DRN-5775892

The complaint

Mr and Mrs B'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 B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 29 February 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy the right to occupy a certain apartment during week 19 of every year from 2018 to 2030 (the 'Purchase Agreement'). They ended up paying €18,456.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs B 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 and Mrs B paid for their Fractional Club membership by taking finance of £14,950 from the Lender (the 'Credit Agreement').

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 8 May 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:

- The Supplier would terminate Mr and Mrs B's existing timeshare agreement they held with another timeshare provider.
- The membership they were buying from the supplier would only run until 2030 and the resort would be sold, enabling them to recoup "some, if not all, of their money".
- They were told that "in 2020 the Russian market would open up and that they could sell earlier, if they wished, and were guaranteed to make a profit."
- They were told they could expect to make a profit from rental income if they didn't use their weeks.

The PR says that Mr and Mrs B never received any rental income from their unused weeks and that neither this, nor the eventual sale of the resort in 2030 will happen now because the Supplier has ceased trading.

The PR also referred to a Spanish court case that it says shows that "more than one person has been mis-sold" by the Supplier.

The Lender dealt with Mr and Mrs B's concerns as a complaint and issued its final response letter on 27 June 2019, 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.

The Investigators' views

The Investigator said, in summary that they were not persuaded that there were any actionable misrepresentations by the Supplier at the Time of Sale, nor that the Supplier failed to fulfil one or more of the contractual terms, or that even if it had, there had been no associated financial loss.

The PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision. The complaint was later reassessed by another Investigator, who also didn't think it ought to be upheld. This Investigator said:

"When considering this complaint, I have looked at the entirety of the credit relationship between [Mr and Mrs B] and the Business along with all of the circumstances of the complaint before coming to my view.

In the initial complaint letter, [Mr and Mrs B]' representative said the following that might amount to a breach of Regulation 14(3):

- *The Supplier breached Regulation 14(3) because:*
    - *The supplier explained that the resort would be sold by 2030, enabling [Mr and Mrs B] to recoup some, if not all, of their money.*
    - *The supplier advised [Mr and Mrs B] that in 2020 the Russian market would open up, enabling [Mr and Mrs B] to sell earlier, if they wished, and were guaranteed to make a profit.*
    - *The supplier said that if [Mr and Mrs B] did not use their purchased weeks, the supplier could rent them out, which would pay their maintenance fees and that [Mr and Mrs B] would receive approximately 1,000 Euros profit.*
- *And the Supplier's breach of Regulation 14(3) led to an unfair credit relationship because:*
    - *[Mr and Mrs B] agreed to purchase their membership on this basis, but they have never received any rental money from the non-use of their purchased weeks.*
    - *[Mr and Mrs B] have also discovered that the Supplier is closing down, so there will be nobody to sell their weeks in 2020 or 2030.*

I've also seen that my colleague considered other complaint points raised by [Mr and Mrs B] in their view under the lens of Section 75 of the CCA, but the representatives rejected those findings. Nothing further has been said about those matters and I don't disagree with my colleague's findings, so I won't consider them further.

<u>Did the Supplier breach Regulation 14(3) of the Timeshare Regulations?</u>

There is competing evidence in this complaint as to whether the Membership was marketed and/or sold by the Supplier to [Mr and Mrs B] as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

On the one hand, it's clear that the Supplier made efforts to avoid specifically describing membership of the Membership as an 'investment' or giving details of the amount a prospective purchaser, such as [Mr and Mrs B], might expect to get back at the end of their membership term. There were also disclaimers in the sales documents that went some way to saying that the Membership wasn't to be seen by [Mr and Mrs B] as an investment. So, it's possible that the Membership wasn't marketed or sold to them as an investment in breach of

Regulation 14(3).

But on the other hand, [Mr and Mrs B]' representatives have made submissions that, due to the things they were told, the Supplier did market the Membership as an investment. I appreciate this information may have been collected during a conversation with [Mr and Mrs B] but, crucially, neither I nor the Business appear to have been provided with [Mr and Mrs B]' first-hand testimony. So, I don't know the extent to which the letters reflect [Mr and Mrs B]' recollections. I also don't know precisely what was said or the context in which it was said. Given that, I don't have anything from [Mr and Mrs B] to help me work out what they say happened during the sale or their reasons they took out the Membership.

I have considered the sales documentation, and I acknowledge that some of the wording used within it left open the possibility that the sales representative may have positioned the Membership as an investment. However, 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 B], might expect to get back at the end of the membership term.

Nor is there reference of any guaranteed rental program on offer that would guarantee [Mr and Mrs B] returns of in excess of £1,400. Notably the Supplier has confirmed within its own submission that this was not something it offered. The Supplier has confirmed that it paid the maintenance fees in 2017 because the resort was closed for maintenance. But it says that [Mr and Mrs B] used their weeks in 2018 and 2019, so it doesn't appear that any rental programme was something they were interested in at that time.

On balance, without any direct evidence from [Mr and Mrs B], I simply can't say what they were told during the sale. It follows that, I haven't seen sufficient evidence to conclude that the timeshare was marketed or sold to [Mr and Mrs B] 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.

Conclusion

Given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Business and [Mr and Mrs B] was unfair to them for the purposes of Section 140A. And as I've not seen any other reason to hold the Business 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:

- The Letter of Complaint was a direct personal recollection from Mr and Mrs B in their capacity as the only individuals present during the sales discussions. This is admissible as direct evidence and must be afforded proper evidential weight.
- The evidence provided describes multiple statements by the Supplier which clearly position the membership as a financially beneficial product with a future resale or rental value, namely:
    - Promise of resale by 2030 to recoup all, or most, of the purchase price.
    - Promise of early resale opportunities via a 'Russian market opening' in 2020 with guaranteed profit.
    - Assurance of rental income covering maintenance fees with additional profit.
- Each of these points constitutes marketing as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

- The presence of disclaimers does not override oral misrepresentations made by the sales personnel.
- The breach of Regulation 14(3) directly influenced Mr and Mrs B's decision to enter into the Credit Agreement.
- The Supplier's closure further eliminated any possibility of resale or rental services.

The PR then provided examples of other Ombudsman decisions, case law and regulatory guidance that it felt supported its position, and why Mr and Mrs B's complaint ought to be upheld.

As no agreement could be reached the matter has come to me for a decision.

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 very 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.

And having done that, I agree with the findings of both Investigator's, for broadly the same reasons. I do not think this complaint should be upheld.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it. I have also considered all of the previous ombudsman decisions, case law and regulatory guidance highlighted by the PR. But I am considering the merits of this case on its specific 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 of Sale, and that the Supplier had breached the contractual terms of the Purchase Agreement. As such it said that the Lender was unfair in not accepting Mr and Mrs B'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 B 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 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 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 B 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 Club membership was actionably misrepresented or breached 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 and Mrs B 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 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 relationship between Mr and Mrs B and the Lender.

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

As I have already said, although the PR has not referred to any regulations, in effect it says that the Supplier breached Regulation 14(3) of the Timeshare Regulations. 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.

A share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs B the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

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

And there is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

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 and Mrs B, 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 and Mrs B 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?

I now need to consider what impact any potential breach had on the fairness of the credit relationship between Mr and Mrs B 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, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs B 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.

Regrettably, the PR hasn't provided a witness statement from Mr and Mrs B – 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 B, 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 B, I have to rely on the paperwork that has been provided.

And on my reading of the evidence before me, I do not think the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs B decided to go ahead with their purchase. I am simply not persuaded that was the case. I acknowledge the Letter of Complaint says that they could expect to recoup "some, if not all, of their money", but this to me does not suggest that they were told to expect a profit.

And there is no evidence to support the allegation made in the Letter of Complaint regarding the "Russian Market" and a potential profit in 2020, nor is there any evidence to suggest that Mr and Mrs B were interested in selling their timeshare at that time.

Given that Mr and Mrs B were 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 B'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 in order to relinquish their existing timeshare product.
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 B themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs B'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 the purchase for the holidays it could provide them, and 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 relationship between Mr and Mrs B and the Lender was 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 a credit relationship with Mr and Mrs B under the Credit Agreement that was 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 uphold this complaint about Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 25 September 2025.

Chris Riggs
Ombudsman