DRN-4487110

The complaint

Mr and Mrs P complain that Shawbrook Bank Limited ("Shawbrook") unfairly turned down their claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in respect of a timeshare product they financed.

What happened

Mr and Mrs P have held timeshare products since around 2013 purchased through a supplier who I'll refer to as "D". In or around November 2017, they attended an update meeting with D during which they agreed to increase their existing points holding in a timeshare membership product previously supplied by D.

The purchase agreed provided an additional 5,000 points which could be used against holidays, accommodation and experiences from within a portfolio operated by D. The purchase price agreed of £7,500 was funded under a regulated fixed-sum loan agreement over 123 months and provided by Shawbrook in their joint names.

In or around February 2022, using a claims management company ("the CMC"), Mr and Mrs P submitted a claim to Shawbrook under the CCA. The CMC said that during the sales meeting in in November 2017, D made a number of representations about the membership benefits which turned out not to be true. And it was these misrepresentations that had induced Mr and Mrs P to enter into the purchase contract with D. They believe that under section 75 of the CCA ("S75"), Shawbrook are jointly liable for any misrepresentation. In particular, the CMC allege that D told Mr and Mrs P:

- the membership was an investment;
- they could access more holidays and *"unique to the supplier";* and
- the scheme had a guaranteed end date, after which they would have no further legal liability.

The CMC also allege that an unfair relationship exists between Mr P, Mrs P and Shawbrook under section 140A of the CCA ("S140A") resulting out of the timeshare purchase agreement entered into. In particular, the CMC allege Mr and Mrs P:

- were pressured into purchasing a membership in breach of various legislation and regulations;
- weren't provided with sufficient information as required by the relevant regulations.

Further, the CMC believe the requirement to pay management charges throughout the term amounted to an unfair contract term under Regulation 5 of UTCCR[1].

Shawbrook didn't uphold Mr and Mrs P's claim. They didn't think there was evidence to support the alleged misrepresentation and didn't agree the various alegations gave cause to create an unfair relationship pursuant to S140A. In addition, Shawbrook also addressed and didn't uphold claims that:

- D wasn't authorised to act as a credit broker; and

[1] The Unfair Terms in Consumer Contracts Regulations 1999

- a proper credit assessment wasn't completed such that the loan wasn't affordable for Mr and Mrs P.

However, I can't see that these two specific claims were included within the CMC's claim letter in February 2022.

The CMC didn't agree with Shawbrook's findings, so referred Mr and Mrs P's complaint about their claim outcome to this service. One of our investigators considered all the evidence and information available.

Having done so, our investigator didn't think there was any evidence of misrepresentation. Or that a court was likely to find the relationship unfair under S140A. They also didn't think there was any evidence to suggest that Shawbrook had lent irresponsibly or that the loan was unaffordable for Mr and Mrs P. Our investigator also addressed a claim relating to commission payments albeit I also can't see that this aspect was included within the original claim.

The CMC didn't agree with our investigator's findings and asked that Mr and Mrs P's complaint be referred to an ombudsman. So, it was passed to me to consider further. As part of my review, the CMC have asked me to consider the contents of a 51-page document prepared by counsel headed *"Generic Submission of behalf of complainants".* They also asked this service to obtain information and provide responses to questions about the procedures and policies that applied to the sale of loans with Shawbrook for the purchase of timeshare products.

Having considered all the information available together with the CMC's comments and observations, I was inclined to reach the same outcome as our investigator However, I'd considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 3 November 2023 giving both sides the chance to respond before I reach a final decision.

In my provisional I said:

> Relevant Considerations
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> When considering what's fair and reasonable, DISP[2] 3.6.4R of the FCA[3] 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 consumers with protection for goods or services bought using credit. Mr and Mrs P paid for the timeshare product under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means Mr and Mrs P are afforded the protection offered to borrowers like them 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.
>
> S140A looks at the fairness of the relationship between Mr P, Mrs P and Shawbrook arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're deemed to be related agreements. 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 distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe Shawbrook's response to Mr and Mrs P's claim was fair and

[2] Dispute Resolution: The Complaints sourcebook (DISP)
[3] Financial Conduct Authority

reasonable given all the evidence and information available to me, rather than deciding the legal claim itself.

It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. And as I've already said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.

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.

Was the timeshare product misrepresented?

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

Various allegations have been made specifically relating to the sale and purchase in November 2017. So, I've considered those allegations against the information available from the time of the sale. It appears that as Mr and Mrs P's purchase in November 2017 gave them additional points increasing their existing holding. This appears to contradict the CMC's assertion that *"The scheme replaced and superseded* [Mr and Mrs P's] *previous membership".*

From what I can establish, Mr and Mrs P bought an initial trial membership from D in 2013. This was upgraded to a full membership in July 2014 when they purchased 10,000 points in D's timeshare scheme. An agreement was reached to increase this again by 5,000 points in June 2015. Although it appears that purchase was subsequently cancelled by Mr and Mrs P under the withdrawal clause within the agreement. So, following their upgrade in July 2014, it seems Mr and Mrs P still maintained membership of the same scheme.

It's apparent that Mr and Mrs P's membership status with D changes in accordance with the total number of points held at the time. Each status category affords various benefits, some of which (but not necessarily all) may increase or change within each higher category. The purchase in November 2017 resulted in Mr and Mrs P's membership status moving to a higher category. But, more fundamentally, the purchase gave Mr and Mrs P more points to spend against accommodation and experiences from within D's portfolio.

The difficulty I have is identifying what was actually said at the time of the sale. Looking at the available documentary evidence, I can't see anything that suggests the points were misrepresented to Mr and Mrs P in the way described. I agree they may be able to access more holidays and/or a better quality of accommodation or

experience. Simply put, they had more points available to spend than before the purchase. And I've not seen any evidence that they weren't able to do that.

I also note that point 4 of Part 1 of the Key Information document clearly states that the membership will last until 31 December 2054. So, I don't agree the scheme had no end date as the CMC assert.

Finally, I haven't found any evidence to suggest the purchase of additional points was represented by D as an investment. In fact, the documentation (signed and confirmed by Mr and Mrs P) makes specific reference to the fact that the purchase shouldn't be considered an investment for financial returns.

I don't think the purchase 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 and Mrs P's membership. And in any event, I've found nothing within the evidence provided to suggest D gave any assurances or guarantees about the future value of the points purchased. D would had to have presented the membership in such a way that used its investment element to persuade Mr and Mrs P 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) of the TRs.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (Shawbrook) and the debtor (Mr and Mrs P) 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).

The breadth of the unfair relationship test under S140A is stark. But a simple breach of a legal or equitable duty doesn't necessarily make the relationship unfair. It also isn't just about 'hard-edged requirements' – though the standard of commercial conduct reasonably expected can be important. And while there may be features of the transaction that operates harshly against the debtor, it doesn't necessarily follow that the relationship is unfair. After all, such features may be required in order to protect what a court regards as legitimate interests.

Relationships between businesses and private individuals are also often characterised by large differences of knowledge and expertise – which means they're inherently unequal as a result. But as far as the Supreme Court was concerned in *Plevin*[4], it can't have been parliament's intention that such relationships should be liable to be reopened for that reason alone.

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

I think it's relevant to acknowledge Mr and Mrs P's existing membership and relationship with D. As I've already said above, Mr and Mrs P have maintained a relationship with D from 2013. And they first purchased their full membership and

[4] The Supreme Court's judgement in *Plevin v Paragon Personal Finance Ltd [2014]*

points in the current scheme in 2014. So, I think it's reasonable to conclude they had a reasonably strong awareness about the product they'd purchased, how it operated and any associated costs. I also think it's reasonable to conclude Mr and Mrs P were familiar with D (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the meeting in November 2017 certainly wasn't their first experience.

- The pressured sale and process

The claim suggests Mr and Mrs P were pressured into purchasing the additional points due to the length of the meeting, the misrepresentations, inducements in the form of a discount only available on the day and the provision of refreshments. It's also suggested they felt they couldn't leave the meeting until a purchase was agreed.

I acknowledge what the CMC 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 Mr and Mrs P approached the closing stages, they were 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 Mr and Mrs P agreed to the purchase in 2017 when they simply didn't want to. I haven't seen any evidence to demonstrate that they went on to say something to D, after the purchase, suggesting they'd agreed to it when they didn't want to. And neither the CMC nor Mr and Mrs P have provided a credible explanation for why they didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here. Particularly when they'd previously cancelled a purchase agreed in 2015.

If they only agreed to the purchase because they felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr and Mrs P were obviously harassed or coerced into the purchase. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr and Mrs P made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired contrary to the Consumer Protection from Unfair Trading Regulations ("CPUT").

Furthermore, Mr and Mrs P also signed and dated a document headed *"Customer Compliance Statement/Declaration to Treating Customer Fairly"* at the time of the sale. Point 20 of that document specifically confirms they hadn't been put under any pressure to purchase the points.

- The provision of information

The CMC suggest D failed to provide all the material information to Mr and Mrs P they needed to. In particular they suggest key information wasn't provided regarding the investment element together with the *"ongoing costs of FPOC membership".*

As I've explained above, based upon the evidence, I can't say the points purchased were represented as an investment. So, I wouldn't expect D to have provided any key information on that basis. Furthermore, the CMC's reference to *"FPOC"* relates to a different form of membership. The purchase to which the claim relates didn't involve this type of product. So, I can't see how this aspect is relevant to Mr and Mrs P's complaint here.

However, I've considered the information that should have been provided to Mr and Mrs P as required under the TRs that apply here. I've seen copies of various documents, including the Key Information document that Mr and Mrs P signed. Further, the Customer Compliance Statement/Declaration to Treating Customers Fairly, which Mr and Mrs P also signed, confirms they either received and/or read

and understood the relevant and required documents. Based upon what I've seen, I can't say that D did breach any requirement to provide any written information to enable Mr and Mrs P to make an informed decision. And I also haven't seen anything to suggest Mr and Mrs P had subsequently raised this as an issue with D.

Unfair terms - consequences of non-payment of annual maintenance fees

I accept that it's possible that some of the terms governing the associated annual management charges and D's remedies if they weren't paid may possibly go against the requirements of the UTCCR[5].

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 D's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Mr and Mrs P ultimately lost out or almost certainly stands to lose out from having entered into a contract, the financial implications of which they didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

However, as the Supreme Court decision in Plevin[6] 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 Mr and Mrs P suffered loss as a consequence.

I understand Mr and Mrs P stopped paying their annual management charges which led to the cancelation of a booking they'd made for September 2021. That appears to be in accordance with the terms that govern the product Mr and Mrs P hold. However, the circumstances of non-payment haven't been explained. So, it's not possible for me to attribute that to anything that might lead to unfairness due to the actions of D. And in any event, such breaches can only be decided by a court.

D has (as I understand it) given Shawbrook an undertaking that consumers with complaints at the Financial Ombudsman Service who remain members can choose to relinquish their membership without having to pay any outstanding management charges (if there are any) and without prejudice to their ongoing complaint. With that being the case, even if the terms criticised were found to be unfair under the UTCCR, D's undertaking would seem to me to go a long way to mitigating if not resolving any unfairness that the terms might otherwise lead to.

Other considerations

There are certain aspects that appear to have been addressed in either Shawbrook's claim response or our investigator's findings, that I can't see were included in the claim submitted by the CMC. But for completeness, I will address these here.

- Was a proper credit assessment completed?

Shawbrook have given an overview of the credit assessment they completed and said that Mr and Mrs P's application met their lending policy and guidelines and showed the loan was considered affordable based upon the information Mr and Mrs P provided at the time, and the credit reference checks they undertook. I've also seen a copy of the loan application Mr and Mrs P completed in November 2017 which includes details of their income and employment situation – amongst other things.

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[5] The Unfair Terms in Consumer Contracts Regulations 1999

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

If I were to find that Shawbrook hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that the loan repayments weren't sustainably affordable for Mr and Mrs P in order to uphold any related complaint. However, with no information about Mr and Mrs P's actual position at the time and no evidence or suggestion that they struggled to maintain repayments, I can't reasonably conclude the loan was unaffordable for them. And there doesn't appear to be any evidence of unaffordability or resultant loss.

- Authorisation to act as a credit broker

This service's records show that D came under our consumer credit jurisdiction at the time the loan was agreed in November 2017. This means they held the required authorisation from the FCA under the Financial Services and Marketing Act 2000. So, I don't agree with any suggestion D wasn't authorised to introduce Mr and Mrs P to Shawbrook for the purpose of financing their purchase.

- Commission

In their findings, our investigator addressed a claim that the payment of commission by Shawbrook to D was kept from Mr and Mrs P. As I understand it, no commission was paid. But even if Shawbrook had paid D commission, I don't this would've been incompatible with their role in the transaction.

D weren't acting as an agent of Mr and Mrs P, but as the supplier of contractual rights they obtained under the timeshare points purchase agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was D's role to make an impartial or disinterested recommendation, or to give Mr and Mrs P advice or information on that basis. As far as I'm aware, they were always at liberty to choose how they wanted to fund the transaction. In fact, they'd funded previous purchases from D by card payment.

What's more, I haven't found anything to suggest Shawbrook were under any regulatory duty to disclose the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr and Mrs P requested those details from Shawbrook (or D) at any point. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure or payment of commission (had it been paid) would've created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

The CMC's responses to our investigator

I have considered the various additional submissions provided by the CMC. In particular, the generic submissions prepared by Counsel. However, as these were generic points and not specific to Mr and Mrs P's own purchase or recollections, I don't think they offered much help in making factual findings in their case.

The CMC requested that this service obtain extensive details of Shawbrook's processes and procedures together with evidence that D (and in turn Shawbrook) complied with the relevant rules, regulations and codes of practice that applied in the circumstances of the loan that was provided to Mr and Mrs P.

This service's role as an Alternative Dispute Resolution service does not extend to regulating financial businesses or questioning their policies and procedures – that's the role of the regulator. In this case the FCA. Our powers are confined to deciding whether, on balance, their processes and procedures were applied in a fair and reasonable way in Mr and Mrs P's individual circumstances. And in doing so, whether BPF's handling of Mr and Mrs P's claim appears fair and reasonable. That's what I've done here.

Furthermore, it is for this service to decide what information and evidence is required in order to investigate and decide Mr and Mrs P's complaint. That's also what I've done here, and I believe the evidence and information provided enables me to reach a fair and reasonable outcome here.

Summary

To reiterate – My role in deciding Mr and Mrs P's complaint is to establish whether, based upon all the evidence available, Shawbrook's response to their claim was unfair or unreasonable. Given my findings above, I can't say that it was. And on that basis, I don't currently intend to ask Shawbrook to do anything more 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.

In response to my provisional decision, Shawbrook confirmed they have no further comments to add.

The CMC said that Mr and Mrs P don't agree with my provisional findings and provided further detailed reasons why they believe Mr and Mrs P's complaint should be upheld. They also provided a statement from Mr and Mrs P explaining further the circumstances of their purchase together with details of their subsequent experiences.

Availability of preferred bookings

Mr and Mrs P reiterate their belief that they were told the purchase of additional points from D would provide better availability and priority for holidays worldwide and other small benefits. But they say this turned out to be false. They go on to describe their experience when trying to book a preferred holiday destination which didn't appear to be available, despite previous assurances given.

In my provisional decision, I acknowledged that the purchase agreement (and the associated documentation) is clear that bookings are, at all times, subject to availability. I've not seen anything within the evidence provided that shows D gave any assurances that bookings at preferred locations or preferred times were guaranteed to be available. That seems reasonable to me as I wouldn't expect D to be able offer unlimited availability anyway.

The accommodation and experiences available in the members directory each attract a different points value which could vary according to demand, seasonality and availability/supply. The additional points purchased in turn meant that Mr and Mrs P had more points to spend. So, it seems they would've been able to consider higher (points) priced experiences as a consequence of their purchase in 2017. Further, I've not seen any evidence that Mr and Mrs P weren't able to utilise the additional benefits afforded to them in accordance with their resultant new membership category. And without that evidence, I can't reasonably conclude the additional points purchased were misrepresented in the way alleged.

Affordability

Mrs and Mrs P say that their financial circumstances at the time were such that they wouldn't be able to afford further loan repayments. They say that a previous purchase in 2015 didn't proceed and said, *"after a credit check it would not go through".* Whilst I haven't seen any evidence to support what they say happened in 2015, I don't think this has relevance to the complaint I'm considering here anyway. And I've already addressed the allegations of affordability and the credit assessment undertaken by Shawbrook in my provisional decision. Based upon what Mr and Mrs P have said, I haven't seen anything that persuades me to vary from those findings.

Regulatory breaches

The CMC again describe, at length, why they believe there were breaches of the various regulations and legislation that applied to the circumstances of Mr and Mrs P's purchase. These include alleged breaches of:

- The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("The TRs");
- The Unfair Terms in Consumer Contract Regulations 1999 ("UTCCR"); and
- The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").

I don't propose to repeat all the CMC's comments and observations at this stage. And to a large extent, I've already addressed most of the arguments in my provisional decision. However, in reaching my final decision, I want to assure them (and Mr and Mrs P) that I've carefully considered everything that's been said, even if I haven't overtly commented on some aspects.

- Alleged breaches of the TRs

The CMC allege the contract and full paperwork wasn't made available until after Mr and Mrs P had committed to buy the product. I've not seen any evidence that was the case here. So, I can't say, with any certainty, that D did withhold contractual information before Mr and Mrs P completed the purchase of additional points.

As I said in my provisional decision, Mr and Mrs P had been members of D's timeshare schemes since 2013; and as regards the points-based membership scheme, since July 2014. Therefore, I think it's reasonably to conclude that Mr and Mrs P already had a reasonably level of familiarity with their points-based membership before their purchase in 2017. And I also think they had experience and knowledge of the associated ongoing costs.

I've seen the documentation that Mr and Mrs P signed in 2017 which includes the Key Information and confirmation they'd received the latest membership guide and other required documents. So, based upon the evidence available, I can't reasonably say they weren't provided with the required information at the time. And as I said in my provisional decision, the purchase agreement included a withdrawal/cancellation period of 14 days. So, it seems Mr and Mrs P had every opportunity to change their mind without incurring any cost.

In my provisional decision, I explained how I thought a court would view the circumstances in Mr and Mrs P's case. And given their previous experience their resultant knowledge and the evidence available, even if they weren't provided with some of the information in a timely manner, I think it's very unlikely a court would find unfairness in these circumstances.

- Alleged breaches of the UTCCRs

Much of the detailed allegations appear to relate specifically to the ongoing calculation and payment of management charges. In particular with reference to regulation 5 and schedule 2 of the UTCCRs. But as I've already said, Mr and Mrs P were existing members and didn't purchase a product that was new to them. They merely increased their points holding taking them to a higher membership category. So, the basis of any management charge calculation, as far as I can see, varied little from what they'd previously experienced and been told about.

Once again, even if the explanation provided in 2017 was found to be unclear – and I make no such finding – based upon their existing experience and resultant knowledge, I don't think a court is likely to find this resulted in unfairness pursuant to S140A. And given the undertaking provided by D (as mentioned in my provisional decision) I think this further serves to support my view.

- Alleged breaches of CPUT

As regards the allegations of pressure, I've already addressed this aspect in my provisional decision. And the CMC's responses don't provide me with anything new to consider or any

evidence that D did pressure or coerce Mr and Mrs P to entering into the additional points purchase.

Summary

I want to acknowledge Mr and Mrs P's strength of feeling here. But having considered their (and the CMC's) responses to my provisional decision, I'm not persuaded to change my view on their complaint. I do realise they will be very disappointed, but for the reasons above I won't be asking Shawbrook to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr and Mrs P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P and Mr P to accept or reject my decision before 9 January 2024.

Dave Morgan
Ombudsman