DRN-4544095

The complaint

Mrs and Mr S's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably under the Consumer Credit Act 1974 (as amended) (the 'CCA').

Background to the complaint

On 13 July 2016, Mrs and Mr S traded in their trial membership and purchased membership of a timeshare from a timeshare provider (the 'Supplier'). They entered into an agreement with the Supplier to buy 1,010 fractional points at a cost of £17,851.

On 29 August 2017, Mrs and Mr S traded in the membership and entered into another agreement with the Supplier to buy 1,360 fractional points at a cost of £5,953.

Where appropriate, I will refer to both of these products as the 'Fractional Club', the agreements as the 'Purchase Agreements' and the events as the 'Times of Sale'.

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

Mrs and Mr S paid for their Fractional Club memberships by taking finance from the Lender. Where appropriate, I will refer to these as the 'Credit Agreements'.

The trial membership was funded using a loan from the Lender too, but that purchase does not form part of their complaint. Both the Credit Agreements included the consolidation of the remaining balance of the existing loan – meaning they agreed to borrow £20,512 and £26,445, respectively.

Mrs and Mr S – using a professional representative (the 'PR') – wrote to the Lender on 14 April 2020 (the 'Letter of Complaint') to complain about the events that happened at the Times of Sale. In short, the PR says that Mrs and Mr S were persuaded to enter both the Purchase Agreements because they were told they would receive a return on their money after 19 years, but the Supplier should not have sold the Fractional Club as an investment as this was illegal. The PR also says that Mrs and Mr S struggled to book holidays as there was limited availability of the holidays they wanted to take.

The Lender dealt with Mrs and Mr S's concerns as a complaint and issued its final response letter on 17 October 2022, saying that it thought the claim under s.75 CCA was raised too late.

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

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

I set out my thoughts in a provisional decision (the 'PD'). In short, I agreed with the outcome reached by our Investigator, but wanted to give both parties the opportunity to consider what I said and provide any further information or arguments before I set out my final decision.

An extract from the PD reads as follows:

"The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I don't currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What's more, I've made my decision on the balance of probabilities – which 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.

I would also like to set out my thoughts on the information provided to me by the PR during the course of this complaint.

The Investigator requested a copy of Mrs and Mr S's testimony from the PR prior to issuing her findings. In response, the PR says:

"The original claim complaint that was sent to [the Lender] was the personal statement taken from our client if you can review this."

But the PR's letter is largely generic in nature, it is almost identical to other complaints brought by the PR, and it is not written in Mrs and Mr S's own words. As such, I don't accept the PR's position that its letter is Mrs and Mr S's personal statement.

Direct testimony from the consumer, in full and in their own words, is important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. Here, that simply isn't possible. It's also important that the decision-maker can see that the Letter of Complaint genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case.

With all this considered, I'm unable to place much, if any, evidentiary weight on the Letter of Complaint. So, I have relied on the paperwork that's been provided from the Times of Sale, and the particular circumstances of the case.

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

The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mrs and Mr S 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 Mrs and Mr S at the Time of Sale, the Lender is also liable.

This part of the complaint was made by the PR for the reasons I summarised at the start of this decision. But as I've said, the Letter of Complaint does not offer any evidence of what happened at the Times of Sale. It provides no colour or context to support the alleged misrepresentations.

What's more, there's nothing else on file that persuades me there were any false statements of existing fact made to Mrs and Mr S by the Supplier at the Times of Sale. While I recognise that Mrs and Mr S have concerns about the way in which the Fractional Club memberships were sold to them, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at either of the Times of Sale for any of the reasons they allege.

For these reasons, therefore, I don't think the Lender is liable to pay Mrs and Mr S any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I don't 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 Mrs and Mr S 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 Agreements, the Lender is also liable.

The PR says that Mrs and Mr S were "…finding it extremely difficult to book holidays now as there is hardly any availability due to [the Supplier] being advertised on the internet…" So, I have considered whether the Supplier might have breached the contract for this or any other reason. I appreciate Mrs and Mr S may not have always been able to secure their first choice of holiday dates or locations, but I'm not persuaded the Supplier would have told them they were guaranteed availability at any time or any location. I've not been given any evidence or testimony about any specific issues they faced in trying to use their memberships. And the Supplier says that Mrs and Mr S stopped paying their maintenance fees from the year 2018 onwards. So, it's not surprising that Mrs and Mr S found it difficult to book holidays when they had stopped paying the maintenance fees.

In any case, given the lack of evidence to support this allegation, I am not persuaded that there has been a breach of contract here which warrants compensation.

Overall, therefore, from the evidence I have seen to date, I don't think the Lender is liable to pay Mrs and Mr S any compensation for a breach of contract by the Supplier. And with that being the case, I don't 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 Mrs and Mr S had a successful claim under Section 75 of the CCA. But, the PR also says the Fractional Club membership was sold to Mrs and Mr S as an investment when it was not supposed to be as it says:

"This gave them an option to sell the Fractional in 19 years and get a return on their money."

The Lender does not dispute, and I am satisfied, that Mrs and Mr S's Fractional Club memberships met the definition of "timeshare contracts" and were "regulated contracts" 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 Times 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 the PR says that the Supplier did exactly that at the Times of Sale as the PR says Mrs and Mr S were told they could expect to make a profit. So, for completeness, that is what I have considered here.

However, as a possible breach of Regulation 14(3) does not fall neatly into a claim under Sections 75 of the CCA, I must turn to another provision of the CCA if I am to consider this aspect of the complaint and arrive at a fair and reasonable outcome. And that provision is Section 140A.

Having considered the entirety of the credit relationships between Mrs and Mr S and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were 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 standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Times of Sale along with any relevant training material;*

2. *The provision of information by the Supplier at the Times 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 Times of Sale; and*
4. *The inherent probabilities of the sales given their circumstances.*

I have then considered the impact of these on the fairness of the credit relationships between Mrs and Mr S and the Lender.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

A share in the Allocated Property clearly constituted an investment as it offered Mrs and Mr S the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs and Mr S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Times of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs and Mr S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mrs and Mr S as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

Were the credit relationships between the Lender and Mrs and Mr S rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Times of Sale, I now need to consider what impact that breach had on the fairness of the credit relationships between Mrs and Mr S and the Lender under the Credit Agreements and related Purchase Agreements as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs and Mr S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreements and the Credit Agreements is an important consideration.

On my reading of the evidence provided, I'm not persuaded that was what is more likely than not to have happened at the Times of Sale. I'll explain why.

As I've said before, there is simply no direct evidence from Mrs and Mr S about what happened at the Times of Sale which supports this allegation.

What's more, there is no evidence to suggest that Mrs and Mr S were motivated to purchase their Fractional Club memberships at the Times of Sale because they were told they would make a profit upon the sale of the Allocated Property. Because of this, I just don't think that was likely to have been what happened.

Given that Mrs and Mr S were at the Supplier's resort on a holiday, I think they were interested in taking holidays, and specifically, the type of holidays the Supplier could give them with the points they gained through the Purchase Agreements.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club memberships as investments in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs and Mr S's decisions to purchase their Fractional Club memberships at the Times of Sale were motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I don't think the credit relationships between Mrs and Mr S and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

My provisional decision

In conclusion, given the facts and circumstances of this complaint, I don't think that the Lender acted unfairly or unreasonably when it dealt with Mrs and Mr S's claims under Section 75, and I'm not persuaded that the Lender was party to credit relationships with Mrs and Mr S under the Credit Agreements that were unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them."

The Responses to the PD

The Lender confirmed it had nothing to add to the PD.

The PR, on behalf of Mrs and Mr S, did not reply by the deadline I provided them.

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 I've not received any new information or arguments to consider, I see no reason why I ought to depart from the findings and conclusion I reached in the PD.

Given the facts and circumstances of this case, I don't think that the Lender acted unfairly or unreasonably when it dealt with Mrs and Mr S's claims under Section 75, and I'm not persuaded that the Lender was party to credit relationships with Mrs and Mr S under the Credit Agreements that were unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

I don't uphold Mrs and Mr S's complaint about Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 9 September 2025.

Andrew Anderson
Ombudsman