DRN-5816363

Financial Ombudsman Service

The complaint

Mrs J's complaint is, in essence, that First Holiday Finance Ltd ("FHF") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her 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.

Background to the complaint

Mrs J and her husband, Mr J, 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 5 June 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 660 fractional points at a cost of £10,329 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs J 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.

To help pay for the Fractional Club membership, Mrs J took finance of £4,829 from FHF (the 'Credit Agreement').

As only Mrs J was named on the Credit Agreement, only she is able to refer a complaint about FHF to our Service. For ease I will refer to Mrs J only from here on, even where she and Mr J may have been acting (or the matter is otherwise applicable to them both) jointly.

Mrs J – using a professional representative (the 'PR') – wrote to FHF on 15 September 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.

FHF dealt with Mrs J's concerns as a complaint and issued its final response letter on 3 October 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.

As Mrs J disagreed with the Investigator's assessment, her complaint was passed to me to decide. Having considered everything, I reached the same view as our Investigator in that I did not think this complaint should be upheld. As the explanation of my reasoning was more extensive than that of our Investigator, I issued a provisional decision and invited both parties to respond with anything else they wanted me to take into account before I made my final decision.

FHF responded to say it agreed with what I had said. The PR responded to say that Mrs J did not accept what I said, with some further arguments as to why the complaint ought to be upheld.

Having received the responses from both parties, I'm 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:

<u>The Consumer Credit Sourcebook ('CONC') – found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

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]

<u>The FCA's Principles</u>

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.

Having done that, I do not think this complaint should be upheld. 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.

<u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

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. FHF 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 Mrs J was:

1. Told that she had purchased an investment that would "considerably appreciate in value".
2. Promised a considerable return on her investment because she was told that she would own a share in a property that would considerably increase in value.
3. Told that she could sell her Fractional Club membership to the Supplier or easily to third parties at a profit.
4. Made to believe that she would have access to "the holiday 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 an 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 Mrs J 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 FHF acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

Section 140A of the CCA: did FHF 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 Mrs J and FHF 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. The commission arrangements between FHF 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 Mrs J and FHF.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

Mrs J's complaint about FHF 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 FHF lent to Mrs J. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that FHF 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 Mrs J was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship with FHF was unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mrs J.

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 FHF wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mrs J knew, amongst other things, how much she was borrowing and repaying each month, who she was borrowing from and that she was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for her, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mrs J suffering a financial loss – such that I can say that the credit relationship in question was unfair on her as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell FHF to compensate her, 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 Mrs J in practice, nor that any such terms led her to behave in a certain way to her detriment, 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.

Overall, therefore, I don't think that Mrs J's credit relationship with FHF was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with FHF was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her 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

FHF does not dispute, and I am satisfied, that Mrs J'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 Mrs J was told by the Supplier that Fractional Club membership was the type of investment that would only 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 Mrs J the prospect of a financial return – whether or not, like all investments, that was more than what she 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 Mrs J 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her 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 Mrs J, 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 Mrs J 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.

<u>Was the credit relationship between FHF and Mrs J rendered unfair?</u>

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 Mrs J and FHF 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 Mrs J and FHF that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

In my provisional decision I explained that 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 Mrs J decided to go ahead with their purchase. That did not mean she was not interested in a share in the Allocated Property. After all, that would not be surprising given the nature of the product at the centre of this complaint. But as Mrs J herself did not persuade me that her purchase was motivated by a share in the Allocated Property and the possibility of a profit, I did not think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision she ultimately made.

In summary, my reasons for this were as follows:

- While noting it was said in the Letter of Complaint that Mrs J had been told that she had purchased an investment and could expect a profit, there was no further detail underpinning these statements and they were rather generic in nature. In fact, such assertions had been made in an identical fashion by the PR in a number of other complaints.

- Following our Investigator's view, the PR had provided a statement from Mrs J made in February 2024 providing her recollections from the Time of Sale. The statement was fairly brief, reflecting the understandable difficulty Mrs J will have had in remembering events that took place some seven years prior, as she herself acknowledged.

- Further, Mrs J purchased six memberships from the Supplier between 2014 and 2018 – which could, in my view, make it difficult for Mrs J to recount with much accuracy what happened in one sale compared to another. And her statement seemed to reflect this difficulty, as she talked in somewhat vague terms about the sale of the various memberships she purchased as one, rather than setting out her recollections about the specific sale at issue within this complaint.

- So although I noted that Mrs J had said "[t]*he overriding reason for us to invest initially and then upgrade our investment on future visits was the clear prospects told to us of the gains we would make by investing when it came to the sale of our investment due to the increased value of our share and the better returns and profit*

rewards" and that she "*was encouraged to take out more finance to increase our investment saying that the more we invested the bigger the returns would be*", it was hard for me to be confident of her specific motivations for the 2017 purchase at issue in this complaint.

- I also noted that Mrs J recalled the Supplier trying to get her to upgrade – and invest – again on what she describes as her last visit, when she was pushed the prospect of better returns to help fund Mr J's ongoing care costs. But this cannot have been in 2017, given that Mrs J took holidays – and purchased further memberships – after the sale at issue here.

- I was also mindful that Mrs J only provided her comments in 2024. As well as coming some significant time after the Time of Sale, they were only provided following our Investigator's view that the complaint should not be upheld and the judgment in *Shawbrook & BPF v FOS*[1]. So I could not discount the possibility that Mrs J's comments had been influenced by one, or both, of these.

- I was conscious that the more time that passed between a complaint and the event complained about, the more risk there was of recollections being vague, inaccurate and influenced by discussions with others. In this case, especially in the absence of an earlier account nearer to the Time of Sale or the time the complaint was first made, I didn't feel I could place significant weight on Mrs J's recollections. I found it difficult to explain why Mrs J hadn't, at the outset, just said that she had been told she would make more money than she put in and this is why she purchased Fractional Club membership, if this is what happened. In the circumstances, and on balance, I thought there was a high risk that Mrs J had been influenced by discussions with others or the widespread publicity following the outcome of the judicial review. Put simply, I couldn't put enough weight on Mrs J's account that would enable me to uphold this complaint.

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 was not persuaded that Mrs J'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 thought the evidence suggested she would have pressed ahead with her purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I did not think the credit relationship between Mrs J and FHF was unfair to her even if the Supplier had breached Regulation 14(3).

In their response to my provisional decision, the PR said, in summary, that:

- They did not provide our Investigator's view to Mrs J before she gave her recollections of the sale. They said this was done so as not to influence her memories, so her recollections were honest and not written in light of what our Investigator had said.

- Mrs J was not aware of the outcome of Shawbrook & BPF v. FOS and even if she had been, would not have understood the complexity of the issues involved therein.

- It had not been challenged in Shawbrook & BPF v. FOS that the Supplier sold Fractional Club membership as an investment. It had done so in the sale to Mrs J, and this had been a motivating factor in her decision to proceed with the purchase.

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[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)

I have carefully considered the PR's further submission, but the points they have raised have not, ultimately, led me to reach a different conclusion. I'll explain why.

Part of my assessment of the testimony was to consider *when* it 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*. On balance, I don't find the PR's explanation of the contents of Mrs J's evidence credible. Here, the PR responded to our Investigator's view to say that Mrs J alleged that Fractional Club membership had been sold to her as an investment and it provided evidence from her to that effect. I fail to understand how Mrs J disagreed with the view and PD on the basis that the timeshare was sold as an investment if she didn't know our Investigator's conclusions. It follows, I think it more likely than not, that Mrs J *did* know about our Investigator's view before they evidence was provided.

So, I maintain that there is a risk that Mrs J's testimony was coloured by the Investigator's view and/or the outcome in *Shawbrook & BPF v FOS*. And, on balance, the way in which the evidence has been provided makes me conclude that I can place little weight on it.
With regard to the point that it was not challenged that the product in question was marketed and sold as an investment in the judgment handed down in Shawbrook & BPF v. FOS, I explained in my provisional decision that the Timeshare Regulations did not ban the sale of products such as the Fractional Club. They just regulated how such products were marketed and sold. And the judgment referred to did not make a blanket finding that all such products were mis-sold in the way the PR appears to be suggesting. Any complaint needs to be considered in the light of its specific circumstances. So just because the complaint that was subject to judicial review was upheld, it does not follow that I must (or should) also uphold Mrs J's complaint.

Ultimately the question I have had to decide is whether or not any marketing of the membership as an investment to Mrs J proved to be a material factor in her decision to purchase it. The PR maintains that it did, but for the reasons given in my provisional decision and as summarised above I remain unpersuaded of this. So I still do not think that the credit relationship between Mrs J and FHF was unfair to her, even if the Supplier breached Regulation 14(3).

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that FHF acted unfairly or unreasonably when it dealt with Mrs J's Section 75 claim, and I am not persuaded that FHF was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 FHF to compensate her.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J to accept or reject my decision before 2 January 2026.

Ben Jennings
Ombudsman