DRN-4723681

Financial Ombudsman Service

The complaint

Mr and Mrs C'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 C purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 21 June 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy the right to occupy a certain apartment (apartment 403) during week 49 of every year from 2018 to 2030 (the 'Purchase Agreement'). They ended up paying €22,105.

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

Mr and Mrs C paid for their Fractional Club membership by taking finance of £17,960 from the Lender (the 'Credit Agreement').

In October 2016, as a result of a request by Mr and Mrs C, the Supplier agreed to change their apartment to 600, and their week to week 40 for no extra charge.

Mr and Mrs C – using a professional representative (the 'PR') – wrote to the Lender on 11 May 2020 (the 'Letter of Complaint') to complain about events that happened at the Time of Sale. The PR says the Supplier made the following misrepresentations:

- The Supplier would terminate Mr and Mrs C's existing timeshare agreement they held with another timeshare provider ('provider A').
- Fractional Club was an investment product which guaranteed a return on their initial investment, plus a profit by 2030 at the latest.
- They could expect to make a profit from rental income if they didn't use their weeks.

The Lender dealt with Mr and Mrs C's concerns as a complaint and issued its final response letter on 29 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, rejected the complaint 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 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 C] 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 C]'s representative in its correspondence with the [Lender]:

- *When [Mr and Mrs C] bought the Membership, they were guaranteed a return on their initial investment plus profit at the latest in 2030.*
- *[Mr and Mrs C] has now learned that the Supplier is closing, and the resort has been sold to a hotel chain, which means their week will not be sold.*
- *The Supplier told [Mr and Mrs C] it had a rental programme – and if [Mr and Mrs C] were to rent their week, it would more than cover their annual maintenance fees. However, there is no rental programme. The Supplier supposedly said it was so sure their week would be rented out they were given a cheque for 1,850 euros as an advance of the rental income for the first year.*

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 C]'s representative simply requested an ombudsman's decision without saying more.

I've carefully considered the submissions that [Mr and Mrs C] was sold the Membership 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 Membership to [Mr and Mrs C] as an investment, which could render the credit relationship between them 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 C]'s reasons for entering the contract. I appreciate this information might have been collected during conversations with [Mr and Mrs C]. However, it's important to note that neither our service nor the [Lender] have been provided with first-hand testimony from [Mr and Mrs C]. So it's difficult to say what in the representative's letters reflect [Mr and Mrs C]'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 C], I note that the Supplier doesn't describe the Membership as an 'investment' or give details of the amount a prospective purchaser, such as [Mr and Mrs C], might expect to get back at the end of the membership term.

All things considered, without first-hand testimony from [Mr and Mrs C], 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 C] was told there was a rental programme when there wasn't. The Supplier has confirmed that [Mr and Mrs C] made use of their week in 2017, 2018, and 2019.

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 C]'s Membership. Neither [Mr and Mrs C] or 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 their 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 C] 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 C] 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:

- The Investigator had misapplied Section 75 of the CCA, disregarding the legal position that the Lender is jointly liable for the Supplier's misrepresentations. The consumer's submissions and industry practice shows the Fractional Club was sold as an investment guarantee and a rental programme which did not materialise, both of which were misrepresentations.
- Marketing the Fractional Club as an investment breaches Regulation 14(3) of the Timeshare Regulations, triggering an unfair credit relationship under Section 140A of the CCA.
- The Investigator's reliance on the absence of "first hand testimony" to discount submissions and contemporaneous evidence ignores the practical realities of fractional investment complaints. Previous Ombudsman decisions have accepted representative evidence as sufficient for upholding complaints.
- In denying redress in these circumstances undermines consumer confidence and creates injustice.

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. The PR has also pointed to other Ombudsman's decisions in support of its position that this complaint ought to be upheld. But I don't agree with the point the PR is making here. Other decisions issued by other ombudsmen do not have a precedent effect like some court judgments might, and each Ombudsman must determine each case on its own specific facts.

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

In the Letter of Complaint, the PR alleged that there had been actionable misrepresentations made at the Time of Sale, and that the Supplier had breached the contractual terms of the Purchase Agreement. As such it said that the Lender was unfair in not accepting Mr and Mrs C'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.

It was said in the Letter of Complaint that Fractional Club had been misrepresented by the Supplier at the Time of Sale because Mr and Mrs C were told:

- The Supplier would terminate Mr and Mrs C's existing timeshare agreement they held with another timeshare provider ('provider A').
- Fractional Club was an investment product which guaranteed a return on their initial investment, plus a profit by 2030 at the latest.
- They could expect to make a profit from rental income if they didn't use their weeks.

These issues 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 C in this regard.

No new evidence or arguments were put forward by the PR in response to the Investigator's views relating to these complaint points, so I do not think it necessary to consider them further. But for completeness, having considered everything that has been submitted, when looking at the claim 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 this particular Section 75 claim.

I also do not think the Lender is liable to pay Mr and Mrs C 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 Fractional Club membership was actionably misrepresented at the Time of Sale, or that there was a breach of contract. 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 relationship between Mr and Mrs C and the Lender along with all of the circumstances of the complaint, I don't 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 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 the credit relationship between Mr and Mrs C and the Lender.

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

As I have already said, although in the Letter of Complaint the PR has not referred to any regulations, in effect it said that the Supplier breached Regulation 14(3) of the Timeshare Regulations. And it has expanded on this point in response to the second Investigator's view.

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 the Allocated Property clearly constituted an investment as it offered Mr and Mrs C 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 <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*.

[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)

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 C 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.

And there is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time 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 Mr and Mrs C, 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. But having considered all of the evidence submitted, I do not think it is *probable* that it was sold in this way. There is simply no direct evidence that the sale was presented in the way the PR says it was.

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 between the Lender and Mr and Mrs C unfair to them?

Accepting that it is *possible* that there was a breach of Regulation 14(3) by the Supplier at the Time 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 credit relationship between Mr and Mrs C and the Lender under the Credit Agreement and related Purchase Agreement. This is because 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 Mr and Mrs C 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.

Regrettably, the PR hasn't provided a witness statement from Mr and Mrs C – or anything else that sets out in their own words what happened.

I appreciate that the Letter of Complaint was probably prepared by the PR following a conversation or conversations with Mr and Mrs C, but 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 the Letter of Complaint 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 C, 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 Fractional Club membership was an important and motivating factor when Mr and Mrs C decided to go ahead with their purchase. I am simply not persuaded that was the case.

Given that Mr and Mrs C were at the Supplier's resort on a reduced-cost holiday at the invitation of the Supplier, 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. I can also see that the Supplier appears to have successfully terminated Mr and Mrs C's existing timeshare agreement they held with 'provider A'. So, I think it's likely that they were also motivated to enter the Purchase Agreement in order to relinquish their existing timeshare product.

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 am not persuaded, on the basis of the evidence in this case, that their purchase was 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 the decision they ultimately made.

So, on balance, the evidence does not persuade me that the Supplier breached Regulation 14(3) of the Timeshare Regulations. But even if I am wrong about that, and the Supplier did market or sell the Fractional Club membership as an investment in breach of Regulation 14(3), I am not persuaded that Mr and Mrs C's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with the purchase for the holidays it could provide them, and for the timeshare termination service the Supplier was offering, whether or not there had been a breach of Regulation 14(3).

And for that reason, I do not think the credit relationship between Mr and Mrs C and the Lender was 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 C under the Credit Agreement 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 C and Mr C to accept or reject my decision before 12 March 2026.

Chris Riggs
Ombudsman