DRN-4800263

The complaint

The Complaint

Mrs C and Mr S's 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') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mrs C and Mr S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 29 May 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £10,338 (the 'Purchase Agreement'). The membership was on a bi-annual basis, meaning that they could use their points in exchange for holiday accommodation every other year, commencing in 2018.

Fractional Club membership was also asset backed – which meant it gave Mrs C and Mr S 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.

Mrs C and Mr S paid for their Fractional Club membership by taking finance of £10,338 from the Lender (the 'Credit Agreement') in their joint names.

Mrs C and Mr S – using a professional representative (the 'PR') – wrote to the Lender on 26 September 2023 (the 'Letter of Complaint') to raise a number of different concerns about their Fractional Club membership and the associated Credit Agreement. 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 initially dealt with Mrs C and Mr S's concerns as a claim, which it rejected. As Mrs C and Mr S were unhappy with this outcome, the Lender considered it as a complaint, and issued its final response letter on 3 January 2024, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service with some testimony from Mr S. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

The Investigator said, in summary, that she didn't think their credit relationship with the Lender had been rendered unfair under Section 140A of the CCA because:

- She didn't think Mrs C and Mr S had been pressured into purchasing the membership, and the Supplier's marketing and sales practices were not likely to have prejudiced their purchasing decision either.

- She was not persuaded that the investment element of the Fractional Club was important to them, so any potential breach of the regulations was not material to their purchasing decision.
- Although it was possible that some of the terms in the Purchase Agreement were unfair, she couldn't see that any of the terms had been applied unfairly; and
- While it was also possible that the Supplier didn't give Mrs C and Mr S sufficient information, in good time, on the various charges that they could be subject to, she was not persuaded that any such failings were likely to have prejudiced their purchasing decision.

The Investigator also thought that the Lender had not been unfair in rejecting Mrs C and Mr S's claim under Section 75 of the CCA, because they had made the claim for misrepresentation by the Supplier more than six years after the events concerned.

The Investigator also considered whether it was likely that the loan was provided to them when it ought not to have been, and she concluded that she had seen nothing persuasive indicating that the lending was unaffordable for Mrs C and Mr S.

The PR, on Mrs C and Mr S's behalf, disagreed with the Investigator's assessment. But it only provided arguments in relation to whether Mrs C and Mr S's credit relationship had been rendered unfair by a breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') as it said the Fractional Club had been sold and/or marketed by the Supplier as an investment.

It asked for this argument and Mr S's testimony to be put before an Ombudsman for consideration – which is why it was passed to me.

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 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 in detail here. But I would add that the following regulatory rules/guidance are also relevant:

<u>The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

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 opinion of the Investigator in that 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.

As set out, the initial complaint made to the Lender on Mrs C and Mr S's behalf consisted of several points. They were, in summary, that:

- The Lender had been unfair and unreasonable in not accepting Mrs C and Mr S's claim of misrepresentation under Section 75 of the CCA; and
- Mrs C and Mrs S's credit relationship with the Lender had been rendered unfair under Section 140A of the CCA.

The Investigator considered these points and rejected them, as I've set out above. In response to what the Investigator said, the PR only made one argument – that Mrs C and Mr S's credit relationship had been rendered unfair to them under Section 140A of the CCA because of a material breach of Regulation 14(3) of the Timeshare Regulations by the Supplier because the Fractional Club had been sold to Mrs C and Mr S as an investment. And it resubmitted Mr S's testimony in support of this point.

So as this is the only point that remains in dispute, I will address that now. But for the avoidance of doubt, having considered everything submitted, I agree with the outcome reached by the Investigator on all of the other complaint points, for broadly the same reasons.

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

I have considered the entirety of the credit relationship between Mrs C and Mr S and the Lender along with all of the circumstances of the complaint. In carrying out my analysis, and in coming to my conclusion I have looked at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
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; and
4. The inherent probabilities of the sale given its circumstances.

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

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

The Lender does not dispute, and I am satisfied, that Mrs C and Mr S's 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 the PR says that the Supplier did exactly that at the Time of Sale.

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 Mrs C 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 C 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.

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.

[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)

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 C 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.

But 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 C 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.

Would the credit relationship between the Lender and Mrs C and Mr S have been rendered unfair to them had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found that it was possible 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 (if there was one) would have had on the fairness of the credit relationship between Mrs C and Mr S and the Lender under the Credit Agreement and related Purchase Agreement because, as the case law on Section 140A makes clear, 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 C 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 Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, like the Investigator, I am not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mrs C and Mr S decided to go ahead with their purchase. I'll explain.

As part of its initial submission to this Service, the PR sent a witness statement from Mr S. This set out his recollections of their entire relationship with the Supplier. As far as is relevant to the Time of Sale and this complaint Mr S said in his testimony:

> *"During the meeting, we were paired with a dedicated salesperson who, in retrospect, was nothing more than a high-pressure salesman. At no point were we informed that this meeting would involve a property sales pitch, let alone a financial agreement. The sales tactics were aggressive, with repeated consultations with their manager when we raised objections or expressed doubts.*
>
> *Eventually, we were taken to view the properties they were promoting, all of which were far beyond what we could afford. At this point, fatigue and frustration had set in, and we reluctantly agreed to terms that included an APR that we [sic] didnt fully understand. Notably, there was no mention of [the Lender], the entity responsible for financing the property, and we were unaware of the loan aspect at that time.*
>
> *Upon returning to the UK, we were shocked to receive correspondence from [the Lender], revealing that the loan for the [Supplier] property was now our responsibility. The exorbitant interest rates on the loan were a heavy financial burden for our family.*

Furthermore, they assured us that we could sell our share of the property back to them at any time and recover our initial investment, which we had covered through a loan from [the Lender].

Regrettably, the ongoing maintenance fee was not emphasized during the discussion.

[…]

In hindsight, it is clear that we were misled and coerced into a contract with [the Supplier] under deceptive circumstances. Had we been fully informed about the true nature of the [Supplier's] offer, including the high-interest loan and the aggressive sales tactics involved, we would never have agreed to it.

We are seeking your assistance to terminate our contract with [the Supplier] and to potentially seek compensation for the financial hardships and emotional distress that this ordeal has caused our family. We believe that the evidence of their misleading practices and the significant financial burden imposed upon us justifies the termination of our contract."

Having considered this testimony, I cannot see that if the Supplier sold and/or marketed the membership as an investment with a potential profit, thereby breaching Regulation 14(3), that it was bought by Mrs C and Mr S for this reason. That has not been mentioned in the testimony at all. Mr S says that the Supplier *"…assured us that we could sell our share of the property back to them at any time and recover our initial investment…"* but this makes no mention of any potential profit. And after all, as I've said, the investment element of the Fractional Club was the Allocated Property and its sale at the end of the membership term – this has not been mentioned at all by Mr S, which I find surprising if, as the PR attests, it was the potential profit from this sale that was the motivating factor when Mrs C and Mr S decided to purchase the Fractional Club membership.

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 Mrs C and Mr S themselves don't persuade me 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.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, like the Investigator, I am not persuaded that Mrs C and Mr S'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). And for that reason, I do not think the credit relationship between Mrs C and Mr S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Overall Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs C and Mr S's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement and related Purchase Agreement that was 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 do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr S to accept or reject my decision before 19 May 2026.

Chris Riggs
Ombudsman