DRN-6289206

The complaint

Mr and Mrs S' complaint is, in essence, that First Holiday Finance Limited, (the 'Lender'), acted unfairly and unreasonably by being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

In August 2013, Mr and Mrs S purchased a timeshare membership – which I'll call 'Fractional Club' membership – from a timeshare provider (the 'Supplier'). It included 2,220 fractional points. The membership was asset backed – which means it gave Mr and Mrs S 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 was £27,965.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs S more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs S paid for their Fractional Club membership by taking finance of £7,965 from the Lender (the 'Credit Agreement'), in their joint names. They also borrowed £20,000 from another lender to complete the purchase.

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 9 March 2022 (the 'Letter of Claim') to make a claim under Section 140A of the CCA.

The Letter of Claim made a number of allegations in respect of what was considered to be an unfairness in the relationship between the Lender and Mr and Mrs S.

In summary it said:

- The purchase under the 2013 contract amounted to a Collective Investment Scheme (CIS) as defined in the Financial Services and Markets Act 2000 (FSMA), which was not authorized by the Financial Conduct Authority (FCA). It went on to say that the promotion and sale of a scheme that was unlawful led to the relationship being unfair to Mr and Mrs S.
- Mr and Mrs S had been told that Fractional Club membership was an investment that would lead them to purchasing a percentage of the property that would eventually be sold and lead to them recovering their money.
- It was a high-pressure sales event.

In its response of April 2022, the Lender explained why it wasn't upholding the complaint. An investigator looked into the complaint and explained why they thought the complaint was one this service could consider. The Lender accepted the assessment that the complaint had been made in time. The investigator then issued another assessment explaining why they thought the complaint should be upheld.

The Lender disagreed and another of our investigator's reviewed the case and issued

another assessment explaining why they didn't think the complaint should be upheld. The PR provided further evidence and submissions in support of the claim and asked for the case to be reviewed. The complaint has been passed to me for review.

I issued a provisional decision explaining why I didn't think the complaint should be upheld. No response was received from the PR. The Lender said that it accepted the PD and had nothing further to add.

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 not having received any further submissions or evidence to consider, I remain of the opinion that this complaint should not be upheld. I've set out my reasoning again below.

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.

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

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 credit relationship between Mr and Mrs S 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 Times of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Times 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 Times 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 sales given their circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

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

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

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

The PR says Mr and Mrs S were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. However, as things currently stand, this doesn't strike me as a reason why this complaint should succeed.

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

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

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

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

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

But on the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs S 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.

The PR has also argued that the Fractional Club membership was a Collective Investment Scheme (CIS') and that led to an unfair debtor-creditor relationship. However, as the Purchase Agreement qualified as a 'timeshare contract' for the purposes of the Timeshare Regulations (because Mr and Mrs S acquired holiday rights when joining the Fractional Club), it was exempt from giving rise to a CIS (see paragraphs 39-54 in *Shawbrook & BPF v FOS*).

Was the credit relationship between the Lender and Mr and Mrs S rendered unfair?

Even if the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs S and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs S decided to go ahead with the purchase.

I say this because in the statement that has been provided in support of the complaint, Mr and Mrs S said:

"In August 2013 we were using the membership to stay in Tenerife. We were again invited to a meeting that turned into a sales event. They did not tell us it was a sales event when they invited us.

We were told that we had to upgrade our contract as CLC was moving away from Spain and into Tenerife. They said that their new product was a fractional ownership and we would actually own part of the property that would later be sold and we would get our money back. They said it was an investment.

The statement provided on behalf of Mr and Mrs S, does say that Fractional Club membership was positioned to them as an investment. But that, and what is said about them being told about owning part of the property as a result of purchasing Fractional Club membership, wasn't incorrect. Also, when it goes on to say they were told they would get their money back, this doesn't suggest to me that they were led to believe or had an expectation that they would receive a financial gain/profit from purchasing Fractional Club membership. It seems to me from what they have said that they were motivated by the quality of the accommodation, and that the membership was exclusive to members.

Nevertheless, I can't rule out the possibility that Mr and Mrs S may have been interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs S don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

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

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

Mr and Mrs S seem to be suggesting that they were not given sufficient information at the Time of Sale by the Supplier in order to make an informed choice, including in relation to 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 S sufficient information, in good time, including information on the various charges they 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 and Mrs S nor the PR have persuaded me that they 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 fact and circumstances.

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 relationship between Mr and Mrs S and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. And as a result, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 12 May 2026.

Simon Dibble
Ombudsman