DRN-4384750

The complaint

Ms S complains that Sainsbury's Bank Plc unfairly declined her claim under the Consumer Credit Act 1974 ("CCA") in relation to the purchase of a timeshare product she paid for using her credit card.

What happened

While on holiday in June 2017, Ms S and her husband (Mr S) were invited to attend an update meeting with a timeshare supplier who I'll refer to as "L". At the time of the meeting, they were existing customers of L having previously purchased points in timeshare products supplied by them.

During the course of that meeting, L presented details of an offer available to Mr S and Ms S to expand their points holding with them. Mr S and Ms S agreed to purchase an additional 40,000 points under the offer presented at a cost of £8,150. Ms S paid this using a Sainsbury's credit card in her sole name.

In December 2021, using a professional representative (the "PR"), Ms S submitted a claim to Sainsburys under sections 75 and 140A of the CCA. The PR said L had misrepresented the product to Mr S and Ms S. And it was those misrepresentations that persuaded them to agree to the purchase. They held Sainsbury's jointly liable for the alleged misrepresentations under section 75 of the CCA ("S75"). In particular the PR said:

- L told Mr S and Ms S that after three years, they would receive €100 per 1,000 points held to purchase property;
- Mr S and Ms S were told they could rent out or sell the property back through L; and
- The product was sold as an investment.

The PR say Mr S and Ms S weren't contacted or offered property to purchase by L after expiry of the initial three years.

The PR also thought that as a consequence of the sales presentation and product purchased, the relationship between Ms S and Sainsbury's was unfair under section 140A of the CCA ("S140A"). In particular, they said:

- L hadn't explained that management charges associated with the new points purchased were at a rate higher than for points previously purchased and held;
- the contract term was near perpetual;
- there was unlimited liability for management charges which was concealed at the point of purchase;
- there was no provision for withdrawal at a later date;
- there was no secondary market to sell or dispose of the points;
- contract terms were unduly onerous with incomplete disclosure made;
- L's sales presentation and the resultant purchase contract breached various legislation and regulations that apply; and
- L pressured Mr S and Ms S to complete the purchase using aggressive commercial

practices.

Sainsbury's didn't uphold Ms S's claim. They didn't think there was evidence to support a breach of contract or misrepresentation and further evidence requested from the PR hadn't been provided. Sainsbury's also said Mr S and Ms S had exited the contract before expiry of the three years and there was no record of queries or complaints to L while the points were held. They said evidence from the time suggested Mr S and Ms S were happy with their purchase.

The PR complained to Sainsbury's about the outcome of Ms S's claim. But having reviewed what had happened, Sainsbury's didn't think they'd done anything wrong in refusing the claim. So, the PR referred Ms S's complaint to this service. One of our investigators considered everything that had happened together with the evidence provided. Having done so, they didn't think Sainsbury's response was unfair or unreasonable.

Ms S didn't agree with our investigator's findings, so the PR asked that her complaint be referred to an ombudsman for a final decision. In doing so, the PR provided a further detailed submission reiterating much of what had previously been said. They also referred to various other complaints and decisions issued by this service to support their belief that Ms S's complaint should be upheld.

Having considered Ms S's complaint, while I was inclined to reach the same outcome as our investigator, I'd considered a number of issues which I don't feel were previously fully addressed and wanted to give both sides the chance to respond. So, I issued a provisional decision.

In my provisional decision, I said:

> Relevant Considerations
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> The purchase here was completed using a credit card in Ms S's sole name. So, while the timeshare product was purchased in joint names with her husband, Ms S is the only eligible claimant under the CCA and, as such, the only eligible complainant.
>
> When considering what's fair and reasonable, DISP 3.6.4R of the Financial Conduct Authority ("FCA") Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
>
> S75 provides protection for consumers for goods or services bought using credit. Ms S paid for the timeshare points with a credit card issued by Sainsbury's, so it isn't in dispute that S75 applies here. This means that Ms S is afforded the protection offered to borrowers like her under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
>
> Section 140A of the CCA ("S140A") looks at the fairness of the relationship between Ms S and Sainsbury's arising out of any credit agreement (taken together with any related agreements). And where the product purchased was funded under a credit agreement – here that's under a pre-existing credit card agreement - it's deemed to be a related agreement. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.
>
> It's important to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. The complaint being considered here specifically relates to whether I believe Sainsbury's treatment of Ms S's claim was fair and reasonable given all the evidence and information available. This service is not afforded powers to decide a legal claim. While the

decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Ms S's timeshare experience

Based upon the information available, it seems Mr S and Ms S had maintained a long association with L dating back to 2003. The documents provided by the PR confirm they already held 252,001 points prior to completing the purchase in June 2017. I've also seen evidence of bookings they made using the product(s) with L from 2003 up to the point of the purchase in 2017 and beyond. I appreciate their product holdings and benefits were likely to have varied over that period. But based upon this information, I think it's reasonable to conclude Mr S and Ms S had a reasonably strong awareness about the products they'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude Mr S and Ms S were familiar with L (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the meeting in June 2017 certainly wasn't their first experience.

Before I consider the various allegations, it's relevant to say that Mr S and Ms S appear to have exited the timeshare product before expiry of the three-year period referred to in the purchase documentation from June 2017. Both the PR and Sainsbury's have confirmed this. So, whether the term of the contract was *"perpetual"* or not - the contract does have an end date defined within the documentation - this no longer appears relevant for the purpose of the purchase in question.

Misrepresentation

For me to conclude there was a misrepresentation by L in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that L made false statements of fact when selling the timeshare product in 2017. In other words, that they told Ms S something that wasn't true in relation to one or more of any points raised. I would also need to be satisfied that these misrepresentations were material in inducing Ms S to enter the contract. This means I would need to be persuaded that Ms S reasonably relied on these false statements when deciding to buy the additional product points.

Allegations have been made specifically relating to the product sale referenced above. The difficulty I have is identifying what was actually said at the time of the sale. The PR have provided limited details and evidence to support the misrepresentations Ms S says L made, although I acknowledge she does say she was told these things. So, I've thought about this alongside the limited evidence that's available from the time of her purchase.

Although not determinative of the matter, I've not seen any specific evidence from the time of the sale, such as marketing material or any of the wider purchase documentation. I've seen four pages of documents relating to the original purchase. I've also seen a document headed *"Declaration of Treating Customers Fairly In a Compliant Sale Practice"* dated 12 June 2017 ("The Declaration"). It appears this was signed and initialled by Mr S and Ms S. Having considered these carefully, I can't see that they support what Ms S says she was told or that what was said amounted to misrepresentation.

In particular:

- the *"Memorandum of understanding"* dated 12 June 2017 and signed by Mr S and Ms S states, *"*[…] *3 years after the completion of the Purchase Agreement I/We* ***may*** *trade my/our* […] *points* […] *against any future properties that* ***may become available*** *for sale* […] (emphasis added). The documentation appears to give no assurances or guarantees and is subject to availability. And there's no suggestion Mr S and Ms S would be proactively contacted by L;
- there's no reference to the product being sold as an investment. In fact, the declaration (which Mr S and Ms S signed) states, *"I/We also understand that I/We have not entered into this purchase purely for a wider investment opportunity or financial gain"*; and
- while it may have been a feature of the points purchased, there appears to be no contractual obligation (for L or Mr S and Ms S) to rent or sell any property associated with the points. The declaration states, *"*[L] *does not undertake the responsibility of guaranteeing any rental to third parties"*. In fact, the PR have confirmed Mr S and Ms S made no request or attempt to rent out their product holding.

Ultimately, I don't think the contract can have been marketed and sold as an investment contrary to The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs") simply because there might have been some inherent value to Mr S and Ms S's membership. And in any event, I've found nothing within the limited evidence provided to suggest L provided any assurances or guarantees about the future value of the product purchased other than the future exchange value, should they choose to use it against a property purchase. L would had to have presented the membership in such a way that used its investment element to persuade Mr S and Ms S to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3).

The PR have emphasised that verbal representations form part of a purchase contract, regardless of whether they're documented or not. But in considering the allegations, it's also important to consider the documentary evidence from the time of the sale. Particularly where this may contradict any allegations in question. On this basis, I can't reasonably conclude that L did misrepresent the product in the ways that have been alleged. And while I acknowledge what Ms S says, the documentary evidence from the time of the sale, which she signed, doesn't appear to support her own recollections.

<u>The claim under S140A</u>

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (Sainsbury's) and the debtor (Ms S) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

In deciding whether to make a determination under S140A, the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

The PR have made various allegations they feel create an unfair relationship under S140A.

- The pressured sale and process

The claim suggests Ms S was pressured into purchasing the product through the use of aggressive commercial practices. I acknowledge what the PR have said about this. So, I can understand why it might be argued that any prolonged presentation might have felt like a pressured sale – especially if, as Ms S approached the closing stages, she was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Ms S agreed to the purchase in 2017 when she simply didn't want to. I haven't seen any evidence to demonstrate that she went on to say something to L, after the purchase, to suggest she'd agreed to it when she didn't want to. And neither the PR nor Ms S have provided a credible explanation for why she didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If she only agreed to the purchase because she felt she was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Ms S was obviously harassed or coerced into the purchase.

Point 18 of the Declaration document signed and initialled by both Mr S and Ms S at the time of the sale says *"…we have not been put under pressure or coerced to purchase the products and services…".* Mr S and Ms S's handwritten note at the end of that document states, *"We were treated well. No pressures".* Having considered all of this, I'm not persuaded there's sufficient evidence to demonstrate Ms S made the decision to proceed because her ability to exercise choice was – or was likely to have been – significantly impaired.

In deciding whether to make a determination under S140A, *the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor* [Sainsbury's] *and matters relating to the debtor* [Ms S*)*.

Ms S already held existing timeshare product points she'd purchased previously from L. Importantly; the new purchase appears to relate to an increase in her existing timeshare product holding. It wasn't simply a new product purchase. And Ms S wasn't a new customer of L. So, it's likely she would've benefitted from her previous experience and what she might expect from the meeting and sales presentation in 2017.

Whilst there could be potential for a court to decide that some of the allegations might have led to an unfair debtor-creditor relationship here, I think any decision is likely to be taken within the context of Ms S's overall experience. And even if I was to find that some of the information could've been clearer during the sale – and I make no such finding – I think it's unlikely a court might say this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

- The contract terms and alleged regulatory breaches

I understand the purchase agreement was subject to a 14-day cooling off period during which Mr S and Ms S could choose to cancel it without giving any reason and at no cost to themselves. So, even if I were to find that Mr S and Ms S weren't given adequate opportunity to read, consider and understand the purchase documentation at the time of the sale - and I make no such finding - I would expect them to have had sufficient time in which to consider their decision within the subsequent 14 days. And, where appropriate, seek advice and raise any questions or concerns before payment was made and the purchase completed.

There's no suggestion or evidence that Mr S and Ms S did raise any questions or concerns prior to the sale being completed. Or that they had any intention of cancelling the agreement.

The Declaration signed by Mr S and Ms S includes various points. In particular:

- *"I/We acknowledge receipt of the Points Fee Schedule";*
- *"I/We have been given every opportunity to consider the purchase";* and
- *"I/We confirm that the following documents have been provided* [including the] *Purchase Agreement General Conditions".*

Mr S and Ms S also handwrote, *"*[the sales representative] *explained to us the way in which the new purchase would work. He painstakingly went through it all with us".*

One of the main aims of the various regulations that applied here was to enable consumers to understand the financial implications of their purchase so that they are put in a position to make an informed decision. If L's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Ms S ultimately lost out or almost certainly stands to lose out from having entered into a contract, the financial implications of which she didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

However, having considered the limited documentation provided, I haven't seen any evidence to support the breaches alleged here. And as the Supreme Court decision in Plevin[1] makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. In other words, if I were to find there'd been regulatory breaches – and I make no such finding - they are only likely to lead to unfairness where there's evidence Ms S suffered loss as a consequence.

I haven't seen any evidence that L enforced any of the terms within the product agreement to such an extent that they caused loss or resulted in unfairness.

Was the appropriate relationship in place?

Under S75, a "debtor-creditor-supplier agreement" is a precondition to a claim under that provision. And given the facts of this complaint, that's also the case when claiming under S140A.

Sainsbury's have pointed out that the beneficiary of the credit card payment differs to the supplier of the product purchased – L in this case. So, it's possible that there was no such agreement in place. This is particularly relevant following the High Court's judgment in the recent case of *Steiner v National Westminster Bank PLC* [2022].

However, given the facts and circumstances of this complaint and my intended outcome with those in mind, I don't think it's necessary to make a formal finding on the debtor-creditor-supplier arrangement for the purpose of this decision, because I don't think the complaint should succeed on its merits anyway.

Summary

While I may not have referred to everything that's been said and provided in my decision, I would like to reassure Ms S that I have carefully considered every point raised in this complaint. Having done so, I haven't found anything that persuades me that Sainsbury's response to her claim was unfair or unreasonable. And because of that, I don't currently intend to ask Sainsbury's to do anything more.

[1] *Plevin vs Paragon Personal Finance Ltd [2014] ('Plevin')*

However, I will consider any new or additional evidence provided, such that it's specific and relevant to the circumstances Ms S's own experience and purchase, before reaching my final decision.

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.

Sainsbury's confirmed receipt of my provisional decision and agreed with my findings. Despite follow up attempts by this service, neither the PR nor Ms S have provided any response to my provisional decision.

In the circumstances, and with no new evidence or information to consider, I've no reason to vary from my provisional findings.

My final decision

For the reasons set out above, I don't uphold Ms S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 2 November 2023.

Dave Morgan
Ombudsman