DRN-5726684

The complaint

Mr and Mrs O'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 O were existing members of a timeshare with a third-party timeshare provider, having bought a number of products over time.

On 9 June 2015 (the 'Time of Sale 1') Mr and Mrs O bought a new timeshare (the 'Fractional Membership 1') from a timeshare provider (the 'Supplier'). They entered into an agreement with the Supplier to buy the right to occupy a named apartment during a set week each year (apartment 403 in week 16) for €21,052 (the 'Purchase Agreement 1').

Mr and Mrs O paid for their Fractional Membership 1 by taking finance from the Lender (the 'Credit Agreement 1') for £16,000 in their joint names.

Then, on 20 April 2016 Mr and Mrs O bought a second membership (the 'Fractional Membership 2') from the Supplier (the 'Purchase Agreement 2'), which gave them the right to occupy a different named apartment (apartment 605 in week 17). This second membership cost them €19,277. At the same time Mr and Mrs O switched their apartment and week from Purchase Agreement 1 to Apartment 605 in week 18. This meant they had the right to occupy the same apartment for a fortnight every year.

Mr and Mrs O paid for their Fractional Membership 2 by taking finance from the Lender (the 'Credit Agreement 2') for £16,000 in their joint names.

Fractional Membership 1 and 2 were asset backed – which meant they gave Mr and Mrs O more than just holiday rights. They also both included a share in the net sale proceeds of a property named on the Purchase Agreement(s) (the 'Allocated Property') after the membership terms end in 2030.

Mr and Mrs O – via a professional representative (the 'PR') - wrote to the Lender on 3 October 2019 (the 'Letter of Complaint') to complain about the events that happened at the Time of Sale. The PR says the Supplier made the following misrepresentations:

- Fractional Membership was an investment product which could be resold at any time and which also guaranteed a return on their initial investment plus profit at the latest in 2030.
- The Supplier would terminate Mr and Mrs O's existing timeshare agreement held with another timeshare provider, and would recover what they had paid for this.
- They could expect to make a profit from rental income if they didn't use their weeks.

The PR said that Mr and Mrs O never received any money back from their original timeshare, and they said the Supplier's marketing department was closing down, meaning the resale and rental promises will remain unfulfilled.

The Lender dealt with Mr and Mrs O's concerns as a complaint and issued its final response letter on 15 October 2019, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service when, in addition to the above complaints, the PR said that the Allocated Property(s) had been sold as part of the complex to a third-party.

Mr and Mrs O's complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

The Investigator's views

The Investigator said, in summary, that they were not persuaded that there had been actionable misrepresentations made by the Supplier at either Time of Sale 1 or 2, and they couldn't see that the Supplier had breached the terms of either of the Purchase Agreement(s).

The PR disagreed with the Investigator's assessment and raised the allegation that the Fractional Membership(s) had been sold by the Supplier as investments, which was in breach of Regulation 14(3) of the Timeshare Regulations[1]. It said that these breaches rendered each of the Credit Agreement(s) unfair to Mr and Mrs O as they had been material to their purchasing decisions.

The complaint was later reassessed by another Investigator, who also didn't think it ought to be upheld. This Investigator said:

"In response to my colleague's view, Mr and Mrs [O]'s representative sent us a copy of a letter it had sent the [Lender] which expanded on its earlier claim that the Membership was sold as an investment in breach of Regulation 14(3). It said this rendered the credit relationship unfair for the purposes of Section 140A of the CCA. The letter stated the following:

- *The Supplier breached Regulation 14(3) because:*
    - *"They were originally advised they could sell at a profit in 2030 which is listed on the owner certificate…"*
    - *"…our clients were advised there would be no maintenance fees associated with their fractional ownership as the vendor advised these fees would be covered by the rent program…"*
- *And the Supplier's breach of Regulation 14(3) led to an unfair credit relationship because:*
    - *"Our clients felt that there were no options left and given a chance to own a little piece of paradise and to retain an investment for a profit they felt they had no other option but to invest further into the scheme or walk away with debt a current timeshare product that was not in demand and tied into a contract which would see them paying maintenance fees for the next 54 years. There was no get-out clause, this would also be passed down via family should they not be able to sell the current ownership, so this new scheme showed many benefits mainly a profitable return by year 2030."*

[1] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

I've seen that my colleague considered other complaint points raised by Mr and Mrs [O] in their view under Section 75 of the CCA. But Mr and Mrs [O]'s response has been limited to the question of whether the Supplier breached Regulation 14(3) during the sale and a few other new matters - that the sales documents didn't make it clear that if Mr and Mrs [O] defaulted on the loan, the investment would be confiscated by the resort. And that the property was sold by the Supplier to Hoima Hotel.

Given that, I assume that my colleague's conclusions on matters not raised following the view are no longer in dispute, so I've only considered the breach of Regulation 14(3), the impact of defaulting on the loan and the sale to Hoima Hotel, in the rest of this view.

Did the Supplier breach Regulation 14(3) of the Timeshare Regulations?

I have carefully reviewed every submission that Mr and Mrs [O]'s representative has made. These submissions from Mr and Mrs [O]'s representative set out what Mr and Mrs [O] were supposedly told during the sale and their reasons for entering the contract. I appreciate this information might have been collected during the conversations between Mr and Mrs [O] and their representative. However, it's important to note that neither our service nor the [Lender] have been provided with first-hand testimony from Mr and Mrs [O]. So, it's difficult to substantiate what elements of these letters are from Mr and Mrs [O]'s recollections at the time of each sale and what are their representative's submissions. Therefore, I don't have anything from Mr and Mrs [O] that helps me work out what it was they said happened during the sale or the reasons behind their purchase.

In addition to the above, having reviewed the available documentation, some of which was signed by Mr and Mrs [O], 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 [O], might expect to get back at the end of the Membership term. So the actual evidence I've seen in this case doesn't point to the Membership being presented to Mr and Mrs [O] as an investment. That doesn't mean Mr and Mrs [O] weren't told something during the course of the sales by the Supplier, but without any direct evidence from them, I simply can't say what, if anything, they were told about this during the sales.

Considering the available information, on balance, I haven't seen sufficient evidence to conclude that the timeshare was marketed or sold to Mr and Mrs [O] as an investment in breach of Regulation 14(3). Or, if there was such a breach, it was such an important and motivating factor in their purchasing decision that it led to an unfair credit relationship.

I say that because I have no direct evidence from Mr and Mrs [O] why it was they took out their Membership. Further, one of the details of the sale that they representative gave was that they were told they could rent out their timeshare weeks for more than the annual maintenance cost, therefore generating a profit. However, I have seen that they used their Membership every year between 2016 to 2019, so there is no evidence that suggests that they were interested in renting out their holiday weeks.

Defaulted loan payments

Mr and Mrs [O]'s representative also said that it wasn't explained to them that should they default on the loan, the investment would be confiscated by the resort.

Firstly, as I've already stated above, without first-hand testimony from Mr and Mrs [O], I don't know what was discussed during the sales process. Therefore, I have considered the evidence that is available to me, namely the sales documents. I note that the Supplier's purchase agreement terms and conditions state the costs of the purchase and any additional costs, such as maintenance fees. However, it doesn't say that the Membership will be

confiscated if Mr and Mrs [O] defaulted on the loan. And I've seen no evidence that this would happen.

But in any event, the [Lender] have also said that Mr and Mrs [O] have settled both loans in August 2018 and July 2018, respectively. So, I can't see that they in fact defaulted on the loans or any term was operated unfairly against them. It follows, I can't say there was an unfair credit relationship for this reason.

Hoima Hotel

Mr and Mrs [O]'s representative said that the Supplier has [sold] the property to Hoima Hotel and they won't honour the agreement to sell the property which means that Mr and Mrs [O] have no comeback on their investment.

The property was owned by Trustees and not the Supplier so it's not clear the extent to which the property has new owners or what impact that has on Mr and Mrs [O]'s Membership. Neither Mr and Mrs [O] or their representative have said, suggested or provided evidence to demonstrate that they are no longer:

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

I understand that Mr and Mrs [O] 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, it would seem that 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 [O] 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, in relation to the alleged breach of Regulation 14(3):

- The Letter of Complaint was a direct personal recollection from Mr and Mrs O of the Time(s) of Sale. This is admissible as direct evidence and must be afforded proper evidential weight.
- Both oral and written misrepresentation are material.
- Mr and Mrs O were given specific assurances of potential profitability, the absence of maintenance fees, and other indicative investment features, all falling within the Regulation 14(3) prohibition.
- Refusing to adequately consider testimonial evidence provided by an authorised PR is contrary to fair assessment.
- The testimonial evidence reflects that the representations made about potential profit were the primary drivers of the purchase. Mr and Mrs O were left feeling pressured with no alternative but to accept the new scheme.

- A material breach of Regulation 14(3) inherently introduces unfairness to the credit relationship.

The PR then addressed the allegation of 'defaulted loan payments'.

- Even if no default occurred, the failure to clearly disclose the potential consequences of non-payment is a form of mis-selling. The possibility of repossession or loss of value is highly relevant to the fairness of the agreement.

And in relation to the sale of the hotel complex:

- The sale of the property to a third-party continues to cause concerns about their membership rights and their ability to realise any benefit or usage as originally guaranteed.

The PR concluded that the complaint should be upheld considering the evidenced misrepresentations, the unfairness attached to the credit agreement(s) and the proper legal weight that must be given to the representative's testimony.

The second Investigator remained of the opinion that the complaint ought not to be upheld, and said that it would be considered by an Ombudsman. He said that the PR should provide any new evidence that it wanted to be considered.

As no agreement could be reached the matter has come to me for a decision. No further evidence has been provided or arguments made by either side.

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.

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 do not currently think this complaint should be upheld, for broadly the same reasons as given by both Investigators.

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.

I have also made my decision on the balance of probabilities – that is, what I consider is most likely to have happened – based on all of the evidence and wider circumstances.

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(s) of Sale, and that the Supplier had breached the contractual terms of the Purchase Agreement(s). As such it said that the Lender was unfair in not accepting Mr and Mrs O's claims under Section 75 of the CCA.

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 O in this regard.

No new evidence or arguments were put forward by the PR in response 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 claims under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons set out by the Investigators, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

I also do not think the Lender is liable to pay Mr and Mrs O 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 Membership(s) were actionably misrepresented or breached by the Supplier at the Time(s) of Sale. But it seems that, in addition to the alleged breach of Regulation 14(3) which I will address later in this decision, there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationships between Mr and Mrs O and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale.

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

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

Mr and Mrs O's complaint about the Lender being party to unfair credit relationships is made for several reasons, including:

- Fractional Membership was misrepresented to them by the Supplier;
- There is a term in the contractual documentation which is unfair; and
- The property has been sold to a third-party.

However, as things currently stand, none of these strike me as reasons why this complaint should succeed.

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 O'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 they were told something that was factually untrue, and that this induced them to make the purchase at the Time of Sale.

It is not entirely clear from the PR's submissions what misrepresentations were allegedly made by the Supplier at the Time of Sale, but it appears that it is saying that Mr and Mrs O were given some sort of assurance by the Supplier that they would receive money back from the surrender of their existing membership, and rental income from the property(s) which would negate the need to pay annual maintenance fees. However, I have seen nothing to suggest that this was said to Mr and Mrs O. There has been no direct testimony from Mr and Mrs O in this regard, so I am not persuaded that this representation was made at either of the Time(s) of Sale.

The PR has also said that the Fractional Membership was marketed to Mr and Mrs O as a profitable scheme, when this was untrue. However, telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. After all, a share in an allocated property was, by its very nature, an investment. And I have seen nothing which persuades me that any potential profit was set out by the Supplier as a fact when such an assertion would be impossible to stand by, given the inevitable uncertainty around property values some way into the future.

The PR also says that there is a contractual term governing the requirement to maintain the loan repayments and the consequences of not meeting those which was an unfair contract term.

For me to conclude that any term caused any unfairness to Mr and Mrs O in their credit relationship with the Lender, I would have to see that the term was applied in a way that was unfair to them. Yet, having considered everything, it seems unlikely to me that the term cited by the PR has led to any unfairness in the credit relationship for the purposes of Section 140A of the CCA. I say that because I have seen no evidence that this particular term even exists, nor that any similar term has been actually operated against Mr and Mrs O, let alone unfairly. Afterall, both loans were repaid in full by Mr and Mrs O in 2018, so no default has occurred in any event.

And like the second Investigator, I cannot see that the change in ownership of the properties concerned has caused there to be a breach of contract and/or any unfairness to their credit relationship with the Lender. I think this because neither Mr and Mrs O nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. Holders of the Fractional Membership(s);
2. able to use their Fractional Membership(s) to holiday in the same way they could initially; and
3. entitled to a share in the net sales proceeds of the Allocated Property(s) when their membership terms end.

Overall, therefore, I don't think that Mr and Mrs O's credit relationships with the Lender were rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR now says the credit relationships with the Lender were unfair to Mr and Mrs O. And that's the suggestion that both the Fractional Membership(s) were marketed and sold to them as investments in breach of the prohibition against selling timeshares in that way.

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

As I've already said, a share in an Allocated Property clearly constituted an investment as it offered Mr and Mrs O 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 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 Membership. They just regulated how such products were marketed and sold.

To conclude, therefore, that either or both Fractional Memberships were marketed or sold to Mr and Mrs O 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 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 Membership was marketed and/or sold by the Supplier at the Time(s) 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 the Fractional Membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs O, 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, statements signed by Mr and Mrs O which set out that the membership *should not* be regarded as a financial investment.

But on the other hand, I acknowledge that the letter of complaint sets out that the sales representative positioned both Fractional Membership(s) as investments. So, I accept that it's equally possible that Fractional Membership was marketed and sold to Mr and Mrs O as an investment in breach of Regulation 14(3) at the Time(s) of Sale.

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 relationships between the Lender and Mr and Mrs O 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(s) of Sale, I now need to consider what impact that breach (if there was one) had on the fairness of the relevant credit relationship between Mr and Mrs O and the Lender under the Credit Agreement(s) and related Purchase Agreement(s), as 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 O 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 relevant Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, I am simply not persuaded that the prospect of a financial gain from either of the Fractional Membership(s) was an important and motivating factor when Mr and Mrs O decided to go ahead with their purchase. I'll explain.

The PR hasn't provided a witness statement from Mr and Mrs O – 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 O, 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 O, I have to rely on the paperwork that has been provided, the nature of the sales and Mr and Mrs O's circumstances at the time.

And on my reading of all of the above, I do not think the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs O decided to go ahead with their purchases. I am simply not persuaded that was the case.

Given that Mr and Mrs O were originally 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 O's existing timeshare agreement they held with a different timeshare provider. So, I think it's likely that they were also motivated to enter the Purchase Agreement 1 in order to relinquish their existing timeshare product.

And it is also important to note what Mr and Mrs O did at the Time of Sale 2. They transferred their existing property and week into the same property as their new membership, on an adjacent week. This meant they were able to take a fortnight's holiday in the one apartment every year. This strongly suggests that their motivation behind the purchase was the holidays it could provide them.

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 Mr and Mrs O themselves don't persuade me that their purchases were motivated by their share in the Allocated Property(s) 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 decisions they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Membership(s) as investments in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs O's decisions to purchase Fractional Membership(s) at the Time(s) of Sale were motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with the purchases for the holidays they could provide them, and, in relation to the Time of Sale 1, 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 relationships between Mr and Mrs O and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

Conclusion

In conclusion, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and I am not persuaded that the Lender was party to credit relationships with Mr and Mrs O under the Credit Agreement(s) that were 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 think that this complaint against Shawbrook Bank Limited ought to be upheld.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O and Mrs O to accept or reject my decision before 29 December 2025.

Chris Riggs
Ombudsman