DRN-5779008

The complaint

Mr and Mrs H's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mr and Mrs H were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 14 July 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,490 fractional points at a cost of £30,960 (the 'Purchase Agreement'). But after trading in their existing membership, they ended up paying £13,560 for the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs H 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 H paid for their Fractional Club membership by taking finance of £13,560 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 9 January 2020 (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 and Mrs H's concerns as a complaint and issued its final response letter on 22 January 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 and Mrs H disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The provisional decision

Having considered everything, I didn't think this complaint ought to be upheld. I sent my initial thoughts on the merits of Mr and Mrs H's complaint to both sides in a provisional decision (the 'PD').

In the PD I said:

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

And having done that, I do not currently think this complaint should be upheld.

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.

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 purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 cannot succeed.

As set out above, the purchase price of Mr and Mrs H's Fractional Club membership was £30,960 so this means that their claim under Section 75 of the CCA for the alleged misrepresentations by the Supplier is not valid and cannot succeed.

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 75 of the CCA: the Supplier's Breach of Contract

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. I have also explained that there are financial limits which have invalidated Mr and Mrs H's claim of misrepresentation under Section 75.

But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included. I have gone on to say what I think this means in respect of Mr and Mrs H's Section 75 claims.

Mr and Mrs H say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement.

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays for instance. Some of the sales paperwork likely to have been signed by Mr and Mrs H states that the availability of holidays was/is subject to demand. I accept that they may not have been able to take certain holidays, but I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs H any compensation for a breach of contract by the Supplier. 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 the Lender was unfair or unreasonable when it declined Mr and Mrs H's claims under Section 75 of the CCA. 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 H 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; 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 H and the Lender.*

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

Mr and Mrs H's complaint about the Lender being party to an unfair credit relationship was and is made for several reasons.

The PR says, for instance that:

1. *the right checks weren't carried out before the Lender lent to Mr and Mrs H; and*
2. *Mr and Mrs H were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.*

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

I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's 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 H was actually unaffordable, 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. But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs H.

I acknowledge that Mr and Mrs H 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. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs H 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 and Mrs H'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 the PR now 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 and Mrs H'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.

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 and Mrs H 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 H 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 and Mrs H, 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 H 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 and Mrs H 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 and Mrs H 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 Mr and Mrs H decided to go ahead with their purchase.

For example, Mr and Mrs H have made it clear in their statement that they found the prospect of a shorter membership with a guaranteed end date attractive. They said in their statement:

> *"We were advised that fractional ownership would give us a guaranteed exit from our contract. We were told this would be sold in 19 years and this would tie and [sic] well as we would both be in our 70's and insurance would be harder and maybe doing our own thing in the UK."*

Now 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. And they say as much in their statement:

> *"The points were and [sic] investment and an ownership of a property and we would all sell in 19 years where we would be able to recoup some of our money. The maintenance fees would also be reduced."*

But again, the investment part of the membership was only one element of what they have mentioned. They have also said that they would get reduced maintenance fees as a result of the purchase. So, given this and the shorter membership term, which was clearly important to them and which matched their future lifestyle, I'm not persuaded that the investment part

of the membership was a motivating factor for them. I think they would have probably bought the membership anyway.

So as Mr and Mrs H 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 H'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 for the reduced membership term, 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 H and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

<u>The provision of information by the Supplier at the Time of Sale</u>

The PR says that Mr and Mrs H were not given sufficient information at the Time of Sale by the Supplier in order to make an informed choice.

It isn't clear what information the PR thinks the Supplier failed to provide at the Time of Sale. But as I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

So, while I acknowledge that it is also possible that the Supplier did not give Mr and Mrs H sufficient information, in good time, in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'), even if that was the case, neither Mr and Mrs H nor the PR have persuaded me that they were deprived of information that would have led them to make a different purchasing decision at the Time of Sale. And with that being the case, even if there were information failings (which I make no formal finding on), I can't see why they led to a financial loss.

<u>Mr and Mrs H's Commission Complaint</u>

I note that one of Mr and Mrs H's other concerns about the sale of Fractional Club membership relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreements. The Court of Appeal's recent judgment in Johnson and Wrench -v- FirstRand Bank, and Hopcraft -v- Close Brothers [2024] EWCA Civ 1282 ('Johnson, Wrench and Hopcraft') sought to clarify the law on secret and partially disclosed commission – albeit in the context of car dealers acting as credit brokers.

In my view, the Court of Appeal's judgment sets out principles which appear capable of applying to credit brokers other than car dealer–credit brokers. But as it was recently appealed to the Supreme Court, whose judgment is still pending, I don't intend on finalising my thoughts on this complaint until it is handed down and its implications on this complaint, if there are any, considered.

Conclusion

In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and if I put the issue of commission to one side for the time being, I am not persuaded that the Lender was party to credit relationships with Mr and Mrs H under the Credit Agreements 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.

But, as I've already suggested, the Supreme Court's pending judgment on Johnson, Wrench and Hopcraft may prove important to this complaint. And with that being the case, it is necessary to wait and consider the possible implications of that judgment before finalising my thoughts on the merits of this complaint.

My provisional decision

I do not think that Mr and Mrs H's complaint about how the Lender dealt with their Section 75 claims ought to be upheld.

At this stage I also do not think their complaint of an unfair relationship under Section 140A of the CCA ought to be upheld, but I will reserve judgement on the undisclosed commission element of their argument until after the Supreme Court's judgment on Johnson, Wrench and Hopcraft."

The responses to the PD

The Lender responded to the PD and accepted it. The PR, on Mr and Mrs H's behalf, also responded but did not accept it, and provided some further comments and evidence that they wished to be considered.

Following this I also communicated to both sides how I was not persuaded that Mr and Mrs H's credit relationship with the Lender was unfair to them for reasons relating to the commission arrangements between it and the Supplier.

The PR responded to say it had nothing further to add in relation to the commission arrangements, but maintained that the complaint ought to be upheld for the reasons it set out following the PD.

Having received the relevant responses from both sides, I am now finalising my 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, 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. But I would add that the following regulatory rules/guidance are also relevant:

The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

Both the PR and Mr and Mrs H's further comments in response to the PD, in the main, relate to the issue of whether the credit relationship between Mr and Mrs H and the Lender was unfair. In particular, Mr and Mrs H and the PR have provided further comments in relation to whether the membership was sold to them as an investment at the Time of Sale. Mr and Mrs H have also said more about the pressure they felt under during the sales process, and that they weren't given a cooling off period nor were they told about the commission the Supplier was to get from the Lender[1].

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But neither they nor Mr and Mrs H made any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on Mr and Mrs H's and the PR's points raised in response.

[1] This comment was made before I set out my provisional thoughts on the commission arrangements, and the PR has said they have no further comment on this, so I will not address this any further.

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

Firstly, I will address what Mr and Mrs H have said about the pressure they were put under during the sales process. They have again said that the process lasted all day, despite them telling the sales representatives that their children were on their own. They felt unable to leave and felt captive, with three representatives pressurising them in turn for hours.

But as I acknowledged in the PD, I can see that the sales process went on for a long time, and may well have made Mr and Mrs H tired. But I do not understand how it can be that they ended up buying a membership that they didn't actually want. And although they have said that they were not told that they had a 14-day cooling off period, I can see from the contractual paperwork that they signed and accepted the document titled *"SEPARATE STANDARD WITHDRAWAL FORM TO FACILITATE THE RIGHT OF WITHDRAWAL".* This sets out that they had the right to withdraw from both the Credit Agreement and Purchase Agreement within 14 calendar days without giving any reason, starting on 14 July 2014. So, I remain unpersuaded that Mr and Mrs H made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

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

As I explained in my PD, although I found there was a possibility that the Supplier breached Regulation 14(3) at the Time of Sale, I wasn't persuaded that the evidence suggested that Mr and Mrs H purchased Fractional Club membership in whole or in part down to any breach of Regulation 14(3).

In response, the PR has said that I was incorrect in not applying sufficient weight to the following section of Mr and Mrs H's recollections of the representations made at the Time of Sale and their motivations at the time for entering into the transaction:

> *"The points were and [sic] investment and an ownership of a property…"*

The PR said that when Mr and Mrs H use the word "investment" they do so in the ordinary sense of the word – i.e., a way of making a profit.

But the PR has not repeated everything that Mr and Mrs H said in that particular sentence of their testimony. This actually reads:

> *"The points were and [sic] investment and an ownership of a property and we would all sell in 19 years where* ***we would be able to recoup some of our money****. The maintenance fees would also be reduced." (bold my emphasis).*

This, on my reading of everything they have said, is not indicative of making a profit from the transaction. It merely suggests that they were expecting to get some of their money back.

As I've said, Mr and Mrs H provided the PR some further comments following the PD that they wished me to consider. In relation to the investment element of the membership, and their motivations to make the purchase, they have said:

> *"We were told that the points and club ownership were an investment and that after 19 years we could sell and the likelihood was that property values would have increased. At this point we may more than recoup all of the money we had paid and also have had fantastic holidays for 19 years.*
>
> *[…]*

I feel that whilst we have not explicitly stated that we expected to make a profit, by expecting to have as a minimum the cost recouped and had 19 years holidays from it, this implies a gain thus we should have profited from it. We did not get this benefit."

I accept that what Mr and Mrs H are saying here does suggest that what they were told by the Supplier made them expect a profit when the Allocated Property was sold. However, with this evidence there is a real risk that Mr and Mrs H's recollections have been coloured by what I have said in my Provisional Decision. And, on balance, the timing and way in which this evidence has been provided makes me conclude that I can place little weight on it, particularly as it contains assertions which weren't present in Mr and Mrs H's original statement.

But in any case, it wasn't just what they had said in their original testimony which made me think any breach of the regulations was immaterial. Given all the circumstances and everything they had said I thought that they would have bought the membership anyway, even if the Supplier had breached Regulation 14(3) of the Timeshare Regulations in the way it had sold the membership to them. And I remain of that opinion now. I think the reduced maintenance fees and the shorter membership term, which they had linked to their future lifestyle meant they would have likely bought the membership anyway.

So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr and Mrs H's purchasing decision. So, I still don't think the credit relationship between Mr and Mrs H and the Lender was unfair to them for this reason.

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 and Mrs H's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mr and Mrs H.

My final decision

Given all of the above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 9 January 2026.

Chris Riggs
Ombudsman