

The complaint

Ms S complains that Shawbrook Bank Limited (“Shawbrook”) unfairly declined her claims under sections 75 and 140A of the Consumer Credit Act 1974 (“CCA”) in relation to a timeshare product she purchased with a loan they provided to her.

What happened

In or around September 2017, Ms S attended a meeting with a timeshare supplier who I’ll refer to as “C”. During that meeting, Ms S agreed to purchase a Trial Membership timeshare product from C. The purchase price of £4,595 was funded by a fixed sum loan agreement with Shawbrook.

In or around December 2021, using a professional representative (“the PR”), Ms S made a claim to Shawbrook under sections 75 and 140A of the CCA. The PR said that during the sales meeting in September 2017, C made a number of misrepresentations about the trial membership benefits which turned out not to be true. And it was these misrepresentations that had induced Ms S to enter into the purchase contract with C and the associated loan agreement with Shawbrook.

The PR said that despite the representations made by C, Ms S subsequently discovered:

- availability was poor; and
- resorts weren’t exclusive to members as they were open to non-members, being available to book online through other websites.

Further, the PR said that the terms of the purchase agreement are so egregious so as to be unfair in themselves. They made the following observations to support the existence of an unfair debtor-creditor relationship under section 140A of the CCA (S140A):

- the meeting Ms S attended wasn’t disclosed as a sales presentation at the outset;
- commission paid by Shawbrook to C wasn’t disclosed to Ms S;
- no comparisons with other loan companies were provided;
- Ms S wasn’t told she was free to arrange her own finance;
- Ms S was pressured into completing the purchase;
- Ms S wasn’t given the opportunity to read the purchase and loan agreements;
- maintenance fees payable by Ms S increased “*drastically*”;
- there was no assessment of Ms S’s income and expenditure and the loan affordability; and
- no credit checks were completed.

The PR also said C had breached various legislation and regulations relating to the product sold to Ms S.

Shawbrook didn’t uphold Ms S’s claims. They said there was no evidence she was reluctant to accept the recommendations made to her or that she sought to cancel her purchase within the cooling off period provided. Shawbrook said Ms S had signed a Customer

Compliance Statement confirming her understanding of both the purchase and loan agreements. They said they'd completed a credit assessment in line with their regulatory obligations.

Ms S didn't accept their response, so the PR raised a complaint with Shawbrook. In response, Shawbrook didn't think they'd done anything wrong and:

- didn't agree Ms S had been aggressively targeted or pressured unduly;
- didn't think C had breached the regulations referred to by the PR;
- said management fees weren't payable under the trial membership held by Ms S;
- Ms S had never had a holiday request denied and had since upgraded her membership;
- didn't accept a fiduciary relationship existed between Ms S and C and the payment of commission didn't create an unfair debtor-creditor relationship;

As Ms S remained unhappy, the PR referred her complaint to this service. Having considered the circumstances of Ms S's complaint, one of our investigators didn't think her complaint should be upheld.

The PR confirmed that whilst Ms S didn't agree with our investigator's findings, they weren't able to assist her further. Miss S requested her complaint be passed to an ombudsman to review and provide a decision but didn't provide reasons why she disagreed with our investigator's findings.

As an informal resolution couldn't be reached, Ms S's complaint was passed to me to consider. Having done so, I'd considered a number of issues which I don't feel were previously fully addressed. So, I issued a provisional decision on 27 July 2023 giving Ms S and Shawbrook the opportunity to consider my findings and provide any further comment and evidence before I reached a final decision.

In my provisional decision I said:

Relevant Considerations

When considering what's fair and reasonable, DISP¹ 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.

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 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 complaint.

S140A looks at the fairness of the relationship between Ms S 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.

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

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

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 Ms S'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.

Ms S's claim relates specifically to the Trial Membership she purchased from C in September 2017. It appears she upgraded her Trial Membership to a different product in or around June 2018. But that transaction doesn't form part of the claim raised. So, I've only considered the circumstances as they relate to the purchase in September 2017.

Was the timeshare product misrepresented?

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 holiday product to Ms S in September 2017. In other words, that they told Ms S 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 S to enter the contract. This means I would need to be persuaded that Ms S reasonably relied on any false statements when deciding to purchase the Trial Membership.

I've considered the allegations made against the information and evidence available. The difficulty I have is identifying what was actually said at that time of the sale. It was, however, indicated that Ms S was told these things. So, I've thought about that alongside the evidence available.

I've only seen the front page of the Trial Membership Agreement together with the Loan Agreement. The Trial membership provided Ms S with five holiday weeks over a three-year period (i.e., to September 2020). I can't see that these documents support what Ms S says she was told or that what was said amounted to misrepresentation. In particular, these documents makes no reference to availability or exclusivity. And in any event, Shawbrook have confirmed that Ms S only attended a prelude holiday in June 2018 when she decided to upgrade her Trial Membership. So, it doesn't appear Ms S used her Trial Membership beyond that prelude holiday.

Although not determinative of the matter, I also haven't seen any other documentation which supports Ms S assertions, like marketing material or documentation from the time of the sale that echoes what she say she was told. Whether in terms of booking availability, exclusivity or otherwise.

On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that C did in fact make the alleged misrepresentations.

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 (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 allegations of pressure

The original claim alleges that Ms S was pressured into entering the purchase and loan agreements. However, against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Ms S agreed to the purchase at the time of the sale 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. Ms S hasn't explained why she didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted. So, if she only agreed to the purchase because 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. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Ms S made the decision to proceed because her ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

Time to consider the agreement(s)

As I've said, I've seen very limited documentation from the time of the sale. But having previously seen similar documents relating to C's product sales, I'm aware they normally include a period of 14 days from the date of agreeing to the purchase within which to cancel the agreement without giving any reason – as required under the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

So, even if I were to find that Ms S wasn'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 her to have had sufficient time in which to consider her decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before the loan was drawn and the purchase completed. There's no suggestion or evidence that Ms S did raise any questions or concerns prior to the sale being completed. Or that she had any intention of cancelling the agreement.

Disclosure of Commissions

Part of Ms S's claim questions the status of C (as the introducer of the loan) and their resultant responsibilities towards her. In particular, it's argued that a payment of commission by Shawbrook to C wasn't declared to Ms S. But I don't think the fact that Shawbrook might have paid C commission was incompatible with their role in the transaction. C wasn't acting as an agent for Ms S, but as the supplier of contractual rights obtained under a timeshare product agreement. And, in relation to any 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 S advice or information on that basis. As far as I'm aware, Ms S was always at liberty to choose how she wanted to fund any purchase and there was no requirement or duty upon C to provide funding recommendations or options.

What's more, I haven't found anything to suggest Shawbrook were under any regulatory duty to disclose the amount of commission paid in these circumstances. As I understand it, the typical amounts of commission paid by lenders to suppliers (like C in this case) was unlikely to be much more than 10%. I haven't seen any evidence to suggest otherwise. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure and payment of commission created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

Management charges

The product purchased by Ms S was a Trial Membership. Shawbrook say that such memberships do not attract annual management charges – these only apply to full memberships. While it appears Ms S subsequently updated her Trial Membership in June 2018, that transaction doesn't form part of Ms S's claim here. So, in the absence of any evidence to support what Ms S says about management charges in relation to her Trial Membership, I've not seen anything that persuades me that a court is likely to find that this aspect led to an unfair debtor/creditor relationship under S140A.

Regulatory breaches

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 C'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, given the limited documentation provided, I haven't seen any evidence to support the breaches alleged here. And as the Supreme Court decision in *Plevin*² 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 C enforced any of the terms within the Trial Membership agreement to such an extent that they caused loss or resulted in unfairness. And in any event, it appears the Trial Membership ended in June 2018 when Ms S upgraded it, as did the associated loan with Shawbrook.

Were the required lending checks undertaken?

There are certain aspects of Ms S's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Shawbrook undertook a proper credit assessment. The allegations within the claim suggest the loan was provided irresponsibly. In particular that no affordability checks were undertaken by C or Shawbrook.

² *Plevin vs Paragon Personal Finance Ltd [2014]* ('Plevin')

Ms S hasn't provided any evidence to show that the loan was unaffordable or unsuitable for her. And I've not seen anything that supports any allegation of financial difficulty from that time.

Shawbrook haven't provided details of the checks they undertook albeit they have confirmed their checks and assessment complied with their regulatory obligations. If I were to find that they 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 Ms S in order to uphold her complaint here. With no such evidence provided, I can't reasonably conclude the loan was unaffordable for her or that she suffered loss as a consequence.

Summary

Having carefully considered everything that's been said and provided, I haven't found anything that persuades me that C did misrepresent the trial membership to Ms S. Or that a court is likely to find anything to suggest an unfair relationship existed under S140A. And because of that, I can't reasonably conclude that Shawbrook's treatment of Ms S's claim was unfair or unreasonable.

In the circumstances, I don't currently intend to uphold Ms S's complaint. However, in the event Ms S is able to provide further evidence or information to support her claims, I will consider that before issuing 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.

Both Ms S and Shawbrook confirmed they'd received my provisional decision. Shawbrook had nothing further to add. Ms S said she would refer my findings to her barrister, but she hasn't since provided anything further for me to consider.

With the time given for further comment and evidence having now passed, I've not received or seen anything that persuades me to vary from my provisional findings. And for that reason, my final decision remains unchanged.

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 27 September 2023.

Dave Morgan
Ombudsman