

The complaint

Mr and Mrs H say their creditor-debtor relationship with Shawbrook Bank Limited, was unfair to them under section 140A of the Consumer Credit Act 1974 ('CCA').

What happened

In July 2017, Mr and Mrs H purchased a timeshare membership from a timeshare provider (the 'Supplier'). The membership was asset backed – which meant 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 on the purchase agreement was £5,499, which provided 1,200 points. The loan taken out with the Lender to finance that purchase was £16,946, which consolidated a loan taken out to purchase a previous membership in the amount of £11,447.

In November 2023, Mr and Mrs H used a professional representative ('PR') to complain about the purchase and the related loan. In summary, the complaint submissions said:

- The Supplier told Mr and Mrs H that Fractional Club membership would give them increased benefits, and the term would be 19 years. They were also told that it would provide much better availability than their existing membership. And it would be a much better long-term investment in terms of guaranteeing a return at the end of the membership term.
- They were told the property would be worth more at the end of the membership term due to increasing property prices and was described as a savings scheme.
- They had no time to discuss anything between themselves and didn't think they would be accepted for finance as they were in a debt management plan.

Mr and Mrs H say this led to unfair relationships for the purposes of section 140A of the CCA, specifically relying on R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (Admin) ('Shawbrook v Financial Ombudsman Service').

The Lender responded to Mr and Mrs H's complaint in March 2024 and explained why it wasn't upholding the complaint.

Mr and Mrs H's PR referred the complaint to our service. One of our investigators considered the complaint. They explained why they didn't think it should be upheld.

Mr and Mrs H's PR asked for a final decision from an ombudsman, which is why it has been 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 acknowledged and accepted my PD. No response was received from the PR.

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:

The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

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 and having not received any further submissions to consider from either party in response to my provisional decision, by the deadline I set; I remain of the opinion that this complaint should not be upheld.

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 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 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 H 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 the PR says Mr and Mrs H's creditor-debtor relationship with the Lender was unfair to them.

It seems to me from what Mr and Mrs H have said, that they are saying they couldn't afford the loan. And they have referred to the fact that they were in debt management plans (DMP) at the time of the sale; and they have provided documentation to support that. 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 H 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, whilst the documents regarding the DMP from the information provided, do raise some concerns about the checks the Lender says it carried out, I haven't been provided with sufficient information that evidences the lending was unaffordable for Mr and Mrs H.

Mr and Mrs H have said in the undated Timeline of Events document they signed, that when they were wavering about purchasing the Fractional Club membership, a manager was called over to reinforce what the salesman was saying. And it seems to me that from what they have said the suggestion is that they felt pressured into purchasing the Fractional Club membership as a result of the sales process. I appreciate that Mr and Mrs H 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 H has 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.

They were also given a 14-day cooling off period. But it's not clear to me from the information provided as to 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 H made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier. I'm not persuaded, therefore, that Mr and Mrs H'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 H'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 the PR 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 H'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 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 H 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 H, 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 H as an investment. So, it's *possible* that Fractional Club membership wasn't 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 was marketed and sold to Mr and Mrs H 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 H 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 H 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 H when they decided to purchase Fractional Club membership.

As I've already said, the PR has provided a "*Timeline of Events – Evidence of Misrepresentation questionnaire*" that has been completed by Mr and Mrs H. This asks a number of questions about the promises that were made to them during the sale. It's signed by both Mr and Mrs H and dated but it is undated. In relation to investment, it asks:

7. "Did they say that the ownership would increase in value, be an investment, or be easy to sell, even back to the resort?"

8. "Did the representatives inform you that the ownership was valuable or had monetary value?"

I have a number of concerns about these questions. Firstly, I think they are leading in the way they are framed, and in my opinion, Mr and Mrs H's responses have clearly been influenced by the way in which the questions were posed.

And it seems that the statement was prepared in contemplation of this complaint being made, after the High Court had handed down its judgment in *Shawbrook v Financial Ombudsman Service*.

In my experience, 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.

Indeed, as there's no evidence on file to corroborate the summary of Mr and Mrs H's recollections, I think there's a real risk that Mr and Mrs H's recollections were influenced by the PR'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

The PR seems to be suggesting that Mr and Mrs H weren't given sufficient information at the Time of Sale by the Supplier to enable them to make an informed decision about whether or not to enter into the contract. And it also seems to be suggesting that key contractual terms were unfair contract terms as were the terms governing the ongoing costs of membership.

It isn't clear what information the PR thinks the Supplier failed to provide at the Time of Sale. But 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.

So, while I acknowledge that it is also possible that the Supplier did not give Mr and Mrs H sufficient information, in good time, in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'), even if that was the case, neither Mr and Mrs H nor the PR have persuaded me that they were deprived of information that would have led them to make a different purchasing decision at the Time of Sale. And with that being the case, even if there were information failings (which I make no formal finding on), I can't see why they led to an unfair credit relationship as a result.

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 H in practice, nor that any such terms led them to behave in a certain way to his 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 am not persuaded that the Lender was party to a credit relationship with Mr and Mrs H 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 to not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 13 May 2026.

Simon Dibble
Ombudsman