between Mr L and BPF unfair.

I have considered everything all parties have said in relation to this complaint, and having done so, I haven't seen any other circumstances which I think would lead a court to conclude there was an unfair debtor-creditor relationship in this case.

Conclusion

To summarise, I have reached the following conclusions:

- I'm satisfied BPF were right to consider some of Mr L's complaint points under s.75 of the CCA.

- I am not persuaded The Membership was misrepresented to Mr L, so I think BPF's decision not to uphold a s.75 claim on Mr L's behalf was fair.

- I am not persuaded Mr L purchased The Membership because he was pressured to do so. Instead, I think it more likely that Mr L went ahead with this purchase because he was interested in taking out the product.

- In the event that commission was paid, I don't think that it was at a level which was high enough for the courts to conclude there was an unfair debtor-creditor relationship.

- I accept there is a potential for the terms to be operated unfairly against Mr L in the future, but as it stands at the date of this decision, I don't think the practical application of the associated contract terms in relation to on-going fees and terminating/suspending The Membership in Mr L's case has led to an unfairness to such an extent that it's likely the courts would deem the debtor-creditor relationship to be unfair.

- I am not persuaded the loan was unaffordable for Mr L and I think the interest payable on the loan was set out clearly on the loan agreement.

- I have not seen any evidence to suggest BPF both breached EU law and that in turn, this led to an unfair debtor-creditor relationship.

My final decision

For the reasons explained above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 24 October 2023.

Lucy Wilson
Ombudsman