

The complaint

Mr and Mrs M complain that they were mis-sold a timeshare product and the loan used to pay for it. The loan was provided by Shawbrook Bank Limited. Mr and Mrs M have been represented in bringing this complaint by a claims management business, so any reference to their arguments and submissions include those made on their behalf.

What happened

In or around May 2018 Mr and Mrs M took out a trial membership of Club La Costa Vacation Club ("the Club"), a holiday and timeshare club. In September of the same year they traded in their trial membership and bought a fractional timeshare – where, along with other members, they took an interest in a property and became entitled to share the proceeds of a future sale. In August 2019 they bought a further fractional timeshare interest.

In November 2019 Mr and Mrs M bought from Club La Costa (UK) Sucursal en España (a UK company with registration in Spain) a 15-year membership of the Club and 3,001 points rights. Mr and Mrs M could trade the points rights annually for holiday accommodation and other benefits over the 15-year membership period. They traded in their existing timeshare interests.

To pay for the membership and points, Mr and Mrs M took out a loan with Shawbrook for £13,616, the purchase price after credit had been given for the fractional timeshare interests. The loan agreement records that it was brokered by Club La Costa Resorts and Hotels.

In July 2023 Mr and Mrs M complained to Shawbrook. They said that they had been misled about the sale of the holiday club membership and the holiday points they had bought. They mentioned in particular that there were issues with the availability of accommodation and the exclusivity of resorts, that no proper assessment of the affordability of the loan had been carried out and that the duration of the contract and the provisions relating to management fees were unfair. They also said that the sales process had been pressured and that they had not been provided with the information required under The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations").

Mr and Mrs M said that, under section 75 of the Consumer Credit Act 1974, Shawbrook was responsible for the misrepresentations made by the seller and that the circumstances of the sale were such that the loan agreement created an unfair relationship within the meaning of section 140A of the same Act.

Shawbrook did not accept Mr and Mrs M's claims, and they referred the matter to this service. One of our investigators considered what had happened, but did not recommend that the complaint be upheld. Mr and Mrs M did not accept the investigator's recommendation and asked that an ombudsman review the case.

I did that and issued a provisional decision, in which I said:

Affordability

Mr and Mrs M have said that Shawbrook did not properly assess whether the loan was affordable for them. Shawbrook says that it carried out appropriate checks, and it provided a copy of the loan application, which includes details of Mr and Mrs M's employment status and salaries. It also provided a copy of the Compliance Statement which formed part of the loan agreement and which included an acknowledgment from Mr and Mrs M that they had been given time to consider the financial commitments they were entering into, they had not been coerced into entering into the agreement and that they were confident the repayments would be met.

In addition, as part of the timeshare sales process, Mr and Mrs M signed a one-page declaration which included, at paragraph 9:

"We understand clearly what we have purchased and, having carefully considered this and our other financial commitments, are able to pay the amounts due on the dates agreed and in the case of purchases made with the assistance of finance agree that we are not aware of any future event that may prevent us from meeting the monthly repayments."

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case. I note in this case that Mr and Mrs M's representatives referred to both guidance issued by the Office of Fair Trading and to CONC, the part of the Financial Conduct Authority's Handbook which deals with consumer credit. The obligations of lenders are similar under both regimes, but the relevant rules and guidance here were those in CONC.

In assessing whether a loan is affordable, lenders should consider not just whether it is affordable when it is taken out, but whether it is likely to remain affordable. They should, for example, consider whether there are any future events which might have an impact on a borrower's ability to pay – such as retirement, for example. They should not necessarily rely solely on assurances from the borrower that they can afford to make repayments.

It is clear that Shawbrook did obtain information about Mr and Mrs M's income and obtained assurances from them that they could afford the loan. That may have been sufficient in the circumstances.

I note nevertheless that Mr and Mrs M have, it seems, been able to meet the loan payments. That does not necessarily mean that Shawbrook carried out appropriate checks, but it is an indication that the loan was affordable.

I note as well that Mr and Mrs M had taken out credit to pay for their existing timeshares. They have not provided any information about the treatment of those loans (for example, whether they were repaid or are still running), but that would be important information in assessing whether the Shawbrook loan was affordable and, if not, whether they have suffered any loss as a result of taking it out.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and*

- *that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

I am satisfied that the necessary conditions were met in this case, and so will discuss what has been said about misrepresentation.

Misrepresentation

A misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

Mr and Mrs M say they were given assurances about the availability of accommodation and were told that Club properties were exclusive to members. They say that these statements were not true. They have not however provided any information about their use of the Club or shown, for example, when they have been unable to book accommodation. Shawbrook says that they had booked seven holidays by the time they complained – and indeed had a holiday booked at the time.

I also note that, as part of the sale agreement, Mr and Mrs M signed a Member's Declaration which included, at paragraph 2:

We understand that any points we may purchase will be for a limited duration and expire on 31/12/2034 (Term) and that we have the flexibility to use such points when we wish to reserve holidays during the Term. All reservations are made strictly on a first come basis and subject to availability.

In general, the allegations of misrepresentation are generic and unsupported by evidence. I do not find them particularly convincing. I am not therefore persuaded that Mr and Mrs M were given the assurances they say they were given, or that – if they were – those statements were untrue. And the Member's Declaration also included, at paragraph 10:

"We understand that this Member's Declaration, together with the Agreement, is the entire written contract between the parties, anything additional shall only be valid if signed and stamped on behalf of the Company."

A similar provision was included in the Acquisition Agreement itself.

In my view, the inclusion of "entire agreement" provisions was an attempt to ensure that anything on which Mr and Mrs M sought to rely was included in the contract itself. Such provisions are not uncommon, even in consumer contracts, as they can help to provide clarity about the parties' rights and obligations. I am not persuaded in this case that Mr and Mrs M were misled, but, if I were to take a different view on that, I would need to consider the effect of those provisions.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties, refunding payments and re-opening an agreement which has come to an end. In considering whether a credit agreement creates an unfair relationship, a court can have regard to any connected agreement, which in this case could include the sale contract.

An ombudsman does not have the power to make an order under section 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable. And I have the power to make a wide range of awards – including, for example, requiring a

borrower to refund interest or charges, and to write off or reduce the balance of a loan. I am not persuaded however that I should do so here.

Mr and Mrs M say that the timeshare sale was pressured and that they did not receive the information which the seller was obliged to provide under the Timeshare Regulations. There is however persuasive evidence that they did receive that information. Paragraph 12 of the Member's Declaration said:

"We have received a copy of our Agreement together with the notices and Information Statement (which we have had adequate time to review before signing) required under the EU Timeshare Directive 2008/122/EC."

The Timeshare Regulations incorporated the Directive into UK law. Further, the Acquisition Agreement included an acknowledgment that Mr and Mrs M had received the Information Statement and that it was attached as a schedule to the agreement. Page 4 of the Acquisition Agreement was a separate standard withdrawal form, receipt of which Mr and Mrs M acknowledged by initialling it.

In the circumstances, I think it more likely than not that Mr and Mrs M did receive the Standard Information, including the cancellation provisions. If, therefore, they felt they had been pressured into buying the points rights, they could have exercised their right to cancel. That they did not do so indicates they did not feel pressured at the time. I note as well that this was their fourth purchase within less than two years. They would therefore have been familiar with the sales process and the protections they had.

Mr and Mrs M say the management fees are unfair. I note however that the Acquisition Agreement referred to them on page 1; it said they were (at the time) €2,401 a year. Mr and Mrs M have not provided any information about changes to them or, if that is their argument, why those changes were unfair.

Finally, I note that Mr and Mrs M have asked, rhetorically, why they would have switched from a fractional timeshare product to a points-based membership. They say the sellers must have "worn them down". I don't believe that is necessarily the case. Indeed, whilst the sale of the fractional timeshares does not form part of this complaint – since they weren't financed by Shawbrook – it is clear from Mr and Mrs M's complaint submissions that they were unhappy with at least one of the previous sales. Since the presentation at which Mr and Mrs M were introduced to the points-based membership was to discuss any issues with existing timeshares, it is quite likely in my view that they saw it as an opportunity to switch to a more suitable arrangement for them.

It is not for me to decide whether Mr and Mrs M have a claim against Club La Costa, or whether they might therefore have a "like claim" under section 75 of the Consumer Credit Act. Nor can I make orders under sections 140A and 140B of the same Act.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr and Mrs M's complaint. In the circumstances of this case, however, I do not believe that it would be fair to require Shawbrook to do any more to resolve things.

Mr and Mrs M said that they did not agree with my provisional findings, but they did not submit any further evidence or arguments for me to consider.

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.

Your text here

As I have not received any further evidence or arguments in response to my provisional decision, I do not believe that there is any reason for me to reach a different conclusion about Mr and Mrs M's complaint.

I should nevertheless stress that, in reaching that conclusion, I have reviewed the case in full before issuing this final decision.

My final decision

For these reasons, my final decision is that I do not uphold Mr and Mrs M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 21 August 2024.

Mike Ingram

Ombudsman