DRN-5993249

The complaint

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

What happened

Mr and Mrs D were members of a timeshare provider (the 'Supplier') – having purchased a total of 16,000 points in the Supplier's 'Vacation Club' since 2005. 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 29 October 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 16,500 fractional points, and after converting their existing Vacation Club points (for which they were given a conversion rate of £1/point) they ended up paying £11,720 (the 'Purchase Agreement') for their Fractional Club membership.

Unlike their previous membership, the Fractional Club was asset backed – which meant it gave Mr and Mrs D 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. But in addition to this it provided a shorter membership term – 15 years – compared to the end date of 2054 with the Vacation Club.

Mr and Mrs D paid for their Fractional Club membership by taking finance of £11,720 from the Lender (the 'Credit Agreement') in both of their names.

Mr and Mrs D – using a professional representative (the 'PR') – wrote to the Lender on 21 October 2019 (the 'Letter of Complaint') to intimate a claim under Section(s) 75 and 140 of the CCA. This was a generalised letter which set out that:

- An undisclosed amount of commission was paid by the Lender to the Supplier.
- The Supplier pressured Mr and Mrs D into taking the agreement.
- No proper affordability check of the lending was carried out.
- The Supplier did not undertake a suitability assessment to ensure that the product met Mr and Mrs D's needs.

The Lender did not respond to the Letter of Complaint, so on 25 July 2022 the PR referred Mr and Mrs D's complaint to the Financial Ombudsman Service. The complaint points raised in the referral were:

1. The [Lender] paid a commission to the [Supplier] which was not declared to our client;
2. The [Supplier] failed to conduct a proper assessment of our client's ability to afford the loan;
3. The [Supplier] unduly pressured our client into entering a contract with the timeshare owner and finance agreement with the finance company;

4. The [Fractional Club] was misrepresented to our client;
5. The [Supplier] used aggressive commercial practices to pressure our client;
6. The [Supplier] marketed and sold the timeshare as an investment in breach of Regulation 14(3) of the Timeshare Regulations[1]. It was illegal for them to do so.
7. [The Supplier] is in liquidation. They are in breach of contract and this complaint should be considered under this also.
8. Our clients were not provided with the key information necessary for them to make an informed decision regarding their purchase, in breach of Regulation 12(4)(b) of the Timeshare Regulations.
9. The booking of holidays at each resort was not necessarily the purpose of the purchase of the timeshare. A material part was as of an investment.

Mr and Mrs D's complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs D disagreed with the Investigator's assessment and asked for an Ombudsman's decision. It also provided a statement from Mr D, dated 1 October 2019, setting out his recollections of their entire relationship with the Supplier. As regards their Fractional Club purchase, he said:

> *"In October 2013 we were on holiday in Tenerife (RSBC) we were invited to a breakfast update at first the representative tried to sell us more points and we were [sic] advised that we were unhappy with everything. He then advised that there was a new system which was fractional points. This was an investment which would increase in value and we would partially own a property and then after a certain number of years they would sell it for us and we would have a guaranteed exit from the agreement. We trusted and believed the representative in good faith. During this meeting we were subjected to high pressured and very persistent sales tactics. This was partially in relation to not having anytime [sic] to go away and think about the decision and it had to be made on the day as it was advised it was on special offer. The representative offered us a free meal voucher for signing up. We thought this was the only option to guarantee exit from the club."*

Having considered the content of the statement, the Investigator wasn't persuaded that it should change the outcome he had reached. So, as no agreement could be reached, the matter has come to me.

The provisional decision

I considered the matter and issued a provisional decision (the 'PD') setting out my initial thoughts on the merits of Mr and Mrs D's complaint.

In the PD I said:

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

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

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair

[1] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

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 PR said, in the Letter of Complaint, that the Supplier had made actionable misrepresentations at the Time of Sale, but did not expand upon what these were. And it repeated that misrepresentations had been made in the complaint form sent to this Service, but again, did not expand on this at all. But since that time, it has provided a statement from Mr D. Having considered what has been said, it seems that he is perhaps suggesting that he and Mrs D were told by the Supplier that Fractional Club membership was an "investment" when that was not true.

However, 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. After all, a share in an allocated property was, by its very nature, an investment. And as there's nothing else on file to support the PR's allegation, I'm not persuaded that there was a representation by the Supplier on the issue in question that constituted a false statement of fact.

So, while I recognise that Mr and Mrs D 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 did not accept this particular Section 75 claim.

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

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Although this was not set out in the Letter of Complaint, the complaint form to this Service suggests that the Supplier breached the Purchase Agreement because it went into liquidation. And if certain parts of the Supplier's business were put into liquidation, I can understand why the PR is alleging that there was a breach of the Purchase Agreement as a result. However, neither Mr and Mrs D nor the PR have said, suggested or provided evidence to demonstrate that they are, due to the liquidation process, no longer:

1. *members of the Fractional Club;*
2. *able to use their Fractional Club membership to holiday in the same way they could initially; and*

3. *entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.*

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs D any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that 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 and Mrs D and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs D and the Lender.

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

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

The PR says, for instance that:

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

However, as things currently stand, neither of these strike me as a reason why this complaint should succeed.

I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs D was actually unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs D.

As regards what has been said about pressure, I acknowledge that Mr and Mrs D 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. I can see that they have, over time, attended several sales presentations from the Supplier and have made several purchases. And having looked at the statement given, the same allegation of being put under pressure to buy is made each time. So, I find it hard to understand why, if Mr and Mrs D felt pressurised to buy every time, why they continued to do so. They were also given a 14-day cooling off period following their purchase of the Fractional Club and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs D made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr and Mrs D's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR now says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

A share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs D the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs D 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.

And there is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs D, 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 and Mrs D 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 and Mrs D and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs D and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, I am not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs D decided to go ahead with their purchase. I'll explain.

As I've said, the Letter of Complaint sent to the Lender by the PR on 21 October 2019 was very generic, and contained little evidence which was specific to Mr and Mrs D themselves. Indeed, looking at the contents of the two pages, it is only the heading and the specific date, price and number of points bought that was specific to Mr and Mrs D.

As part of its initial submissions to this Service, the PR didn't provide a witness statement from Mr and Mrs D – or anything else that sets out in their own words what happened. And the Letter of Complaint, even though it includes their details and what they bought, is not evidence – especially when, as here, it contains bare allegations and no specific detail of the consumer's own allegations or recollections.

But, one day after the Investigator said he didn't think their complaint ought to be upheld, the PR sent in a statement from Mr D. This was unsigned and dated 1 October 2019.

Given that it was only one day after the Investigator sent his opinion, I think it was probably written before that. But there is no evidence to support that it was written on the date given. And this is unusual, as I'm aware this particular PR normally provides details of the date the telephone consultation with a consumer was scheduled for, which is when the statements were normally compiled. But we don't have that in this case.

However, I don't think it necessary to make a formal finding on whether or not it is safe to rely on the contents of the statement, because I am not persuaded in any event, when I compare what Mr D has said to the remaining contemporaneous evidence, that they made the purchase of the Fractional Club for the investment element and the possibility of a profit from it.

Mr D has said that they went into the meeting on 29 October 2013 unhappy with everything about their existing Vacation Club membership. They were then:

> *"…advised that there was a new system which was fractional points. This was an investment which would increase in value and we would partially own a property and then after a certain number of years they would sell it for us and we would have a guaranteed exit from the agreement."*

And then further:

> *"We thought this was the only option to guarantee exit from the club."*

So, although Mr D has said they were told the membership was an investment which would increase in value, they were unhappy with the way their Vacation Club membership was working. And he has twice in his statement talked about the shorter membership term that Fractional Club membership offered when compared to their Vacation Club.

And this appears to be supported by the contemporaneous note made on the day of the sale by the Supplier:

29-Oct-2013 11:22 : KBROOKS
bu: done by K Brooks. Fractional conv for shorter memb term, ties in with ages, more realistic time period,explained not automatically inherited by family, they want to make provision in their wills to pass on. Total amount Shawbrook funded by inheritance monies from father, plan to settle loan when receive funds.

Although, like the provenance of the statement, there is no direct evidence to support this was recorded when it says it was, it does contain very personal details of Mr and Mrs D's circumstances and plans which gives it credence. And when taken in conjunction with Mr D's comments in his statement regarding the shorter membership term and their 'guaranteed' exit from the membership, I think on balance that is the reason they decided to switch from the Vacation Club to the Fractional Club membership.

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 and Mrs D themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs D's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase for the shorter membership term it offered, whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs D and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

The PR, in the referral of the complaint to this Service, says that Mr and Mrs D were not given sufficient information at the Time of Sale by the Supplier in order to make an informed choice.

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

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

Mr and Mrs D's Commission Complaint

I note that one of Mr and Mrs D's other concerns relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreement. The Supreme Court's recent judgment Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd [2025] UKSC 33 ('Johnson, Wrench and Hopcraft') clarified the law on payments of commission – albeit in the context of car dealers acting as credit brokers. In my view, the Supreme Court's judgment sets out principles which appear capable of applying to credit brokers other than car dealer–credit brokers. So, once the implications of that judgment become clear, I will finalise my findings on this complaint.

Conclusion

In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and if I put the issue of commission to one side for the time being, I am not persuaded that the Lender was party to a credit relationship with Mr and Mrs D under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate them.

But, as I've already said, once the implications of Johnson, Wrench and Hopcraft become clear, I will finalise my findings on this complaint."

The responses to the provisional decision

The Lender responded to the PD and accepted it, and provided details of the commission that it had paid to the Supplier. The PR, on Mr and Mrs D's behalf, did not accept it, but provided no further evidence that it wished me to consider.

Following this, and further to my PD, I set out to both sides how I was not persuaded that Mr and Mrs D's credit relationship with the Lender was unfair to them for reasons relating to the commission arrangements between it and the Supplier.

The PR responded to say it had nothing further to add.

Having received the relevant responses from both sides, I am now finalising my decision.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

The 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.

Following the responses from both sides, I've considered the case afresh. And having done so, and because no new evidence has been submitted or arguments made in response to my initial findings, I see no reason to depart from the outcome as set out in the provisional decision above.

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

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D and Mr D to accept or reject my decision before 10 February 2026.

Chris Riggs
Ombudsman