DRN-6160980

Financial Ombudsman Service

The complaint

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

What happened

Mr O purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 5 September 2018 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy fractional points at a cost of £16,740 (the 'Purchase Agreement') after trading in their existing Trial membership.

Fractional Club membership was asset backed – which meant it gave Mr O 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 his membership term ends.

Mr O paid for his Fractional Club membership by taking finance of £20,681 from the Lender (the 'Credit Agreement'). The additional amount was to consolidate an existing loan (from another credit provider) that was used to pay for Trial membership.

Mr O – using a professional representative (the 'PR') – wrote to the Lender on 8 August 2022 (the 'Letter of Complaint') to raise several different concerns. Since then, the PR has raised some further matters it says are relevant to the outcome of this complaint. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender said it would not consider the matter as Mr O had complained about the credit agreement twice before, receiving final responses on 29 March 2021 and 21 March 2022.

The complaint was then referred to the Financial Ombudsman Service. It has been accepted that the matters covered by the final responses in March 2021 and March 2022 (relating to earlier complaints) are outside of our jurisdiction, since they were not referred to the Financial Ombudsman Service within six months of the relevant final response. But that we can consider the complaint points about the Lender (1) being party to an unfair credit relationship with Mr O 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 arising from misrepresentation by the Supplier.

These complaint points were assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Lender 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 that I was not planning to uphold the complaint.

The Lender accepted my provisional decision. The PR disagreed with my provisional decision and provided some comments and documents it wanted me to consider when making my final 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 no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

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 parties, I've considered the case afresh. Having done so, I've reached the same decision as that which I outlined in my provisional findings – and for broadly the same reasons. A copy of my provisional findings is below. As such, I do not uphold this complaint.

START OF COPY OF PROVISIONAL FINDINGS

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

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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") if there is an actionable misrepresentation and/or breach of contract by the supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr O was:

1. Told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.

2. Told by the Supplier that he owned a 'fraction' of the Allocated Property when that was not true as it was owned by a trustee.

3. Told by the Supplier that Fractional Club membership was an "investment" when that was not true.

Neither the PR nor Mr O have set out in any detail what words and/or phrases were allegedly used by the Supplier to misrepresent Fractional Club for the reason given in points 1 or 2. However, the PR says that such representations were untrue because the Allocated Property was legally owned by a trustee and there was no indication of what duty of care it had to actively market and sell the property. Further, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrases in points 1 or 2 above would have been untrue at the Time of Sale even if they were said. It seems to me that they reflect the main thrust of the contract Mr O entered into. And while, under the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor'[1], longer than that if there were problems selling and the 'Owners'[2] agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

As for point 3, it does not strike me as a misrepresentation even if such a representation 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 – nor was it untrue to tell prospective members that they would receive some money when the allocated property is sold. After all, purchasing Fractional Club membership clearly included acquiring the rights to a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give prospective members that interest, it did not change the fact that they acquired such an interest.

The PR has raised other matters as potential misrepresentations, but it seems to me that they are not allegations of the Supplier saying something that was untrue. Rather, it is that Mr O wasn't told things about the way the membership worked – for example, that the obligation to pay management fees could be passed on to his children. It seems to me that these are allegations that Mr O wasn't given all the information he needed at the Time of Sale, and I will deal with this further below.

So, while I recognise that Mr O - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this Section 75 claim.

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

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

[1] Defined in the FPOC Rules as "CLC Resort Developments Limited"
[2] Defined in the FPOC Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

Having considered the entirety of the credit relationship between Mr O and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material.

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier.

3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements.[3]

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.

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 O and the Lender.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

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

They include allegations that:

1. Mr O was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

2. The right checks weren't carried out before the Lender lent to Mr O.

3. The loan interest was excessive.

4. The fact that the loan was used to refinance an earlier one wasn't set out in the Credit Agreement.

5. Mr O was not given a choice of lender by the Supplier.

However, as things currently stand, none of strikes me as a reason why this complaint should succeed.

I acknowledge that Mr O may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or done by the Supplier during his sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. Mr O was also given a 14-day cooling off period and he have not provided a credible explanation for why he did not cancel his

[3] The PR has accepted our approach to its complaints about undisclosed commission and that in this case (where the commission was only 2.49% of the amount borrowed) that complaint point would not succeed.

membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr O made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

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 O was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr O.

The PR says that the fact that the loan was used to refinance an earlier one wasn't set out in the Credit Agreement, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr O knew, amongst other things, how much he was borrowing and repaying each month, who he was borrowing from, that he was refinancing an earlier loan and that he was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for him, even if the Credit Agreement didn't contain all the information it needed to (which I make no formal finding on), I can't see why that led to Mr O experiencing a financial loss – such that I can say that the credit relationship in question was unfair on him 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 him, even if the loan wasn't arranged properly.

Similarly, the PR has not explained how, if it were true, Mr O not being offered a different lender to pay for Fractional Club membership caused him any unfairness or financial loss. Mr O was aware of the interest rate, which was set out on the face of the Credit Agreement, as well as the term of the loan and the monthly repayments, so he understood what it was he was taking out. Further, I don't think the rate of interest was excessive, compared either to other rates available from other point-of-sale lenders or on the open market, so I can't say it would be fair or reasonable to tell the Lender to do anything because of this.

Overall, therefore, I don't think that Mr O's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason why the PR now says the credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him 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

The Lender does not dispute, and I am satisfied, that Mr O's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

> *"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."*

But the PR and Mr O say that the Supplier did exactly that at the Time of Sale – saying, in summary, that he was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term “investment” is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

A share in the net sale proceeds of the Allocated Property could constitute an investment as it offered Mr O the prospect of a financial return – whether or not, like all investments, that was more than what he 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*.[4]

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 O 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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, the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an ‘investment’ or quantifying to prospective purchasers, such as Mr O, 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 think 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 O as an investment in breach of Regulation 14(3).

However, whether 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.

[4] The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment in *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).

Was the credit relationship between the Lender and Mr O 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 Mr O 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 O and the Lender that was unfair to him and warranted relief as a result, it is important for me to consider whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement.

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 O decided to go ahead with his purchase. I say this because:

- Mr O's unsigned and undated statement does say he was told he could make a financial gain or profit from Fractional Club membership. Although he says it was sold it as an investment, the statement says Mr O only expected to get his money back. The PR says this means not only what he paid for it but also the loan interest and management fees payable as a Fractional Club member, which would be a profit on his initial outlay. But that is not made clear by Mr O in the statement – as you might expect it to be if that was important to him at the Time of Sale.

- The PR's call note dated 9 December 2021 says Mr O was told Fractional Club membership would give him holidays but also an investment in that he would own part of a property. It goes on to say that the property would be sold *"at some stage"* and he would get money back to cover his costs. Again, this does not clearly speak to Mr O hoping or expecting a profit. And it differs from what he said in his statement.

- The timeshare advice company questionnaire dated 3 December 2021 says Fractional Club membership would be a great investment for the future that would see Mr O get money back and more. This does suggest a profit but differs from Mr O's statement and the PR's call note. The questionnaire was also completed by the timeshare advice company rather than Mr O himself. And I have seen a number of examples of complaints from the PR where the questionnaire said something similar when the customer's own statement did not say this – as is the case here. That makes me question the reliability of what is written in the questionnaire, and I think that Mr O's own statement is more likely to be accurate in terms of what he remembers of the Time of Sale.

- The timeshare advice company webform submission dated 10 December 2019 says, *"We were told we could sell this anytime and profit from our investment they now say we can't. Its very expensive and fees are too high and we have to pay for 19 years or we won't get our share of profit."* This clearly does speak of making a profit. But I am troubled by the inconsistency between this, the questionnaire, call note and Mr O's statement. The Supplier also says it does not have a record of Mr O asking about selling his membership for a profit (only asking the Supplier to buy it back due to his dissatisfaction) prior to or since ceasing paying management fees and his membership being suspended.

- The webform purports to be Mr O's own writing. Yet Mr O (or Mrs O on his behalf) complained to the Supplier about six weeks prior to the webform being completed. In that email the complaints made were about the standard of holiday accommodation and that the purchase price of membership seemed to vary depending on how well a customer could barter with the Supplier. It did not mention Fractional Club membership being an investment or that Mr O hoped or expected to profit from it.

- Mr O complained to the Lender on 23 February 2021 about the Supplier going into administration meaning he could no longer use Fractional Club membership. He did not express any concerns about losing out on his "investment" and that he would not make a profit.

- Mr O complained to the Lender again on 4 January 2022 because he felt he was mis-sold the Credit Agreement because it was not affordable.

- It was not until the Letter of Complaint that Mr O first mentioned to the Lender that Fractional Club membership was sold to him as *"an investment opportunity"*. Despite this, the Letter of Complaint was focussed on Fractional Club membership being an Unregulated Collective Investment Scheme which the Supplier was not authorised to sell – rather than the way it was sold creating an unfair relationship. That argument was only made later, after it became clear that an ombudsman may uphold a complaint about a timeshare due to it being sold in that way.

Overall, I do not find Mr O's evidence to be sufficiently clear, consistent, and persuasive for me to conclude that his purchase was motivated by the hope or expectation of making a profit. His own recollections are not consistent on this point despite apparently being clear about this when initially contacting the timeshare advice company.

That doesn't mean Mr O 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 Mr O himself does not persuade me that his purchase was motivated by his 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 he ultimately made.

On balance, therefore, even if the Supplier marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr O'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 he would have pressed ahead with his purchase regardless of whether there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr O and the Lender was unfair to him even if the Supplier did breach Regulation 14(3).

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

The PR says that Mr O was not given sufficient information at the Time of Sale by the Supplier about Fractional Club membership, including about the ongoing costs and the fact that Mr O's heirs could inherit these costs.

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 O sufficient information, in good time, on the various charges he could have been subject to as Fractional Club members 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 Mr O nor the PR have persuaded me that he would not have pressed ahead with his 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 Mr O's heirs would inherit the on-going management charges, I fail to see how that could be the case or that it could have led to an unfairness that warrants a remedy.

END OF COPY OF PROVISIONAL FINDINGS

<u>The PR's response to my provisional findings about an unfair relationship</u>

My role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the provisional decision only relate to the issue of whether the credit relationship between Mr O and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr O as an investment at the Time of Sale.

As outlined in my provisional decision, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn't make any further comments in relation to those in their response to my provisional decision. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my provisional decision. So, I'll focus here on the PR's points raised in response.

The PR has provided further comments and evidence which in my view relate to whether Fractional Club membership was marketed or sold as an investment in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. However, as I explained in my provisional decision, while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it isn't necessary to make a finding on this as it is not determinative of the outcome of the complaint. I explained that Regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

The PR's comments and evidence in this respect do not persuade me that I should uphold Mr O's complaint, because they do not make me think it's any more likely that the Supplier's breach of Regulation 14(3) led Mr O to enter into the Purchase Agreement and the Credit Agreement.

The PR has provided its further thoughts as to Mr O's likely motivations for purchasing Fractional Club membership. I recognise it has interpreted Mr O's evidence differently to how I have and thinks it points to him having been motivated by the prospect of a financial gain from Fractional Club membership.

In my provisional decision, I explained the reasons why I didn't think Mr O's purchase was motivated by the prospect of a financial gain (i.e., a profit). And although I have carefully considered the PR's arguments in response to this, I'm not persuaded the conclusions I reached on this point were unfair or unreasonable.

The PR has suggested that the term *"get our money back"* extends beyond simply getting back what was paid for Fractional Club membership and includes the possibility of making a profit. But I do not agree with this interpretation. I accept it is possible that is what was meant, but I think it would be taking too much of a leap to reach that conclusion in this case.

So, ultimately, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr O's purchasing decision. And for that reason, I do not think the credit relationship between Mr O and the Lender was unfair to Mr O even if the Supplier had breached Regulation 14(3).

Conclusion

In conclusion, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with Mr O under the Credit Agreement that was unfair to him 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 Mr O.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 19 March 2026.

Phillip Lai-Fang
Ombudsman