DRN-6080493

Financial Ombudsman Service

The complaint

Mr and Mrs W say that Shawbrook Bank Limited– (the Lender), unfairly declined their claim under section 75 and section 56 of the Consumer Credit Act 1974 ('CCA'). And they say their creditor- debtor relationship with the Lender was unfair to them under section 140A of the CCA.

What happened

In February 2015, Mr and Mrs W purchased a timeshare membership – which I'll call 'Fractional Club' membership – from a timeshare provider (the 'Supplier'). It included 4,090 fractional points. The membership was asset backed – which means it gave Mr and Mrs W more than just holiday rights. It included a share of the net sale proceeds of a property named on the purchase agreement (the 'Allocated Property') after the membership term ended.

The purchase price, as shown on the pricing summary which set out details of the Fractional purchase and how the cost was calculated, was £46,952. Mr and Mrs W received a trade in value for their existing time share in the sum of £44,011. They paid an additional £2,941 and borrowed £15,656 from the Lender to pay for it. This was because the loan also consolidated a loan, they had taken out previously with a different Lender, in the sum of £12,715.

On 16 February 2021, Mr and Mrs W – using a professional representative ('PR1') – wrote to the Lender (the 'Letter of Claim'), to make a claim under sections 56, 75 and 140 of the CCA.

In summary, the Letter of Claim said that the Supplier made two misrepresentations. Firstly, it told Mr and Mrs W that the only way they could 'exit' their existing timeshare membership was to purchase Fractional Club membership, when they could have exited their membership in different circumstances. Secondly, it guaranteed that Mr and Mrs W would 'exit' the Fractional Club membership after a finite period, but this wasn't true as a purchaser must first be found. In addition:

- It went on to say that there had been a breach of contract in respect of Mr and Mrs W receiving the net proceeds from the sale of the property, as there was nothing within the documentation to confirm that Mr and Mrs W owned any part of the property and that they would receive any proceeds from the sale.
- It said specific terms in the management agreement that governed Fractional Club membership were unfair pursuant to the Unfair Terms in Consumer Contracts Regulations 1999.
- The Supplier didn't conduct a proper assessment of Mr and Mrs W's financial position and their ability to repay the loan, which rendered the creditor-debtor relationship unfair to them.
- The Supplier applied 'undue' pressure on Mr and Mrs W to procure their agreement to the loan.
- The Supplier 'breached EU law'.

The Lender dealt with the Letter of Claim as a complaint and issued its final response letter on 14 May 2021. It rejected the complaint on every ground.

In February 2023, Mr and Mrs W changed their professional representative to 'PR2'. In August 2023, PR2 made some further submissions. In summary, it said Mr and Mrs W were told the Fractional Club membership would be a 'good investment', and that at the end of the term, they would 'get their money back with a profit'.

PR2 specifically referred to *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (Admin) ('Shawbrook v Financial Ombudsman Service')*, which confirmed that a creditor-debtor relationship could be unfair under section 140A of the CCA if the timeshare membership was sold as an investment. And it said the contract should be void for illegality.

One of our investigators looked into the complaint but rejected it on its merits.
PR2 asked that an ombudsman make a final decision. It subsequently provided a witness statement from Mr and Mrs W in support of the complaint.

The case was passed to me for review. I issued a provisional decision explaining why I didn't think the complaint should be upheld. In response, the Lender said it accepted the decision. PR2 didn't agree with my decision. In summary it said:

- The complaint pursuant to Section 140A was not statute barred as time ran from the end of the credit relationship.
- From its experience, it considered there were systemic misrepresentations in Timeshare sales. It went on to say there was an industry practice among timeshare companies colloquially described as "bait and drop," identifying or implying a problem with consumer's existing ownership and then presenting an "upgrade" or fractional product as the solution, often with strong emphasis on financial value, exit potential, or future return.
- Any drafting failures by PR1 could not justly deprive the clients of their statutory rights.
- The clients' evidence regarding investment representations was credible, now confirmed by a sworn statement, and consistent with widespread industry practice.
- Apparent similarities in witness statements reflect systemic mis-selling, not fabrication.

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 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

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 so, I remain of the opinion that this complaint should not be upheld. I've set out my reasoning below. Before I explain why, I want to make it clear that my role as an ombudsman isn't to address every single point that's been made to date – it's to decide what's fair and reasonable in the circumstances of this complaint. So, if I haven't commented on, or referred to, something that either party has said, it doesn't mean I haven't considered it.

Section 75 of the CCA

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs W could have made against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, but I don't think Mr and Mrs W would have been able to make a successful claim for misrepresentation under Section 75. I'll explain why.

The sale complained about took place on 10 February 2015. The claim letter from PR1 is dated 16 February 2021. At the time the Lender received notification of PR1's claim, in February 2021, I think it would have been time-barred under the Limitation Act 1980 ("LA"). The LA sets out limitation periods (time limits) for bringing various types of legal claim. If a claim is brought too late, the respondent is likely to have a complete defence to the claim on that basis.

For claims relating to misrepresentation, the limit normally runs six years from the date a person suffers damage as a result of the misrepresentation – such as entering into a contract and incurring liabilities they wouldn't have otherwise. This means the time to bring a claim for misrepresentation would have been six years from the Time of Sale, so the limitation period for such a claim would have expired on 10 February 2021, which was before the Lender was notified of the claim. So, I do not think the Lender would be wrong to decline it.

In its letter of claim, PR1 said that it didn't think one of the agreements was statute barred. As only one agreement is being complained about, I find it odd that PR1 referred to another agreement. I've also noted that this is very similar wording to that used by it in other similar complaints that I have seen.

PR1 also referred to Section 32 of the LA as postponing the limitation period in the case of fraud, concealment or mistake. I disagree. Section 32(1) 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(1), but it hasn't explained what acts were carried out, 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 PR1 in this case, how section 32(1) could extend the time limit for Mr and Mrs W.

Also, in their statement, Mr and Mrs W refer to the lack of availability of the accommodation, which they describe as almost non-existent, and they refer to not being able to rent the apartment. So, my understanding is that they believed the Timeshare was misrepresented because they couldn't holiday in the way they say they were led to believe by the Supplier, and they couldn't rent out their points in the way they were expecting. But that would have been clear to them soon after the Time of Sale. So, even if it could be said that section 32(1) is likely to have postponed the limitation period until they first discovered that the availability of holidays was not what they thought it would be, and they couldn't rent out their points (and I make no such finding that it would), I'm not persuaded that would make a difference here.

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.

For completeness, I'd add that the Lender could simply have declined a claim under section 75(1) of the CCA because Mr and Mrs W's purchase did not meet the relevant criteria. I say this because the pricing summary states that the Purchase price was £46,952. And irrespective of any trade in value they received for their existing Timeshare, that was the effective cash price of the Fractional Club membership they were purchasing. Section 75(3) of the CCA says section 75(1) doesn't apply to a claim:

'(b) so far as the claim relates to any single item to which the supplier has attached a cash price…[of] more than £30,000…'.

Overall, therefore, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs W 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?

PR2 has said that the complaint pursuant to Section 140A was not statute barred, as time ran from the end of the credit relationship. I'm a little surprised that PR2 has made this argument, as I considered the merits of the Section 140A complaint in my provisional decision, and I didn't say that it was statute barred. I did say, as I've explained above, that I considered Mr and Mrs W's Section 75 claim would have been time-barred under the Limitation Act 1980 ("LA"). I've set out my thinking in respect of Mr and Mrs W's Section 140A claim below.

Section 140A says a court may make an order if it thinks the relationship between a creditor and a debtor is unfair to the debtor. It's deliberately framed in wide terms, and a finding of unfairness can flow from something done on the creditor's behalf in connection with a 'related agreement'. Here, the purchase agreement is a 'related agreement'. And, by virtue of section 56 of the CCA, the Lender is legally answerable for the Supplier's actions.

Having considered the entirety of the relationship, I don't think it was unfair for the purposes of section 140A. In reaching this conclusion, I've considered:

(1) The standard of the Supplier's commercial conduct, which includes its sales and marketing practices at the time of sale, and any relevant training material.
(2) The information provided by the Supplier at the time of sale, including the contracts and any 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) All the evidence provided by both parties on what was supposedly said and/or done at the time of sale.
(5) The inherent probabilities of what's likely to have happened given the circumstances of the sale; 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 and Mrs W and the Lender given their circumstances at the Time of Sale.

The Supplier's sales and marketing practices at the time of sale

There are several reasons why PR1 and PR2 say Mr and Mrs W's creditor-debtor relationship with the Lender was unfair to them.

PR1 says that the right affordability checks weren't carried out. 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 W 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 them.

PR1 said Mr and Mrs W were subject to undue pressure during the sale. I appreciate that Mr and Mrs W may have felt weary after a sales process that went on for a long time. But it's not clear to me from what Mr and Mrs W have said, as to what was done by the Supplier during the sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership, when they simply didn't want to.

I'm not persuaded, therefore, that Mr and Mrs W'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 they say their 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 the prohibition against selling timeshares in that way.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr and Mrs W'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 membership of the Fractional Club 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 PR2 says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.
The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, 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*" at [56]. I will use the same definition.

Mr and Mrs W's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But 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 <u>as an investment</u>. 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 W 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 and Mrs W, 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs W as an investment. So, it's *possible* that Fractional Club membership <u>wasn't</u> marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material 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 <u>was</u> marketed and sold to Mr and Mrs W 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 is 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 W have been rendered unfair to them had there been a breach of Regulation 14(3) of the Timeshare

Regulations?

As I think it's possible the Supplier breached Regulation 14(3) at the time of sale, I now need to decide what impact it might have had on the fairness of the relationship between Mr and Mrs W and the Lender. I say this because in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61* ('Plevin'), the Supreme Court said:

'Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair.'

What this means is that a breach of Regulation 14(3) doesn't automatically mean the credit relationship is unfair for the purposes of section 140A. Such breaches and their consequences (if there are any) must be considered in the round rather than in a narrow or technical way. For me to conclude that a breach of Regulation 14(3) led to an unfair relationship, I need to see sufficient evidence to conclude, on the balance of probabilities, that the prospect of a financial gain was an important and motivating factor for Mr and Mrs W when they decided to purchase Fractional Club membership.

PR1 didn't provide any direct, first-hand testimony from Mr and Mrs W. And I've noted that it didn't say anything in its Letter of Claim about the Supplier marketing or selling the Fractional Club membership as an investment, despite making several other detailed allegations. And if that had been an important and motivating factor which led Mr and Mrs W into purchasing Fractional Club membership, I would have expected it to have specifically mentioned this when the complaint was originally made.

I've thought carefully about what PR2 has said about the information regarding the Fractional Club membership being positioned to Mr and Mrs W as an investment, that would provide them with a profit, was communicated to PR1 by Mr and Mrs W, but omitted by it in the original complaint. I can understand that taking into account what they've said, Mr and Mrs W and PR2 are frustrated with the omissions they say PR1 made in presenting the case.

And it's regrettable that all of Mr and Mrs W's recollections, weren't articulated fully in the original complaint. But unfortunately, I don't have any evidence of what they told PR1, so I simply don't know what they told it. And as the decision maker, I have to consider the complaint that has been made on their behalf by PR1, not the complaint that Mr and Mrs W and PR2 think ought to have been made. So, I'm not persuaded to change my opinion on this point from what I've set out above.

In my provisional decision, I noted that PR2's submissions in August 2023 (not the witness statement that it referred to in its response to my provisional decision) are identical to the submissions it's made in other cases, so when it says, for example, 'Our Client [sic] was told that Fractional Ownership would be a 'good investment'…'. And the clearly generic nature of the submission provides me with very little insight from Mr and Mrs W as to what they were told during the sales process.

In February 2024, Mr and Mrs W provided their recollections about the sale in the form of a witness statement, and it's apparent it was prepared after the complaint was rejected. And it was after the High Court had handed down its judgment in Shawbrook v Financial Ombudsman Service, and it had been approximately 9 years since the events complained about and nearly three years since the Letter of Claim.

I remain of the opinion informed by my own experience, that the more time that passes between a complaint and the events complained about, the greater the risk that the

consumers' recollections will be vague and inaccurate and potentially influenced by discussions with others, and even the complaint process itself. And in this case that is demonstrated by the inaccuracy in Mr and Mrs W referring in relation to the purchase of the Fractional Club membership, to the finance being provided by a different Lender to the one that actually provided the finance for this purchase, which was Shawbrook.

Indeed, as there's no evidence on file to corroborate the summary of Mr and Mrs W's recent recollections, I think there's a real risk that their recollections were influenced by PR2's submissions and/or the judgment in Shawbrook v Financial Ombudsman Service. This means that I can't give them the weight necessary to conclude that the credit relationship in question was unfair because of a breach of Regulation 14(3).

The information provided by the Supplier at the time of sale

PR1 says that Mr and Mrs W weren't given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that, because some of the terms of the Purchase Agreement weren't individually negotiated, they were unfair contract terms as were the terms governing the ongoing costs of 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 Mr and Mrs W sufficient information, in good time, on the various charges they could have been subject to as a Fractional Club member in order to satisfy the requirements of Regulation 12 of the 2010 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 Mr and Mrs W or PR1 have persuaded me that Mr and Mrs W would not have pressed ahead with their 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.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mr and Mrs W in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, 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, even if they could be said to be unfair contract terms, which I make no formal finding on.

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 Mr and Mrs W's Section 75 claims. I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement and related Purchase 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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and Mrs W to accept or reject my decision before 26 February 2026.

Simon Dibble
Ombudsman