

## The complaint

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

## What happened

Mr and Mrs R purchased membership of a timeshare (the 'Vacation Club') from a timeshare provider (the 'Supplier') on 4 July 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 points at a cost of £16,986 (the 'Purchase Agreement').

Mr and Mrs R paid for their Vacation Club membership by taking finance of £20,816 from the Lender in both of their names (the 'Credit Agreement'). This also consolidated a previous loan.

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 22 March 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker authorised by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

Mr and Mrs R say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that they had purchased an investment and that their timeshare would considerably appreciate in value.
2. Told them that they would have a share of a property and its value would considerably increase therefore they were promised a considerable return on investment.
3. Told them that they could sell the timeshare back to the resort or easily sell it at a profit.
4. Made them believe that they would have access to the holiday apartment at any time all around the year.

Mr and Mrs R say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs R.

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

Mr and Mrs R suggest that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. So, this means they wouldn't be able to recover any amounts that are expected to be awarded by the Spanish courts.

As a result of the above, Mr and Mrs R suggest that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs R.

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

The Letter of Complaint set out several reasons why Mr and Mrs R say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The term which stated that if Mr and Mrs R failed to make a payment under the Purchase Agreement, the agreement would be forfeited along with any money they had paid to the Supplier so far, is an unfair term.

The Lender dealt with Mr and Mrs R's concerns initially as a 'dispute' and provided a response to that on 29 April 2022.

This letter didn't give any referral rights to our Service, but the PR referred it to us on 26 September 2023. The Lender responded to our Service's subsequent request for information to explain they hadn't dealt with the matter as a complaint under the Financial Conduct Authority's (FCA) DISP rules and so required the usual eight week period to look into it. But, they didn't send a final response letter to the complaint in any event.

The complaint was then assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits as they felt the loan was unaffordable for Mr and Mrs R at the Time of Sale and as a result, the Lender shouldn't have lent to them.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I considered the complaint and issued a provisional decision on 13 September 2024. In that decision, I said:

### **"Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale"**

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*The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.*

*In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs R could make against the Supplier.*

*Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs R at the Time of Sale, the Lender is also liable.*

*While I recognise that Mr and Mrs R concerns about the way in which their Vacation Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons they allege. And I say that because beyond making the bare allegations, they haven't provided any supporting evidence such as what they were told, by whom and in what context.*

*Mr and Mrs R did provide a witness statement, but these alleged misrepresentations aren't mentioned anywhere in their recollections of the sales process.*

*I also note that some of the points the PR raised seem to be based on the understanding that the timeshare Mr and Mrs R purchased was a different type of product to the one they were actually sold. The PR's comments appear to be based on the understanding that Mr and Mrs R purchased a certain type of timeshare membership, generally described as 'fractional' ownership. Fractional ownership products are asset backed – which means it gives a consumer more than just holiday rights. It also includes a share in the net sale proceeds of a property named on a consumer's Purchase Agreement after their membership term ends. The membership term is also generally shorter than other, more traditional timeshare products (usually around 15-19 years).*

*However, Mr and Mrs R purchased the Supplier's 'Vacation Club' membership, which was a different type of product. I accept that it has been a feature of some, more traditional, timeshares like the one Mr and Mrs R purchased, that consumers could benefit from a share of the sale proceeds of a relevant shared property. However, the main emphasis with this kind of timeshare product seems to have been much more on securing long-term rights of accommodation for members rather than creating a property investment, with the ultimate possibility of a financial return not normally very immediate or likely and not therefore an attractive selling point in relation to them. Membership terms for this type of product were also generally much longer (often several decades or indeterminate) and therefore lacked any certainty to the investment element.*

*This means the type of product Mr and Mrs R purchased was not structured in such a way that the investment element was a central feature and an important factor in deciding whether or not to purchase membership.*

*So, some of the misrepresentations set out in the Letter of Complaint, therefore also seem unlikely to have been made.*

*What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs R by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.*

*For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs R any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.*

#### **Section 75 of the CCA: the Supplier's breach of contract**

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*I've already summarised how Section 75 of the CCA works and why it gives Mr and Mrs R a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.*

*Mr and Mrs R say that the Supplier went into liquidation in December 2020. And, in their view, this means they can't recover any amounts that are expected to be awarded by the Spanish Courts. But the PR's argument is difficult to square with the claim that seems to be made here under Section 75. After all, suing the Supplier in a Spanish court follows from, and is separate to, the rights and obligations that the parties to a contract might have.*

*What's more, in light of the Supplier's apparent liquidation, neither Mr and Mrs R nor their PR have said, suggested or provided evidence to demonstrate that they are no longer:*

- 1. members of the Vacation Club;*
- 2. able to use their Vacation Club membership to holiday in the same way they could initially*

*Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs R any compensation for a breach of contract by the Supplier. And, for that reason, I don't think it was unfair or unreasonable of the Lender to turn down the Section 75 claim for breach of contract.*

#### **Section 140A of the CCA: did the Lender participate in an unfair credit relationship?**

*I have already explained why I am not persuaded that the contract entered into by Mr and Mrs R was misrepresented or breached by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs R also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA for a number of reasons, when looking at all the circumstances of the case.*

*As Section 140A of the CCA is relevant law in the context of this complaint, I do have to consider it. So, in arriving at a fair and reasonable outcome to this complaint, it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Mr and Mrs R and the Lender. For the reasons I've explained below, I don't currently think the credit relationship between Mr and Mrs R and the Lender was unfair to them for any of the reasons they've raised.*

#### **Was the membership sold or marketed to Mr and Mrs R as an investment?**

*The PR has alleged that the membership was sold to Mr and Mrs R as an investment. As I've noted above, this seems to be predicated on the understanding that the timeshare sold to Mr and Mrs R was a different type of timeshare product than the one they were actually sold.*

*Again, I accept that it has been a feature of some traditional timeshares, like the one Mr and Mrs R purchased, that consumers could benefit from a share of the sale proceeds of a relevant shared property. However, the main emphasis with this kind of timeshare product seems to have been much more on securing long-term rights of accommodation for members rather than creating a property investment, with the ultimate possibility of a financial return not normally very immediate or likely and not therefore an attractive selling point in relation to them. As mentioned above, membership terms for the type of product Mr and Mrs R purchased were generally much longer and therefore lacked any certainty to the investment element.*

*This means the type of product Mr and Mrs R purchased was not structured in such a way that the investment element was a central feature and an important factor in deciding whether or not to purchase membership.*

*In any event, beyond the bare allegation, no evidence has been provided to support it such as what they were told, by whom and in what context. Mr and Mrs R don't make any comments about the timeshare in question being sold to them as an investment in their description of what happened at the Time of Sale, nor have they said anything which suggests that it was. They also haven't said this was something which motivated their decision to purchase in any way.*

*So, I don't think this is a reason to uphold the complaint or is something which rendered the credit relationship unfair.*

#### Unfair term

*Mr and Mrs R say that the Purchase Agreement contains an unfair contract term (under the CRA) which states that, if they fail to make a payment (of any size) under the Agreement, the Supplier can terminate the Agreement and keep any money they had paid.*

*To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs R and the Lender unfair to them, I'd have to see that the term was unfair under the CRA and operated against Mr and Mrs R in practice.*

*In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs R, have flowed from such a term because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (*Link Financial v Wilson* [2014] EWHC 252 (Ch)) attached importance to the question of how an unfair term had been operated in practice: see [46].*

*As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.*

*Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mr and Mrs R have led to any unfairness in the credit relationship between them and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that they were actually operated against Mr and Mrs R, let alone unfairly.*

*Therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs R was unfair to them for the purposes of Section 140A for this reason.*

#### Unaffordable lending

*As noted above, the Investigator in this case upheld the complaint as they felt the loan had been granted to Mr and Mrs R irresponsibly for being unaffordable. But, on the basis of the information currently available, I don't agree and I'll explain why.*

*Under the legal and regulatory framework I've set out above, the Lender was obliged to lend responsibly.*

*In summary, they had to carry out an assessment of Mr and Mrs R's creditworthiness prior to entering into the Credit Agreement and not only their ability to afford the lending at the Time*

*of Sale, but also their ability to sustainably repay the lending over the life of the Credit Agreement.*

*In this case, we don't have any information about the checks the Lender completed at the Time of Sale and what these showed. But I don't think I need to make a finding on whether those checks were reasonable and proportionate as required because, even if the Lender didn't undertake reasonable and proportionate checks, I don't think the money lent to Mr and Mrs R was unaffordable for them given their circumstances at the Time of Sale.*

*In practice, it's not possible to determine with certainty what reasonable and proportionate checks would have shown (unless they were already completed). So, what I'm looking at here is the likelihood of reasonable and proportionate checks showing the Lender that Mr and Mrs R either would or wouldn't have been able to sustainably repay their loan over its term.*

*Mr and Mrs R have provided their comments and bank statements from around the Time of Sale (April to August 2019) as well as some other information about their finances at the time, such as evidence of their respective incomes and a 2023 copy of each of their credit reports.*

*I've reviewed this information and I acknowledge that there are some unanswered questions about Mr and Mrs R's financial situation at the Time of Sale. For example, they initially said they were paying £700 per month in rent when the Investigator explained they couldn't see that on their statements. Mr and Mrs R then clarified that, around the Time of Sale, Mrs R's grandfather purchased their house, and they were repaying him for that at £500 per month. They say they continued those monthly payments until after he died, at which point he then left the house to them in his will. But, having reviewed the statements, I can only see that £500 payment once on the bank statement which covered the period 6 April 2019 to 7 May 2019. But I've proceeded to consider the matter as from the information I've seen, as I don't think the answers to those questions make a difference to the outcome of this complaint.*

*As the Credit Agreement was in both of their names, both Mr and Mrs R's incomes were relevant to an assessment of their afford and sustainably repay the loan.*

*However, Mrs R was pregnant and about to go on maternity leave. It's not clear whether reasonable and proportionate checks at the Time of Sale would have drawn this to the Lender's attention and I make no such finding here. But I've excluded her income from my review below because again, it doesn't in my view make a difference to the outcome of this complaint. The reason for this is that, as I've explained in more detail below, I think the loan was likely affordable for them at the Time of Sale regardless of Mrs R's income.*

*I've looked at Mr R's average income only over the period the bank statements cover. I've taken an average since Mr R's income fluctuated slightly presumably due to hours worked. Again, I've taken into account Mr R's income only since they've said Mrs R was due to stop work soon at the Time of Sale due to being pregnant. And, I've looked at their essential monthly spending (including existing credit commitments) from the items I can see on their bank statements such as bills.*

*And, subtracting this essential spending from Mr R's average monthly income, I can see this left them with an average over the aforementioned period of approximately £530 per month in disposable income.*

*I'm also mindful that this loan was consolidating Mr and Mrs R's previous one. They were already paying £144.51 per month towards their existing loan at the Time of Sale and there is no indication they were struggling to afford that at the time. The new loan payment*

consolidated their previous one, and their new payment was £240.54. So, this represents a £96.03 increase on what they were paying before, which it would seem was affordable at the Time of Sale based on Mr R's income alone. And, I can also see that Mr and Mrs R were regularly transferring £100 into a savings account.

Additionally, it's also difficult to see that, even if Mr and Mrs R were lent to when it wasn't affordable for them (which as I've outlined above, I don't currently agree is the case), that there was any detriment to them as a result. The reason I say this is that I can't see any evidence on Mr and Mrs R's credit reports of any missed or late payments, for example, either in relation to this loan or any other credit commitments they had, so this also doesn't suggest to me that they struggled after taking out the lending in a way that caused them detriment.

For these reasons, taking all of the above into account, I'm therefore not sufficiently persuaded based on what I've seen so far that the lending was unaffordable for Mr and Mrs R. So, it follows that I don't think the credit relationship was rendered unfair to them as a result.

### **Section 140A: Conclusion**

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs R was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

### **The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not regulated by the FCA to carry out that activity**

Mr and Mr R say that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't and isn't permitted to enforce the Credit Agreement as a result.

However, having looked at the FCA register, I can see that the Lender named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA for credit broking. And in the absence of any evidence to suggest that its authorisation did not cover credit broking, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker."

I provisionally decided not to uphold the complaint as, for the above reasons, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs R's Section 75 claims, and I was not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

The Lender responded to my provisional decision and confirmed they had nothing further to add. The PR also responded and explained Mr and Mrs R did not agree with my provisional decision and provided some further evidence and comments they wanted 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.

The further comments and evidence the PR has provided relate to whether the lending was

affordable for Mr and Mrs R, and also that undue pressure was placed on them by the Supplier at the Time of Sale. So, I will focus here on those points.

Neither party has provided any new evidence or arguments in relation to the other complaint points I addressed in my provisional decision. So, I don't believe there is any reason for me to reach a different conclusion on those other points from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion in relation to those other points.

The PR, on behalf of Mr and Mrs R, has said there was pressure from the Supplier at the Time of Sale and this is another reason why they feel the credit relationship between them and the Lender was unfair. This is something they suggested in their witness statement provided previously and they've explained in response to my provisional decision that the sale presentation was lengthy and Mrs R was pregnant at the time, and they were separated from their son during it.

I've taken all of the comments made by Mr and Mrs R throughout the course of the complaint into account (as I did in my provisional decision), and I acknowledge that they may have felt weary after a sales process that went on for a long time. But they've said little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. I can see they were also given a 14-day cooling off period following the sale which was clearly outlined on their loan agreement. And, they have not provided a credible explanation for why they did not cancel their membership during that time following the sale. I acknowledge that they've said that during the sales presentation they were told cooling off periods don't apply in Spain, but again, the 14-day cooling off period was clearly outlined in their loan agreement, and I haven't seen anything to suggest this wouldn't have been available to them.

And with all of that being the case, there remains insufficient evidence to demonstrate that Mr and Mrs R made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier. So, it follows that I still don't think the credit relationship between Mr and Mrs R and the Lender was rendered unfair to them under Section 140A for this reason.

Mr and Mrs R have also provided some further comments and evidence in relation to whether the lending was affordable for them. They've explained that while they were regularly transferring around £100 per month to a savings account, they often transferred this money back into their current account in order to pay for other things, such as bills. They've also provided a copy of the bank statement for this savings account from April 2019 to April 2020.

They've also said that on the bank statements for their current account previously provided, these show that they were regularly receiving amounts of money from Mrs R's mother to help cover their outgoings. So, in their view, this shows the loan was unaffordable for them.

I've taken all of the above into account, as well as everything that's been provided previously. I appreciate it may come as a disappointment to Mr and Mrs R, but I remain unpersuaded that the loan was unaffordable for them at the Time of Sale.

The reason I say this is that, as I explained in my provisional decision, I've looked at what Mr R's sole average earnings were across the period the bank statements cover prior to the Time of Sale. And, subtracting the essential monthly spending shown on those bank statements (including existing credit commitments) from his monthly income, I can see this



left an average over the aforementioned period of approximately £530 per month in disposable income.

As I explained in my provisional decision, I've taken an average since Mr R's income fluctuated slightly presumably due to hours worked. Again, I've taken into account Mr R's income only since they've said Mrs R was due to stop work soon at the Time of Sale due to being pregnant.

To be clear, when looking at this I didn't take into account any money Mrs R's mother transferred to them as a source of income. I looked at whether the loan was affordable for them based on Mr R's income alone and for the reasons I've already outlined, I think the evidence shows that it was. This also didn't take into account Mrs R's income for the reasons I outlined in my provisional decision although I'd note that the information provided about Mrs R's taxable income showed she continued to work and earn an income at least until March 2020 the following year.

I also acknowledge that Mr and Mrs R were regularly transferring funds in their savings account back to their current account and they say this was to pay for other things including bills. It's difficult to know whether all of this was specifically spent on bills, given that it was transferred back into their current account from which they also spent on non-essential items. But in any event, I don't see anything inherently wrong in using savings to pay for things where necessary. And, again, I didn't take these amounts as a source of income when looking at whether the loan was affordable – I based my decision on Mr R's income alone.

For these reasons, taking all of the above into account, I'm therefore not persuaded that the lending was unaffordable for Mr and Mrs R.

So, overall, I still don't think the credit relationship between Mr and Mrs R and the Lender was rendered unfair to them under Section 140A for any of the reasons they've alleged.

### **My final decision**

For these reasons, I do not uphold Mr and Mrs R's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R and Mrs R to accept or reject my decision before 1 November 2024.

Fiona Mallinson  
**Ombudsman**