DRN-4627047

The complaint

Mr and Mrs T complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA'), (2) deciding against paying claims under Section 75 of the CCA, and (3) providing a loan to pay for an Unregulated Collective Investment Scheme ('UCIS').

What happened

Mr and Mrs T were members of a timeshare provider (the 'Supplier') – having purchased several products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 4 February 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 8,000 Fractional Points at a cost of £13,440 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs T more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs T paid for their Fractional Club membership by trading in their existing European Collection membership, which included 8,000 European Collection Points, given a trade-in value of £8,000, and taking finance of £5,540 from the Lender (the 'Credit Agreement') for the remaining amount. Mr and Mrs T paid off the loan, and their credit relationship with the Lender ended, on 13 March 2017.

Mr and Mrs T – using a professional representative (the 'PR') – wrote to the Lender on 2 December 2020 (the 'Letter of Complaint') to raise several different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs T's concerns as a complaint and issued its final response on 23 April 2021, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, said that the complaint should be upheld.

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 published ombudsman decisions on very similar complaints –

which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context here.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have decided that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs T as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, 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, while I recognise that there are a number of aspects to Mr and Mrs T complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Lender acted unfairly and unreasonably by (2) deciding against paying claims under Section 75 of the CCA, and (3) providing a loan to pay for an Unregulated Collective Investment Scheme ('UCIS').

This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs T in the same or a better position than they would be if the redress was points (2) and (3) above.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

Having considered the entirety of the credit relationship between Mr and Mrs T and the Lender along with all of the circumstances of the complaint, I 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.

4. The inherent probabilities of the sale given its circumstances.

5. Where relevant, any existing unfairness from a related credit agreement.

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs T 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 Fractional Club membership 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 Mr and Mrs T say that the Supplier did exactly that at the Time of Sale – saying the in a signed statement dated 17 March 2021 that:

> *"The primary factor, we succumbed to agreeing to purchase the Fractional was that the Rep on numerous times mentioned that the Fractional was an investment and that we would get all our money back plus profit back when the Fractional was sold in 15 years.*
>
> *The Rep told us that we were investing our money to purchase a part share of an apartment…*
>
> *In summary, we only agreed to purchase the Fractional and convert our existing timeshare points because the Rep stated that we were purchasing an investment – a share of an apartment where we would recover in 15 years all our money plus a profit on the sale of the apartment."*

Mr and Mrs T allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were investing to purchase part of an apartment and after 15 years they would get back all their money plus a profit.

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.

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

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

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs T, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs T as an investment.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs T allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

(1) Whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs T or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn

(2) Whether the Supplier's actions constitute a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

The Supplier has previously provided evidence to show what training and policies and procedures were in place for the selling of Fractional Club membership. I accept that this shows the Supplier took steps to avoid breaching Regulation 14(3) when selling fractional timeshares such as Fractional Club membership.

The Policy and Procedure (sales misrepresentation) document included the following:

> *"[The Supplier] strictly prohibits any forms of Misrepresentation. In this respect, [the Supplier] specifically stresses the importance of representing the [Supplier's] product in line with the following guidelines:*
>
> - *[The Supplier] does not represent vacation ownership as an investment.*
>
> *…*
>
> - *With regards to the presentation of the Fractional product:*
>
> - *Sales Team members will not represent the Fractional product as an investment*
>
> - *Sales Team members will not discuss any predictions with regards to the residual value."*

The document went on to say that *"non compliance of the rules established herein, will lead to the adoption of the relevant disciplinary actions … including the automatic extinction of the employment relationship by means of a dismissal."*

It is likely that the salesperson and sales manager involved with Mr and Mrs T's sale would have signed the Policy and Procedure (sales misrepresentation) document under the statement that:

- *"I hereby acknowledge receipt of the present Misrepresentation [Standard Operating Procedure] … as detailed above."*

The Supplier has also provided a copy of its training manual, which states on page 53:

> *"**The basis of both products is centered on the experiences clients will enjoy when travelling, neither product is an investment type product and as such <u>it is forbidden</u> when selling to our guests to discuss eventual values or returns.**"*
>
> **[emphasis in original]**

While this forbids discussion of eventual values or returns it does not forbid describing the product in such a way that might imply it is nevertheless an investment. Nor does it mention that the reason for saying this is because the Timeshare Regulations prohibit the sale or marketing of a timeshare as an investment.

I note the Supplier's 'Code of Conduct for Agents Engaged in Sales & Marketing Operations' dated 1 November 2012 discusses the Timeshare Regulations, it does not mention Regulation 14(3) or the prohibition of selling or marketing a timeshare as an investment. It does include as an appendix the Resort Development Organisation Code of Ethics, which states, *"A Timeshare Interest must not be marketed or sold as an investment."* But this aspect of the code is not mentioned in the main body of the Supplier's Code of Conduct for Agents Engaged in Sales & Marketing Operations.

The Training Manual includes an exercise on page 54 that asks the question:

> *"Why do you think it is important never to present the Fractional ownership club as an investment?"*

This question does suggest that salespeople should not present Fractional timeshares as an investment. But no examples are given in terms of what answers are to be expected from trainees. Again, there is no mention of the Timeshare Regulations, nor anything that clearly explains what would constitute a breach of Regulation 14(3).

Looking at these documents, I am satisfied that the Supplier took steps to try and prevent a breach of Regulation 14(3) by its salespeople when selling Fractional Timeshares like Fractional Club membership. And that these steps will have gone some way to reducing the risk of breaches occurring. But the materials are not as explicit as they could be in making salespeople aware of the prohibition in Regulation 14(3), which they do not explicitly refer to.

So, it is not clear to me that a salesperson would've understood why they should not present a fractional timeshare as an investment as defined above. For example, the above question is not answered in the Training Manual. Nor that the concept of an investment was clearly defined nor clear guidance provided on what was acceptable and what was not. For example, there are no sales scripts or prescribed wordings that limit how a salesperson could describe a fractional timeshare and specifically the right to a share in the net sale

proceeds of the Allocated Property. Nor is there anything that sets out what a salesperson should do if a prospective customer clearly does end up with the impression that Fractional Club membership is an investment in that they could make a financial gain or profit from it.

In *Shawbrook & BPF v FOS* the judge acknowledged the difficulty in selling a fractional timeshare without breaching Regulation 14(3), where he said at 77:

- *"I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3) It is a particularly acute challenge to do so by way of an 'upgrade' which does not confer new accommodation rights, when the fractional ownership component inevitably assumes more prominent proportions in the bargain. Getting the governance principles and paperwork right may not be quite enough."*

The documents referred to above suggest to me that the Supplier may have taken too narrow a view of what constituted selling or marketing a timeshare as an investment (a view which the Lender appears to share). I say this because these documents focus on not presenting the fractional timeshare as an investment in the context of not discussing the residual value of the Allocated Property or the eventual values or returns a customer might receive. I think this left open the possibility that a salesperson might engage in other discussions about this benefit which could cross the line into breaching Regulation 14(3) – even if that was not the intention of the salesperson or the Supplier.

In my opinion, merely suggesting or implying that a customer might make a financial gain or profit (that is, potentially get back more than they paid for Fractional Club membership) would be enough to breach the prohibition in Regulation 14(3).

So, I am not persuaded that these documents are sufficient for me to conclude that it is implausible or inherently unlikely that Fractional Club membership could have been sold or marketed as an investment at the Time of Sale. That makes it important to consider the evidence from the Time of Sale as well as Mr and Mrs T's recollections of what happened.

Mr and Mrs T's recollections are the only evidence available that is specific to the sale from someone who was there. And while the sales documents do reflect the Supplier's intention to comply with Regulation 14(3), the sales documents in themselves again do not guarantee that Regulation 14(3) was not breached. Those documents were provided to Mr and Mrs T *after* they had agreed in principle to make the purchase (but before they signed the contracts). So, the disclaimers and statements contained therein may not have been enough to prompt Mr and Mrs T to question what they had been told if that was different to what was shown in the documents.

I do not suggest that there was a systemic issue that meant Fractional Club membership was sold in breach of Regulation 14(3) in every case. Clearly a fractional timeshare could be sold without breaching Regulation 14(3). And my decision is based on the evidence and circumstances specific to Mr and Mrs T's sale. But overall, considering the above, I am satisfied that it is possible that the Supplier breached Regulation 14(3) when selling Fractional Club membership to Mr and Mrs T at the Time of Sale.

The circumstances of the sale

Mr and Mrs T's purchase was a point-for-point upgrade from European Collection membership to Fractional Club membership (similar to the case referred to in the quote above from *Shawbrook & BPF v FOS*). This means Mr and Mrs T exchanged (and paid extra) to exchange 8,000 European Collection Points for 8,000 Fractional points.

European Collection Points and Fractional points worked in the same way and were worth the same in terms of purchasing holidays with the Supplier and its affiliates. So, Mr and Mrs T did not gain any additional holidays from the purchase.

My understanding is that the main differences between European Collection membership and Fractional Club membership were:

1. A shorter membership term of about 15 years.

2. A share in the net sale proceeds of the Allocated Property at the end of the membership term.

Given their ages, a shorter membership term may have been beneficial to Mr and Mrs T. I say this because, barring specific circumstances such as health issues meaning they could no longer take holidays, Mr and Mrs T would not have been able to give up their European Collection membership until they turned 75 years of age. And this would not have happened until more than 15 years after the Time of Sale.

However, Mr and Mrs T's statement says that the primary reason they agreed to the purchase was because it was an investment that could lead to them making a profit. Given the circumstances of the sale, that does not seem implausible or unlikely.

The Lender has disputed their recollections because Mr and Mrs T's motivation for the purchase was not mentioned in the Letter of Complaint. But the PR has explained that it chose to focus the letter on its view (which turned out to be mistaken as set out in the judgement in *Shawbrook & BPF v FOS*) that Fractional Club membership was a UCIS and that this meant the contract was void. I do not find this implausible having seen dozens of such claims made by the PR regardless of the detail of each individual customer's recollection of what happened at the time of sale and why they purchased Fractional Club membership from various timeshare providers.

The Lender also points to Mr and Mrs T's email to the PR on 5 July 2020. But I think that email was a brief summary of some of the problems Mr and Mrs T had with their timeshare memberships, rather than a detailed explanation of what happened when they purchased Fractional Club membership – which is what their signed statement appears to be.

Overall, I am satisfied that Mr and Mrs T's signed statement is a fair reflection of their recollections of what happened at the Time of Sale. As such, I am satisfied that the Supplier breached Regulation 14(3) at the Time of Sale.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs T and the Lender under the Credit Agreement and related Purchase Agreement.

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.

It also it seems to me in light of *Carney* and *Kerrigan* that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs T 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 Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs T statement (and considering all the evidence in this complaint), the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays or a shorter membership term. And that is not surprising given the nature of the product at the centre of this complaint. But Mr and Mrs T say (plausibly and persuasively in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as an investment (as defined above) and this was the primary reason they purchased it. So, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, not least because that share was one of the defining features of membership that marked it apart from their existing European Collection membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

I am not persuaded that Mr and Mrs T would not have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs T under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr and Mrs T would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable

to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs T agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs T were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 8,000 European Collection Points. And, like Fractional Club membership, they had to pay annual management charges as a European Collection member. So, had Mr and Mrs T not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs T from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

So, here's what I think needs to be done to compensate Mr and Mrs T with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs T's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs T's Fractional Club annual management charges paid after the Time of Sale and what their European Collection annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs T used or took advantage of; and

   ii. The market value of the holidays* Mr and Mrs T took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of European Collection Points they would have been entitled to use at the time of the holiday(s) as ongoing European Collection members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

      For example, if Mr and Mrs T took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 European Collection Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr and Mrs T's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs T's Fractional Club membership is still in place at the time of this decision, as long as they both agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs T took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

My final decision

For the reasons I've explained, I've decided to uphold this complaint. I direct Shawbrook Bank Limited to pay fair compensation to Mr and Mrs T as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T and Mrs T to accept or reject my decision before 4 December 2025.

Phillip Lai-Fang
Ombudsman