DRN-6050599

The complaint

Mr and Mrs R'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.

Background to the complaint

Mr and Mrs R were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the products at the centre of this complaint are their memberships of timeshares that I'll call the 'Fractional Club' and the 'Vacation Club' – points in which Mr and Mrs R purchased on the dates below:

- 680 fractional points on 13 June 2017 for £12,276 ('Purchase Agreement 1')
- 1,180 Vacation Club points on 7 October 2020 for £7,395 ('Purchase Agreement 2')

  (which, when appropriate, I'll simply refer to as the ''Purchase Agreements')

As this complaint is concerned with the purchases on both of those dates, those are the 'Times of Sale' for the purposes of my decision.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs R more than just holiday rights. It also included a share in the net sale proceeds of a property named on the relevant purchase agreement (which I'll refer to as the 'Allocated Property') after their membership term ends. Vacation Club membership was not asset backed, so it did not include a share in the net sale proceeds of a property.

Mr and Mrs R paid for their timeshare purchases by making small advance payments and taking the following amounts of finance from the Lender:

- £11,776 on 13 June 2017 ('Credit Agreement 1')
- £16,927 on 7 October 2020 ('Credit Agreement 2'), which was also used to consolidate the lending they took out under Credit Agreement 1.

  (which, when appropriate, I'll simply refer to as the ''Credit Agreements')

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 1 December 2022 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs R's concerns as a complaint and issued its final response letter on 9 December 2023, 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.

Mr and Mrs R disagreed with the Investigator's assessment and asked for an Ombudsman's decision. So the complaint was passed to me to decide.

I considered the matter, and I also thought this complaint ought not to be upheld. But as my reasons were more extensive than those given by our Investigator, I issued a provisional decision (the 'PD'), and I invited both parties to respond before issuing a final decision.

The PR responded stating it did not accept the PD, and it provided some further comments it wished to be considered. The Lender confirmed it accepted the PD and had nothing further to add.

In light of the parties' responses to the PD, I'm now finalising my decision on this complaint.

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 considered the complaint afresh, I still do not think it 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's to decide what's 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.

The legal and regulatory context

In considering what's fair and reasonable in all the circumstances of the complaint, I'm required under DISP 3.6.4 R 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's 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]

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

Section 75 of the CCA: the Supplier's misrepresentations at the Times 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 Times of Sale because Mr and Mrs R 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.

The Fractional Club purchase

In relation to Mr and Mrs R's Fractional Club membership purchase, 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 relevant 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.

The Vacation Club purchase

In relation to Mr and Mrs R's Vacation Club purchase, it seems inherently improbable to me that the Supplier would have made the alleged misrepresentations under points 1, 2 and 3. Vacation Club membership was not asset backed, so it didn't include any rights to a share in the net sale proceeds of a property. I also don't think it's probable that Vacation Club membership was misrepresented for the reason given under point 4. It's 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 Vacation Club membership was misrepresented for any of these reasons, I don't think it was.

Section 75: Conclusion

While I recognise that Mr and Mrs R and the PR have concerns about the way in which the Fractional Club and Vacation Club memberships were 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 I don't think 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 one or more unfair credit relationships?

I've already explained why I'm not persuaded that the Fractional Club and Vacation Club memberships were actionably misrepresented by the Supplier at the Times of Sale.
But there are other aspects of the sales processes 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 relationships between Mr and Mrs R and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were 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 Times of Sale along with any relevant training material;

2. The provision of information by the Supplier at the Times 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 Times 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 relevant credit relationships between Mr and Mrs R and the Lender.

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

Mr and Mrs R's complaint about the Lender being party to unfair credit relationships was made for several reasons.

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mr and Mrs 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 and Mrs R was actually unaffordable before also concluding that they lost out as a result, and then consider whether the credit relationships with the Lender were unfair to them for this reason. But from the information provided, I'm not satisfied that the lending was unaffordable for Mr and Mrs R.

Connected to this is the suggestion by the PR that the person(s) the Credit Agreements were arranged by were self-employed and unauthorised to broker credit in their own right, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreements. However, it looks to me like Mr and Mrs R 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 and Vacation Club memberships respectively. And as none of the lending looks like it was unaffordable for them, even if the one or more of the Credit Agreements were 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 and Mrs R experiencing a financial loss – such that I can say that the credit relationships in question were 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 them, even if the loans weren't arranged properly.

The PR also says that there were one or more unfair contract terms in the Purchase Agreements. But as I can't see that any such terms were operated unfairly against Mr 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 the Fractional Club and the Vacation Club memberships are likely to have led to an unfairness that warrants a remedy.

I acknowledge that Mr and Mrs R may have felt weary after sales processes that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentations that made them feel as if they had no choice but to purchase Fractional Club and Vacation Club memberships when they simply did not want to. They were also given a 14-day cooling off period after each purchase and they have not provided a credible explanation for why they did not cancel their memberships during that time. With all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs R made the decisions to purchase Fractional Club and Vacation Club memberships because their ability to exercise those choices was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think Mr and Mrs R's credit relationships with the Lender were 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 relationships with the Lender were unfair to them. And that's the suggestion that their memberships were marketed and sold to them as investments in breach of the prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I'm satisfied, that Mr and Mrs R's Fractional Club and Vacation Club memberships both met the definition of a "timeshare contract" and were "regulated contracts" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club and Vacation Club memberships as investments. 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 Times of Sale – saying, in summary, that Mr and Mrs R were told by the Supplier that their memberships were 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.

As I've explained above, Vacation Club membership wasn't asset backed, so it didn't give Mr and Mrs R an interest in the sale proceeds of a property in the way that Fractional Club membership did. As such, Vacation Club membership did not include a means by which Mr and Mrs R could have hoped or expected to profit from it. It follows that the Supplier would not likely have marketed or sold membership to them as an investment because it didn't include an investment element. Consequently, I've found the Supplier did not breach Regulation 14(3) of the Timeshare Regulations when it sold Vacation Club membership to them. So I don't think the credit relationship between Mr and Mrs R and the Lender under Credit Agreement 2 was unfair to them for reasons relating to a breach of Regulation 14(3).

However, a share in the Allocated Property under Fractional Club membership clearly constituted an investment as it offered Mr 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's 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 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 relevant Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

On the one hand, it's clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr 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 the Supplier's sales process left open the possibility that the sales representative(s) may have positioned Fractional Club membership as an investment. So, I accept it's also possible that Fractional Club membership was marketed and sold to Mr 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 when it sold Fractional Club membership to Mr and Mrs R 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.

Would the credit relationship between the Lender and Mr and Mrs R have been rendered unfair to them had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the relevant Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs R and the Lender under Credit Agreement 1 and related Purchase Agreement 1, 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'm to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs R 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 Purchase Agreement 1 and Credit Agreement 1 is an important consideration.

In my PD 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 Mr and Mrs R decided to go ahead with their purchase. That didn't mean they weren't interested in a share in the Allocated Property. After all, that would not have been surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs R 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 they ultimately made.

I said this because while Mr and Mrs R's recollections of what the Supplier told them included that *"*[they] *would see a return on* [their] *investment,"* taken as a whole their recollections did not give me the impression that they thought they would get back any more money than what they paid for their membership. Their recollections did not make out that they thought they would make a profit from it, nor what the Supplier told them about the prospect of a financial gain, only that it would end up not costing them anything once their membership term ended. Moreover, I explained I could not give Mr and Mrs R's testimony the weight necessary to finding the credit relationship in question was unfair to them due to a breach of Regulation 14(3). That's because their testimony was only provided to us after the Investigator issued their view and after the judgment in *Shawbrook and BPF v FOS*[1] was handed down, and the other evidence before me did not corroborate their testimony.

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 and Mrs R's decision to purchase Fractional Club membership at the relevant Time of Sale was motivated by the prospect of a financial gain (i.e. a profit). On the contrary, I thought the evidence suggested they would have proceeded 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 and Mrs R and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The PR's response to my PD

The PR argued that Mr and Mrs R explicitly referred to their purchase as an "investment," which they understood to mean that they would receive a financial gain at the end of the contract, even if only a modest one. It said their understanding that they would receive *"a return on* [their] *investment"* shows they were induced into making the purchase by what the Supplier told them about the prospect of a financial gain.

However, I don't find the PR's argument persuades me to depart from my provisional findings about the contents of Mr and Mrs R's recollections. Taken as a whole, Mr and Mrs R's recollections do not make out what the Supplier told them about the prospect of a financial gain. Nor do they make out that it was their understanding of what the Supplier told them that there was a possibility of making a financial gain as the PR suggests. In the context of the assertion that the prospect of a financial gain was an important and motivating factor in their decision to go ahead with their purchase, I find it difficult to understand why Mr and Mrs R's recollections do not clearly indicate that they understood there was a possibility of a profit and that they were induced into purchasing membership by what the Supplier told them about that.

The PR also explained in its response to my PD that it hadn't shared the Investigator's view on this complaint with Mr and Mrs R, saying *"this was a deliberate step to ensure that their recollections remained entirely their own and were not influenced by external documents."*

The PR added that even if Mr and Mrs R had come across any information about the judgement handed down in *Shawbrook and BPF v FOS*, they would not have understood it because of the complexity of the issues and as they do not have a legal background.

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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)

Part of my assessment of Mr and Mrs R's 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.*

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

So, I maintain that there is a risk that Mr and Mrs R'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 leads me to conclude that I can place little weight on it.

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 and Mrs 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 Fractional Club membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr and Mrs 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 and Mrs R and the Lender under Credit Agreement 1 was unfair to them for this reason.

Section 140A: Conclusion

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

Overall conclusion

Given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs R's Section 75 claim. I'm not persuaded that the Lender was party to a credit relationship with them under the Credit Agreements and related Purchase Agreements that were unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs R to accept or reject my decision before 30 January 2026.

Asa Burnett
Ombudsman