DRN-5261587

The complaint

Mr and Mrs G'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 a claim under Section 75 of the CCA.

What happened

Mr and Mrs G have held various timeshare products since around July 2013 which they had purchased from a timeshare supplier (the 'Supplier').

On 21 September 2017 (the 'Time of Sale'), Mr and Mrs G attended a meeting and sales presentation with the Supplier during which they entered into an agreement to purchase 7,500 points in timeshare product (the 'Purchase Agreement'). The purchase price agreed was £8,400 which was paid for by taking finance for that amount from the Lender, repayable over a period of 123 months (the 'Credit Agreement').

Mr and Mrs G – using a professional representative (the 'PR') – wrote to the Lender in July 2022 (the 'First Letter of Complaint') to complain that the Supplier was not permitted or authorised to arrange loans as it was prohibited by section 19 of the Financial Ser vices and Markets Act 2000 ('FSMA').

At the same time, the PR asked the Lender to provide details of the checks, searches and assessments it had undertaken in order to establish whether Mr and Mrs G could afford to maintain the monthly repayments required under the Credit Agreement. Further, the PR asked the Lender to provide details of the steps it had taken to ensure the Supplier had undertaken a clear, lawful and transparent sales process when arranging the loan on its behalf.

The Lender responded to Mr and Mrs G's complaint on 13 September 2022, and in doing so, didn't uphold the complaint. In particular, the Lender didn't agree that the Supplier wasn't properly authorised. Or, that it hadn't undertaken a full and compliant assessment of affordability before agreeing to lend to Mr and Mrs G.

On 22 February 2024, Mr and Mrs G – again with the assistance of the PR – wrote to the Lender again with a new complaint (the 'Second Letter of Complaint'). It was alleged that the Supplier had made a number of representations about the timeshare points purchase which turned out not to be true. And it was these misrepresentations that had induced Mr and Mrs G to enter into the Purchase Agreement with the Supplier.

I don't propose to repeat all of the various allegations included here, as the parties to this complaint are familiar with them. However, I may refer more specifically to them below where I believe it is of value to the outcome of this complaint. However, the suggestion is that Mr and Mrs G have a claim against the Lender, for the misrepresentations under Section 75 of the CCA ('S75').

The PR also include allegations about what happened at the Time of Sale together with the Supplier's sales practices which resulted in the existence of an unfair relationship between Mr and Mrs G and the Lender under Section 140A of the CCA ('S140A'). In addition to the allegations the Lender addressed from the First Letter of Complaint, the PR allege:

- Mr and Mrs G were subjected to immense pressure to enter into the Purchase and

Credit Agreements;

- Mr and Mrs G were not given time to consider whether they could afford the purchase and associated Credit Agreement;
- the Supplier did not explain the basis and purpose of the annual maintenance fees payable under the Purchase Agreement;
- the Supplier inadequately explained the mechanics of the timeshare product; and
- The additional points product was sold to Mr and Mrs G by the Supplier as an investment contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

In support of the latter of these allegations, the PR made particular reference to the findings '*Shawbrook & BPF v FOS*'[1] which related to the sale of Fractional Timeshares, suggesting that Mr and Mrs G's experience mirrored those of that case.

The Lender dealt with Mr and Mrs G's concerns as a complaint and issued its final response letter on 27 March 2024 rejecting it on every ground.

Mr and Mrs G then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, didn't think the Financial Ombudsman Service had jurisdiction to consider the complaint points raised in the First Letter of Complaint as the Lender's response to that complaint hadn't been referred to this service in time under the rules that apply.

However, having agreed to consider the new complaint points and allegations included within the Second Letter of Complaint, the investigator thought that any claim Mr and Mrs G had under S75 had been made too late pursuant to the Limitation Act 1980 (the 'LA'). And having considered the other aspects of Mr and Mrs G's complaint, the investigator wasn't persuaded that a court was likely to find unfairness such that it should result in redress pursuant to S140A.

Mr and Mrs G disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. In doing so, the PR expanded further upon the various complaint points. The PR also thought that the provisions of Section 32 of the LA should apply to allow the time limit restrictions to be postponed. In particular because it believes there were certain aspects that had been deliberately concealed at the Time of Sale that Mr and Mrs G only became aware of having sought professional advice following the findings in *Shawbrook & BPF v FOS*.

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.

Relevant Considerations

When considering what's fair and reasonable, DISP[2] 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

[1] R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) (*'Shawbrook & BPF v FOS'*).
[2] Dispute Resolution: Complaints Sourcebook

S75 provides protection for consumers for goods or services bought using credit. Mr and Mrs G paid, for the purchase under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means that Mr and Mrs G are afforded the protection offered to borrowers like them under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr and Mrs G and the Lender arising out of the credit agreement (taken together with any related agreement). And because the product purchased was funded under the credit agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

Given the facts of Mr and Mrs G's complaint, relevant law also includes the LA. This is because the original transactions - the purchase funded by a loan with the Lender - took place in 2017. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered the effect this might also have.

It's important to stress that this service's role as an Alternative Dispute Resolution Service is to provide mediation in the event of a dispute. The complaint being considered here specifically relates to whether I believe the Lender's treatment of Mr and Mrs G's claim was fair and reasonable given all the evidence and information available. This service is not afforded powers to decide a legal claim. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

The first letter of complaint

The Lender has confirmed that the First Letter of Complaint was received from the PR on 18 July 2022. I've seen a copy of the Lender's final response to that complaint which is dated 13 September 2022.

DISP 2.8.2 says:

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, redress determination or summary resolution communication;

I've found no evidence to show that Mr and Mrs G referred their first complaint from July 2022 to the Financial Ombudsman Service. So, more than six months has now elapsed since the Lender issued its final response. Because of that, I agree that this service does not have jurisdiction to consider any of the specific complaint points raised and responded to at that time. So, I won't be considering further the allegations relating to the authorisation of the Supplier to arrange the loan and/or the assessments undertaken in order to comply with the rules and guidelines within the Consumer Credit Sourcebook ('CONC')

That said, the Second Letter of Complaint appears to include new complaint points – as I've summarised above. So, this service is free to consider the Lender's response to those new points raised.

Was the claim of misrepresentation under S75 made in time?

The PR says the supplier misrepresented the nature of the purchase agreements and benefits to Mr and Mrs G when they agreed to purchase the product. And it believes this brings cause for a claim under S75.

However, I don't think it would be fair or reasonable to uphold Mr and Mrs G's complaint for reasons relating to the S75 misrepresentation claim. As a general rule, creditors can reasonably reject S75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr and Mrs G's S75 claim was time-barred under the LA before it was put to BPF.

A claim under S75 is essentially a "like" claim against the creditor. It mirrors the claim Mr and Mrs G could make against the Supplier. 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 (see Section 2 of the LA).

But a claim under S75, like this one, 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 here was the Time of Sale. I say this because Mr and Mrs G entered into the purchase of the additional timeshare points at that time based upon the alleged misrepresentations of the Supplier – which Mr and Mrs G say they relied upon. And as the Credit Agreement provided funding to help finance that purchase, it was when they entered into the Credit Agreement that they allegedly suffered the loss.

The PR first notified the Lender of Mr and Mrs G's S75 complaint in February 2024. And as more than six year had passed between the Time of Sale and when the complaint was first put to BPF, I don't think it was ultimately unfair or unreasonable of BPF to reject Mr and Mrs G's concerns about the Supplier's alleged misrepresentations.

Could the limitation period be postponed?

The PR argue that the limitation period should be postponed pursuant to Section 32 of the LA because facts relevant to Mr and Mrs G's claim were deliberately concealed.

Section 32(1)(b) applies when *"any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant"* [my emphasis]. But the PR haven't provided me with any persuasive evidence to demonstrate that the Supplier deliberately concealed anything in relation to the various allegations that Mr and Mrs G wouldn't have realised well before the they submitted the claim.

In particular, it is suggested that Mr and Mrs G were sold the timeshare points as an investment, and it was on that basis that they purchased it. The PR makes continued reference to the findings in *Shawbrook & BPF v FOS*, suggesting that Mr and Mrs G only became aware of an alleged deception following these findings and having sought professional advice.

However, the circumstances of that particular case were very different to those in Mr and Mrs G's complaint. The products referred to in *Shawbrook & BPF v FOS* were Fractional timeshares which included an interest in the eventual sales proceeds of an *"Allocated property"* detailed within those purchase agreements. No such interest was included within the Purchase Agreement Mr and Mrs G entered into. So, whilst in my view, Fractional timeshare included an investment element as they offered consumers the prospect of a financial return, from the evidence I have seen I'm not persuaded that was the case here. Nothing within the evidence provided suggests that the points Mr and Mrs G purchased were attributed any ongoing tangible value by the Supplier – other than in exchange for holiday

bookings. Or that the Supplier had any responsibility under the Purchase Agreement to realise and distribute any 'alleged' tangible value at a point in the future. And given the nature of the timeshare points purchased, I think it's unlikely that the Supplier would have described such a product as a financial investment.

The PR argue that the Supplier deliberately concealed the fact that it was unlawful (under regulation 14(3) of the Timeshare Regulations) to sell a timeshare product to Mr and Mrs G as an investment. However, despite the assertions made, I've found no evidence to support that allegation. To the contrary, the Purchase Agreement and accompanying documentation, which Mr and Mrs G signed at the Time of Sale, include specific warnings to ensure that they understood their purchase should not be considered a financial investment. In particular, I am drawn to note 5 of the Terms and Conditions included on page 2 of the Purchase Agreement where it says:

> *"You should not purchase your Points as an investment – except of course in your holidays* […]*".*

Further, note 14 of a document headed *"Customer Compliance Statement/Declaration to Treating Customers Fairly"* says:

> *"We understand that the purpose of our Points is an investment in our future holidays, but that it should not be regarded as a property or financial investment and that any subsequent resale will depend upon market conditions".*

And note 12 of the same document confirms:

> *"We understand that there is currently no resale or buyback programme for our points and that you therefore cannot assist us in selling our Points."*

Based upon the evidence available, I can't reasonably conclude that the product Mr and Mrs G purchased contained any financial investment element. Or anything to support the allegation that the Supplier sold it as such. Because of that, I can't reasonably conclude that the Supplier breached the requirements of regulation 14(3) of the Timeshare Regulations. And, as a consequence, I can't see how the Supplier can be found to have deliberately concealed a breach that doesn't appear to have occurred.

Will all of this in mind, I can't see why, given the other allegations fuelling the claim, the particular issues prevented Mr and Mrs G from making a claim or - at the very least - raising a complaint earlier. So in my view, the PR's argument that Section 32 of the LA applies doesn't help Mr and Mrs G's cause here.

Based upon my findings above, I'm not persuaded that there's any reason why a court might decide the time limits could be postponed pursuant to the provisions of the Section 32 of the LA.

Mr and Mrs G's S140A Complaint

Under S140A, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of the terms of the credit agreement itself and how the creditor (here that's the Lender) exercised or enforced their rights under the agreement. Such a finding may also be based on the terms of any related agreement. Including when combined with Section 56 of the CCA ('S56') on anything done or not done by the Supplier on the Lender's behalf before the making of the Credit Agreement or any related agreement.

In cases such as this one, when restricted credit was granted, S56 created a statutory agency relationship between the Supplier and the Lender because it states that any negotiations between a debtor and the supplier before a transaction financed by a debtor-creditor-supplier agreement are deemed to have been conducted by the supplier as an agent of the creditor.

However, an assessment of unfairness under S140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered

into. The High Court held in *Patel v Patel* [2009] EWHC 3264 (QB) (which was recently approved by the Supreme Court in the case of *Smith v Royal Bank of Scotland Plc* [2023] UKSC34), that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination".* In that case it was deemed as either the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

So, for as long as the Credit Agreement remains outstanding, the Lender remains responsible for the matters that might have made their relationship with Mr and Mrs G unfair and for taking steps to remove the source of that unfairness or mitigate its consequences so that the relationship was no longer unfair.

Accordingly, in alleging that they were subject to an unfair credit relationship under S140A, Mr and Mrs G's complaint extends to the Lender's acts and omissions, in being party to such a relationship and continuing its unfairness, right up until the moment that credit relationship ends. So, it is these particular aspects of Mr and Mrs G's complaint that I will consider next.

The pressured sale and process

The claim suggests Mr and Mrs G purchased timeshare points and entered into the Credit Agreement following a lengthy and pressurised sales presentation. I acknowledge what the PR has said about this. So, I can understand why it might be argued that the prolonged nature of the presentation might have felt like a pressured sale – especially if, as Mr and Mrs G approached the closing stages, they were going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr and Mrs G agreed to the purchase in 2017 when they simply didn't want to. And neither the PR nor Mr and Mrs G have provided a credible explanation for why they didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If they only agreed to the purchase because they felt they were pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr and Mrs G were obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate they made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired.

I think it is also relevant that Mr and Mrs G had purchased timeshare products and upgrades from the Supplier on four occasions prior to the purchase in 2017. And on one of those occasions (in 2016), Mr and Mrs G cancelled the purchase agreement within the statutory withdrawal period permitted at no cost to themselves – being aware of their right to do so. Further, the Lender has confirmed that Mr and Mrs G attended a total of seven such presentations prior to their points purchase in 2017, and a further three presentations thereafter.

Based upon this, I think it's reasonable to conclude that Mr and Mrs G were familiar with the Supplier's sales meetings and practices. So, I'm not persuaded that they would have felt pressured to such a degree that they would have felt unable to leave the sales meeting in 2017 without agreeing to purchase the additional timeshare points discussed and apply for the loan with the Lender.

Time to consider the agreements

Page 3 of the Purchase Agreement is headed *"Separate Standard Withdrawl Form to Facilitate the Right of Withdrawal"*. It clearly states that Mr and Mrs G *"has the right to withdraw from this contract within 14 days without giving any reason"* – as required under the Timeshare Regulations. Mr and Mrs G signed this page at the bottom confirming

"Acknowledgement of receipt of information". And given they had previously cancelled a similar agreement in 2016, I think it's reasonable to conclude they were fully aware of their withdrawal rights.

The Credit Agreement also includes a similar provision in a paragraph immediately above where Mr and Mrs G signed and dated headed (in bold typeface) ***"YOUR RIGHT TO WITHDRAW".***

So, even if I were to find that Mr and Mrs G weren't given adequate opportunity to read, consider and understand the Purchase Agreement documentation and Credit Agreement at the time of the sale - and I make no such finding - I would expect them to have had sufficient time in which to consider their decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before the loan was drawn and the purchase completed. There's no suggestion or evidence that Mr and Mrs G did raise any questions or concerns prior to the sale being completed. Or that they had any intention of cancelling the agreement.

The provision of information and adequate explanations

The PR suggest the Supplier failed to provide all the material information and explanations to ensure Mr and Mrs G understood:

- the basis and purpose of the annual maintenance fees payable under the Purchase Agreement; and
- the mechanics of the timeshare product.

When considering these particular allegations, I do so in the knowledge that Mr and Mrs G had been customers of the Supplier since 2013. Further, that their purchase in 2017 was for points in a product they'd previously purchased and benefitted from in 2014.

As I've explained above, based upon the evidence available, I can't reasonably conclude that the points purchased were represented to Mr and Mrs G as an investment. So, I wouldn't expect the Supplier to have provided any information relating to that. Furthermore, the PR's reference to *Shawbrook & BPF v FOS* relates to a different form of membership/timeshare. The purchase to which this complaint relates didn't involve this type of product. So, I can't see how reference to this is relevant to Mr and Mrs G's complaint here.

However, I've considered the information that should have been provided to Mr and Mrs G, as required under the Timeshare Regulations that apply here. I've seen copies of various documents, including the Key Information document that Mr and Mrs G signed. Further, the Customer Compliance Statement/Declaration to Treating Customers Fairly, which Mr and Mrs G also signed, confirms that they received and/or read and understood the relevant and required documents. Note 8 of the Key Information document makes clear reference to the payment of Management Charges. In particular stating that *"The Management Charges are not linked to inflation but are likely to increase each year".* It goes on to explain the basis of those charges

Based upon what I've seen, I can't say that the Supplier failed in its responsibilities to provide the information required under the regulations that applied. And I haven't seen anything to suggest that Mr and Mrs G raised this as an issue with the Supplier at the time.

I think it's again relevant to acknowledge Mr and Mrs G's existing membership with the Supplier and their purchase history. They'd purchased and owned timeshare products previously – including membership and points in the product purchased in 2017. So, on balance, I think it's more likely than not that Mr and Mrs G were familiar with how their timeshare points operated together with their associated annual liability for maintenance fees and charges.

On balance therefore, I'm not persuaded that the Supplier failed in their duty to explain how their timeshare points operated and the basis of any ongoing management/maintenance charges. And even if they had – and I make no such finding – I'm not persuaded that Mr and Mrs G's decision to purchase would've been any different. On that basis, I'm not persuaded that the Suppliers actions resulted in any unfairness that a court is likely to find the Lender liable for under S140A.

Section 140A Conclusion

I have already addressed the allegation that the additional points were sold to Mr and Mrs G by the Supplier as an investment contrary to Regulations 14(3) of the Timeshare Regulations earlier in this decision.

Furthermore, and in conclusion, given all the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs G was unfair to them for the purposes of S140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Summary

In summary, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs G's Section 75 claim. And I am 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 see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

For the reasons set out above, I do not uphold Mr and Mrs G's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs G to accept or reject my decision before 12 March 2025.

Dave Morgan
Ombudsman