DRN-4389247

The complaint

Mr B complains that Shawbrook Bank Limited ("Shawbrook") unfairly declined his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("CCA") in relation to a timeshare product he purchased with a loan they provided to him.

What happened

On or around 11 March 2009, Mr B (together with his partner) attended a meeting and sales presentation with a timeshare supplier who I'll refer to as C. During that meeting, Mr B was presented with details of a points-based timeshare product.

Mr B agreed to purchase 1,501 points for use against bookings of accommodation and experiences from a portfolio operated by C. The total purchase price agreed was £21,294, against which a trade in allowance of £5,595 was provided in respect of a trial membership Mr B had previously purchased from C. The balance of £15,699 was funded by a fixed sum loan in Mr B's sole name provided by another business.

The total amount of the new loan was £17,049 as it included the refinance of existing borrowing of £1,350 which, it appears, related to the purchase of Mr B's original trial membership. The loan was repayable in monthly instalments over a term of 120 months.

At the same meeting, Mr B also agreed to purchase 1,000 points under a different scheme operated by C at a cost of £2,000. This purchase was completed under a separate agreement and was funded by a credit card in Mr B's sole name

Sometime later, the ongoing management and administration of Mr B's loan was transferred to Shawbrook as part of a larger portfolio sale. In doing so, Shawbrook took on any obligations and responsibilities from the original lender associated with the loan

In or around April 2021, Mr B submitted a claim to Shawbrook under sections 75 and 140A of the CCA. Mr B has provided copies of various handwritten documents and letters. Some of these documents don't include addressees or dates. So, I haven't been able to confidently establish which of the documents constituted the original claim. However, it appears Mr B raised various allegations of misrepresentation by C together with various reasons why he believes there was an unfair relationship between him, C and, consequently, Shawbrook.

Shawbrook provided their written response to Mr B's claims in March 2022. They said Mr B had *"already raised a misrepresentation previously that was escalated to* [this service] *in 2010".* The response and our decision had already addressed various allegations. So, their response served only to address the new allegations raised. Specifically:

- disclosure of and increases in annual maintenance fees;
- the location of holidays available;
- the unfair relationship claim (under section 140A of the CCA); and
- *"*[C] *going bust".*

Having considered the various claims, Shawbrook didn't agree C had made the alleged misrepresentations, or that the liquidation of C had led to a breach of contract. They also didn't agree that an unfair relationship existed.

Mr B didn't agree with their findings, so complained to Shawbrook. Shawbrook responded in June 2022 but didn't think they'd done anything wrong in rejecting his claim.

Mr B decided to refer his complaint to this service. In doing so, he outlined the full extent of his claim, including allegations previously included in his original claim and referral in 2010. He also referred to various attempts he'd made to cancel the timeshare product contract and obtain a refund by engaging the services of various claims management companies ("CMCs") in the UK and overseas. He explained how these had resulted in various claims against those CMCs with mixed success.

One of our investigators considered everything Mr B had said together with the documentary evidence available. Unfortunately, due to the passage of time, the specifics of Mr B's original claim in 2010 weren't available. However, our investigator was provided with evidence from 2010 which outlined some of those specifics together with the response given.

Having considered all the information available, our investigator didn't think Mr B's complaint should be upheld. In particular, having considered the later allegations made, they couldn't find any evidence to support Mr B's allegations and didn't think it likely a court would find the relationship was unfair.

Mr B didn't agree with our investigator's findings. In doing so, he referenced various Spanish court decisions and rulings. He thought these meant all claims against C should be upheld. But an informal resolution to Mr B's complaint still couldn't be reached. So, his case has been referred to me to consider and reach a final decision.

Having done so, while I was inclined to reach the same outcome as our investigator, I 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 on 7 September 2023 giving opportunity for the parties to provide any additional comments or evidence they felt relevant before I reached a final decision. In my provisional decision, I said:

> Relevant Considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the 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.
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> Section 75 of the CCA ("S75") provides consumers with protection for goods or services bought using credit. Ms S paid for the timeshare product with a restricted use fixed sum loan agreements. So it isn't in dispute that S75 applies here. This means that Mr B is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this complaint.
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> Section 140A of the CCA ("S140A") looks at the fairness of the relationship between Mr B and Shawbrook arising out of the credit agreement (taken together with any related agreement). 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.
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> Given the facts of Mr B's complaint, relevant law also includes the Limitation Act 1980 (the "LA"). This is because the original transaction - the purchase funded by a loan with Shawbrook - took place in 2009. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered the effect this might also have.

[1] The Dispute Resolution Sourcebook from the Financial Conduct Authority's Handbook of Rules and Guidance (DISP)

It's 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 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.

It's important to recognise that the complaint considered specifically relates to whether I believe Shawbrook's response to Mr B's claim was fair and reasonable given all the evidence and information available to me. 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 claim of misrepresentation under S75 made in time?

Mr B says C misrepresented the nature of the purchase agreement and benefits to him when he agreed to purchase the product. And he believes this brings cause for a claim under S75.

But a section 75 claim is *"an action* [that is, court action] *to recover any sum by virtue of any enactment"* under section 9 of the LA. And the limitation period under that provision is six years from the date on which the cause of action accrued. So here, Mr B had to make a claim within six years of when he entered into the purchase contract and credit agreement. Mr B says this took place in March 2009. That's because this is when he says he lost out having relied upon the alleged false statements of fact at that time.

It appears a claim was submitted to the original lender sometime following the purchase in 2009. I've seen evidence that a complaint relating to this claim was being considered by this service in the summer of 2010. However, it appears this wasn't upheld. Particularly as Mr B later made subsequent attempts to cancel the contract by enlisting the support of various CMCs. There's no evidence the new claim for further alleged misrepresentations was submitted to Shawbrook until 2021. And as this was more than six years after the purchase was completed and Mr B first says he lost out; I believe a court is likely to find that his new claim falls outside of the time limit permitted in the LA.

Was the claim for breach of contract under S75 made in time?

Having read the submissions provided by Mr B. I've found no overt reference to C's liquidation or otherwise. However, Mr B does say he hasn't been able to use his membership to book holidays for some time. So, if proven, there is the possibility this could constitute a breach of contract. As for misrepresentation, a claim for breach of contract is also covered under section 9 of the LA. So, the limitation period under that provision is six years from the date on which the cause of action accrued. It's not entirely clear when it was Mr B first discovered he couldn't use his membership. But from what has been said, I'm persuaded it was within six years of when the claim was submitted to Shawbrook. And on that basis, I think it's likely a court would find Mr B's claim for breach of contract was brought within the time limit permitted in the LA.

Was the unfair relationship claim under S140A made in time?

A claim under Section 140A is a claim for a sum recoverable by statute – which is also governed by Section 9 of the LA. As a result, the time limit for making such a claim is also six years from the date on which the cause for action accrued.

However, in determining whether or not the relationship complained of was unfair, the High Court's decision in *Patel v Patel (2009)* decided this could only be determined by *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination".* In that case, it was the date of the trial or otherwise the date the relationship ended.

So, having considered this, I believe the trigger point here is slightly different. Any relationship between Mr B and Shawbrook continued while the finance agreement remained live. So, that relationship only ended once the agreement ended and any borrowing under it was repaid.

Shawbrook have provided a loan statement which confirms Mr B's loan with them was fully repaid and closed in April 2019. As this was less than six years before his claim was submitted to Shawbrook, I believe it's likely a court would find that Mr B's S140A claim was made in time.

The 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 B) 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).

So, I think the newly alleged misrepresentations are, therefore, relevant here. Even though I don't think the additional claims Mr B raised can be considered under S75 due to limitation.

As I've said above, there appear to be certain elements of Mr B's claim to Shawbrook that have previously been included within an earlier claim in 2010. And because it appears these have already been considered, this service isn't afforded powers to revisit these aspects. As a result, I can only consider Mr B's complaint against Shawbrook to the extent that it relates to any new allegations and the related claim. It appears that's what Shawbrook have done here, and on balance, I think that was a fair and reasonable approach to take.

- Annual Fees

Mr B claims these were never explained or highlighted to him and that he wasn't provided with any of the documentation explaining them. As I've already said, the issue of documentation was previously addressed in the 2010 claim/complaint. However, it's relevant that the Member's Declaration (signed and initialled by Mr B) from the time of the sale specifically refers to the payment or maintenance fees at point 6, together with reference to the basis of their calculation. They are also referred to within the Acquisition Agreement Terms and Conditions.

Mr B has pointed out that he didn't initial next to point 5 of the declaration as he wasn't agreeable to paying annual fees. However, point 5 actually relates to ensuring the annual fees have been paid up to date for the product traded in – in this case his previous trial membership. And because C's trial memberships doesn't include annual fees, this point wasn't relevant. I think this explains why this point wasn't

initialled. Furthermore, if Mr B had objected to the payment of annual fees at the time, I find this at odds with him then initialling point 6 and still signing the agreement to proceed with the purchase.

- Holiday locations and availability

Having considered the documents available from the time of the sale, I can find no suggestion that C provided any guarantees or assurances about holiday locations or their availability. Holiday locations were from within their portfolio. Alternatively, Mr B could use their approved exchange scheme – subject to any additional fees and charges that applied. In response to Mr B's claim, Shawbrook confirmed that bookings are offered on a first come-first served basis and subject to availability. This is certainly my understanding of the product memberships offered by C. And in the absence of any evidence from the time to corroborate Mr B's allegations here, I can't reasonably conclude that C did misrepresent this aspect to him.

- The sales meeting and process

Mr M suggests he was coerced into purchasing the product through the use of aggressive commercial practices. In particular, he refers to:

  - the length of the meeting;
  - being offered alcohol to the point of intoxication; and
  - the use of witnesses who weren't independent.

I acknowledge Mr B has said about this. So, I can understand why it might be argued that the prolonged presentation might have felt like a pressured sale – especially if, as Mr B approached the closing stages, he 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 Mr B agreed to the purchase in 2009 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to C to suggest he'd agreed to it when he didn't want to. And Mr B hasn't provided a credible explanation for why he didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here. I acknowledge his claim that the cooling off period wasn't highlighted. But the documentation suggests different – in particular, his cancellation rights are clearly shown in block capital letters immediately above his own signature – *"YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT. YOU HAVE UNTIL 25/03/2009 IN WHICH TO DO SO"*

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

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* [Mr B*)*.

Mrs S already held a trial membership he'd purchased previously from C. Importantly; this new purchase appears to relate to an upgrade in his existing timeshare product holding. It wasn't simply a new product purchase. And Mr B wasn't a new customer of C. So, it's likely he would've benefitted from his previous experience and what he might expect from the meeting and sales presentation in 2009.

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 Mr B'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.

I'm not aware of any requirement for witnesses to be completely independent of C. It's normally accepted that this individual's role is merely to witness the purchaser's signature. Further, there's also no expectation that any compliance officer is independent of C in these transactions. Their remit is normally to ensure all documents have been provided, understood and signed. And the declaration Mr B signed at the time confirms he received and understood everything.

The claim for breach of contract

Mr B has suggested he's been unable to use his timeshare membership with C. So, I've considered whether that was the case and why that might be. It's likely that this allegation is, to a large extent, underpinned by Mr B's continued allegation about the lack of availability of holidays and accommodation. However, I've already addressed this aspect above.

I've seen a copy of a letter Mr B sent to C requesting relinquishment of his membership. Unfortunately, the letter isn't dated. But it does refer to correspondence from C dated 22 May 2018. So, it's reasonable to conclude the letter was sent after that date. In it Mr B tells C that his financial circumstances prevent him from paying his 2018 fees.

Relinquishment of Mr B's membership requires that all fees are paid up to date and that he returns his timeshare certificate. But Mr B says he'd never received the certificate. Again, this is an aspect included in his original claim in 2010. So, I'm unable to consider this aspect again.

I'm also aware that annual management fees are payable in advance in January of each year. So, unless these were paid in January 2018 and the certificate had been returned, I can understand why C might not be able to complete Mr B's membership relinquishment request.

I've seen a copy of an indemnity signed by Mr B (and his partner) in August 2018 enabling them to obtain a duplicate certificate. But I've seen no evidence the 2018 fees were brought up to date. Shawbrook also confirmed this in their claim response. As a consequence of not paying the management fees, it appears Mr B's membership was suspended. And that appears to be the reason why he can't use his membership rather than any contractual breach by C. Point 2 of the Members Declaration from the time of the sale confirms this – *"We understand that our Points may be used each year for accommodation* […] *provided that all annual fees are paid up to date,* […]*".*

On a separate point, I understand that members and owners of C's product have been able to continue to use their membership to book holidays and experiences, regardless of the impact of any insolvency process.

Given my findings above, I'm not persuaded there's been a breach of contract that Shawbrook would be liable for under any like claim under S75.

Mr B's response to the investigator's findings

Mr B has referenced a Spanish Court Ruling against C and believes this means this service should uphold all claims against C. He also refers to a judicial review ("JR") in relation to products sold by C.

The timeshare product agreement Mr B entered into states that it is governed by English Law, not Spanish Law. So, I don't think the Spanish judgment Mr B refers to could be applied directly to the question of whether the contract is voidable under English Law. They are distinct and separate legal jurisdictions, so I can't see how it would apply in this case.

I'm familiar with the JR Mr B refers to. It has now been completed and the findings have been published. But it's relevant to say that this JR specifically relates to certain unique aspects of the product type reviewed. And that product is different to the one Mr B purchased. So, I don't think the outcome of that JR helps Mr B's complaint here.

Financial Checks

Mr B says the original lender didn't complete any financial checks on him when agreeing the loan. When the loan was agreed and provided in 2009 the Office of Fair Trading's Irresponsible Lending Guidelines applied and set out expectations about the checks and tests that the original lender should've done. Upon taking over responsibility for Mr B's loan, Shawbrook took on those specific responsibilities.

Shawbrook haven't provided any explanation or evidence to support how and if a credit assessment was completed. And given the passage of time, it's likely that information is no longer available anyway. If I were to find that the original lender (now 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 loan repayments weren't sustainably affordable for Mr B in order to uphold his complaint here.

However, I haven't seen any information about Mr B's actual financial situation at the time. And there's no obvious suggestion or evidence he struggled to maintain repayments. So, I can't reasonably conclude the loan was unaffordable for him. And given the loan was fully repaid in April 2019 – as originally agreed - there doesn't appear to be any evidence of loss here either.

Summary

I do appreciate that Mr B is clearly very unhappy with the product he purchased, further frustrated by his inability to benefit from it. Much of the information he's provided crosses over into different claims for different services and products. In particular, he refers to chargeback requests and claims for CMC services and another points product he purchased from C.

Ultimately, his claim here is made under the CCA and specifically relates to the loan agreement with Shawbrook. And that loan agreement specifically relates to the points-based product it was used to fund in 2009. So, in considering his complaint, I've done so in so far as it relates to his claim for that product sale only.

Having considered everything he's said, together with all the evidence and information available, I haven't found anything that leads me to believe Shawbrook's response to his complaint was unfair or unreasonable. So, I don't intend to ask them 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.

Shawbrook acknowledged receipt of my provisional decision and confirmed they have no further comments to add.

Mr B also acknowledged receipt of my provisional decision. In doing so, he undertook to provide further questions together with a list of things he thought I'd missed. He also asked

that I specifically comment on why this service *"can't uphold the Spanish court decision".* That being said, I've not received any further comments or questions from Mr B.

I believe I covered the question of the Spanish court ruling against C in my provisional decision. But for clarity, I'll address this in further detail. Mr B's purchase agreement makes it clear that it is governed by English Law – not Spanish law. So, as I've already said, I don't think any Spanish judgment can be applied directly to the question of whether Mr B's timeshare agreement is void under English Law. In any event, Mr B's assertion is that the Spanish ruling effectively meant that all of C's timeshare agreements weren't valid. I don't believe that's the case here for the reasons I'll explain below.

Mr B hasn't been specific about which particular Spanish Court ruling he's referring to. So, it isn't possible for me to establish whether the circumstances or specifics of his purchase agreement were the same as the ruling to which he refers. And in any event, as I also said in my provisional decision, this service isn't able to make legal decisions. So, I'm not in a position to apply the Spanish Decision to English Law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("The TRs") served to implement EU Directive 2008/122/EC into English Law. The 2008 Directive took into account various EU (and constituent jurisdiction) rulings. So, while I don't believe a Spanish Court Ruling can be directly applied to English Law, I do believe the 2008 Directive serves this purpose. So, accepting that the TRs came into force after Mr B's purchase in 2009, I think they're relevant in establishing whether the purchase agreement Mr B entered into was valid given they served to implement the 2008 Directive.

Having considered the TRs, I'm satisfied that Mr B's agreement falls within the definition of a timeshare contract contained within them. So, I'm also satisfied that these types of timeshare have never been prohibited to be sold under English Law, whether at the time of Mr B's sale or after.

In summary, I've not found anything that persuades me to vary from my provisional findings. And because of that, 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 B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 22 November 2023.

Dave Morgan
Ombudsman