DRN-5884386

The complaint

Mr T and Mrs A'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 T and Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 29 October 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 940 fractional points at a cost of £14,756 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr T and Mrs A 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 T and Mrs A paid for their Fractional Club membership by paying a £500 deposit and taking finance for the remaining amount due of £14,256 from the Lender (the 'Credit Agreement') in both of their names. This loan also consolidated the balance of a previous loan, which is not the subject of this complaint.

Mr T and Mrs A – using a professional representative (the 'PR') – wrote to the Lender on 1 February 2023 (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 T and Mrs A's concerns as a complaint and issued its final response letter on 13 February 2023, rejecting it on every ground.

The complaint was then referred it to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

The PR, on Mr T and Mrs A's behalf, disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Having considered everything, I also did not think this complaint ought to have been upheld. But my reasons were more extensive than those given by our Investigator, so I issued a provisional decision and invited both parties to respond with any new evidence or arguments that they wished me to consider before issuing a final decision.

The Lender responded to say it agreed with what I had said. The PR responded to say that Mr T and Mrs A did not accept what I said, with some further arguments as to why the complaint ought to be upheld. In light of those submissions, I will now set out my final determination on this complaint.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred 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 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.

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.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr T and Mrs A were:

1. Told that they had purchased an investment that would "considerably appreciate in value".
2. Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.
3. Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.
4. Made to believe that they 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 a 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 Mr T and Mrs A - 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 the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr T and Mrs A 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. 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 T and Mrs A and the Lender.

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

Mr T and Mrs A'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 T and Mrs A. 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 T and Mrs A 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 T and Mrs A.

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 T and Mrs A knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were 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 T and Mrs A's financial loss – such that I can say that the credit relationship in question was unfair to 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 them, 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 T and Mrs A 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.

I acknowledge that Mr T and Mrs A 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 this 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 T and Mrs A 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 T and Mrs A'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 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 T and Mrs A'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 T and Mrs A 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 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 T and Mrs A 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 T and Mrs A 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 T and Mrs A, 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.

But, 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 T and Mrs A 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 (if there was one) had on the fairness of the credit relationship between Mr T and Mrs A 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 T and Mrs A 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.

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 they decided to go ahead with their purchase. That did not mean they were 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 Mr T and Mrs A themselves did not persuade me that their purchase was motivated by their 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 Mr T and Mrs S ultimately made.

I said this because of the evidence Mr T and Mrs S provided in response to our Investigator's view. After their complaint was initially rejected, they provided some handwritten testimony to our Service in December 2023. Mr T said:

> "*After buying new windows part of the deal was a free week at [the Supplier] in [resort].*
>
> *In that week we were what I would call brow beaten for 5 hours. The same thing happened the second time.*
>
> *This led to us having two fractions in a property that when sold we would receive a bonus monetary gift that was believed would pay off the debt.*"

I was mindful that this testimony was only provided in late 2023, after our Investigator sent their view, when Mr T would have known that their complaint was rejected, in part, because the Investigator did not conclude that they bought the membership for any investment element. Taken as a whole, I could not conclude that Mr T and Mrs A's purchase at the Time of Sale was motivated by any investment element in Fractional Club membership.

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 Mr T and Mrs A'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 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 did not think the credit relationship between Mr T and Mrs A and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The PR responded to my provisional decision to make, in summary, the following points:

- The PR did not provide our Investigator's view to Mr T and Mrs A before they gave their recollections of the sale. The PR said this was done to not influence their memories, so their evidence was their honest recollections and not written in light of what our Investigator had said.
- The PR also said that Mr T and Mrs A were not aware of the outcome of a judicial review into two Ombudsmen's decisions *(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"))*, that held that an unfairness could be found in cases where a timeshare was sold as an investment.
- The PR submitted that the evidence showed that the Supplier did sell membership as an investment and that was a motivating factor in their purchasing decision.
- The PR noted that Mr T and Mrs A were not asked to provide any evidence of their memories until 2023, so that ought not to be held against them.

I have considered PR's submissions, but I have not changed my mind from my provisional findings.

The PR has said that Mr T and Mrs A were not aware of the reasons behind our Investigator's view rejecting their complaint. But following that view, the PR provided an argument that their membership had been sold to them as an investment and provided a statement from them to that effect. In other words, the evidence from Mr T and Mrs S was that Fractional Club membership had been sold to them as an investment, in contrast to the Investigator's conclusions. Further, in my mind, their statement did not go beyond that allegation and, for example, did not mention all of the alleged misrepresentations set out by the PR in the Letter of Complaint, nor did it give any fulsome memories of the sale more than it being positioned as an investment. I find it inherently unlikely that they would have made that argument, in isolation, had they not been aware of the outcome and reasons of our Investigator's view. In other words, I do not think it credible that the evidence would have been solely geared toward the sale having been made in breach of Regulation 14(3), and that being important to them, had our Investigator not concluded that was not the case. Further, I do not understand how the PR took instructions from Mr T and Mrs A about why they rejected our Investigator's view without telling them about what they found, any why. So, I do not accept the argument that Mr T and Mrs A were unaware of the outcome of our Investigator's view before they wrote their statement.

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 provisional decision, 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 complaints that were subject to judicial review were upheld, it does not follow I must (or should) also uphold Mr T and Mrs A's complaint.

So, for all of the above reasons, along with those I already explained in my provisional decision, I still do not think that the credit relationship between Mr T and Mrs A and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier

In response to my provisional findings, the PR also raised a further 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 T and Mrs A in the future, as any delay could mean a delay in the realisation of their share in the Allocated Property.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2033. I'm aware this same date was generally set out under point 1 of the Members Declaration, which had to be signed as being read by consumers at the time of purchase. This date indicates that the membership has a term of 16 years. The ambiguity identified by the PR is that in the Information Statement provided as part of the purchase documentation 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).

It seems clear to me that the commencement date for the start of the sales process is 31 December 2033. This actual date is repeated in the sales documentation as I've set out above.

So, I can't see that this is a reason to find the credit relationship unfair and 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 T and Mrs A'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

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr T to accept or reject my decision before 5 January 2026.

Fiona Mallinson
Ombudsman