DRN-4226652

The complaint

Mr and Mrs W complain that Shawbrook Bank Limited has unfairly declined their claim under section 75 of the Consumer Credit Act 1974 ("CCA") in relation to timeshare products they were sold.

What happened

Mr and Mrs W purchased multiple timeshare memberships with a company I'll call "D" between 1998 and 2017. Membership was in the form of points and the total number of points held provide varying levels of benefits. These benefits include the ability to book and utilise holiday accommodation and other facilities through D and other affiliated businesses and schemes.

In or around July 2016, Mr and Mrs W attended a sales presentation by D to talk about their current membership and discuss the purchase of more points in order to raise their membership status and associated benefits. Mr and Mrs W agreed to purchase 25,000 additional points elevating their membership status to D's platinum level. The purchase price of £19,750 was financed through a 10-year fixed sum loan agreement with Shawbrook. This loan was repaid and closed in July 2017.

In or around August 2017, Mr and Mrs W attended another sales presentation by D and agreed to purchase a further 15,000 membership points. This resulted in a total points holding of 70,500 and they chose to allocate a proportion of these to three family members, retaining the balance in their own name. The purchase price of £16,800 was financed through a 10-year fixed sum loan agreement with Shawbrook. This loan was repaid and closed in March 2018.

In December 2019, using a professional representative ("the PR"), Mr and Mrs W made a claim to Shawbrook under section 75 ("S75") of the CCA. The PR said that during the sales meetings in July 2016 and August 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 W to enter into the purchase contracts with D.

The PR said the following misrepresentations had been made:

- the membership points were marketed as an investment, or at least an asset capable of being sold; and
- the membership points could be utilised to book cruises at prices cheaper than on the open market; and
- the membership points would provide access to better holidays for less; and
- the holidays and properties available were exclusive to D's members.

Further, the PR said Mr and Mrs W had experienced availability issues for their preferred holidays and accommodation.

The PR believe there to be an unfair relationship under section 140A ("S140A") of the CCA as a result of unfair conditions and clauses within the legal documentation governing the membership points and their usage.

The PR also thought Shawbrook had lent to Mr and Mrs W irresponsibly. They said there'd been no affordability checks or discussions and no information had been discussed in relation to Mr and Mrs W's income and expenditure. They said additional maintenance fees hadn't been discussed or considered as part of the overall affordability assessment.

In response, Shawbrook didn't agree the membership scheme and points had been misrepresented to Mr and Mrs W. Or that there was any other reason for their claim to be upheld.

One of our investigators looked into what had happened. Having considered all the information and evidence provided, our investigator didn't think D had misrepresented the points and membership benefits to Mr and Mrs W, or that a court was likely to find that an unfair relationship existed under S140A. As such, our investigator could find no reason to uphold their complaint.

The PR didn't agree with our investigator's view. In summary, they said:

- the evidence provided by both Mr and Mrs W, and D hadn't been fully assessed, analysed or considered; and
- reference should be made to the circumstances and evidence in other similar claims in respect of memberships sold by D; and
- there was insufficient reliance upon Mr and Mrs W's own recollections of the sales presentations; and
- D, as the supplier, has failed to provide rebuttal witness evidence; and
- adherence to the provisions of the CCA wasn't fully considered; and
- the omission of key information and misleading verbal statement by D haven't been considered, instead relying on D's own contractual and legal documentation; and
- it hadn't been considered that Shawbrook's failure to appropriately assess Mr and Mrs W's application for finance placed them under financial strain.

As an informal resolution couldn't be reached, Mr and Mrs W's 's complaint has been passed to me to consider and provide a final decision.

Having considered the relevant information about this complaint, whilst I ultimately came to the same outcome as our investigator, I'd considered certain aspects not previously addressed. Because of that, I issued a provisional decision ("PD") on 8 June 2023 – giving the PR, Mr and Mrs W and Shawbrook the opportunity to respond to my findings 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 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.
>
> S75 provides consumers with protection for goods or services bought using credit. Mr and Mrs W paid for the timeshare products with restricted use fixed sum loan agreements. So it isn't in dispute that S75 applies here. This means that Mr and Mrs W 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 and Mrs W and Shawbrook arising out of the credit agreements (taken together with any related

agreements). And because the products purchased were funded under those credit agreements, 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.

The FCA's DISP rules specifically relate to complaints about regulated financial products or services and provide rules and guidance about what this service is able to consider. 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.

There are also other regulations that may apply specifically to misrepresentation, the sale of timeshare products, unfair trading and unfair terms. So, I've considered any impact of the various related regulations and how they might apply here.

In considering the various points raised by the PR, I want to take this opportunity to clarify this service's role in considering Mr and Mrs W's complaint. It's important to recognise that the complaint considered specifically relates to whether I believe Shawbrook's response to their 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.

Mr and Mrs W's experience as timeshare product users

Before looking at the complaint in depth, I think it's relevant to acknowledge Mr and Mrs W's experience of timeshare products supplied by D up to the point of the product sales in July 2016 and August 2017. Records suggest that products were purchased by Mr and Mrs W as follows:

- June 1998 – purchased 8,000 points for £9,499 funded by credit card;
- June 1999 – purchased a further 2,500 points through a third party for £2,799 funded by a card payment;
- August 1999 – purchased a sampler membership in another product for US $1,395
- June 2009 – purchased a further 2,500 points under a private resale agreement with another member;
- November 2010 – traded 2,500 points towards 4,500 points in another scheme operated by D for US $7,915;
- December 2010 – exchanged the recently acquired 4,500 points back into their original scheme with D at no cost;
- August 2011 – purchased a further 10,000 points under a private resale with another member;
- April 2013 – traded 21,000 points for 21,000 points in a Fractional timeshare scheme operated by D for £12,600 funded by card payment. This transaction was reversed in June 2013;

- February 2016 – purchased a further 5,500 points for £4,211 funded by card payment;
- July 2016 – purchased a further 25,000 points for £19,750 funded under a fixed sum loan agreement with Shawbrook; and
- August 2017 – purchased a further 15,000 points for £16,800 funded under a fixed sum loan agreement with Shawbrook.

The transactions in July 2016 and August 2017 are the subject of Mr and Mrs W's complaint here.

Furthermore, while I don't have access to Mr and Mrs W's use of their timeshare points, Shawbrook did confirm (in their final response) that they'd *"secured 15 reservations in 2018 alone and have assisted in securing their desired bookings on many occasions throughout their membership".*

Were the timeshare products 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 W the holiday products in July 2016 and August 2017. In other words, that they told Mr and Mrs W something that wasn't true in relation to one or more of the points they have raised. I would also need to be satisfied that the misrepresentations were material in inducing them to enter the contract. This means I would need to be persuaded that Mr and Mrs W reasonably relied on the false statements when deciding to buy the membership point upgrades.

Various allegations have been made specifically relating to the two sales referenced above. So, I've considered those allegations against the information available from the Time of the Sale in each case. Not all documents from that time appear to be available. But I have considered those provided together with information that's contained in D's Membership Guide and in a summary of D's Loyalty Benefits.

As Mr and Mrs W's points holding increased, their status with D changed in accordance with the total number of points they held at any time. Each status category affords them various benefits, some of which (but not necessarily all) may increase or change within each higher category.

Based upon Mr and Mrs W's points holding over time, they benefitted from a "Standard" membership status up until December 2010; whereupon their holding gave them "Silver" status. This continued until February 2016 when their purchase, at that time, changed their membership to "Gold" status. The purchase in July 2016 again changed their membership to "Platinum" status, which was retained after the purchase in August 2017.

There is a suggestion that points purchased privately (i.e., not directly from D) don't count towards a members enhanced status. I haven't seen this confirmed and as I don't believe D were directly involved in these transactions, I can't reasonably hold them responsible for not explaining this to Mr and Mrs W at the time.

It appears Mr and Mrs W would ordinarily expect to derive enhanced benefits from their increased membership status as a result of the points purchased in July 2016. But as the purchase in August 2017 didn't appear to result in a further change in membership category, I wouldn't expect those benefits to have been enhanced further at that stage.

D's "Loyalty Benefits" suggest that where Mr and Mrs W's membership status changes to "Platinum", they would benefit from the following (non-exhaustive) list of enhanced benefits over and above the preceding "Gold" status:

- using points to pay for cruising and luxury jet bookings for up to 30% of the cost at US $0.30 per point with no redemption fee;
- seven complimentary loyalty accommodation upgrades per year when requested within 72 hours of arrival date;
- three preferred unit reservations per year – subject to availability;
- five active loyalty search requests;
- complimentary Reservation Protection Plan for up to seven single stay reservations of less than 5,000 points; and
- access to 24-hour reservation hold, D's legacy program, associate membership of In-resort benefits, a chat and call service and points redemption on fee payments.

Other enhanced benefits relate to the pricing of other services and benefits. So, overall, I'm persuaded that D did tell Mr and Mrs W that the purchase they completed in July 2016 could enhance the benefits they could access under their membership in line with their published points levels (subject to any restrictions relating to private transfers). However, it doesn't appear these benefits would've been enhanced following their purchase in August 2017 as this doesn't appear likely to have resulted in further enhancement of their membership status. The additional points would only have provided them with more spending power within the context of the membership levels provided by D.

The difficulty I have is identifying what was actually said at the time of the sales. I have Mr and Mrs W's recollections, but these appear to run contrary to the documentation. Looking at the available documentary evidence from the time of sale, I can't see anything to show that the products were misrepresented to Mr and Mrs W. And while I don't doubt the honesty of their recollections, honesty isn't the same as credibility – which is an important distinction to make for the purpose of this complaint (see what Mr Justice Leggatt had to say in *Gestmin SGPC S.A. v Credit Suisse (UK) Limited* [2013].[1]

But even if I was to put to one side what the courts might say about the reliability of human memory, experience tells me that the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and influenced by discussions with others. And having not been present at the Time of the Sale, it isn't possible for me to determine with certainty what Mr and Mrs W were or weren't told by D. So, in the end, the part their testimony plays in determining the outcome of this complaint comes down to the extent it can be corroborated given the other evidence available.

I've also not seen any evidence which shows they were told that the resorts were exclusive solely to their membership with D. And in any event, it doesn't seem to me that's prevented Mr and Mrs W from making bookings, subject to availability – a point that is made repeatedly in many of the documents from the Time of the Sale. I appreciate that the representatives of D may have emphasised the positive elements of membership and stressed the benefits Mr and Mrs W could obtain. But that doesn't mean that I can say they misrepresented the products.

Were the upgrades marketed and sold as an investment?

For Mr and Mrs W's upgrades to have been sold as an investment contrary to the Timeshare Regulations, D would've needed to present them in a way that used an

[1] This was followed in *Lachaux v Lachaux [2017], discussed with approval and explained by the Court of Appeal in Kogan v Martin [2019] (see, in particular, paragraph 88) and quoted with approval by the Supreme Court in Bancoult, R (on the application of) (No 3) v Secretary of State for Foreign and Commonwealth Affairs (Respondent) [2018].*

investment element to persuade Mr and Mrs W 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)[2].

Having considered all the evidence, I'm not persuaded that the upgrades were marketed and sold as investments. I say that because there's evidence that D made efforts to avoid giving Mr and Mrs W the impression that their membership was a financial investment. There were, for example, various disclaimers in the paperwork at The Time of the Sale. The Terms and Conditions (signed and dated by Mr and Mrs W on 14 July 2016) said *"You should not purchase your points as an investment – except of course in your holidays […]".* And the "Customer Compliance Statement/Declaration to Treating Customer Fairly" (the "Compliance Statement"), which was only two pages long and was signed by Mr and Mrs W, said the following at point 14:

"We understand that the purchase of our Points is an investment in our future holidays, but that it should not be regarded as a property or financial investment and that any subsequent resale will depend on market conditions".

What's more, whilst Mr and Mrs W's witness statement suggest that D's representatives told them that the *"purchase was a good investment, and that points were selling for more than what we were to pay […]",* I'm not persuaded that this was the main reason Mr and Mrs W agreed to the purchase. And in any event, this statement appears to align with D's reference to their *"investment in […] future holidays",* rather than for financial returns, and seems to be a reference to the preferential price being offered to Mr and Mrs W at the time. What's more, I think it's particularly relevant that Mr and Mrs W were already long-standing members who were likely to be familiar with the membership scheme in question.

On balance and in light of what I've said above, I think it's unlikely that the upgrades were marketed and sold by D as an investment contrary to the Timeshare Regulations.

Was there an unfair relationship under S140A?

The PR suggest various terms of the Purchase Agreement and associated legal documentation are unfair. And as a debtor-supplier-creditor agreement exists by virtue of the loan agreements entered into, they believe this means that an unfair relationship exists within the context of S140A.

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 transactions that operate 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*[3], it can't have been parliament's intention that such relationships should be liable to be reopened for that reason alone.

I acknowledge that some of the contractual terms that apply to Mr and Mrs W's membership may have been unfair under the UTCCR[4] and there may have been an

[2] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

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

[4] The Unfair Terms in Consumer Contracts Regulations 1999

imbalance of knowledge that only D was in a position to rectify. The Supreme Court did say in its decision in the case of *Plevin* (at paragraph 18) that an inequality of knowledge and understanding is capable of making a relationship unfair. But it also referred to the imbalance needing to be 'sufficiently extreme' when doing so.

As I've already highlighted, Mr and Mrs W had been members of D's membership scheme for several years by the time they agreed to upgrade their points holding in 2016 and 2017. And those upgrades weren't the first time they'd upgraded their membership. In fact, they'd also independently done so through private resale agreements. So, I think their experience as members is likely to have given them a reasonable amount of insight into what they were purchasing and what the ongoing costs associated with their membership were and might be like going forward. Mr and Mrs W decided to enter into the upgrade agreements with that experience in mind. And in the absence of a credible explanation from them as to why, at the Time of the Sale, anything said by D (or not said) could've have played a significant part in that decision, I'm not persuaded it did.

I also 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, together with Mr and Mrs W's right of withdrawal may go against the requirements of the UTCCR. But I don't think I need to formally decide that point here because, even if the terms were unfair, I can't see they've actually operated unfairly against Mr and Mrs W.

As a consequence, I'm not persuaded that the positions of both parties to the upgrade agreements were so one sided that Mr and Mrs W's ability to choose between upgrading or not (and borrowing the money to do so) was severely limited.

This doesn't necessarily mean to say that Mr and Mrs W couldn't have been put at a disadvantage when entering into the upgrade agreement if the contractual terms criticised by the PR were unfair under the UTCCR. But as I've already said, as far as I can currently tell, the potential unfairness of those terms never actually arose in practice.

In summary, I'm not persuaded that a court is likely to find the relationship between Shawbrook and Mr and Mrs W unfair for the purposes of S140A.

Irresponsible Lending

The PR have made various allegations suggesting that the loans were provided irresponsibly. In particular that no affordability checks were undertaken by D or Shawbrook, having not discussed this aspect with Mr and Mrs W and not sought details of income and expenditure as part of any assessment.

Shawbrook haven't provided specific evidence of their credit assessment or details of Mr and Mrs W's credit files or credit scores at the time. But they have said that an appropriate credit assessment was completed based upon their *"regulatory obligations under CONC rule 5.2.1".*[5] And that the loans were considered affordable based upon the information they were aware of at the time, and the credit reference checks they undertook. I've also seen a copy of the loan application Mr and Mrs W completed in July 2016 which includes details of their income and property equity.

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 W in order to uphold their complaint here. However, with no information about Mr and Mrs W's actual position at the time and no evidence or suggestion that they struggled to maintain repayments, I can't reasonably conclude the loans were unaffordable for them. And given both loans were fully repaid within

[5] The Financial Conduct Authority Consumer Credit Sourcebook ("CONC")

12 months of being drawn, there doesn't appear to be any evidence of unaffordability or resultant loss.

Summary

Having carefully considered all the information and arguments presented in this complaint, I'm not currently persuaded that Shawbrook's response to Mr and Mrs W's claim was ultimately unfair or unreasonable. So, while I appreciate they will be disappointed, I currently don't intent to uphold their complaint.

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, Shawbrook accepted my findings and confirmed they had nothing further to add at this point.

The PR didn't accept my provisional findings and responded at length with a number of points for me to consider. In particular, they thought I'd *"given insufficient weight to* [Mr and Mrs W's] *witness statement"* and went on to highlight a number of points within that document they thought should be given further consideration. As I've already said above, I've fully and carefully considered all recollections provided. But these need to be considered in a balanced way against the evidence and information available from the time of the sale – that's what I've done here.

I think it's also relevant to say that a good proportion of Mr and Mrs W's recollections do relate to purchases and interactions that pre-date the ones that are the subject of this complaint. And I can't reasonably hold Shawbrook responsible for events or interactions for which there is no like claim under the CCA.

The investment allegation

The PR have made repeated reference to the Fractional Timeshare purchased by Mr and Mrs W in 2013, which they suggest ultimately resulted in Mr and Mrs W upgrading their points-based membership. They believe this reflects Mr and Mrs W's strategy to increase their "investment" for a future return.

As I said in my PD, it appears the Fractional product exchange was unwound within 2 months of completion. And in any event, that transaction doesn't form part of this complaint. And it didn't as far as I can see, involve any funding from Shawbrook. As regards the subsequent upgrades of Mr and Mrs W's points-based membership, it appears the first of those upgrades didn't occur until almost three years later.

Ultimately, and as I've already concluded in my PD, I've found no evidence that D represented or sold the points-based upgrades as a financial investment. Whilst I acknowledge what Mr and Mrs W have said, the evidence provided from the time simply doesn't support that. Their motivation may well have been based upon a perception formed that an investment return could be achieved. But I can't fairly say that this was because of anything D said or did.

Shawbrook's handling of the claim

The PR assert that Shawbrook didn't consider similar complaints when investigating Mr and Mrs W's claim, as required within the FCA's DISP rules. The original claim was based upon allegations of misrepresentation and unfairness. These aspects are governed under various legislation. These include, the Misrepresentation Act 1967 and the UTCCR. As I've explained in my PD, under the CCA, a like claim can be made against Shawbrook. So, these are legal claims.

The FCA's DISP rules apply to complaints about the provision of financial products and services. The subject of Mr and Mrs W's legal claim is the purchase of timeshare products rather than any financial product or service. So, I would expect Shawbrook to handle and consider the claim as such. As far as I can see, that's what they did here.

The alleged unfairness of the foreclosure clause(s)

The PR suggest *"it is incorrect to say that* [D] *does not exercise the* [foreclosure clause]*"*. To support this, they've provided a redacted copy of a letter recently sent by D to another consumer.

I don't believe I made any reference in my PD to D not exercising the foreclosure clause(s). Only that there's no evidence or assertion they did so in Mr and Mrs W's case. I also don't see how the circumstances of, or D's actions towards, another consumer has bearing upon what actually happened in Mr and Mrs W's case. As I previously said, I don't think I need to formally decide this point because, even if the terms were unfair, I can't see they've actually operated unfairly against Mr and Mrs W.

What's more, D has (as I understand it) given Shawbrook an undertaking that consumers with complaints at this service, who still have points-based product membership, can choose to relinquish their membership without having to pay any of their outstanding annual management charges (if there are any) and without prejudice to their ongoing complaint. With that being the case, even if the terms criticised here are found to be unfair under the UTCCR, in the absence of evidence that the terms in question had been operated unfairly against Mr and Mrs W in practice, D's undertaking would seem to go a long way to mitigating, if not resolving the unfairness that the terms might otherwise have led to.

Conclusion

Once again, I would like to assure the Mr and Mrs W that I have carefully and fully considered everything that's been said and provided. Having done so, I've not been persuaded to vary from the findings in my PD. 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 and Mrs W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and Mrs W to accept or reject my decision before 9 August 2023.

Dave Morgan
Ombudsman