

The complaint

Mr S'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 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 purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 11 September 2016 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 810 fractional points at a cost of £15,648 (the 'Purchase Agreement').

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 part of his Fractional Club membership by a credit card payment, and the remaining balance by taking finance of £10,000 from the Lender in his name (the 'Credit Agreement').

This Fractional Club membership was traded in towards the purchase of a new timeshare on 28 November 2017, so the Purchase Agreement was terminated on that day. And the Credit Agreement which is the subject of this complaint was cleared on 28 December 2017.

Mr S – using a professional representative (the 'PR') – wrote to the Lender on 6 September 2023 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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.
3. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment, and (2) because the loan was unaffordable.

(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 the

Lender, 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.

He also says that there is no guarantee that the Allocated Property will be sold, as the Supplier can delay the sale, at its absolute discretion, for up to two years after the proposed sale date, and management charges would still be due.

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

(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 S says that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

- Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- He was pressured into purchasing Fractional Club membership by the Supplier.
- 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 the Lender didn't carry out the right creditworthiness assessment.
- The interest rate on the loan was unfairly high.

The Lender did not respond to Mr S's complaint, so the PR referred the complaint to the Financial Ombudsman Service. In addition, PR submitted a written statement from Mr S's wife, Mrs S, which set out her and Mr S's recollections of the Time of Sale. As far as is relevant to this complaint she said:

"Having been provided with free holiday accommodation in 2016 by (the Supplier), we were obligated to attend a Timeshare Presentation Meeting, for what they said would be a couple of hours. When we attended the meeting, we had to take our young baby, the meeting started early in the morning. They provided breakfast, but the meeting just went on and on as they compared the costs of different holidays, and to our surprise they then provided a lunch. In the afternoon session at about 3pm, our baby was distressed and ended up vomiting on me. (Mr S) was also becoming very stressed from the pressure to purchase as well as getting upset with the baby being unwell. We thought it was not fair on the baby or (Mr S), so I requested that we should all leave. Their reps were nasty and quite aggressive, I was told that if we all left, we would have to attend another meeting again the next day, as that would be our last full day of our holiday. The thought of another full day in the meeting was horrendous. They did say I could go back to the apartment, but (Mr S) would have to stay and complete this meeting. They stated that if he did not attend a full presentation before we returned home, we would be charged for the accommodation, so I took the baby back to the apartment and left (Mr S) there. This seemed the best worst option.

While I was in the meeting, they explained that the Timeshare would be great for family holidays, we actually liked the resort as it was quite easy access for wheelchairs, which (Mr S) sometimes had to use, although at the time of the meeting he was using his walking sticks. They told us we could easily book holidays through them, even if we wanted to try other places in the future. They kept comparing the cost of different holidays and Timeshare always came out as the cheapest. They explained timeshare contracts have changed and now you can own the Timeshare, which they might buy back at the original cost as a minimum, or we could sell to anyone if we were offered more from a potential private sale. This buy back option made the overall cost very low, as the funds from the sale reduce the total costs. They said the final cost is minimal, and you end up getting almost free holidays. As nice as the timeshare appeared, we agreed we could not afford to commit to any extra expenditure.

After I left, (Mr S) was then in the meeting alone and very upset, he was stressed about me and the baby, and was also under a lot of pressure from the reps to sign the purchase forms. The Reps would not take no for an answer and in order to get out and back to us he signed the original loan agreement, having been in a meeting for about 8 hours and 2 hours alone and unsupported. He does not react to pressure well and felt bullied into signing the agreements.

He returned to our apartment shortly after 5pm, very confused and upset, he stated that he had to sign, as he might have still been in the meeting, if he hadn't.

The next day we spoke to a (the Supplier) rep and told them we wished to cancel the application, the rep on site accepted this and stated they had cancelled the application. I asked for confirmation of the cancelation, the rep said he could not stop the application acceptance letter being sent out to our home, but stated just ignore it, as the letter of cancelation will arrive shortly after. We ignored the Welcome letter and waited for the confirmation of cancelation. It never arrived, so I telephoned (the Supplier) and they said it had not been cancelled and we were now too late to cancel."

Mr S's complaint was considered by an Investigator at our Service. The Investigator thought:

- Mr S's complaint under Section 140A of the CCA ought not to be upheld. He didn't think it likely that Mr S had been unfairly pressured into making his purchase at the Time of Sale, and he didn't think the Supplier's marketing and sales practices were likely to have fallen so short they would have prejudiced Mr S's decision to purchase. He also didn't think Mr S's credit relationship with the Lender had been rendered unfair for the reasons of the contract terms or the lack of cost disclosure by the Supplier.
- The Lender had a defence under the Limitation Act 1980 (the 'LA') to Mr S's claim of misrepresentation by the Supplier, as he had made his claim more than six years after the event he was complaining about.
- Mr S had made his complaint regarding the Lender's decision to provide him with finance too late under the rules by which this Service operates, so we didn't have jurisdiction to consider it.

Mr S did not agree with the Investigator's view and requested his complaint be considered by an Ombudsman, so the matter has been passed to me for a decision.

On 5 September 2024 I issued a provisional decision setting out my initial thoughts on whether this Service had jurisdiction to consider the entirety of Mr S's complaint, and on the merits of the elements of his complaint that I thought we were able to look at.

In summary, I thought Mr S's complaint of unfairness under Section 140A of the CCA had been made too late under the rules by which our Service has to operate, and I will deal with our jurisdiction to consider that complaint in a separate decision. But I did think we could consider Mr S's complaint about the way the Lender handled his Section 75 claims of misrepresentation and breach of contract, and it is those matters that I am dealing with here.

My provisional decision said, as far as is relevant to Mr S's Section 75 claims:

Mr S's Section 75 complaint – our jurisdiction

Section 75 of the CCA operates quite differently to Section 140A and, when it applies, it can give borrowers a very different ground for complaint against their lender. Whereas, as I've explained, Section 140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, Section 75 simply creates a financial liability that the creditor is bound to pay. Liability under Section 75 isn't based on anything the lender does wrong, but upon the misrepresentations and/or breaches of contract by the supplier, for which Section 75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid section 75 claim, it should pay its liability. And if it fails or refuses to do so, that failure or refusal can give rise to a complaint to this Service.

So, when a complaint is referred to this Service on the back of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages the Service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim - rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

I can see that in his 6 September 2023 Letter of Complaint, Mr S has made a claim under Section 75 of the CCA for misrepresentations and a breach of contract by the Supplier. But unlike Mr S's Section 140A complaint of unfairness, this Section 75 claim has not been raised before.

So, in this case, Mr S's complaint to our Service is that the Lender has not dealt with his Section 75 claim fairly or reasonably. This is therefore a new complaint. The Lender did not accept Mr S's Section 75 claim that he made within the Letter of Complaint, so, the primary time limit (of six years) only started at this time. And as this complaint about the Lender's handling of that claim was referred to this Service on 21 November 2023, it was made in time for the purpose of the rules on our jurisdiction.

So, I am satisfied that Mr S's complaints about alleged misrepresentations and breach of contract by the Supplier at the Time of Sale, under Section 75 of the CCA, is in the jurisdiction of this Service.

Mr S's Section 75 complaint – the merits

As I think Mr S's complaint under Section 75 of the CCA is in the jurisdiction of the Financial Ombudsman Service, I have gone on to consider the merits of this complaint.

However, as I've already indicated, I don't think it would be fair or reasonable to uphold this complaint for reasons relating to Mr S's Section 75 claim. As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the LA as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Mr S's Section 75 claim was time-barred under the LA before he put it to the lender.

Mr S's claim of misrepresentation

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued.

But a claim, like the one in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale – 11 September 2016. I say this because Mr S entered into the purchase of the Fractional Club membership at that time based on the alleged misrepresentations of the Supplier, which he says he relied on. And as the loan from the Lender was used to help finance the purchase, it was when he entered into the Credit Agreement that he suffered a loss.

Mr S first notified the Lender of his Section 75 claim on 6 September 2023. And as more than six years had passed between the Time of Sale and when he first put his claim to the Lender, I don't think it would have been unfair or unreasonable of the Lender to reject Mr S's concerns about the Supplier's alleged misrepresentations.

Mr S's claim of breach of contract

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim a consumer could make against the Supplier.

Like Mr S's claim for misrepresentation, his claim for a breach of contract against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967, and as I've said, the limitation period to make such a claim expires six years from the date on which the cause of action accrued.

And this claim, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

But unlike Mr S's claim of misrepresentation, the date on which the cause of action accrued was the date of the alleged breach(es) of contract. Mr S has said his contract with the Supplier was breached by it in the following ways:

- He found it difficult to book the holidays he wanted, when he wanted, due to long waiting lists and poor availability; and*
- There is no guarantee that the Allocated Property will be sold at the end of the membership term.*

It is unclear when these alleged breaches have occurred, as there is no evidence to say when Mr S found he was unable to book the holiday that he wanted. But in any case, the contract that Mr S is alleging to have been breached here was terminated on 28 November 2017, when he traded in his Fractional Club membership. So, any of the alleged breaches must have occurred between the Time of Sale and up to 28 November 2017. As Mr S raised his claim under Section 75 with the Lender on 16 September 2023, this was less than six years from the date on which the contract was terminated, and as such I do not think the Lender would likely have a defence to the claim under the LA.

However, I am not currently persuaded that Mr S's complaint of breach(es) of contract by the Supplier in relation to his Fractional Club membership has any merit. I have seen no

evidence, and Mr S has provided no evidence, which leads me to believe that he was unable to take the holidays he was entitled to take under this membership. And as regards the sale of the Allocated Property, this argument of a breach of contract is misplaced, as the contract (which states the associated Allocated Property would be sold at the end of the membership term) is referring to something that would happen in the future, but only if the membership was still current at that point. So, it follows it cannot have been breached in the way alleged by Mr S.

As a result, I'm not currently persuaded that there has been a breach of contract here. So even though the Lender did not respond to Mr S's claim under Section 75 of the CCA, I do not think it would have been unfair or unreasonable for the Lender to reject his claim of breach of contract by the Supplier.

Section 75 – conclusion

Even though it didn't respond to Mr S's claim under Section 75, I do not think it would have been unfair or unreasonable for the Lender to reject Mr S's concerns about the Supplier's alleged misrepresentation and breaches of contract. As a result, I don't currently think there is anything the Lender needs to do to put things right in this regard, given the facts and circumstances of this complaint.

The Lender did not respond to my provisional decision, but Mr S did. But his response was confined to why he thought his complaint under Section 140A of the CCA was in jurisdiction. No submissions were made in relation to my provisional decision on the merits of his complaint about how the Lender dealt with his claim under Section 75 of the CCA regarding his concerns of alleged misrepresentation and breach of contract by the Supplier.

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 I have reconsidered everything afresh following Mr S's submissions in response to my provisional decision. But as no new evidence and arguments have been made in relation to the merits of Mr S's complaint, I see no reason to depart from the finding I set out in my provisional decision.

I am satisfied that Mr S's complaint to our Service – that the Lender failed to deal fairly and reasonably with his Section 75 claims – was in our jurisdiction, but that it failed on its merits.

My final decision

I do not uphold Mr S's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 30 October 2024.

Chris Riggs
Ombudsman