DRN-5315153

The complaint

Mr and Mrs P's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

Mr and Mrs P purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 14 January 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £14,398 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs P 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 P paid for their Fractional Club membership by making a payment of £500 and then taking finance of £13,898 from the Lender in their joint names (the 'Credit Agreement') for the remaining balance.

Mr and Mrs P – using a professional representative (the 'PR') – wrote to the Lender on 5 January 2018 (the 'Letter of Complaint') to complain about 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.

The Letter of Complaint said the credit relationship was unfair because:

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. It was not disclosed by either the Lender nor the Supplier that commission was paid as a result of the Credit Agreement.
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mr and Mrs P's concerns as a complaint and asked the Supplier to respond on its behalf. It did so, and it rejected their complaint on every ground.

Mr and Mrs P then referred the complaint to the Financial Ombudsman Service. Whilst it was waiting to be considered, Mr and Mrs P confirmed that they no longer wished to be represented by the PR.

Mr and Mrs P's complaint was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits. The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs P at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs P was rendered unfair to them for the purposes of Section 140A of the CCA.

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

Having considered the information on file, I didn't agree with the outcome reached by the Investigator. I didn't think the complaint ought to be upheld. So, I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to respond with any new evidence or arguments that they wished me to consider.

In my PD I said:

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

Mr and Mrs P 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 P 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 P) 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 P'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.

I have considered the entirety of the credit relationship between Mr and Mrs P 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 P 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 P'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.

The PR also says in the Letter of Complaint that the Supplier was paid commission by the Lender as a result of it arranging the Credit Agreement, and that this commission payment was not disclosed to Mr and Mrs P thereby rendering their credit relationship with the Lender unfair. But the Lender has told both this Service and the PR that no commission was paid by it to the Supplier in this case, and this would seem likely to be the case given the Lender was the Supplier's in-house credit provider. So, I am not persuaded that any commission was paid in this case, so it follows that no unfairness was caused for this reason.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs P. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs P was actually unaffordable at the Time of Sale, before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. I understand that Mr and Mrs P's personal and financial circumstances changed after they made the purchase, but from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs P, and that any change that occurred was not reasonably foreseeable at the Time of Sale. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs P wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs P 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. I can also see that they didn't finally agree to make the purchase until five days after the Time of Sale and after they returned home, as it was then that they paid the deposit to the Supplier. So I can't see that there was pressure at that point. With all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs P made the decision to purchase Fractional Club

membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs P'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 P'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 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 says that the Supplier did exactly that at the Time of Sale. 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, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs P'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.

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

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

With that said, I acknowledge that the Supplier's training material 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.

<u>Was the credit relationship between the Lender and Mr and Mrs P rendered unfair?</u>

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 P 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.

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

It appears Mr and Mrs P 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 low-cost 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.

Mr and Mrs P have submitted a statement, in Mrs P's name, setting out her recollections of the Time of Sale. I have considered this statement as it is the only direct evidence in this case of Mr and Mrs P's motivation to make their Fractional Club purchase.

In this regard, the statement reads:

> *"…We were advised that if we bought points, we would have world wide access to luxury holidays as and when we wanted them. The representatives went on to advise that we could also invest in the [Fractional Club]. This would mean that we would be fractional*

owners of a holiday property that would be sold on a specific date. We were advised by the representatives at the time of sale, we would be able to either sell and make a profit or to reinvest with [the Supplier] The representatives went on to advise that the property that we owned would be available to us whenever we wanted". … "As this had been sold to us an investment, that would make money in the future that this might be a good way to have worldwide holidays, the representatives said that if we purchased the fractional points, we would be able to resorts [sic] in Mexico and the USA as well as have use of our fractional property. As an incentive, we were offered an additional free holiday. We therefore decided to invest in the property…""*

So I can see that Mrs P has said that the investment element was a consideration for them when it came to the purchasing decision. But from my reading of what she has said, I think it likely that Mr and Mrs P would have pressed ahead with the purchase of Fractional Club whether or not the Supplier had sold it to them as an investment. I say this because I can see that Mr and Mrs P were motivated by the thought of being able to take luxury world-wide holidays which they would have only been able to take with the Supplier. Mrs P has said so in her statement above. And she went on:

"When we returned home we were very interested in the holiday resort in Mexico recommended by the representative."

And then further:

"In 2015 we took the free holiday in Spain and on our return decided that we would make a booking as we were very interested in the resort in Mexico shown to us by the representative."

Mrs P says they bought Fractional Club membership in order to take holidays, including the free holiday offered as an incentive. There is little evidence to say that any potential return from the sale of the Allocated Property was a material and motivating factor in their decision to purchase.

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 P'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 P and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

The Letter of Complaint sets out that Mr and Mrs P were not given sufficient information at the Time of Sale about the ongoing costs associated with the Fractional Club, and specifically in relation to the annual management charges.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs P when they purchased membership of the Fractional Club at the Time of Sale. And I can see that information regarding the requirement to make annual 'management charges' was included in its own section of the Standard Information form under the heading:

4. INFORMATION ON THE COSTS

Management and fees

…

The Manager is responsible for providing management, repair and maintenance of the Property. Owners will be required to contribute to those charges by means of an annual charge called "management Charge" (Charges) payable whether weeks are used or not. These Charges will be allocated among Owners in a particular Allocated Property in a fair and equitable manner, decided by the Manager, and in proportion to the number of weekly periods an Owner is entitled to use each year according to his Fractional Rights Certificate (the Charges will also include an element for managing and administering the Trustee).

Full details are contained in the Rules and Management Agreement. Charges will be budgets annually and will be subject to increase or decrease as determined by the costs of managing the Project and are payable annually in advance each year.

This Standard Information Statement went on to set out the first year's fee. For 2014 this was €949.

So it seems likely to me that Mr and Mrs P were told by the Supplier at the Time of Sale that the annual management charges could go up each year. And while it's possible the Supplier didn't give them sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't seen enough to persuade me that this, alone, rendered Mr and Mrs P's credit relationship with the Lender unfair to them.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I am not currently persuaded that the Lender was party to a credit relationship with Mr and Mrs P 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 them.

The responses to the PD

In response to the PD the Lender said it had nothing further to add, and Mrs P said whilst she did not agree with the outcome, they had no new evidence to submit. As all parties have now responded the complaint has come back to me to reconsider.

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.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.

- The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- The Consumer Protection from Unfair Trading Regulations (the 'CPUT Regulations').
- 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*').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

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.

But before I explain why I have come to the 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.

And having done that, and as there have been no new submissions made in response to the PD, I see no reason to depart from my provisional findings set out above. I do not think this complaint should be upheld.

My final decision

I do not uphold this complaint against First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P and Mr P to accept or reject my decision before 7 March 2025.

Chris Riggs
Ombudsman