DRN-4697630

Financial Ombudsman Service

The complaint

Mr and Mrs W'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').

What happened

Mr and Mrs W were members of a 'points' timeshare membership with a timeshare provider (the 'Supplier').

Whilst on holiday as part of this membership, Mr and Mrs W purchased a new type of membership (the 'Fractional Club 1') from the Supplier on 12 November 2014 (the 'Time of Sale 1'). They entered into an agreement with the Supplier to buy the right to occupy a certain apartment (#300) during weeks 1 and 2 of every year from 2015 to 2030 (the 'Purchase Agreement 1'). After terminating their existing membership, they ended up paying €18,293 for the Fractional Club 1.

Unlike their previous membership, the Fractional Club 1 was asset backed – which meant it gave Mr and Mrs W more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement 1 (the 'Allocated Property') after their membership term ends.

Mr and Mrs W paid for their Fractional Club 1 membership by taking finance of £15,000 from the Lender (the 'Credit Agreement 1').

Then, on 18 November 2015 (the 'Time of Sale 2') Mr and Mrs W bought a further 'week' (the 'Fractional Club 2'). They entered into an agreement with the Supplier to buy the right to occupy a certain apartment (#15) during week 31 of every year from 2017 to 2030 (the 'Purchase Agreement 1'). This membership was also asset-backed by an allocated property They ended up paying €14,189 for this membership.

Mr and Mrs W paid for their Fractional Club 2 membership by taking finance of £10,500 from the Lender (the 'Credit Agreement 2').

On 10 June 2016, as a result of a request from Mr and Mrs W, the Supplier changed their use of apartment #15 (week 31) and apartment #300 (week 2) to apartment #504 weeks 45 and 46, but they retained their use of apartment #300 in week 1.

Mr and Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 19 July 2019 (the 'Letter of Claim 1') to raise a claim under Section 75 of the CCA regarding misrepresentations at Time of Sale 1 and a breach of contract relating to the Purchase Agreement 1. The PR said the Supplier made the following misrepresentations:

- The new fractional product would guarantee a return on their investment in 2030. It would be sold and they would receive their initial investment back plus any additional profit made.
- In 2020 the Russian market would open up and they could sell earlier, if they wished, and would definitely make a profit.
- If they didn't use their weeks the Supplier would rent their weeks for them to cover not only the maintenance fees but also make a profit.

Then, on 5 August 2018 the PR, on Mr and Mrs W's behalf, again wrote to the Lender (the 'Letter of Claim 2') to make a further claim under Section 75 of the CCA relating to misrepresentation and breach of contract resulting from Time of Sale 2 and the Purchase Agreement 2. It said Mr and Mrs W were told:

- If they bought a further week they would be able to achieve a rental income which would cover the maintenance fees for all three weeks of ownership.

The PR said the only reason Mr and Mrs W bought the third week was the guaranteed rental income.

The Lender dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter to both claims on 25 October 2019, rejecting them on every ground.

The PR referred the matter to the Financial Ombudsman Service as Mr and Mrs W were unhappy with the outcome reached by the Lender. Their complaint was assessed by an Investigator who, having considered the information on file, rejected it on its merits.

The Investigators' views

The Investigator said, in summary that they were not persuaded that there were any actionable misrepresentations by the Supplier at the Time(s) of Sale, nor that the Supplier failed to fulfil one or more of the contractual terms, or that even if it had, there had been no associated financial loss.

The PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision. The complaint was later reassessed by another Investigator, who also didn't think it ought to be upheld. This Investigator said:

"When considering this complaint, I have looked at the entirety of the credit relationship between [Mr and Mrs W] and the [Lender] along with all the circumstances of the complaint before coming to my view.

Below, I've summarised the complaint points made by [Mr and Mrs W]'s representative in its correspondence with the [Lender]:

- *When [Mr and Mrs W] bought the Memberships, they were told they could be 'resold in 2020 once the Russian market was open and also guaranteed a return on their initial investment plus profit at the latest in 2030'. They were told it would be resold in 2020 for 'substantially more' than they paid in 2014 and 2015. In fact, for [Mr and Mrs W] to make a profit given how much they paid for membership, each apartment*

would have to sell for a price that is significantly more than is ordinarily achieved for this type of property.

- *The Supplier would help them relinquish a separate timeshare membership.*
- *[Mr and Mrs W] has now learned that the Supplier is closing, and the resort has been sold to a hotel chain, which means their weeks will not be sold.*
- *The Supplier told [Mr and Mrs W] it had a rental programme – and if [Mr and Mrs W] were to rent their weeks, it would more than cover their annual maintenance fees. However, there is no rental programme.*

In response to my colleague's assessment that there was insufficient evidence to conclude that there had been an actionable misrepresentation by the Supplier, [Mr and Mrs W]'s representative simply requested an ombudsman's decision without saying more.

I've carefully considered the submissions that [Mr and Mrs W] was sold the Memberships as an investment, and whether this was a misrepresentation by the Supplier for which the Lender is legally answerable under section 75. I've also considered whether the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling the Memberships to [Mr and Mrs W] as an investment, which could render the credit relationship between him and the Lender unfair for the purposes of Section 140A of the CCA.

The representative's submissions set out what was supposedly said during the sale and [Mr and Mrs W]'s reasons for entering the contract. I appreciate this information might have been collected during conversations with [Mr and Mrs W]. However, it's important to note that neither our service nor the [Lender] have been provided with first- hand testimony from [Mr and Mrs W]. So it's difficult to say what in the representative's letters reflect [Mr and Mrs W]'s recollections of the sale and what are more generic submissions from the representative.

What's more, having reviewed the available documentation, some of which was signed by [Mr and Mrs W], I note that the Supplier doesn't describe the Memberships as an 'investment' or give details of the amount a prospective purchaser, such as [Mr and Mrs W], might expect to get back at the end of the membership term.

All things considered, without first-hand testimony from [Mr and Mrs W], I've simply seen insufficient evidence to conclude that the timeshare was marketed and/or sold as an investment.

Similarly, I haven't seen any evidence that [Mr and Mrs W] was told there was a rental programme when there wasn't.

Finally, I haven't been provided with any evidence to show that the property has new owners, and if it does, it's not clear what impact that has on [Mr and Mrs W]'s Memberships. Neither [Mr and Mrs W] or his/her/their representative have said, suggested or provided evidence to demonstrate that they are no longer:

1. *A member of the Fractional Club*
2. *Able to use her Membership to holiday in the same way as they could initially*
3. *Entitled to a share in the net sales proceeds of the property when their Membership ends*

I understand that [Mr and Mrs W] may fear that, when the time comes for the Allocated Property to be sold, it either won't be sold, or they will not receive their share of the sales proceeds. However, any breach of contract (if that occurs) lies in the future and is currently uncertain.

Conclusion

Given all of the facts and circumstances of this complaint, I don't think the credit relationship between the [Lender] and [Mr and Mrs W] was unfair to them for the purposes of Section 140A. And as I've not seen any other reason to hold the [Lender] responsible for anything that might have gone wrong, I don't think this complaint ought to be upheld."

The PR's response to the second Investigator's view

The PR did not agree with the second Investigator's view. It said, in summary:

- Misrepresentations – oral and written evidence. Mr and Mrs W were assured at the Time of Sale that:
  - The memberships would be sold in 2020 for 'substantially more' than the purchase price and this resale was 'guaranteed' by 2030
  - Participation in the rental programme would consistently cover all maintenance fees
  - The Supplier would assist them in relinquishing a separate timeshare membership.
- Supplier closure and loss of benefit
  - The closure of the supplier and the sale of the resort to a hotel chain fundamentally undermine the promised returns on the basic use of the product.
- Section 140A-B CCA – Unfair relationship
  - The opportunity is empowered to consider the entire context of the relationship, including sales conduct by the supplier. The burden of proof shifts to the lender to demonstrate otherwise.
- Failure to consider the PR's and pattern evidence
  - Consumers should not be held to a standard of providing only firsthand written testimony in order to have their claims recognised.
- Ongoing right to redress under Section 75
  - The lender is jointly and severally liable for the Supplier's misrepresentations, whether or not the Supplier remains in business.

As no agreement could be reached the matter has come to me for a decision.

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, in many ways, 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.

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.

And having done that, I agree with the findings of both Investigator's, for broadly the same reasons. I do not think this complaint should be upheld.

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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

Further, I have made this decision having weighed up all of the evidence available, deciding, on the balance of probability, what I consider is most likely to have happened.

Section 75 of the CCA: the Supplier's alleged misrepresentations and breach of contract

In the Letter of Claim(s), the PR alleged that there had been actionable misrepresentations made at the Time(s) of Sale, and that the Supplier had breached the contractual terms of the Purchase Agreement(s). As such the complaint to this Service was that the Lender was unfair in not accepting Mr and Mrs W's claims under Section 75 of the CCA.

For the avoidance of doubt, 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.

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 doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on those conditions here.

The claims made in both of the Letter(s) of Claim were addressed by both Investigators, who did not think the Lender was unfair or unreasonable in the way it dealt with the claims, so they did not think the Lender ought to pay any compensation to Mr and Mrs W in this regard.

No new evidence or arguments were put forward by the PR in response to these complaint points – the PR just reiterated them and said it didn't agree with the second Investigator's view. So I do not think it necessary to consider them further as I agree with what has been said so far by both Investigators. But for completeness, having considered everything that has been submitted, when looking at the claims under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons set out by the Investigators, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with these Section 75 claims.

I also do not think the Lender is liable to pay Mr and Mrs W any compensation for a breach of contract by the Supplier, for the same reasons as set out by the Investigators. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that either the Fractional Club 1 or 2 membership was actionably misrepresented or that there was a breach of contract by the Supplier. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationships between Mr and Mrs W 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 all the evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale.

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

The Supplier's collapse and resort sale

The PR has said the closure of the Supplier and the sale of the resort to a hotel chain fundamentally undermine the promised returns on the basic use of the product.

But I cannot see what detriment has been caused to Mr and Mrs W here. I've seen nothing which suggests that Mr and Mrs W are no longer able to use the membership in the way it was originally intended. As the second Investigator said, there is no evidence which demonstrates that Mr and Mrs W are no longer:

1. Members of the Fractional Club(s);
2. Able to use their memberships to holiday in the same way as they could initially; and
3. Entitled to a share in the net sales proceeds of the Allocated Property(s) when their memberships end.

So, I am not persuaded that an unfairness to either of their credit relationships with the Lender has been caused here.

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

As I have already said, although in the Letter of Claim(s) the PR has not referred to any regulations, in effect it says that the Supplier breached Regulation 14(3) of the Timeshare Regulations. But it has expanded on this point since its referral to this Service.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*[1], 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.

A share in an Allocated Property clearly constituted an investment as it offered Mr and Mrs W 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 the fractional memberships included an investment element did not, itself, transgress the

[1] *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin)

prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract <u>as an investment</u>. 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 memberships - they just regulated how such products were marketed and sold.

To conclude, therefore, that either or both Fractional Club memberships were marketed or sold to Mr and Mrs W 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 the membership to them as an investment, i.e. told them or led them to believe that Fractional Club 1 and or 2 offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

And there is competing evidence in this complaint as to whether Fractional Club 1 and 2 memberships were marketed and/or sold by the Supplier at the Time(s) of Sale as investments 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 the membership of the Fractional Club 1 and 2 as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs W, the financial value of their share in the net sales proceeds of the Allocated Property(s) 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 the fractional memberships as an investment, and in the Letter of Claim(s) and its more recent submissions the PR says that the Supplier did so. But having considered all of the evidence submitted, while it is *possible,* I do not think it is *probable* that either membership was sold in this way. I think this because there is simply no direct evidence that the sales were presented in the way the PR says they were to counter what is set out in the contractual paperwork.

But even if I'm wrong about that, and the Supplier did breach Regulation 14(3) of the Timeshare Regulations as set out by the PR, I don't think that makes a difference to the outcome of this complaint anyway. 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.

If there was a breach of Regulation 14(3) would this have rendered the credit relationship(s) between the Lender and Mr and Mrs W unfair to them?

Accepting that it is *possible* that there was a breach of Regulation 14(3) by the Supplier at the Time(s) of Sale (and as I've said, I'm not persuaded that there was) I've gone on to consider what impact any breach (if there was one) would have likely had on the fairness of the associated credit relationships between Mr and Mrs W and the Lender under the Credit Agreement(s) and related Purchase Agreement(s).

This is because, the case law on Section 140A makes it clear that regulatory breaches <u>do not</u> 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, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs W 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(s) and the Credit Agreement(s) is an important consideration.

When assessing *why* Mr and Mrs W decided to make the purchase of the Fractional Club(s), I need to consider everything that has been said along with the wider circumstances at the time. Regrettably, the PR hasn't provided a witness statement from Mr and Mrs W – or anything else that sets out in their own words what happened. Whilst I appreciate that the Letter of Claim(s) were probably prepared by the PR following a conversation or conversations with Mr and Mrs W, a letter of complaint (or claim) is not evidence – especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations.

As the second Investigator said, direct testimony from the consumer, in full and in their own words, is so 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 a Letter of Claim genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case. So, in the absence of direct testimony from Mr and Mrs W, I have to rely on the paperwork that has been provided.

And on my reading of the evidence before me, I do not think the prospect of a financial gain from the Fractional Club 1 and 2 memberships was an important and motivating factor when Mr and Mrs W decided to go ahead with their purchases. I am simply not persuaded that was the case. I acknowledge the Letter of Claim 1 says that they could expect to get their money back and possibly make a profit, but there is no evidence to support that this was said. And there is no evidence to support the allegation made in the Letter of Claim 1 regarding the "Russian Market" and a potential profit in 2020, nor is there any evidence to suggest that Mr and Mrs W were interested in selling their timeshare at that time. And as far as the claim made in the Letter of Claim 2, that the rental income from the third week would cover the maintenance fees for all three weeks, again, as I've said, there is no evidence to support this was said.

Mr and Mrs W were existing members of a points-based timeshare from the Supplier. But in addition to having a share in the Allocated Property, there were significant differences in the memberships – the Fractional Club had a significantly shorter membership term, and the weeks' holiday were guaranteed as opposed to being subject to availability. So I think they were interested in taking holidays, and specifically the type of holidays the Supplier could give them, with the exclusive holiday rights they gained through the Purchase Agreement(s). After all, their existing timeshare membership did not afford them a guaranteed week in their specific property, only points which needed to be used to book accommodation, and that was subject to availability.

That doesn't mean they weren't interested in a share in the Allocated Property - after all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as I'm not persuaded, on the basis of the evidence in this case, that their purchases were motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to either of the purchasing decisions they ultimately made.

And I'm not persuaded that it is sufficient, as the PR seems to contend, simply to suggest unsubstantiated allegations of fact and require that the Lender disprove them else the credit relationship be deemed unfair. This issue was considered in the judgment in *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch) ("*Samra*"), where HHJ David Cooke held (at para.26):

> *"…the onus is on the [creditor] to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (i.e. personal) to the creditor and debtor. This onus on the [creditor] does not however mean, in my judgement…that where Mr Samra[2] makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence."*

I further note that in *Wilson v Clydesdale Financial Services Ltd t/a Barclays Partner Finance* [2021] (unreported), the court also took the view that the burden is on the debtor to prove on the balance of probabilities *the facts* that purportedly create the unfairness. It is then that the lender's burden of proof that requires it to prove *the relationship* was not unfair kicks in[3].

So, on balance, the evidence does not persuade me that the Supplier breached Regulation 14(3) of the Timeshare Regulations at either of the Time(s) of Sale. But, as I've said, even if I am wrong about that, and the Supplier did market or sell the Fractional Club memberships as an investment in breach of Regulation 14(3), I am not persuaded that Mr and Mrs W's decision to purchase either of the memberships at the Time(s) of Sale was 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 the purchases for the guaranteed holidays they could provide them, whether or not there had been a breach of Regulation 14(3).

And for that reason, I do not think the credit relationships between Mr and Mrs W and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

Conclusion

In conclusion, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with Mr and Mrs W under either Credit Agreement 1 or Credit Agreement 2 that was unfair to them for the purposes of Section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

I do not uphold this complaint about Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W and Mr W to accept or reject my decision before 16 March 2026.

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[2] In this case the borrower was making an allegation that there was an unfair credit relationship.
[3] While I do not suggest this offers legal precedent, the subject matter of that case was a fractional timeshare sale, and given the similarities seems to me an appropriate approach when considering the facts in this case.

Chris Riggs
Ombudsman