DRN-5826510

The complaint

Mr R's complaint is, in essence, that First Holiday Finance Limited (the "Lender") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A Consumer Credit Act 1974 (as amended) (the "CCA") and (2) deciding against paying a claim under Section75 of the CCA.

What happened

In 2015 whilst on holiday Mr R and his wife, Mrs R, attended a meeting with a representative of a timeshare provider (the "Supplier") and purchased a product I will call the 'Fractional Club' which they bought on 2 July 2015 ("Time of Sale"). They entered into an agreement with the Supplier to buy 1200 fractional points at a cost of £11,721 (the 'Purchase Agreement').

Fractional Club membership was asset backed in that as well as holiday rights it entitled Mr R and Mrs R to a share in the sale proceeds of a property named on the Purchase Agreement ("the Allocated Property") at the end of the membership term.

Mr R and Mrs R paid for their Fractional Club membership by payment of a deposit of £500 and Mr R taking finance of £11,221 from the Lender to pay the balance. Mrs R sadly passed away on 13 November 2020.

Mr R – using a professional representative (the "PR") – wrote to the Lender on 27 January 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 R's concerns as a complaint and issued its final response letter on 9 December 2022, rejecting it on every ground.

The complaint was then assessed by an Investigator who, having considered the information on the file, rejected the complaint on its merits.

Mr R disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I didn't think the complaint should be upheld and issued a provisional decision ('PD') explaining why, the findings from which are set out below.

"*I've considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And, having done that, 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.

Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

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

The Lender has argued that the complaint made under section 75 CCA has been made too late and the investigator has agreed. The PR has not raised any argument in response to this.

As a rule, creditors can reasonably reject a section 75 claim made after the claim has become statute barred under Limitation Act ('LA') – as it would have a complete defence to the claim in court.

Section 9 LA says a claimant has six years from when the cause of action accrued to commence 'an action to recover any sum by virtue of any enactment'. This cover a claim under section 75 CCA

The date the cause of action accrued for Mr R's claim for misrepresentation is the Time of Sale. This is because that is when Mr R and Mrs R entered into the Purchase Agreement for the Fractional Club membership based on the alleged misrepresentations of the Supplier which Mr R says they relied on. And as the loan agreement from the Lender was used to help finance the purchase at that time, it was when they entered into the Credit Agreement they suffered a loss.

Mr R made his Section 75 claim to the Lender at the earliest in the letter of complaint from his PR dated 27 January 2022 – although I note the Lender said that letter was never received. Given the claim was first made more than six years from the Time of Sale I don't think it was unfair or unreasonable for the Lender to have rejected the complaint about the Supplier's alleged misrepresentations.

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

Having considered the entirety of the credit relationship between Mr R and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *The inherent probabilities of the sale given its circumstances; and, when relevant;*
5. *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 R and the Lender.

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

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

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mr R. 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 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 R 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 the Mr R.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr R and Mrs R knew, amongst other things, how much he was borrowing and repaying each month, who he was borrowing from and that he was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for them, 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 Mr R suffering a financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate Mr R, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr R and Mrs R in practice, nor that any such terms led them to behave in a certain way to their 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.

Another argument raised by the PR in response to the investigator's opinion is that Mr R and Mrs R were pressured into purchasing membership. I acknowledge that they 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. To the contrary, Mr R's recollection of the sale shown in his email of 22 February 2022 refers to Mrs R getting 'more and more interested' and 'getting convinced that it would be great' as the sales process went on.

They were also given a 14-day cooling off period and Mr R has 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 R and Mrs R made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR didn't argue that the alleged misrepresentations that formed the basis of the section 75 claim were relevant to whether there was an unfair credit relationship. However, if Mr R entered into the Fractional Club membership/Credit Agreement because of those misrepresentations then this could render the credit relationship between Mr R and the Lender unfair. I therefore think it is appropriate to address the alleged misrepresentations when addressing the question of whether there was an unfair credit relationship.

The letter of complaint alleged that Mr R was told that he could sell his timeshare back to the

resort or easily sell it at a profit and this was a misrepresentation. But the witness testimony that the PR has now provided from Mr R in his email to it of 22 February 2024 with his recollections of the sale makes no reference to being told this. I've therefore seen no evidence that Mr and Mrs R were actually told this.

The letter of complaint also alleges that Mr R and Mrs R were told they would have access to the holiday's apartment at any time around the year. But again this isn't supported by what Mr R has said happened at the Time of Sale. He makes no mention of this in the email I have referred to. So, once again I've seen no evidence that Mr R and Mrs R were told this.

The final alleged misrepresentation relates to the Fractional Club membership being sold as an investment. As wells as this being put as an alleged misrepresentation it is also argued that doing so was a breach of the Timeshare Regulations. I address below whether Fractional Club membership was sold as an investment in breach of those regulations.

However, on the question of whether this would have amounted to a misrepresentation, I am not satisfied it would have been. This is because there was an investment element to Fractional Club membership so talking about it as such wouldn't have been a misrepresentation.

Overall, therefore, I don't think that Mr R's credit relationship with the Lender was rendered unfair to him 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 the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him and Mrs R as an investment in breach of prohibition against selling timeshares in that way.

<u>The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations</u>

The Lender does not dispute, and I am satisfied, that Mr R's and Mrs R's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr R and Mrs R were 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 Mr R and Mrs R 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 R and Mrs R 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 R and Mrs R, 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 R and Mrs R 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 the Lender and Mr R 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 Mr R 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 R and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him 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 R and Mrs R decided to go ahead with their purchase. In his email of 22 February 2022 to the PR with his recollection of the sale all Mr R could recall was that Fractional Club membership was for a set period of time after which the property would be sold and he and Mrs R would get a share of the money it was sold for. There is nothing in what he has said that leads me to think that he and Mrs R entered into the Purchase Agreement and he entered into the Credit

Agreement because of the prospect of a financial gain. To the contrary, what he has said makes clear that it was Mrs R that was particularly attracted to Fractional Club membership and that this was for reasons other than it being an investment.

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 R himself doesn't persuade me that his and Mrs R's 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 R's and Mrs R'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 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 R and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The liquidation of the Supplier

The PR argues that the liquidation of the Supplier's sales company in Spain means that Mr R wouldn't be able to recover any amounts awarded by the Spanish Courts against the Supplier. He hasn't explained why this is relevant to the complaint he has made against the Lender and I am not satisfied that it is.

Mr R has not argued that this means the Supplier is in breach of the Fractional Club membership because it cannot fulfil its obligations rendering the Credit Agreement unfair. And for the avoidance of doubt I have been provided with no evidence suggesting this is the case.

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 R's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him 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."

I gave both parties the opportunity of responding and providing any further information or argument before I made my final decision. The Lender responded and said it agreed with my PD and had nothing further to add. The PR also responded on behalf of Mr R and didn't accept the PD, providing some further comments and arguments they wish to be considered.

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 PD, for the same reasons – I don't think this complaint should be upheld. For the avoidance of doubt the findings in my PD form part of the findings in this final decision unless I state to the contrary.

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.

The PR's further comments in response to the PD in the main relate to the issue of whether the credit relationship between Mr R and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr R as an investment at the Time of Sale.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn't make 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 the PR's points raised in response.

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

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

The PR explained in their response to my PD that they hadn't shared the Investigator's view on this complaint with Mr R, saying "this was done in order not to influence their recollections". The PR said this means Mr R's recollections have not been influenced by the Investigator's view and they say neither could they have been influenced by the judgment in *Shawbrook and BPF v FOS.* However, I haven't suggested that Mr R's recollections were influenced in some way. Instead I found his testimony didn't provide persuasive evidence that he was motivated to purchase Fractional Club membership because it was an investment.

As I said in my provisional decision, Mr R's recollection of what he was told was that membership was for a set period after which the property would be sold and he would get a share of the money it was sold for. And there is nothing in what he said that suggests to me that he purchased membership because of the gain or profit he might make.

The PR's arguments to the contrary in response to my PD are not persuasive. They say, for example, that Mr R referred to being shown the Supplier's properties several times in his testimony and that this showed he was interested in property ownership. But Mr R refers to being able to "*upgrade the types of property we could use"* and being given a *"tour of different types of properties we could upgrade to"* and it is in the context of those statements that he said Mrs R was getting 'very interested' and getting 'convinced this would be great'. To my mind what Mr R said about being shown properties establishes that the reason he and Mrs R went ahead with the purchase of Fractional Club membership was because of the accommodation available to them when holidaying and doesn't support a finding they went ahead with the purchase of membership because it was an investment

The PR has argued that when people invest in a property they generally have an expectation that the property will increase in value. But Mr R does not say that he expected this and his testimony doesn't support a conclusion that he purchased membership because he expected to make some gain or profit. And given this, what the PR has said doesn't persuade me this was what motivated him to purchase membership.

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 R's purchasing decision.

The PR also said that in the judgment handed down in *Shawbrook & BPF v FOS*, it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my PD, the Timeshare Regulations did not ban 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, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr R's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr R and the Lender was unfair to him.

The provision of information by the Supplier at the Time of Sale

I will also address the PR's point regarding the apparent ambiguity in the proposed sale date of the Allocated Property. The PR suggests that a delayed sale date could lead to an

unfairness to Mr R in the future, as any delay could mean a delay in the realisation of his share in the Allocated Property.

The terms and conditions of the Purchase Agreement state that Mr R's fractional rights and points shall continue until the sale date. The Fractional Rights Certificate identifies the sale date as as 31 December 2032 and this as the start of the sale process. This date indicates that the membership has a term of around 16 years. The ambiguity identified by the PR is that in the Information Statement provided to Mr R at the Time of Sale it says the following:

*"The Owning Company will retain such Allocated Property until the automatic sale date in **19 years time** or such later date as is specified in the Rules or the Fractional Rights Certificate." (bold my emphasis).*

However, the Information Statement is a generic document provided to members purchasing Fractional Club membership whereas the Ownership Certificate is specific to Mr R's and Mrs R's Fractional Club membership. As such I think it is more likely than not the sale date is as set out in the certificate. Moreover, whilst The PR has said that what was set out in the Information Statement contradicted what Mr R understood in his explanation of what happened he said he couldn't remember how long it was for. This doesn't suggest that the Allocated Property being sold after 16 years was important to him when he and Mrs R decided to purchase membership or that they wouldn't have gone if the sale was later than this In the circumstances I am not persuaded that this ambiguity causes an unfairness that requires a remedy or is a reason to now uphold this complaint.

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 R's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him 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 him.

My final decision

I don't uphold this complaint for the reasons I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 16 January 2026.

Philip Gibbons
Ombudsman