

The complaint

Mr S's complaint is, in essence, that Shawbrook Bank Limited ('Shawbrook') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr S was an existing member of a timeshare arrangement (the 'Fractional Club') provided by a timeshare business (the 'Supplier') having bought 810 fractional points on 11 September 2016 at a cost of £15,648. To help with the purchase of this Fractional Club membership Mr S took out a fixed-sum loan agreement with Shawbrook for £10,000. This purchase and loan agreement is the subject of a separate complaint at this Service and is not being considered in this decision.

On 28 November 2017 (the 'Time of Sale'), whilst on a holiday taken through his existing Fractional Club membership, Mr S traded in his existing Fractional Club membership and purchased a new membership of a timeshare (the 'Signature Collection') from the Supplier. He entered into an agreement with the Supplier to buy 1,100 fractional points at a total cost of £23,330 (the 'Purchase Agreement'), but after taking into account the trade-in value that the Supplier gave to his existing Fractional Club membership, he ended up paying £12,800 for the Signature Collection membership.

The Signature Collection, like his previous Fractional Club membership, was asset backed – which meant it gave Mr S more than just holiday rights. It also included a share in the net sale proceeds of a property named on his Purchase Agreement (the 'Allocated Property') after his membership term ends.

Mr S paid for his Signature Collection membership by taking out a fixed sum loan agreement from Shawbrook in his name (the 'Credit Agreement') for £22,424 which also consolidated the remaining finance from his previous loan.

Mr S – using a professional representative (the 'PR') – wrote to Shawbrook on 21 March 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against Shawbrook under Section 75 of the CCA, which Shawbrook failed to accept and pay.
2. Shawbrook being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because (1) Shawbrook did not show sufficient due diligence as they didn't carry out the right creditworthiness assessment and had used self-certified income/expenditure, and (2) the loan was unaffordable for him.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mr S says that the Supplier made a pre-contractual misrepresentation at the Time of Sale –

namely that the Supplier:

- Told him that he was buying part of an asset which would grow in value like normal property, which he could sell and recoup his investment in later years, when this was not true.

Mr S says that he has a claim against the Supplier in respect of the misrepresentation set out above, and therefore, under Section 75 of the CCA, he has a like claim against Shawbrook, who, with the Supplier, is jointly and severally liable to him.

(2) Section 75 of the CCA: the Supplier's breach of contract

Although not expressed in terms of a breach of contract, Mr S says, in effect, that the Supplier breached the Purchase Agreement because he found it difficult to book the holidays he wanted, when he wanted, due to long waiting lists and poor availability.

As a result of the above, Mr S says that he has a claim against the Supplier. Therefore, under Section 75 of the CCA, he has a like claim against Shawbrook, who, with the Supplier, is jointly and severally liable to him.

(3) Section 140A of the CCA: Shawbrook's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr S says that the credit relationship between him and Shawbrook was unfair to him under Section 140A of the CCA. In summary, they include the following:

- Signature Collection membership was an Unregulated Collective Investment Scheme ('UCIS'), the selling of which was a breach of the Financial Services and Markets Act 2000 ('FSMA').
- He was coerced and pressured into purchasing Signature Collection membership by the Supplier who took advantage of his illness and vulnerability.
- The Supplier did not explain that Mr S's beneficiaries, should he die before the term of the membership was reached, would be responsible for the ongoing management fees.
- The decision to lend was irresponsible because Shawbrook didn't carry out the right creditworthiness assessment.
- No choice of lender was given to Mr S.
- There was undisclosed commission paid to the Supplier.
- The interest rate on the loan was unfairly high.

Shawbrook dealt with the Letter of Complaint as a dispute, and replied to Mr S on 22 July 2022 saying it saw no grounds to uphold his claim. As a result, PR referred Mr S's complaint to this Service on the same day. PR said Mr S was complaining about:

- Insufficient creditworthiness checks were carried out by Shawbrook and the loan was unaffordable for Mr S.
- The Supplier had made actionable misrepresentations to Mr S at the Time of Sale.

- The credit relationship between Mr S and Shawbrook was unfair to him as the Signature Collection was sold/marketed to him by the Supplier as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The Signature Collection was a Collective Investment Scheme (CIS) the selling of which was prohibited under FSMA.

After notification that Mr S's complaint had been referred to ourselves, Shawbrook started its investigation into his complaint, and sent Mr S its final response letter (the 'FRL') on 27 September 2022, rejecting it on every ground. It said, in summary:

- Mr S had been given his 14-day withdrawal period which he had not used.
- Mr S had not informed it of his vulnerability until April 2019.
- It had carried out a full affordability assessment and had concluded that the loan was affordable given his self-declared income and his lending history.

On 22 March 2023 the PR confirmed that Mr S did not accept Shawbrook's response and asked for his complaint to be assessed by an Investigator. It also submitted a written statement from Mr S's wife, Mrs S, which set out Mr S's recollections of both the 2016 and 2017 sales. As far as is relevant to this complaint she said:

"In 2017 we made plans to go back to the resort, but just before we were due to fly, I was ill, as I was having a rough time with my pregnancy. Therefore, we made a last minute change, and [Mr S] went with his sister, as he always needs a carer. However, when they got to the resort, and tried to enter the arranged meeting, the reps would not allow his sister into the meeting, as she was not on the previous application.

[Mr S] had to attend the meeting alone, but he needed his sister's support and was very upset at having to attend the meeting without her as he felt intimidated. At this meeting he was in a wheelchair, and he found it hard to challenge the CLC reps as they were confident and had very forceful personalities. Also, he thought he was going into a meeting about cancelling the previous timeshare. However, he quickly became aware that the meeting was about upgrading to a bigger and better timeshare. He said they would not talk about the cancellation and just wanted to discuss a better holiday experience for the family as well as being able to make a bigger profit from the sale of this new timeshare, which meant taking on another loan. The reps had again explained by comparing the costs, in the long run, that this was even cheaper than the timeshare he had purchased in 2016.

This again put him under undue pressure that exacerbated his medical situation. The outcome of him being in this meeting made it difficult for him to cope and he felt very unwell. [Mr S] was confused and upset, and the Reps knew he was struggling, but he was still pressurised into upgrading his timeshare membership. He went there to get rid of the loan and the timeshare to reduce our costs, their reps just took advantage of [Mr S]'s vulnerability.

When he got home, I contacted [the Supplier] again, but got no joy. I then contacted [Shawbrook] on many occasions, pleading for help. They were of no help at all, as they had said they had investigated and were happy with the application and [the Supplier's] sales processes. I told them so many times that [Mr S] was on benefits since 2014 and we could not afford the loan. They just ignored this, it was awful and very upsetting speaking to them."

Mr S's complaint was considered by an Investigator at our Service. The Investigator thought that Mr S's irresponsible lending complaint had been made too late under the rules by which our Service must operate, so it was out of our jurisdiction. However, he thought Mr S's

complaint under Section 140A of the CCA ought to be upheld. He thought the Supplier had more likely than not marketed and sold the Signature Collection membership to Mr S as an investment, contrary to Regulation 14(3) of the Timeshare Regulations, and in doing so rendered the relationship between Mr S and Shawbrook unfair to him under Section 140A of the CCA. The Investigator then went on to set out how he thought Shawbrook should calculate and pay compensation to Mr S.

Shawbrook did not agree with the Investigator. It said there was insufficient evidence to say the Signature Collection was sold and/or marketed to Mr S as an investment, so it didn't think the credit relationship was unfair to him.

Mr S agreed that the complaint should be upheld, but disputed some elements of the calculation methodology as set out by the Investigator.

As an informal resolution of this complaint could not be reached, the matter was passed to me for a decision.

On 7 October 2024 I issued a provisional decision setting out my initial thoughts on our Service's jurisdiction, and on what I considered to be a fair and reasonable outcome to Mr S's complaint.

In summary, I thought that this Service had jurisdiction to consider Mr S's complaint, and I thought that Shawbrook wrongfully entered into the Credit Agreement contrary to the Financial Conduct Authority (the 'FCA')'s Consumer Credit Sourcebook ('CONC'). And had Shawbrook carried out its affordability assessment in keeping with the relevant rules and guidance at the Time of Sale, I think Mr S would have been saved from the financial burdens of both the Credit and Purchase Agreements.

In my provisional decision I said:

The Financial Ombudsman Service's Substantive Jurisdiction

The part of the FCA rules that cover time limits are found within the Dispute Resolution Rules ('DISP'). DISP 2.8.2. says, as far as is relevant here:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

- 1) more than six months after the date on which the respondent sent the complainant its final response...;*

Unless:

- 3) In the view of the Ombudsman, the failure to comply with the time limits...was as a result of exceptional circumstances.*

The Investigator thought that Mr S's complaint - that Shawbrook's decision to lend to him was irresponsible - had been made too late. He thought this because Mrs S, on Mr S's behalf, had made a complaint on 4 August 2021 which had included a complaint that Shawbrook should never have given Mr S finance as he couldn't afford it. And as this complaint was answered with an FRL dated 30 September 2021, Mr S then had six months from that date to refer this complaint to our Service.

But I don't agree with the Investigator's conclusion here, because having considered the nature of the complaint Mrs S made for Mr S on 4 August 2021, I cannot see that it was a complaint about Shawbrook's decision to lend to Mr S for his purchase of the Signature

Collection at the Time of Sale. I think it was a complaint about the lending decision for the earlier sale of the Fractional Club membership on 11 September 2016. I'll explain.

The transcript of Mrs S's call to Shawbrook on 4 August 2021 describes a sales meeting at which she was present with Mr S and their baby. The following is a relevant section of the transcript of the call:

"Mrs has explained that they were given a free holiday abroad on the premise that they would need to attend a meeting regarding a timeshare and that they only had to attend and there was no obligation to purchase, as Mr health poor they felt that the holiday would be beneficial to Mr and they had a 11 month old baby so nice for Mrs etc, Mr & Mrs went on holiday they were requested to attend a meeting which they did, they arrived at 9am and by 4pm they baby was ill they had been kept in room all day with hard sales at them to buy the timeshare, the baby started to throw up everywhere and customers were advised if they both left that they would have to attend another full day meeting so Mrs left with child and Mr stayed."

And then further:

"...the following day Mrs contacted [the Supplier] who adv that they had 14 days and as they were going bk UK forms would be sent to cancel."

So, in this call, Mrs S describes how the baby was sick, and she had to leave. She then goes on to describe how she tried to cancel the purchase Mr S had made while they were at the resort.

This description of events from Mrs S is very different to what Mr S (via his PR) is saying in the complaint I am assessing here. For example, there are records that show Mr and Mrs S's baby was unwell during the sales process for the Fractional Club membership, and Mr S had to finalise and agree to purchase it on his own as a result. This is confirmed in the Supplier's own records. And Mrs S didn't go on the holiday where Mr S purchased the Signature Club - he went with his sister as Mrs S was unwell and couldn't travel. So, it is in my view clear, that the sale Mrs S is complaining about in the call on 4 August 2021, and the decision by Shawbrook to provide finance for that sale, is the sale of the Fractional Club membership on 11 September 2016.

So, it is my current view that no complaint had previously been made about the lending decision related to Mr S's purchase of the Signature Collection prior to the Letter of Complaint dated 21 March 2022. And Shawbrook assessed and replied to this complaint point, along with the other allegations of unfairness and misrepresentations, in its FRL dated 27 September 2022, and PR referred this complaint back to our Service within six months of that date.

So, I am currently satisfied that Mr S's complaint – that Shawbrook's decision to provide him a loan of £23,330 was irresponsible – has been made in time, and is one that I am able to consider the merits of.

The merits of Mr S's complaint – my provisional findings

The legal and regulatory context

At the time of the lending, Shawbrook had to comply with the rules and guidance set down by the FCA and published in the FCA Handbook. Part of that was titled 'Principles of Business' (the 'PRIN') – the most relevant of which was PRIN 2.1.1R(6) which says "[a] firm must pay due regard to the interests of its customers and treat them fairly."

The FCA also set out more specific business guidance for different regulated activities, including when providing consumer credit, in CONC. The relevant part is CONC 5, which deals with responsible lending. At the time of Mr S's borrowing, some of the specific rules and guidance included:

- Before entering into a regulated credit agreement, Shawbrook needed to undertake an assessment of Mr S's creditworthiness (CONC 5.2.1R(1)).*
- Any assessment needed to consider the potential for any commitments under the agreement to adversely impact Mr S's financial situation, taking into account the information of which Shawbrook was aware at the time of lending, and Mr S's ability to make repayments over the life of the loan (CONC 5.2.1R(2)).*
- Any assessment needed to be based on sufficient information obtained from Mr S and a credit reference agency, where necessary (CONC 5.2.1R(3)).*
- Any assessment was dependent upon and proportionate to factors that included the type of credit, the amount borrowed, the cost of credit, Mr S's financial position at the time of lending, Mr S's credit history and existing financial commitments, any future financial commitments or changes in circumstances and any vulnerability; but this list wasn't exhaustive (CONC 5.2.3G).*
- It may have been disproportionate to consider every factor in every case, but that was dependent on the particular circumstances (CONC 5.2.4G(2)).*
- Shawbrook should have considered the type of information it needed to use in its assessment, which could have included evidence of income and expenditure, a credit score, a credit reference agency report and information provided by Mr S (CONC 5.2.4G(3)).*
- A creditworthiness assessment was more than just assessing Mr S's ability to repay the credit (CONC 5.3.1G(1)) and any such assessment should have included Shawbrook taking reasonable steps to assess Mr S's ability to meet the repayments in a sustainable manner and without incurring financial difficulties or experiencing significant adverse consequences (CONC 5.3.1G(2)).*
- If Shawbrook took Mr S's income into account in the creditworthiness assessment (which it said it did), it wasn't generally sufficient to rely solely on a statement of income from Mr S (CONC 5.3.1G(4)(b)).¹*

Also relevant (and referred to in CONC 5.2) was the Office of Fair Trading's ('OFT') Irresponsible Lending Guidance. This guidance helped set out good industry practice prior to the FCA taking over the regulation of consumer credit in April 2014. At para 4.1 it was said:

"Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences."

"Sustainable" is defined in CONC 5.3.1[G] (6):

"For the purposes of CONC "sustainable" means the repayments under the regulated credit agreement can be made by the customer:

¹ Although if the information provided was false and reasonable and proportionate checks wouldn't have shown to Shawbrook that was the case, Shawbrook wouldn't have contravened this guidance.

- a) *Without undue difficulties, in particular:*
 - i. *The customer should be able to make repayments on time, while meeting other reasonable commitments; and*
 - ii. *Without having to borrow to meet the repayments.*
- b) *Over the life of the agreement [...]*
- c) *Out of income and savings without having to realise security or assets”*

And the FCA guidance went on to say:

“A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of the credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer’s financial situation.”

In summary, Shawbrook’s assessment of Mr S’s circumstances before agreeing to lend to him had to be borrower-focused. In practice, that meant that as well as Shawbrook deciding for itself its own level of acceptable risk, it also had to assess the risk of lending to Mr S as a borrower. In doing that, it needed to assess whether he could afford the repayments in a sustainable way over the term of the loan.

The merits of Mr S’s complaint

The Financial Ombudsman Service has set out its approach to lending complaints on its website, so in keeping with that and what I’ve set out above, when deciding a fair and reasonable outcome to this complaint, I need to consider:

1. *Did Shawbrook carry out reasonable and proportionate checks to satisfy itself that Mr S was likely to have been able to repay the borrowing in a sustainable way?*
 - i. *If Shawbrook carried out such checks, did it lend to Mr S responsibly using the information it had? Or*
 - ii. *If Shawbrook didn’t carry out such checks, would reasonable and proportionate checks have shown that Mr S was unlikely to have been able to repay the borrowing in a sustainable way?*
2. *Did Mr S lose out as a result of Shawbrook’s decision to lend to him?*

As I’ve said above, having considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint, I currently think that this complaint should be upheld because Shawbrook wrongfully entered into the Credit Agreement, contrary to CONC. And had Shawbrook carried out its affordability assessment in keeping with the relevant rules and guidance at the Time of Sale, I think Mr S would not now have the financial burden of both the Credit and Purchase Agreements.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr S’s complaint, it isn’t necessary to make formal findings on all of them. This includes the allegations that there was unfairness in the credit relationship between himself and Shawbrook under Section 140A of the CCA, and that the Supplier misrepresented the Signature Collection and breached the Purchase Agreement, about which Mr S made a claim under Section 75 of the CCA. Because, even if those aspects of

the complaint ought to succeed, the redress I'm currently proposing puts Mr S in the same or a better position than he would be in if the redress was limited to those.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Did Shawbrook carry out reasonable and proportionate checks?

The FCA acknowledged in CONC that what constituted reasonable and proportionate checks when Shawbrook lent to Mr S depended on several factors, and what these checks looked like in practice wasn't an exact science.

But CONC 5.2.3[G] indicated that the factors relevant to determining what such checks looked like included the type of credit being applied for, along with the size and cost of the borrowing. Other relevant factors related to the borrower's financial circumstances, which included their financial history and outlook, along with their situation as it was, including any signs of vulnerability and/or financial difficulty.

Shawbrook had to carry out checks that were proportionate to a number of factors like those in CONC 5.2.3[G], and I think reasonable and proportionate checks ought to have been more thorough:

- The lower an applicant's income - because it could be more difficult to make the repayments as a result;*
- The higher the amount repayable - because it could be more difficult to meet a higher repayment, especially from a lower level of income; and*
- The longer the loan term – because the total cost of the credit was likely to have been greater given the longer time over which repayments have to be made.*

What's more, as the FCA said in CONC 5.3.1[G] (4)(b), it didn't consider self-certification of income to be generally sufficient. It went on to say that firms, like Shawbrook, had to take account of the fact that the risk of credit being unsustainable was directly related to the amount of the credit granted (along with associated interest/charges etc) relative to the borrower's financial situation.

So, it seems that the circumstances in which it was reasonable to conclude that a less detailed affordability assessment was proportionate, is more likely to be limited to applicants whose financial situation was stable, and whose borrowing was relatively insignificant and short-lived. And as I go on to explain below, I do not think Mr S's circumstances fitted that description.

In its final response to his complaint, Shawbrook said:

"As part of ensuring that we lend to customers responsibly, we carry out reasonable and proportionate checks in line with our regulatory obligations, including the relevant provisions set out in the Financial Conduct Authority's Consumer Credit Sourcebook ("CONC") relevant to the time of lending, before granting loans to our customers..."

[Mr S] advised his gross income was £60,000 at the point of application and bureau data evidenced an excellent payment history; the loan appeared affordable on the income stated, together with a debt-to-income score of 128%, which was within tolerance of the Bank's threshold."

And when asked to by this Service, Shawbrook sent its internal records of its decision-making process, and the third-party data it had access to at the time. This data set out what credit agreements Mr S had at the Time of Sale and how much credit and debt he already had, and whether there was any adverse reporting around his repayment history.

So, I accept this would have given Shawbrook an overview of Mr S's financial situation, but I can't see that it would have given it any indication of his income and expenditure, and his ability to repay the loan over the following 15 years.

From what I can see Shawbrook considered the following as part of its affordability assessment:

- 1. A one-page application form that was limited to capturing Mr S's personal details and, insofar as it was relevant to a creditworthiness assessment, the following information:
 - a. Mr S's monthly mortgage payments; and*
 - b. Mr S's employment status and his self-declared gross annual income.**
- 2. The results of a credit search.*
- 3. The results of third-party data.*

From Shawbrook's response to this Service I can see that Mr S's application was manually checked by an underwriter. The underwriter, at 13.36hrs on 28 November 2017 recorded the following:

"score 482, vr trail seen. dti 128%. excellent payment history, loan appears affordable on income stated. ok to proceed."

So, it appears to me that the creditworthiness assessment Shawbrook undertook was based on Mr S's credit file and an unsubstantiated statement of Mr S's income provided by the Supplier, and the underwriter's comment that the lending appears affordable on the income stated is, in my view, less than convincing evidence.

As I set out above, the purpose of the creditworthiness assessment was to ascertain whether Mr S was able to repay the borrowing in a sustainable way. But I can't see that any assessment of that was undertaken. In both answering Mr S's initial complaint, and in responding to our Service's request for information, Shawbrook has failed to say how it assessed Mr S's ability to repay the borrowing by giving any indication of what it expected his disposable income to be to cover the repayments. It follows, I can't say that Shawbrook carried out reasonable and proportionate checks given the circumstances of this complaint.

What would reasonable and proportionate checks have shown?

As I've already explained, there weren't specific checks that Shawbrook needed to carry out, so it's not possible to say with certainty what reasonable and proportionate checks would have shown. But what I am considering, is the likelihood that reasonable and proportionate checks would have shown that either Mr S would or wouldn't have been able to sustainably repay his loan.

This is difficult as I am making this decision several years after the date that the loan was granted. So, I've used evidence of the checks Shawbrook says it relied upon at the time, and

also other available evidence provided by Mr S to get a picture of his circumstances at the time. This includes copies of his bank statements and his benefits income.²

According to the results of the credit search that Shawbrook has told us it used, I can see that Mr S already had a loan, a mortgage, credit cards and a bank account with a not insignificant overdraft in place.

Type of credit	Starting date	End date	Outstanding Balance	Repayment period	Monthly repayment
Loan	14/04/2016		£18,314	5 years	£490
Mortgage (joint)	24/02/2016		£284,186		£348
Credit Card	16/09/2011		£7,261		
Credit Card	24/09/2013		£3,543		
Credit Card	10/09/1997		£12,193		
Current Account	06/10/1994		-£3,509 (OD)		

So, I can see Mr S already owed (not taking into account the mortgage) a little over £44,000 in unsecured lending between three credit cards, a loan and an outstanding overdraft balance. And the loan agreed under the Credit Agreement was going to increase this debt to a little over £67,000.

The Finance and Leasing Association (the 'FLA') suggested in its Lending Code as long ago as 2006 that having four or more credit commitments and/or spending more than 25% of gross income on consumer credit might suggest that there was a higher risk of financial difficulty. Such risk factors weren't included in the FLA's 2012 Lending Code – nor the amended version of that in 2014. But since then the Office of National Statistics' (the 'ONS') has included in its definition of 'problem debt':

1. Households whose debt repayments were/are at least 25% of its net monthly income; or
2. Households whose debt to net annual income is higher than 20%.

It can be both an immediate and longer-term problem for a household's material standard of living if the costs of servicing the debt take up too large a proportion of the household's income. The more income a consumer needs to make available for repayments, and the longer they need to make the repayments for, the more risk there is that they'll find the borrowing unsustainable.

² I am not making a finding that Shawbrook needed to see these documents at the time of lending in order to carry out reasonable and proportionate checks, just that these are the sorts of documents that might go towards providing evidence of income/expenditure as suggested in CONC 5.2.4G(3).

At £22,424, Shawbrook's loan (before interest and charges) represented roughly 37% of Mr S's gross annual income as declared on his loan application form. And when his existing consumer credit is taken into account, his overall debt to gross annual income (discounting the mortgage he held jointly with Mrs S) was closer to 110%.

And having considered Mr S's current account statements, I can see the level of debt in the form of the overdraft was sustained at about that same level in the three months prior to the loan being agreed. And I cannot see any form of employment income at all – it appears that Mr S's only form of regular income was a fortnightly benefits payment of £219.30. Although I can see some additional irregular payments into the account, these were apparently made by friends and family in order to help Mr S remain under his overdraft limit. I think Mr S was just about living within his means and I cannot see any significant room for discretionary spending.

Had Shawbrook asked for evidence of income and expenditure, I think it would have discovered all of this for itself. But I can't see that any evidence was requested, nor was Mr S asked to provide details of income and outgoings.

I think that reasonable and proportionate checks were likely to have shown Shawbrook that Mr S was unlikely to have been able to repay what he borrowed sustainably over the course of the loan, without a real risk of undue difficulty given his particular circumstances.

Did Mr S lose out financially?

When bringing the complaint to this Service, Mrs S, on Mr S's behalf, has explained the difficulties caused by this loan with Shawbrook. It has been explained that it has made him significantly financially worse off, as well as causing him considerable stress and worry. An agreement was put in place to suspend the repayments during the global pandemic, but these arrears had to be repaid by Mrs S making a credit card payment. And when he again approached Shawbrook for help, it agreed a reduced monthly repayment of £50, which was further reduced to a monthly payment of £1.

From what I've set out above, I have no doubt that Mr S has had the difficulties repaying the loan that he said he had. From his income that I've seen I don't think he could have afforded the loan without making major sacrifices on other household expenses and, as I said before, I don't think those sacrifices would have come from discretionary spending, rather from foregoing normal day-to-day living expenses.

I've considered whether Mr S bore any responsibility for the declaration made to Shawbrook in the loan application that his income was £60,000. Mr S has said that he told the Supplier at the time of the application that he was not working due to ill health, and that he was on benefits, but he says the Supplier told him to enter on the form what he used to earn while he was working. I am unable to say what Mr S was actually told at the time, nor what he said to the Supplier in this regard, but I have no reason to disbelieve what he has said here. But even if Mr S had given a false or incorrect level of income, that wouldn't be enough for me to say Shawbrook was absolved of responsibility. CONC was drafted in such a way as to protect consumers and imposed on Shawbrook a responsibility to assess whether Mr S could repay the loan in a sustainable way. CONC stated that it wasn't generally sufficient to rely on self-declared income and I find there was a duty on Shawbrook, acting proportionately, to verify Mr S's income and expenditure. After all, CONC 5.3.3G required Shawbrook to take adequate steps, insofar as it was reasonable and practicable to do so, to ensure that information provided in the application relevant to a creditworthiness assessment was complete and correct. And, as set out above, I find Shawbrook simply didn't do that.

In conclusion, I think Shawbrook entered into the credit agreement with Mr S in breach of its regulatory requirements. Further, I find that had a significant effect on him by him entering into long-term financial commitments in the form of the Signature Collection membership and the Credit Agreement. I think that, had Shawbrook carried out its affordability assessment in the way should have done, it would have realised Mr S wasn't in a position to repay the loan sustainably and therefore he wouldn't have taken on the financial burden of both the loan and the timeshare.

The responses to my provisional decision

Shawbrook accepted the provisional decision. The PR, on behalf of Mr S, having sought some clarity on the suggested redress, also accepted it. However, it provided some further detail of the negative impact of the financial difficulties Mr S was now experiencing, and how these, along with the stress caused to himself and his family, had exacerbated the medical condition he suffers from. So the PR asked me to consider if a payment towards the distress and inconvenience was also due.

My further considerations

The PR and Mrs S (who now has lasting Power of Attorney) have provided a substantial amount of information and testimony setting out the position Mr and Mrs S and their family are now in, and I thank Mrs S for her candour here, and I can assure her I have read and considered everything that has been said very closely.

But on this occasion, and in the circumstances of this complaint, I don't think any further payment to reflect the distress and inconvenience caused to Mr S is warranted.

In saying this, I in no way wish to downplay the difficulties being faced here by their family. But to direct Shawbrook to make an additional payment, I would have to be satisfied that the situation and the distress caused by what has happened since the Time of Sale would not have happened had Shawbrook not agreed to provide Mr S with the Credit Agreement. And whilst I agree that the lending decision would not have helped with their overall circumstances, given that sadly Mr S's illness is progressive, I am not satisfied that the difficulties Mrs S has described would not have occurred anyway.

The compensation that I am directing Shawbrook to provide puts Mr S back in, as closely as possible, the position he would have been in had he not purchased the Fractional Club at the Time of Sale. And whilst I can see that Mr and Mrs S have experienced significant problems since, I cannot fairly attribute these to the actions of Shawbrook, so I am satisfied that the compensation is fair and reasonable in the circumstances.

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.

And having reconsidered everything, including the responses to my provisional decision, I see no reason to depart from my findings as set out above.

Putting things right

I don't think Shawbrook should have lent to Mr S in the way that it did, and as a consequence, I don't think he would have been able to purchase the Signature Club membership from the Supplier. I think it would be fair and reasonable for Shawbrook to put Mr S, as far as possible, in the position he would have been in had he not entered into either

the Purchase Agreement and the Credit Agreement at the Time of Sale, provided Mr S agrees to assign to Shawbrook the 1,100 Signature Collection points he purchased, or to hold them on trust for Shawbrook if that can be achieved.

This also means, in effect, that any *additional* management fees that he has incurred following his purchase of the Signature Collection, above what he would have ordinarily been responsible for as part of his Fractional Club membership, should also be refunded.

Mr S had 810 Fractional Club points, which he traded in towards his purchase of 1,100 Signature Collection points. So, it is a fair approximation that his management fees for the Signature Collection would have been 26%³ higher than that which would have been payable under the Fractional Club.

Here's what I think needs to be done to compensate Mr S with that being the case – whether or not a court would award such compensation:

- (1) Shawbrook should refund Mr S's repayments made to it under the Credit Agreement and should clear any outstanding balance.
- (2) In addition to (1) Shawbrook should also refund 26% of the management charges Mr S actually paid after his purchase of the Signature Collection membership on 28 November 2017.
- (3) Shawbrook can deduct the market value* of any holiday(s) taken using Mr S's Signature Collection points, since 28 November 2017.
(the 'Net Repayments')

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holiday(s) taken using Mr S's Signature Collection points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

- (4) Simple Interest⁴ at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date Shawbrook settles this complaint.
- (5) Shawbrook should remove any adverse information recorded on Mr S's credit file in connection with the Credit Agreement.

It seems from the submissions provided, that Mr S's membership of the Signature Collection has been suspended for non-payment of the required management charges. If that is the case, I can see it would be possible that Mr S is still entitled to reinstate his Signature Collection membership, which means the remedy I have proposed above does risk providing him with an unjustified windfall. So, to mitigate this risk, as I've already said, Mr S will have to agree to hold the benefit of 1,100 Signature Collection points for Shawbrook, or assign them to it if that can be achieved.

However, it is possible that the Supplier might pursue Mr S for other costs in addition to the annual management charges arising from his Signature Collection membership, so there is also the possibility of continuing detriment that I think needs addressing. So, in keeping with

³ Rounded to the nearest whole number

⁴ HM Revenue & Customs may require Shawbrook to take off tax from this interest. If that's the case, Shawbrook must give Mr S a certificate showing how much tax it's taken off if he asks for one.

what I've said above, Shawbrook should indemnify Mr S against 26% of any other liabilities accruing from 28 November 2017 onwards that result from his ownership of the Signature Collection membership. This, together with what I've said in the paragraphs above will achieve, as closely as I can in this complaint, the same financial position for Mr S as if he had never joined the Signature Collection in the first place.

My final decision

I uphold this complaint and direct Shawbrook Bank Limited to compensate Mr S in line with the steps set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 25 November 2024.

Chris Riggs
Ombudsman