

The complaint

Mr F and Mrs B complain that Shawbrook Bank Limited won't refund to them the money that they paid for some holiday club membership points rights. They're being represented in this complaint by a claims management company.

What happened

Mr F and Mrs B had bought 7,000 holiday club membership points rights from a holiday company in November 2013 and 8,000 more holiday club membership points rights in February 2016. They then entered into a purchase agreement to buy another 7,500 membership points rights from the holiday company in April 2016. The total price payable for those points rights was £7,500 and they also entered into a fixed sum loan agreement with Shawbrook Bank for a loan of that amount. They agreed to make 120 monthly repayments of £110.59 to Shawbrook Bank, with the first payment due three months after the advance date.

Mr F and Mrs B's representative made claims, on behalf of Mr F and Mrs B, to Shawbrook Bank under sections 75 and 140A of the Consumer Credit Act 1974 in December 2021. It said that the holiday company was in breach of contract, Shawbrook Bank was liable for procuring a breach of fiduciary duty and the purchase agreement and the loan agreement are unfair. It also said that the points rights were misrepresented to Mr F and Mrs B, the holiday company was in breach of the EU timeshare directive and Shawbrook Bank failed to carry out a sound and proper credit assessment.

Shawbrook Bank responded to those claims in detail and set out the reasons that it was unable to conclude that their claims should be upheld. Mr F and Mrs B weren't satisfied with its response so a complaint was made to this service. Mr F and Mrs B's complaint form says that: the holiday company and Shawbrook Bank failed to conduct a proper assessment of their ability to afford the loan; Shawbrook Bank paid a commission to the holiday company which wasn't declared to them; and the holiday company unduly pressured them into entering into the purchase agreement and the loan agreement; all rendering the loan agreement unfair pursuant to section 140A. Shawbrook Bank then said that it was unable to uphold their complaint about the outcome of their claims.

Our investigator didn't recommend that Mr F and Mrs B's complaint should be upheld as she didn't think that Shawbrook Bank's decision to turn down their claims was unfair or unreasonable. She wasn't persuaded that there was a misrepresentation at the time of sale. She said that she hadn't seen enough to suggest that the relationship between Mr F and Mrs B and Shawbrook Bank was unfair and she wasn't persuaded that a court would reach the conclusion that the relationship was unfair. She also said that she hadn't seen anything persuasive to suggest that the lending was unaffordable for Mr F and Mrs B.

Mr F and Mrs B's representative, on behalf of Mr F and Mrs B, has asked for this complaint to be considered by an ombudsman. It has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses. It has raised concerns about the way that the finance was sold to Mr F and Mrs B and says that the holiday company didn't broker proper credit and failed to meet the standard of a regulated firm. It

has also referred to a decision issued by this service on a complaint about a different type of holiday ownership product in which it was found that there was an unfair relationship. It says that the submissions raised in Mr F and Mrs B's complaint are the same as the issues raised in that decision so their relationship with Shawbrook Bank is unfair pursuant to section 140A.

Mr F has also made complaints to this service about the finance providers' responses to the claims that he'd made to them about his and Mrs B's November 2013 and February 2016 purchases of membership points rights from the holiday company. Those complaints are being dealt with separately.

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.

Having done so, I agree with our investigator that Mr F and Mrs B's complaint shouldn't be upheld for these reasons:

- Mr F and Mrs B signed the purchase agreement in April 2016 to buy 7,500 more holiday club membership points rights from the holiday company which increased their number of points rights to 22,500;
- they were provided with other documents at that time, including the terms and conditions and a separate standard form of the withdrawal notice that could be given to withdraw from the purchase agreement and they also signed the loan agreement;
- Shawbrook Bank says that Mr F and Mrs B also signed a key information document and a customer compliance statement – but I've not been provided with copies of those documents;
- Mr F and Mrs B's representative made claims to Shawbrook Bank in December 2021 and Mr F and Mrs B then made a complaint to this service – the claim letter refers to claims under sections 75 and 140A, including that the 7,500 points rights were misrepresented to Mr F and Mrs B, but their complaint form only refers to claims under section 140A and doesn't refer to misrepresentations made by the holiday company;
- section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier (provided that certain criteria set out in that section are met) and section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor;
- I'm not determining the outcome of Mr F and Mrs B's claims under sections 75 and 140A as only a court would be able to do that but I'm considering whether or not Shawbrook Bank's response to their claims was fair and reasonable in the circumstances;
- the December 2021 letter says the points rights were misrepresented to Mr F and Mrs B because they were advised that they would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit but they've never made any profit on the product and they believed that they would be buying into an exclusive membership but almost all of the properties can be accessed and booked by non-members;
- neither Mr F and Mrs B nor his representative has provided a detailed account of the circumstances in which the alleged misrepresentations were made, the

conversations that took place or the information that was provided to Mr F and Mrs B before their April 2016 purchase;

- Mr F and Mrs B had bought membership points rights in November 2013 and February 2016 so I consider that it's reasonable to conclude that they would have known whether or not they'd received rental income and about the exclusivity of the membership;
- Shawbrook Bank says that it understands from the holiday company that Mr F and Mrs B had made three holiday reservations between April 2016 and April 2018 but hadn't paid their annual management fees for 2019 onwards so hadn't been permitted to secure any more bookings since then;
- I've seen no evidence to support Mr F and Mrs B's claim that they were advised that they would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit or that the points rights were an investment so I'm not persuaded that there's enough evidence to show that the holiday company represented to them that they would receive such an income or make a profit or that the points rights were an investment;
- I've seen no reference in the purchase agreement or the terms and conditions to the membership points rights giving them an exclusive membership or exclusive access to holiday properties and I'm not persuaded that there's enough evidence to show that the holiday company told them that they were buying into an exclusive membership or that it was reasonable for them to believe that the membership was exclusive;
- I'm not persuaded that there's enough evidence to show that the points rights were misrepresented to Mr F and Mrs B by the holiday company or that they were induced into entering into the purchase agreement by any such misrepresentations;
- the December 2021 letter also says that Mr F and Mrs B's membership would continue for another 37 years (and potentially in perpetuity) and that they had no control of the sums incurred by and/or charged under the contract and those terms are unfair terms pursuant to the Unfair Terms in Consumer Contracts Regulations 1999 and the contract in its entirety is unenforceable;
- it also says that Mr F and Mrs B weren't provided with notice of the holiday company's general meeting for any year after 2010, so they were not given the opportunity of attending and speaking at the meeting, and that is a breach of the holiday company's articles of association and is a breach of contract by the holiday company for the purposes of section 75;
- Shawbrook Bank says that the holiday company has advised that its articles of association make it clear that the holiday club will be wound up in December 2054 and will not continue in existence beyond that date – and it says that Mr F and Mrs B are under no obligation to continue with their membership until then as they can utilise the non-qualified relinquishment option to relinquish their membership;
- the purchase agreement terms and conditions say: *"You agree to pay annual Management Charges, which are described at Article 13 of the Articles of Association of the ... Collection and in the Management Agreement. These documents are contained in the ... Collection Legal/Governing Documents. The charges will be calculated for future years as described in these documents"*;
- I'm not persuaded that those terms would properly be considered to be unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999, that the purchase agreement is unenforceable or that those terms are enough to constitute a breach of contract for which Shawbrook Bank would be liable under section 75;

- Mr F and Mrs B had been members of the holiday company since November 2013 but they bought the points rights which are the subject of this complaint in April 2016 so they would only have had a right to attend meetings of the holiday company arising from the points that they bought in April 2016 after that time and not from 2010;
- I've seen no evidence to show that Mr F and Mrs B have contacted the holiday company about the general meetings or to tell it that they haven't received the notices of its meetings and the holiday company says that notices for the 2015, 2016, 2017, 2018 and 2020 meetings were sent to Mr F and Mrs B by e-mail and that they were received and opened;
- I'm not persuaded that there's enough evidence to show that there's been a breach of the holiday company's articles of association, but even if there had been such a breach, I don't consider that it would be a breach of contract for which Shawbrook Bank would be liable under section 75;
- I'm not persuaded that there's enough evidence to show that there's been any breach of contract, or a breach of the EU timeshare directive, by the holiday company for which Shawbrook Bank would be liable under section 75;
- the December 2021 letter says that Shawbrook Bank paid a commission to the holiday company but the level of commission wasn't disclosed to Mr F and Mrs B and they didn't consent to it and Mr F and Mrs B's complaint form says that Shawbrook Bank paid a commission to the holiday company which wasn't declared to them;
- Shawbrook Bank says that the customer compliance statement which Mr F and Mrs B signed states: *"We are aware that [the holiday company] is able to recommend credit facilities to its customers to fund their purchase, but understand that [the holiday company] is not independent. We have been advised that [the holiday company] works with a number of selected credit providers and ... is entitled to receive a commission in respect of credit brokered"*;
- I've seen no evidence to show that Mr F and Mrs B asked Shawbrook Bank for any information about any commission that it paid to the holiday company until their representative's letter to it in December 2021;
- I've not been provided with any evidence to show what commission, if any, was paid by Shawbrook Bank to the holiday company but from what this service has seen across the industry, if commission was ever paid it tended to be low and of less than 15% and I'm satisfied that Shawbrook Bank wouldn't have breached any duty in making any such payment – nor was it under any regulatory duty to disclose the amount of any commission paid in these circumstances - and I don't consider that the level of any commission that was normally paid in this type of situation was sufficiently high to mean that Shawbrook Bank should have appreciated that not disclosing any commission to Mr F and Mrs B risked the relationship being unfair under section 140A;
- Mr F and Mrs B entered into the loan agreement in April 2016 but no complaint about the commission was made to Shawbrook Bank until December 2021 and, if they were concerned about the commission that had been paid, I consider that it would be reasonable to expect them to have asked about it sooner than they did;
- the December 2021 letter says that Shawbrook Bank failed to carry out a sound and proper credit assessment and Mr F and Mrs B's complaint form says that the holiday company and Shawbrook Bank failed to conduct a proper assessment of their ability to afford the loan;

- Shawbrook Bank says that it lends to customers responsibly and carries out checks in line with its regulatory obligations before granting loans to customers – it says that it uses lending industry standard products which are designed to assess (on the basis of credit searches and information provided to it by prospective borrowers) the likelihood of them defaulting on their repayment obligations and the likelihood of them becoming over-indebted after entering into the agreement – it says that it's satisfied that those checks were carried out to the required standard before granting Mr F and Mrs B their loan and were appropriate for the type and amount of credit provided so it doesn't agree that the loan was unaffordable;
- I've seen no evidence to show that the loan wasn't affordable for Mr F and Mrs B when it was made to them or that they've experienced any financial difficulties since then – and I've seen no evidence to show that they asked Shawbrook Bank for any information about the affordability assessment that it conducted before their representative's December 2021 letter and I consider that it would be reasonable to expect them to have raised any concerns about the affordability assessment before then;
- Shawbrook Bank hasn't provided any further information about the affordability assessment that it conducted but I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mr F and Mrs B, that Shawbrook Bank should have done more to assess the affordability of the loan for them, that the loan was mis-sold to them or that Shawbrook Bank has acted incorrectly in connection with the loan;
- Mr F and Mrs B's complaint form says that the holiday company unduly pressured them into entering into the purchase agreement and the loan agreement but they'd been provided with the separate standard form of the withdrawal notice that could be given to withdraw from the purchase agreement and which set out their right to withdraw from the agreement within fourteen days without giving any reason – but I've seen no evidence to show that they contacted either the holiday company or Shawbrook Bank to withdraw from the purchase agreement within the withdrawal period;
- the loan agreement also said that Mr F and Mrs B had the right to withdraw from the loan agreement without giving any reason for a period of fourteen days - but I've seen no evidence to show that they contacted Shawbrook Bank to withdraw from the loan agreement within the withdrawal period;
- Mr F and Mrs B signed the purchase agreement in April 2016 but I've seen no evidence to show that they complained to either the holiday company or Shawbrook Bank about the undue pressure that they claim was applied to them until the December 2021 letter – if they had been unduly pressured into signing the purchase agreement and didn't want to buy the additional points rights, I consider that it would be reasonable to expect them to have contacted either the holiday company or Shawbrook Bank about that issue sooner than they did;
- Mr F and Mrs B had bought 7,000 points rights in November 2013 and 8,000 points rights in February 2016 and Mr F's complaint forms about the finance providers' responses to the claims that he'd made to it about those purchases say that the holiday company unduly pressured him and Mrs B into entering into the purchase agreements and him into entering into the loan agreements at those times – but if they'd been unduly pressured into entering into those agreements in November 2013 and February 2016, I don't consider it to be likely that they'd then have allowed themselves to be unduly pressured into buying more points rights in April 2016;
- I'm not persuaded that there's enough evidence to show that Mr F and Mrs B were unduly pressured into entering into the purchase agreement or the loan agreement in

April 2016 or that the holiday company used unacceptable sales practices against them;

- Mr F and Mrs B's representative has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses – but it would be for a court to determine whether or not any of the terms in the agreements were unfair;
- I don't consider that the presence of an unfair (or potentially unfair) term alone is likely to mean that a court would conclude that it created an unfair relationship between a debtor and a creditor as the court would consider how the term operated in practice and whether the operation of that term caused the relationship to be unfair;
- I'm not persuaded that there's enough evidence to show that the terms of the documents have been applied or operated unfairly against Mr F and Mrs B and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mr F and Mrs B and Shawbrook Bank;
- Mr F and Mrs B's representative has referred to a decision issued by this service on a complaint about a different type of holiday ownership product in which it was found that there was an unfair relationship but that decision related to a different type of holiday ownership product which was sold as an investment and related to a specified property – Mr F and Mrs B bought some membership points rights from the holiday company which didn't relate to a specified property and which I don't consider were sold to them as an investment;
- both types of products were often sold in similar ways and may have had similar contractual documentation but the operation and effect of the contractual documentation would be significantly different between the products;
- I'm not persuaded that there's enough evidence to show that Mr F and Mrs B's relationship with Shawbrook Bank was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mr F and Mrs B and Shawbrook Bank in these circumstances;
- I sympathise with Mr F and Mrs B for the issues that they've had with their membership points rights but I consider that Shawbrook Bank's response to the claims that had been made to it was fair and reasonable; and
- I find that it wouldn't be fair or reasonable in these circumstances for me to require Shawbrook Bank to refund to Mr F and Mrs B any of the money that they've paid under the loan agreement, to cancel the loan agreement, to pay them any compensation or to take any other action in response to their complaint.

My final decision

My decision is that I don't uphold Mr F and Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs B to accept or reject my decision before 2 April 2024.

Jarrold Hastings
Ombudsman