DRN-5751242

The complaint

Mr D and Ms L's complaint is, in essence, that First Holiday Finance Ltd (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 D and Ms L purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 25 July 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 810 fractional points at a cost of £13,110 (the 'Purchase Agreement').

Fractional Club membership gave Mr D and Ms L 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.

Mr D and Ms L paid for their Fractional Club membership by taking finance of £12,610 from the Lender (the 'Credit Agreement') and making a direct payment of £500.

Mr D and Ms L – using a professional representative (the 'PR') – wrote to the Lender on 24 October 2022 (the 'Letter of Complaint') to raise a number of different concerns. 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 dealt with Mr D and Ms L's concerns as a complaint and issued its final response letter on 23 November 2022, rejecting it on every ground.

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

Mr D and Ms L disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I issued a provisional decision explaining why I was not planning to uphold the complaint. The Lender responded to say it agreed and had nothing further to add. The PR responded on behalf of Mr D and Ms L to say that they disagreed. It said, in summary, that:

- When the complaint was made there was no expectation that a witness statement be provided. In this case there was no such statement taken prior to the complaint being made or this being requested in late 2023.

- Mr D and Ms L have not been provided with a copy of the Investigator's assessment of the complaint, so as not to influence their additional witness statement that was provided.

- The witness statement stated the benefits that convinced Mr D and Ms L to purchase Fractional Club membership – being the investment element.

- English is not Mr D and Ms L's first language and being unable to verbalise correctly what was important to them or how they felt, or what convinced them to purchase is a natural consequence of that and does not reflect on their honesty or knowledge of the facts. The PR did not help them with this, so as to avoid influencing their recollections.

- The PR reiterated that it thinks Fractional Club membership was sold as an investment and some of its reasons for this.

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 no different to that shared in several hundred ombudsman decisions on similar complaints. And with that being the case, it is not necessary to set it out here.

What I've decided – and why

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

Having done so and having considered the PR's response to my provisional decision, I have decided not to uphold this complaint.

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.

Below is a copy of my provisional findings, which explain why I have decided not to uphold this complaint.

START OF COPY OF PROVISIONAL FINDINGS

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.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr D and Ms L were:

1. Told that they had purchased an investment that would "considerably appreciate in value".

2. Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.

3. Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.

4. Made to believe that they would have access to "the holiday's apartment" at any time all year round.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). 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. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's possible that Fractional Club membership was misrepresented at the Time of Sale for one or both of those reasons, I don't think it's probable. They're given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I don't think it was.

So, while I recognise that Mr D and Ms L - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, 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.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr D and Ms L and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes

of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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.

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 D and Ms L and the Lender.

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

Mr D and Ms L's complaint about the Lender being party to an unfair credit relationship was made for several reasons.

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mr D and Ms L. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. While I understand that Mr D later had some financial difficulties, he has provided no evidence that makes me think the Lender could reasonably have foreseen this at the Time of Sale. I also note that Mr D and Ms L kept up with repayments on the loan until November 2022, when they contacted the Lender to say the cost-of-living crisis was causing them difficulty. So, it appears the loan was affordable for some years after the Time of Sale (even after Mr D potentially stopped being able to contribute to the repayments). So, from the information provided, I am not satisfied that the lending was unaffordable for the Mr D and Ms L at the Time of Sale or that the Lender ought reasonably to have foreseen then that the repayments would become unaffordable for them some years later.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. The Lender says the credit intermediary was authorised at the Time of Sale, and that does appear to be the case. However, it looks to me like Mr D and Ms L knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. So, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so, I can't see why that caused Mr D and Ms L a financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate them, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr D and Ms L in practice, nor that any such terms led them to behave in a certain way to their detriment. So, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

I acknowledge that Mr D and Ms L 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. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. I understand Mr D and Ms L had previously purchased Trial Membership through the Supplier but had cancelled that within the 14-day cooling off period, so they would've known they could do this. And with all of that being the case, there is insufficient evidence to demonstrate that Mr D and Ms L made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr D and Ms L credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason why the PR says the 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.

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

The Lender does not dispute, and I am satisfied, that Mr D and Ms L'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 – saying, in summary, that Mr D and Ms L were told by the Supplier that Fractional Club membership was an investment that would increase in value.

The term *"investment"* is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

A share in the Allocated Property clearly constituted an investment as it offered Mr D and Ms L 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 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 Mr D and Ms L 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 competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr D and Ms L, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr D and Ms L 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.

Was the credit relationship between the Lender and the Consumer rendered unfair?

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 had on the fairness of the credit relationship between Mr D and Ms L and the Lender under the Credit Agreement and related Purchase Agreement 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 D and Ms L 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, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when they decided to go ahead with their purchase.

The Letter of Complaint did no more than allege that the Supplier had sold or marketed Fractional Club membership in breach of Regulation 14(3). The PR did not provide Mr D and Ms L's comments at that time. But it provided Mr D's recollections, dated 22 February 2024, in response to our Investigator's assessment. This is almost seven years after the Time of Sale. I would not expect Mr D to remember everything that was said, and given the time that has passed there may be some inaccuracies in

his recollections. So this is likely to make his recollections less reliable and persuasive than they might have been had they been provided along with the Letter of Complaint.

Mr D says the following about what he was told about Fractional Club membership:

> *"During the presentation, we were assured that, upon joining, we would be entitled to a free holiday week per year, exchangeable through CLC's points system across their hotel catalog and even joining on the [exchange scheme]. Additionally, we were promised potential gains from selling the estate hotel on the end as was used as a rental property."*

This does suggest that the Supplier held out the hope of Mr D and Ms L making a profit. Mr D goes on to describe the sales meeting being long and feeling anxious and tired by the end. But he does not clearly state the reasons Mr D and Ms L went ahead with the purchase.

Bearing in mind when Mr D's recollections were provided, his description of what happened is fairly brief, he provides little detail about how Fractional Club membership was sold, and there is no clear description of Mr D and Ms L's motivations for agreeing to the purchase, I am not persuaded by the evidence that they purchased Fractional Club membership because of the prospect of a financial gain or profit on the sale of the Allocated Property.

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 D and Ms L 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 Mr D and Ms L 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, I am not persuaded that Mr D and Ms L'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, considering the evidence, I think 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 D and Ms L and the Lender was unfair to them even if the Supplier breached Regulation 14(3).

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 Mr D and Ms L's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to Mr D and Ms L 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.

END OF COPY OF MY PROVISIONAL DECISION

Additional findings following the responses to my provisional decision

I note the PR's comments about the witness statement. I see no reason why a professional representative would not ensure that a witness statement accurately reflected what their client meant – while of course taking care to ensure that it did accurately reflect only their clients' recollections. Especially where the PR is aware that the witness statement is not being provided in the clients' first language.

The PR has provided no further clarification or explanation directly from Mr D and Ms L around what was said in the statement or what they meant by it – nor any aspects that may have been inaccurate or misinterpreted due to English not being their first language. So, I see no reason to depart from my provisional findings as set out above.

I note the PR's other comments. But I have not found that Fractional Club membership was not sold as an investment in this case. I have said that it may have been, but that if it was, I am not persuaded that this caused Mr D and Ms L to enter the Purchase Agreement when they otherwise would not have done so. And as such, I remain of the opinion that how Fractional Club membership was sold to them did not create an unfair relationship between the Lender and Mr D and Ms L. So, it would not be fair and reasonable to uphold this complaint.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Ms L to accept or reject my decision before 16 September 2025.

Phillip Lai-Fang
Ombudsman