DRN-4461889

The complaint

Ms O complains that Shawbrook Bank Limited ("Shawbrook") unfairly turned down her claims under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") relating to a loan they provided to her to purchase a timeshare product.

What happened

In or around November 2019, Ms O attended a sales presentation undertaken by a timeshare supplier who I'll refer to as "C". Following the presentation, Ms O agreed to purchase a timeshare product from C – that being membership of a points-based scheme operated by them. Under the purchase agreement, she would receive an annual allowance of 1,100 points to be used against accommodation and other holiday experiences included within a portfolio operated by C.

The purchase price agreed was £18,344. A trade in value of £4,395 was attributed to an existing trial membership Ms O had previously purchased from C in 2018. The net total to be paid of £13,949 was funded under a fixed sum loan agreement with Shawbrook together with a further £2,506 to consolidate the balance outstanding on an existing loan in respect of the original trial membership. So, the total new loan was £16,455 repayable over a term of 10 years.

In June 2021, using a claims management company ("the CMC"), Ms O submitted claims to Shawbrook under sections 75 and 140A of the CCA. In particular, the CMC alleged that C had misrepresented the product purchased by telling Ms O the product was of some substance albeit *"it's now clear it is worthless"*. The CMC also said the product was sold as an investment contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. Further, the CMC said the contract between Ms O and C was breached. They believe that both the misrepresentations and the breach satisfy the criteria for a claim under section 75 of the CCA ("S75").

The CMC also said that the relationship between Ms O and Shawbrook, arising out of the loan agreement, taken with the related purchase agreement with C, is unfair pursuant to section 140A of the CCA ("S140A"). In particular, they said that in addition to the misrepresentations:

- Ms O was subjected to a high-pressure sales presentation;
- there'd been a breach of fiduciary duty
- Shawbrook had deliberately chosen not to disclose the fact that commission was paid to C, or the amount paid;
- Ms O wasn't presented with a choice of finance options; and
- Shawbrook failed to carry out a sound and proper credit assessment and the finance agreement was unaffordable.

Shawbrook responded to Ms O's claims early in August 2021. They didn't agree there was any evidence to support the various allegations. Or that there was any other reason to uphold any other aspect of Ms O's claims or complaint.

Shortly after, the CMC referred Ms O's complaint to this service. One of our investigators considered all the evidence and information available. Having done so, they also didn't think there was sufficient evidence to support the allegations made. Or that a court was likely to find unfairness in the relationship pursuant to S140A. So, they didn't think Shawbrook needed to do anything more.

The CMC didn't accept our investigator's findings. In support, they provided this service with a 51-page document containing *"Generic submissions on behalf of complainants"* which relates specifically to situations where consumer credit has been provided to purchase products sold by C – as in Ms O's case.

Further, the CMC raised specific concerns about the way finance had been sold to purchasers of timeshare products generally. In doing so, they wanted this service to obtain information and provide responses to various questions about the procedures and policies that applied to the sale of loans with Shawbrook by C. They also raised questions about the regulatory status of C and their resultant ability to introduce loans to consumers. Finally, the CMC raised concerns about this service's approach to similar claims and complaints referencing previous decisions and outcomes.

As an informal resolution couldn't be achieved, Ms O's complaint has been passed to me to consider and reach a final decision. In doing so, while I reached a similar outcome to that of our investigator, I considered various aspects that I feel weren't fully addressed previously. Because of that, I issued a provisional decision on 18 October 2023 giving Ms O and Shawbrook Bank Limited the opportunity to respond to my findings before I reach a final decision.

In my provisional decision I said:

> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] 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. Ms O paid for the timeshare product having financed it with a restricted use regulated loan from Shawbrook. So, it's accepted that S75 applies here. Because of that, 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 Ms O and Shawbrook arising out of the credit agreement (taken together with any related agreements). As the product purchased was funded under a credit 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 distinguish between the complaint being considered here and the legal claim. The complaint referred to this service specifically relates to whether I believe Shawbrook's treatment of Ms O's claim was fair and reasonable given all the evidence and information available to me. This service isn't afforded powers to determine any legal claim itself. That is the role of the courts.
>
> It isn't the role of this service to supervise, regulate or impose fines on any business. It's also not our role to ask a business to alter their policies or procedures or impose improvements on the level of service offered to their customers. These aspects fall firmly within the remit of the regulator – in this case, the FCA. But it is our role to examine and decide whether a business has been fair and reasonable in the manner

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

in which those policies and procedures are applied in the individual circumstances of Ms O's experience with them.

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 do not provide a legal service. And as I've said above, 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, it 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.

The claim for misrepresentation under S75

For me to conclude there was a misrepresentation by C in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that C made false statements of fact when selling the timeshare product. In other words, that they told Ms O 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 Ms O to enter into the contract. This means I would need to be persuaded that she reasonably relied on those false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Ms O was specifically told (or not told) about the benefits of the product she purchased. It was, however, indicated that she was told these things. So, I've thought about that alongside the other evidence available. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Ms O's claim, such as marketing material or documentation from the time of the sale that echoes what the CMC says she was told. In particular that the product purchased was represented as a financial investment.

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 her membership. And in any event, I've found nothing within the evidence provided to suggest C gave any assurances or guarantees about the future value of the product purchased. C would had to have presented the membership in such a way that used its investment element to persuade Ms O 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.

Given my findings above, I don't think Shawbrook's response to the allegation was unreasonable.

On a separate (but related) point, the claim submitted by the CMC appears to suggest that Ms O purchased a Fractional points product. A Fractional timeshare is generally accepted as one where the purchaser acquires a defined share in real property under the purchase agreement. In Ms O's case, she purchased points rights to be used against holiday accommodation and experiences from within a portfolio – not a specified and identifiable property. There's no evidence Ms O' purchased a Fractional timeshare product here.

The claim for breach of contract under S75

A breach of contract occurs when one or more parties to a contract or agreement fails to perform their duties or fulfil their obligations under that contract resulting in a loss for the other party. The CMC haven't explained how the purchase agreement has been breached. Or how Ms O suffered loss as a consequence. So, I don't think Shawbrook's response was unreasonable here.

There is a suggestion that Shawbrook breached their fiduciary responsibilities. But as I will explain below, I don't agree that's the case here.

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 (Ms O) 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 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).

- The pressured sale and process

The claim makes an allegation that Ms O was subjected to a high-pressure sales presentation albeit there's no detail as to how this came about or manifested itself. Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Ms O agreed to the purchase in 2019 when she simply didn't want to. I haven't seen any evidence to demonstrate that she went on to say something to C, after the purchase, to suggest she'd agreed to it when she didn't want to. And Ms O hasn't 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 Ms O 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 she were obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate she 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* [Shawbrook] *and matters relating to the debtor* [Mrs O]*)"*.

Ms O already held an existing trial membership timeshare product she'd purchased previously from C. Importantly; the new purchase appears to relate to an upgrade and/or change from her existing timeshare product holding. It doesn't appear it was her first product purchase from C and Ms O wasn't a new customer. So, it's likely she would've benefitted from her previous experience and what might be expected from the meeting and sales presentation in 2019.

Whilst there could be potential for a court to decide that some 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 O'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 this would lead to a court finding this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

- C's responsibilities and disclosure of commission paid

Part of Ms O's S140A claim is based upon the status of C (as the introducer of the loan) and their (and Shawbrook's) resultant responsibilities towards her. In particular, it's argued that the payment of commission by Shawbrook to C was kept from her. But I don't think the fact that Shawbrook might have paid C commission was incompatible with its role in the transaction.

C weren't acting as an agent of Ms O, but as the supplier of contractual rights she obtained under the timeshare product agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was C's role to make an impartial or disinterested recommendation, or to give Ms O advice or information on that basis. As far as I'm aware, she was always at liberty to choose how she wanted to fund the transaction.

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 Ms O requested those details from Shawbrook (or C) 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 would've created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

Were the required lending checks undertaken?

There are certain aspects of Ms O's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Shawbrook undertook a proper credit assessment. The CMC allege a proper affordability check wasn't completed.

It's relevant that the CMC haven't provided any evidence to show that the loan was unaffordable or unsuitable for Ms O. And I've not seen anything that supports any suggestion of financial difficulty from that time.

In their response to Ms O's claim, Shawbrook explained how they completed an affordability assessment which they believe showed the loan was sustainably affordable for her. If I were to find that the checks and tests completed by Shawbrook didn't comply with the regulatory guidelines and requirements that applied – 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 Ms O in order to uphold her complaint here. And I don't believe any proven compliance failure would automatically mean that Ms O's loan agreement was null and void in any event. It would need to be shown that any such failure resulted in a loss to Ms O as a consequence.

I've seen no specific information about Ms O's actual position at the time and no supporting evidence that she struggled to maintain repayments. Shawbrook did suggest Ms O had made some payments late albeit the situation has now been resolved. Where Ms O feels she may be struggling to maintain repayments, Shawbrook have offered to discuss her circumstances in order to identify ways they can help. That's what I would expect in such circumstances. Based upon these findings, I can't reasonably conclude the loan was unaffordable for her or that she suffered any loss as a consequence.

Other considerations

Following our investigator's view, the CMC asked that this service consider the contents of a document headed *"Generic submissions on behalf of complainants".* However, given the generic nature of its contents, I don't think it's helpful in establishing the facts of what actually happened in Ms O's specific case.

The CMC have also referenced other complaint decisions issued by this service in relation to timeshare products funded under regulated agreements. However, my role is to consider Ms O's complaint on its own merits given its own particular set of circumstances.

Furthermore, the CMC also requested that this service obtain extensive details of Shawbrook's processes and procedures together with evidence that C (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 Ms O.

As I've already explained, this service's role as an ADR does not extend to regulating financial businesses or their policies and procedures – that's the role of the FCA. Our powers are confined to deciding whether, on balance, their processes and procedures were applied in a fair and reasonable way in Ms O's individual circumstances. And in doing so, whether Shawbrook's response to Ms O's claims appears fair and reasonable. That's what I've done here.

As regards the regulatory status of C (or otherwise), I can't see that this formed any part of the claim presented to Shawbrook. So, I don't believe this is an aspect that I can consider as part of this complaint.

Summary

I would like to reassure Ms O that I've carefully considered everything that's been said and provided. In doing so, I haven't found any evidence to support the various allegations made. And accepting that my role isn't to decide any legal claim here, I also haven't found anything that leads be to conclude that Shawbrook's response to Ms O's claims was unfair or unreasonable. And because of that, I don't currently intend asking them to do anything more.

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.

Shawbrook acknowledged my provisional findings and confirmed they have no further comments to add. Despite follow up by this service, the CMC haven't provided any response or acknowledgment. In these circumstances, and in the absence of anything new to consider, I've no reason to vary from my provisional findings. So, my final decision remains unchanged.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms O to accept or reject my decision before 15 December 2023.

Dave Morgan
Ombudsman