DRN-6060866

The complaint

Ms G'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 her 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

Ms G was the member of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is her membership of a timeshare that I'll call the 'Fractional Club' – which she bought on 22 July 2013 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 1,540 fractional points at a total cost of £22,440 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Ms G 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 her membership term ends.

Ms G paid for her Fractional Club membership by trading in her existing membership for £12,100 and taking finance of £10,340 from the Lender (the 'Credit Agreement').

Ms G first complained to the Lender in July 2020. And that complaint concerned a subject access request (SAR) she had made to the Lender and the information it had provided in response. She was concerned that a Customer Service Statement (CSS) was missing from the information provided and that one didn't appear to have been completed for her loan. And the name on the partner checklist had been redacted.

In May 2021 the Lender responded to the complaint, rejecting it on every ground. Ms G – using a professional representative (the 'PR') then referred the complaint to this service in October 2021.

One of our investigators then looked into the complaint. They considered Ms G's concerns under Section 140 of the CCA and explained on 9 February 2024 why they weren't upholding the complaint. They also explained that they weren't considering the additional complaint points the PR had made with the complaint submission to this service, because those concerns hadn't been raised with the Lender. The PR then asked for the case to be withdrawn on 15 February 2024.

On 4 January 2024, the PR – wrote to the Lender (the 'Letter of Complaint' - LOC) to raise a number of 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 Ms G's concerns as a complaint and issued its final response letter on 21 March 2024, 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, explained that they thought part of the complaint regarding an unfair credit relationship should be dismissed, as it had already been investigated by this service and an answer given to Ms G. And they rejected the other aspects of the complaint concerning an unfair relationship with the Lender, and the Timeshare being a Collective Investment Scheme (CIS) in breach of the Financial Services and Markets Act (FSMA.)

The PR on behalf of Ms G disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I issued a provisional decision explaining why I thought Ms G's complaint shouldn't be dismissed. And I went on to explain why I didn't think the complaint should be upheld.

In response, the PR asked for further time for Ms G to provide further information. No further information or submissions were received from the PR by, or after the deadline requested. The Lender accepted my decision.

The legal and regulatory context

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

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

<u>The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010</u>

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

<u>The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011</u>

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.

And having done that and no further submissions or information in response to my provisional decision having been received, I remain of the opinion that this complaint should not 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.

Should Ms G's complaint be dismissed?

I've reviewed not only the submissions and evidence in this case, but also the case file for the complaint Ms G made to the Lender in July 2020.

The DISP rules under which I and this service operate, allow me to in certain circumstances, to dismiss a complaint without considering its merits.

DISP 3.3 deals with complaints that I could dismiss without considering its merits. DISP 3.3.4A R reads:

"The Ombudsman may dismiss a complaint referred to the Financial Ombudsman Service on or after 9 July 2015 without considering its merits if the Ombudsman considers that: …

(5) dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service."

And DISP 3.3.4B R says:

"Examples of a type of complaint that would otherwise seriously impair the effective operation of the Financial Ombudsman Service may include: …

(3) where the subject matter of the complaint has previously been considered or excluded under the Financial Ombudsman Service (unless material new evidence which the Ombudsman considers likely to affect the outcome has subsequently become available to the complainant);…"

DISP 3.3.4A says the ombudsman 'may dismiss a complaint' and not 'must dismiss a complaint', such power to dismiss complaints is therefore discretionary, and not mandatory. As a result, I have considered whether I ought to dismiss the part of the complaint that relates to Ms G's concerns regarding an unfair credit relationship with the Lender, pursuant to Section 140 of the CCA.

Having reviewed the original complaint and the submissions in this complaint, I'm satisfied that the complaint Ms G made in 2020 and referred to this service in 2021, is not the same as this complaint. Ms G's complaint in 2020 was in essence about her dissatisfaction with the information provided in response to her SAR request to the Lender.

This complaint raises concerns about misrepresentations made by the Supplier to Ms G and that its actions led to an unfair relationship between her and the Lender. So, in my opinion, this second complaint is clearly different from the first complaint Ms G made in 2020. And as a result, I'm not persuaded that the first complaint can reasonably be interpreted as a complaint concerning an unfair relationship pursuant to Section 140 of the CCA. So, I don't

think Ms G's complaint about misrepresentations made by the Lender which she says led to an unfair relationship with it, should be dismissed.

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

Section 75(1) of the CCA protects consumers who buy goods and services on credit. It says, in certain circumstances, that the finance provider is legally answerable for any misrepresentation or breach of contract by the supplier. As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 (the 'LA') as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant for me to consider whether Ms G's Section 75 claim for misrepresentation was time-barred under the LA before she put it to the Lender.

I wouldn't normally think it would be unfair for a respondent firm to rely on the LA to decline a claim that's been made outside the limitation period, and I don't think it's unfair in this instance. The date on which the cause of action accrued is, in this case, the date of sale. It was then that Ms G entered into an agreement based, she says, on the Supplier's misrepresentations. As the loan from the Lender was used to finance the purchase, it was also then that she suffered a loss. It follows that Ms G had six years from the date of sale to make a claim for misrepresentation. But she didn't make her claim to the Lender until January 2024, which is outside the time limits set by the LA.

The PR says section 32 of the LA also gives Ms G more time to make her claim. I disagree. Section 32 of the LA has the potential to postpone the relevant limitation period in cases of fraud, concealment, or mistake. I have thought about that here. But in this case the PR has simply referenced section 32 of the LA, but it hasn't explained what issues concerning the legality of the timeshare arrangement with the Supplier which it says were concealed or fraudulently misrepresented, that would make it a relevant consideration that might extend time. So, I find it very difficult to see taking into account the brief submissions provided by the PR in this case, how section 32 could extend the time limit for Ms G.

I have been provided with a questionnaire statement, in which Ms G refers to a number of concerns that she became aware of shortly after purchasing her Timeshare. And my understanding is that she believed the Timeshare was misrepresented because she couldn't holiday in the way she says she was led to believe by the Supplier. But that would have been clear to her soon after the Time of Sale. So, even if it could be said that section 32 is likely to have postponed the limitation period until she first discovered that the availability and quality of holidays was not what she thought it would be (and I make no such finding that it would), I'm not persuaded that would make a difference here.

As for the suggestion from the PR that Ms G would only have become aware of cause for complaint after the judgment in Shawbrook & BPF v FOS, I can't see how this can be true, as her claim predates this judgment. So, the PR is clearly wrong to suggest that the limitation period only started from this point in time.

However, the judgment in Scotland and Reast explains that, even if a limitation period has expired for a standalone misrepresentation claim, relevant misrepresentations that could be attributed to the Lender, can be considered as part of the assessment of the unfairness of the credit relationship. So, I have gone on to consider those matters later in this decision.

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

The LA also applies to claims for breach of contract, with the relevant limitation period normally expiring six years after the date of the breach or breaches in question.

Ms G has complained, in essence, that the Supplier was in breach of the Purchase Agreement by being unable to provide her with her choice of holiday accommodation when she wanted it. Bearing in mind the relevant limitation period, any breach occurring in the six years leading up to the date she notified the Lender of her claim would not be time-barred (i.e. 4 January 2018 to 4 January 2024). Ms G's membership appears to have been active up until at least 2015, as the Supplier has provided information about bookings made up to that point. Ms G concerns about not getting the accommodation she wanted, insofar as these are potentially claims that the Supplier breached the Purchase Agreement from 4 January 2018 onwards, can be considered to have been made "in time" as far as the LA is concerned, and Ms G could therefore have relied on Section 75 to claim against the Lender in respect of these.

However, Ms G has provided very little information about exactly when the alleged breaches occurred or what specifically happened when she tried to make certain bookings. And the information I have from the Lender suggests that the last booking was in 2015. This makes it difficult to arrive at any conclusion that the Supplier must have been in breach of contract. It also appears that, as with any holiday accommodation, availability at resorts in the Supplier's portfolio was not unlimited and will have been affected by higher demand at different times of year, like school holidays, for instance.

Some of the sales paperwork signed by Ms G states that the availability of holidays was subject to demand. I'm willing to accept that she may not have been able to get the accommodation she wanted every time she tried to book. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Ms G has also said that the Supplier breached the Purchase Agreement because it's not clear as to what point she will be able to divest her share of the Allocated Property. But the Fractional Rights certificate she was provided with states that the Trustee will start the sales process at the end of 2031. My understanding is that she fears that, when the time comes for the Allocated Property to be sold, she will not receive her share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Ms G 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 when it dealt with the Section 75 claim in question.

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 Ms G 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 in relation to Fractional Club membership, 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 Ms G and the Lender.

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

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

My understanding from the information provided, is that Ms G believes that the Supplier used "emotional drivers" to persuade her into purchasing Fractional Club membership at the Time of Sale. I acknowledge that Ms G may have felt weary after a sales process that went on for a long time. But she says little about what was said and/or done by the Supplier during the sales presentation that made her feel as if she had no choice but to purchase Fractional Club membership, when she simply did not want to. She was also given a 14-day cooling off period and she has not provided a credible explanation for why she did not cancel her membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Ms G made the decision to purchase Fractional Club membership, because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Ms G's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR now says the credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of the 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 Ms G the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.[1]

[1] The PR has argued that Fractional Club membership amounted to a Collective Investment Scheme, however this was considered and rejected in the judgment in *R (on the application of Shawbrook*

To conclude, therefore, that Fractional Club membership was marketed or sold to Ms G as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms G, the financial value of her 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 Ms G 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 Ms G 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 had on the fairness of the credit relationship between Ms G 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 Ms G and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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 Ms G decided to go ahead with her purchase. I'll explain why.

In its submissions in support of the complaint, the PR says that Fractional Club membership was framed as an investment. But I find it difficult to understand why those concerns weren't presented to the Lender when the complaint was first made by Ms G in 2020. And I note that the referral in 2024, also heavily references the case of Shawbrook v FOS. As a result, I think it's highly likely that the submissions made on behalf of Ms G by the PR, are made through the lens of that case, and her recollections framed by it.

Surprisingly, the PR hasn't provided to this service a statement from Ms G that sets out what she was told during the sales process in her own words. But I have been provided with a statement questionnaire by the Lender, that appears to have been produced by the PR on behalf of Ms G. The statement contains a number of questions about the sale and appears to record Ms G's responses to those questions. As I haven't been provided with any direct testimony from Ms G or the PR, it's difficult for me to attach much weight to the statement I do have. But even if I make the assumption that this has come from Ms G, I'm not persuaded by it. I'll explain why.

In its submissions to this service, the PR has said the Fractional Club membership was framed as an "investment" to Ms G. I find it somewhat odd therefore that in the statement provided to me, Ms G doesn't refer to her Timeshare membership as being positioned to her as an investment. And if it was framed as such to her, as argued by the PR, I would have expected her to have said that in her statement, where she recalls what she was told about the sale of the Fractional Club membership to her.

Ms G does however in the statement, make reference to being told that there were various ways she could use her membership to make money and encourage people to use the accommodation using a voucher scheme. And she also says that if she needed to sell her membership, they (the Supplier) had methods where she could access a pool of people who were forever seeking discounted packages. All she had to do was contact (the Supplier) and they would support her. She also said she was told the accommodation could be sold eventually and she would benefit financially, and by encouraging members of her family to use the accommodation.

The difficulty I have in applying much weight to what Ms G has said, (although I accept that the statement records her honest recollections of what she was told), is that her recollections don't correspond with what we know about the Suppliers sales process, or the documents she signed when she made her purchase. My understanding from what Ms G has said, is that she was led to believe that the Supplier would help her sell the property or rent it out. But she's not explained what she was told as to how any such assistance would work. Also, the members declaration she signed says at paragraph 4 towards the top of that page:

"We understand that (The Supplier) the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or Vacation Club Points) or act as agent in the sale other than as a trade in against future property purchases…."

So, I have difficulty in reconciling what was stated above in the members declaration that Ms G signed, with her recollections.

That doesn't mean she wasn'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 Ms G herself doesn't persuade me that her purchase was motivated by her 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 she 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 Ms G'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 she would have pressed ahead with her purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Ms G and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

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

The PR says that Ms G was not given sufficient information at the Time of Sale by the Supplier about the membership, including about the ongoing costs of Fractional Club membership.

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.

I acknowledge that it is also possible that the Supplier did not give Ms G sufficient information, in good time, on the various charges she could have been subject to as a Fractional Club member, in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Ms G nor the PR have persuaded me that she would not have pressed ahead with her purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

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

My final decision

For the reasons I've set out above, my decision is not to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms G to accept or reject my decision before 4 February 2026.

Simon Dibble
Ombudsman