DRN-5219448

The complaint

Mr and Mrs C'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

Mr and Mrs C purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 30 September 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £16,349 (the 'Purchase Agreement').

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 a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs C paid for their Fractional Club membership by taking finance of £16,349 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs C traded in their Fractional Club membership and their fractional points on 27 April 2015 when they purchased membership of the Supplier's 'Signature Collection'. This meant that they relinquished all rights to their share of the Allocated Property named on their Fractional Club Purchase Agreement. Mr and Mrs C paid for this new membership by taking further finance from the Lender, which consolidated the outstanding balance of their previous Credit Agreement. A complaint regarding this purchase and associated credit agreement is being considered separately and is included here for background information only.

Mr and Mrs C – using a professional representative (the 'PR') – wrote to the Lender on 15 January 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

In the Letter of Complaint Mr and Mrs C say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Assured them there would be a high level of availability which was not true.
- Told them that Fractional Club membership was an "investment" when that was not true.
- Told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

- Told them that the sale of the Allocated Property would be fast, easy and profitable when this was not true.

Mr and Mrs C say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs C.

Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr and Mrs C say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

- The misrepresentations as set out above.
- The Supplier misrepresented the true nature of the long-term holiday product.
- They were pressured into purchasing Fractional Club membership by the Supplier.
- The Supplier failed to deliver on the assurances it gave during the sale.
- The Supplier failed to act in Mr and Mrs C's best interests
- The Supplier failed to ensure compliance and due diligence.
- The Supplier failed in its duty of care towards Mr and Mrs C.

The Lender dealt with Mr and Mrs C's concerns as a complaint, but was unable to provide them with a substantive answer as the PR had not sent it the required evidence that it was able to represent Mr and Mrs C. So the Lender informed Mr and Mrs C of their rights to have the complaint considered by the Financial Ombudsman Service.

Mr and Mrs C, via their PR, duly referred the complaint to our Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs C[1] disagreed with the Investigator's assessment, and on 9 May 2024, provided a written account, in the name of Mrs C, setting out her recollections of her entire relationship with the Supplier and the Lender.

And having considered this, and having reviewed the information already held on file, the Investigator changed her opinion. She thought that the Supplier had sold and/or marketed the Fractional Club to Mr and Mrs C as an investment, in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And that breach caused the resulting Credit Agreement and related Purchase agreement to be unfair to Mr and Mrs C under Section 140A of the CCA. She then set out how she thought the Lender should calculate and pay compensation to Mr and Mrs C.

The Lender disagreed with the Investigator's most recent view, and asked for an Ombudsman's decision – which is why it was passed to me.

My provisional decision

I considered everything which had been said and submitted and didn't agree with the finding

[1] By this point Mr and Mrs C were no longer professionally represented.

as set out in the Investigator's second view. I wasn't persuaded that Mr and Mrs C's complaint ought to be upheld, so I set out my initial thoughts in a provisional decision, and invited all parties to respond with any new evidence or arguments they wished me to consider.

In my provisional decision I first set out that I would refer to several regulatory requirements, legal concepts and guidance. These were:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').
- The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')
- The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT').
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *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) ('*Shawbrook & BPF v FOS*').

I then set out my provisional findings on the merits of Mr and Mrs C's complaint. I said:

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 do not currently think this complaint should be upheld. I understand that this will come as a disappointment to Mr and Mrs C, and I'm sorry about that.

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

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

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

In short, a claim against the Lender under Section 75 of the CCA essentially mirrors the claim Mr and Mrs C could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs C at the Time of Sale, the Lender is also liable.

I think it may be useful to set out what a misrepresentation is. A material and actionable misrepresentation is an untrue statement of existing fact, made by the Supplier, that induces a consumer into entering a contract. So, in Mr and Mrs C's case, for me to say there had been a pre-contractual misrepresentation by the Supplier, I would have to be satisfied, on the balance of probabilities, that Mr and Mrs C were told something that was factually untrue, and that this induced them to make their Fractional Club purchase.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include that the Supplier told them there would be a high level of availability, and that the Supplier's resorts were exclusive to members, both of which Mr and Mrs C say are untrue. But other than the bare allegations in the Letter of Complaint, Mr and Mrs C have not said what they were told, by whom and when, to support this. And there is nothing in Mrs C's statement regarding this. And when she refers to her unhappiness with the Fractional Club membership, she only mentions the quality of the accommodation, not the availability or any lack of exclusivity. So I am not persuaded there was a misrepresentation made here.

Mr and Mrs C also state that the Fractional Club was sold to them as an investment, when this was not the case. I will address this point further below, but had they been told that their Fractional Club was an investment (and I make no finding on that point here), that would not have been untrue.

Lastly, Mr and Mrs C state they were told that the sale of the Allocated Property would be "…fast, easy and profitable." But I cannot see how this could be a misrepresentation, as it is talking about something that would happen in the future, and has not yet occurred. So I fail to see how Mr and Mrs C could suggest what they were told is untrue. And in any event, Mr and Mrs C traded in their Fractional Club less than one year after purchasing, and so revoked any rights they had over the future sale of the Allocated Property at that point.

As there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs C by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs C any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs C was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs C also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs C and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship, like the one between the Lender and Mr and Mrs C, can be found to have been or be unfair to the debtor (Mr and Mrs C) because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA).

Such a finding of unfairness may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs C's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). So they were what is known as antecedent negotiations under Section 56(1)(c) – so they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

So, this means that the Supplier is deemed to be the Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. It needs to take into account the entirety of the credit relationship, which in this case, is up to the point the Credit Agreement was cleared on 4 June 2015.

So, I have considered the entirety of the credit relationship between Mr and Mrs C 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 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; 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 Mr and Mrs C and the Lender. And having done that, I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. I'll explain.

The Supplier's sales & marketing practices at the Time of Sale

Mr and Mrs C's complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr and Mrs C and carried on unfair commercial practices which were prohibited (although not set out in these exact terms, these would relate to the CPUT Regulations) for the same reasons they gave for their Section 75 claim for misrepresentation. But given the limited evidence in this complaint, as I set out in the Section 75 section above, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Mr and Mrs C say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to, as alleged in their Letter of Complaint. They were also given a 14-day cooling off period, and have not provided a credible explanation for why they did not cancel their membership during that time if they only made the purchase due to pressure. After all, the Supplier has provided evidence that Mr and Mrs C have attended a total of four presentations over the years, and declined to purchase anything on two of these. Moreover, they did go on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. Mr and Mrs C have said they were given several alcoholic drinks throughout the sales process, but there is simply no evidence to support this. I accept that they may have been given drinks once the sales process was complete, but I am not persuaded that this occurred prior to this. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs C made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

In the Letter of Complaint Mr and Mrs C also set out some other reasons which they say caused them unfairness. Those being that the Supplier failed to deliver on the assurances it had given, failed to act in their best interests and with a duty of care, and had failed to ensure compliance and due diligence. But other than these general statements, they have provided no evidence to support them, nor even to say how these caused an unfairness in their credit relationship with the Lender. And having looked at everything that has been said and provided, I cannot see any evidence to support that unfairness was caused for these reasons.

I'm not persuaded, therefore, that Mr and Mrs C's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr and Mrs C's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. It was not, as set out in the Letter of Complaint, a long-term holiday product, as it provided Mr and Mrs C with the rights to overnight holiday accommodation.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the 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 PR, in the Letter of Complaint, says that the Supplier did exactly that at the Time of Sale. And Mrs C has repeated that in her statement. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit". I will use the same definition.

Mr and Mrs C's share in the Allocated Property clearly, in my view, constituted 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.

So, for me to conclude that Fractional Club membership was marketed or sold to Mr and Mrs C in a way that breached 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.

Although it has not been provided in this case, I have seen evidence in the form of the sales documentation relating to other similar complaints considered by this Service, about the sale of Fractional Club at very similar times to this sale. And in the standard sales and membership documentation that I think would most likely have been provided to Mr and Mrs C at the Time of Sale, I can see 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. There were, for instance, disclaimers in the standard paperwork that related to sales of this kind, that state that Fractional Club membership was not sold to customers as an investment.

However, with all of that said, I also acknowledge that the Supplier's training material, which has also been provided to this Service in relation to other complaints, left open the possibility

that the sales representative may have positioned Fractional Club membership as an investment. So I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

But given the circumstances of this complaint, I do not think it is necessary for me to make a finding on whether Fractional Club membership was likely to have been sold in breach of Regulation 14(3) of the Timeshare Regulations. I think this because I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr and Mrs C rendered unfair?

There has been a significant amount of case law in this area, and I have to take it all into consideration here. For example, 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.

So what does that mean to the complaint I am considering here? 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 (for example compensation) 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.

It appears Mr and Mrs C were not members of any type of timeshare or holiday club at the time they purchased their membership of the Fractional Club. They were at one of the Supplier's resorts on holiday having accepted a promotional break from the Supplier. So I think it is a fair assumption to make that Mr and Mrs C were interested in holidays, and specifically the type of holidays the Supplier could provide.

As I've said, it is possible that the Supplier did in fact breach Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club to Mr and Mrs C as an investment. But in order to find that this has caused an unfairness to their credit relationship with the Lender, I need to think that this breach was a material factor in their purchasing decision.

And the Letter of Complaint from the PR sets this out. It says, as far as is relevant:

> *"… this investment was a primary reason for Our Client choosing to invest in [Fractional Club] …"*

And in her statement, Mrs C says the following:

> *"At the centre it was a large office with numerous tables with couples sat at them. We were allocated a head sales representative and again I cannot recall the persons name, he set out to convince us of the value of a purchase, he used diagrams to show us how much cheaper it would be to become a member of CLC than pay for holidays.*
>
> *They used these charts and computer software from the website to convince us. There were no hardcopies of documents given out at the sales presentation only figures written on paper to show us how costs and repayments would work. I now realise and appreciate they were only stating an estimate, not the final amount we would be due by taking the financial deal*
>
> *…*

We were informed that the property would increase in value, that it was an exclusive club and that you could only stay on site if you were a member or invited on a promotional event."

So Mrs C has said that they were told that the property would increase in value. But I cannot see any reference to them being told they would, or were likely to make a profit here. Mrs C has said how the Supplier showed them that holidaying with it would be cheaper as opposed to paying for the equivalent, but there is nothing about the potential sale proceeds of the Allocated Property. Indeed the only indication in the statement of any motivation to purchase the Fractional Club was to achieve the holidays that they wanted. Mrs C has made mention of being given extra points to enable them to take a free holiday, and free membership of a partner organisation which would allow them to swap their points and take vacations from their range of accommodation all over the world. But, as I've said, there is nothing which persuades me that the Supplier either told them they would, or were likely to, make a profit here.

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, 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 their purchase 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).

Section 140A: Conclusion

In conclusion, therefore, 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 taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

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

If there is any further information on this complaint that Mr and Mrs C wish to provide, I would invite them to do so in response to this provisional decision.

Neither Mr and Mrs C nor the Lender responded to my provisional decision and no further evidence or arguments were submitted.

What I've decided – and why

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

As no further evidence or arguments were submitted in response to my provisional decision, and having reconsidered everything afresh, I see no reason to depart from my provisional findings as set out above.

My final decision

I do not uphold Mr and Mrs C's complaint against 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 15 January 2025.

Chris Riggs
Ombudsman