

The complaint

Mr and Mrs N'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 and Mrs N purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 28 May 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 747 fractional points at a cost of £9,251 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs N 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 N paid for their Fractional Club membership by paying a £500 deposit and taking finance of £8,751 from the Lender (the 'Credit Agreement') in their joint names.

Mr and Mrs N – using a professional representative (the 'PR') – wrote to the Lender on 8 November 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 and Mrs N's concerns as a complaint and issued its final response letter on 28 September 2023, rejecting it on every ground. The complaint was then referred to the Financial Ombudsman Service.

The Investigator's view

Mr and Mrs N's complaint was assessed by an Investigator at this Service who did not think it ought to be upheld. In summary, they said:

- They did not think there was sufficient evidence that the Fractional Club membership was misrepresented at the Time of Sale, particularly since no evidence in Mr and Mrs N's own words had been provided.
- They couldn't see any reason suggesting that the credit relationship between Mr and Mrs N and the Lender was unfair under S140A of the CCA.
- They couldn't see that the lending was unaffordable for Mr and Mrs N.
- They could see the Supplier held the relevant authorisation at the Time of Sale to broker the loan. So, they couldn't see this was a reason to uphold the complaint either.

The response to the Investigator's view

The PR disagree with the first Investigator's view and at that point, they provided a witness statement from Mr and Mrs N. This was in the form of an email which was sent to the PR in May 2024 by Mrs N. This said:

In 2013 we took advantage of a free holiday in Tenerife on the understanding that we would have to attend a two hour presentation by Club La Costa. At this time we were severely in debt and had a Debt Management Plan in place. A 'free' holiday seemed like a great idea.

The sales pitch actually lasted more like seven hours and we were exhausted. However, the dream that they sold was intriguing – a fractional share in a property which could then be exchanged on the points system for holidays in lots of other countries and also for cruises. I was a teacher and worried about having to have school holiday times, but they assured me this would not be a problem. We were told that our fractional share would be a huge and valuable asset for the whole family to enjoy and told how much money we were going to save over the coming years. We were told that at the end of our contract, the property would be sold and we would get our money back or a sizeable share of the profit from it's sale. We now know that these were false promises.

After hours of sales talk, and being given plenty of champagne, we decided to go ahead. We knew our loan application would be turned down because we were in the Debt Management Plan, and indeed it was. However, the sales people then said they would get us a loan through their own finance company, which we doubted. They did however, and we hoped this would start to improve our credit rating. Sadly, the payments just added to our existing debt and we really started to struggle to pay the loan repayments and the resort Management Fees. We tried to book holidays in the main (school holiday) weeks but nothing was ever available and holidays in other countries or cruises were non-existent. We surrendered our fractional share formally with Club La Costa in 2018, but are still paying our loan 11 years on. We were sold a dream that simply did not exist.

The PR said they felt this witness statement, along with the Supplier's sales materials, showed that the Supplier marketed the Fractional Club membership to Mr and Mrs N as an investment. And, that this therefore caused the credit relationship to be unfair.

The PR also provided a copy of an annual statement from Mr and Mrs N's debt management plan and said this showed that they had been lent to irresponsibly.

The second Investigator's view

A second Investigator then assessed the complaint and also did not think it ought to be upheld.

The Investigator firstly noted that while Mr and Mrs N had originally raised several other points of complaint, the PR's response was only limited in the main to whether the membership had been sold to Mr and Mrs N as an investment. So, they proceeded on the basis that those other matters are no longer in dispute and focused on the PR's further points made in response to the first view only.

The second Investigator firstly considered whether they thought the Supplier breach Regulation 14(3) at the Time of Sale.

They said that, on the one hand, it's clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers what they might expect to get back at the end of their membership term. The Investigator also recognised that there were disclaimers in the sales documentation that said membership wasn't to be viewed as an investment. So, they said it was possible that Fractional Club membership wasn't marketed to Mr and Mrs N as an investment at the Time of Sale.

On the other hand, the Investigator acknowledged that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, they accepted that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs N as an investment in breach of Regulation 14(3).

But, the Investigator explained that whether or not there was a breach of the relevant prohibition by the Supplier is not, in their view, ultimately determinative of the outcome in this complaint. And with that being the case, they said it wasn't necessary to make a finding on that particular issue.

The Investigator explained they felt that whether any breach of Regulation 14(3) led Mr and Mrs N to enter into the Purchase Agreement and Credit Agreement is an important consideration when considering whether the credit relationship between them and the Lender was unfair.

The Investigator considered the testimony Mrs N had provided. But, they explained they were mindful of when the statement was provided. They noted the statement wasn't provided until May 2024 which was eleven years after the Time of Sale, after the first investigator's view and after the outcome and widespread publicity of the judgment in *Shawbrook & BPF v FOS*¹.

So, the Investigator explained they felt it was difficult for them to put any weight on Mr and Mrs N's testimony given when it was drafted and provided. So, overall, the Investigator did not think the prospect of a profit or financial gain from the Fractional Club membership was an important and motivating factor when Mr and Mrs N made their purchasing decision. And so, they didn't think the credit relationship between Mr and Mrs N and the Lender was unfair to them even if the Supplier had breached Regulation 14(3) at the Time of Sale. They also still didn't think there was any other reason the complaint ought to be upheld.

Following their view, the Investigator also shared their thoughts with the PR regarding the issue of the affordability of the lending. They noted that the PR had said Mr and Mrs N were in a debt management plan at the Time of Sale and provided an annual statement from their debt management plan which they said evidenced this. However, the Investigator explained to the PR that from the letter provided they could see Mr and Mrs N's debt management plan didn't start until April 2015, approximately two years after the Time of Sale. So, it doesn't appear that Mr and Mrs N were in such a plan at the time of lending like they had claimed. The PR did not respond further on this point or provide any further comments.

But, as Mr and Mrs N ultimately still did not agree regarding the issue of whether the membership was sold as an investment, the matter has come to me for a final decision.

The legal and regulatory context

¹ *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*')

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 Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

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.

And having done so, I've reached the same outcome as the Investigator, for broadly the same reasons.

I'd like to firstly outline that 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.

As I've outlined, the PR's further comments in response to the Investigator's view only relate to the issue of whether the credit relationship between Mr and Mrs N and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr and Mrs N as an investment at the Time of Sale.

As outlined by the Investigator, the PR originally raised various other points of complaint, all of which they addressed. But the PR didn't make any further comments in relation to those in their response to the Investigator's view. Indeed, they haven't said they disagree with any of the Investigator's conclusions in relation to those other points. And since nothing more has been provided in relation to those other points by either party, I see no reason to reach a different conclusion to the Investigator on those other points. So, I'll focus here on the PR's points raised in response.

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

Like the Investigator, I've considered the entirety of the credit relationship between Mr and Mrs N and the Lender along with all of the circumstances of the complaint, and having done so, 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 in relation to Fractional Club membership, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs N and the Lender given their circumstances at the Time of Sale.

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

The PR explained in their response to the Investigator's second view that they hadn't shared either of the Investigator's views on this complaint with Mr and Mrs N, saying "*this was done in order not to influence their recollections*".

The PR said this means Mr and Mrs N's recollections have not been influenced by either the Investigator's view or the aforementioned judgment in *Shawbrook & BPF v FOS*.

Like the Investigator, part of my assessment of the testimony was to consider how much weight I can place on it when considering the merits of their complaint. And this includes *when* the testimony was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*.

I have thought about what the PR has said, but on balance, I don't find it a credible explanation of the contents of Mr and Mrs N's evidence. Here, the PR responded to our Investigator's view to say that Mr and Mrs N alleged that Fractional Club membership had been sold to them as an investment and it provided evidence from Mr and Mrs N to that effect. I fail to understand how Mr and Mrs N disagreed with the view(s) on the basis that the timeshare was sold as an investment if they didn't know our Investigator's conclusions. It follows, I think it more likely than not, that Mr and Mrs N did know about our Investigator's view before their recent testimony was provided.

So, in my view, there is a risk that Mr and Mrs N's testimony was coloured by the

Investigator's view and/or the outcome in *Shawbrook & BPF v FOS*. So, on balance, the way in which the evidence has been provided makes me conclude that I can place little weight on it.

Therefore, 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. 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 like the Investigator, as Mr and Mrs N 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 and Mrs N 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 (which I also make no finding on here), I am not persuaded that Mr and Mrs N'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). And for that reason, I do not think the credit relationship between Mr and Mrs N and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

S140A conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mr and Mrs N and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

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 N'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 them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N and Mr N to accept or reject my decision before 5 January 2026.

Fiona Mallinson
Ombudsman