DRN-5448197

The complaint

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

What happened

Mrs and Mr C previously purchased a trial membership with a timeshare provider (the 'Supplier') in 2007.

On 6 April 2008 (the 'Time of Sale'), Mrs and Mr C attended a sales presentation with the Supplier during which they entered into an agreement to purchase a membership with the Supplier and 1,501 points which could be used to obtain holiday accommodation (the 'Purchase Agreement'). The purchase price was £21,480, but after trading in their trial membership, the total cost of the Purchase Agreement was £16,809. Mrs and Mr C paid for this by taking finance from a lender I will call 'Business G'. They borrowed a total of £21,385.93, which included refinancing of an existing loan and a "Protected Payments Plan" (the 'Credit Agreement').

In June 2016, Business G assigned the loan to Elderbridge and Elderbridge became responsible for the ongoing rights and duties under the Credit Agreement.

Mrs and Mr C, using a professional representative, (the 'PR'), wrote to Elderbridge on 31 March 2021, (the 'First Complaint') saying they had serious concerns about the brokering of their loan and the income assessment checks carried out at the Time of Sale[1]. That complaint was then brought to the Financial Ombudsman Service, and an Investigator rejected it. The PR referred the complaint to an ombudsman as it disagreed with the assessment but later withdrew the complaint before it was assigned to an ombudsman.[2]

On 21 December 2023, the PR raised a new complaint (the 'Second Complaint') to Elderbridge. I will go into more detail below, but in summary, the PR alleges that:

- The Supplier misrepresented the timeshare membership to Mrs and Mr C.
- Elderbridge participated in an unfair credit relationship with Mrs and Mr C under s.140A CCA.

The PR says that Mrs and Mr C have been made aware of the judgment of "*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*

[1] The PR raised an identical complaint to Business G on the same date and brought that complaint to the Financial Ombudsman service too. It then withdrew that complaint.
[2] The PR says that the First Complaint involves "similar matters" to this one, but I will explain why that complaint is not about the same subject matter as the one I am considering. The PR also says it rejected this service's final decision, but it is mistaken as it withdrew the complaint before it was assigned to an ombudsman, so a final decision was not issued.

Ombudsman Service [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*", suggesting that Mrs and Mr C's experience at the Time of Sale resembled those of that case.

Elderbridge wrote to the PR on 2 January 2024. It thought that it had previously addressed the complaint and referred the PR to its final response issued on 22 April 2021.

The PR, on behalf of Mrs and Mr C, then referred the Second Complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, didn't think the complaint should be upheld. He thought Elderbridge had a complete defence to the claim under s.75 CCA due to the time limits set out in the Limitation Act 1980. And he thought there was no reason to conclude that the relationship between Elderbridge and Mrs and Mr C was unfair.

The PR disagreed with the Investigator's assessment and asked for an Ombudsman to make a decision, which is why it was passed to me. In doing so, the PR said it thought that the provisions of s.32 LA extended the limitation period as Mrs and Mr C did not know what they were told at the Time of Sale was false. And the PR insisted that the Purchase Agreement was misrepresented to Mrs and Mr C as an investment.

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

I agreed with the outcome reached by the Investigator but wished to do so for reasons that are different in some respects. Therefore, I issued a provisional decision (the 'PD') to allow both parties the opportunity to respond with any further submissions.

In the PD, I first set out the legal and regulatory context for the complaint, as well as what I thought was representative of good industry practice at the Time of Sale:

Relevant law and regulations

Of particular relevance to this complaint are:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation*
- *The Unfair Terms in Consumer Contracts Regulations 1999*
- *Case law on Section 140A of the CCA, including:*
    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
    - *Shawbrook & BPF v FOS.*

Goode: Consumer Credit Law and Practice is a widely recognised expert commentary on the application of the CCA and related legislation. It offers relevant guidance to certain aspects of the matters at hand in this complaint.

I then gave my provisional findings, which were as follows:

My provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having considered everything, I do not currently think this complaint should be upheld.

But 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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What's 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.

The First Complaint brought by the PR only covered matters involving the brokering of the loan. When the PR referred that complaint to the Financial Ombudsman Service, it attempted to expand its scope to include allegations that the Purchase Agreement was misrepresented to Mrs and Mr C and that the relationship between Elderbridge and Mrs and Mr C was rendered unfair. But, as those allegations were not put to Elderbridge until the PR raised the Second Complaint, they fell outside the scope of the First Complaint as our service can only consider matters that have first been raised with the respondent business. Therefore, as these matters have not been considered by our service before, I will consider them now.

<u>The claim for misrepresentation under s.75 CCA</u>

The PR, on behalf of Mrs and Mr C, says the Supplier misrepresented the timeshare membership to them at the Time of Sale and that they have a claim for misrepresentation against Elderbridge as it has taken over the rights and responsibilities from Business G when it bought the loan.

Certain conditions must be met for Section 75 CCA to apply including, but not limited to, the nature of the arrangements between the parties involved in the transaction. Because of the way in which Section 75 operates, if the Supplier is liable for having misrepresented something to Mrs and Mr C at the Time of Sale, or has breached its contract with them, that might give rise to a potential joint and several liability on the part of the creditor.

At the Time of Sale, Mrs and Mr C took out finance with Business G. So, it is Business G that filled the role as the creditor in the transaction in question. When Business G assigned the loan to Elderbridge, it didn't necessarily follow that all of its duties or other obligations, such as any potential liability for a claim under Section 75, were similarly assigned. Although Section 189(1) of the CCA includes an assignee within the definition of a creditor, Goode[3] indicates that this shouldn't be interpreted as creating a positive liability on the assignee for a monetary claim under (among other things) Section 75.

I'm further conscious of the conclusions reached by the High Court in Jones v Link Financial Ltd [2012] EWHC 2402 ('Jones'), which drew a distinction between pre-assignment liabilities such as might arise under Section 75, and those statutory duties under the CCA that the assignee was required to perform in order to enforce its assigned rights.

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[3] Goode: Consumer Credit Law and Practice – Division I Commentary – Part IC Consumer Credit Legislation – 45A Assignment – III Assignment and the CCA 1974: the assignee as creditor/lender or owner – 1 The basic rule – Pre-assignment breaches (para 45A.62)

With that said, it doesn't mean that a claim like Mrs and Mr C's can't be made. Rather, both Goode and Jones highlight the inherent difficulty that they face in succeeding with their claim. And, with this in mind, I can't say that Elderbridge acted unfairly or unreasonably towards them when it declined to pay them compensation for the claims they say it was liable to pay under Section 75 CCA.

The complaint about an unfair debtor-creditor relationship under s.140A CCA

The matters Mrs and Mr C have raised under Section 140A are not subject to the same difficulties as those raised under Section 75. Paragraph 45A.65 of Goode indicates that Section 140B empowers a Court to impose a positive liability on an assignee. So, determining what's fair and reasonable in the circumstances of this complaint includes considering whether the relationship between Mrs and Mr C and Elderbridge was unfair.

Under Section 140A CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

Elderbridge doesn't dispute that there was a pre-existing arrangement between Business G and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mrs and Mr C's points-based timeshare membership were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for Business G as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

However, an assessment of unfairness under Section 140A 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 (which was recently approved by the Supreme Court in the case of Smith), 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" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

Here, Mrs and Mr C's loan account was settled on 6 July 2023, so I think I can consider the merits of the complaint about an unfair debtor-creditor relationship. As I've explained above, Elderbridge assumed the rights and responsibilities under the Credit Agreement when it purchased this from Business G in June 2016, so it would be responsible for remedying any unfairness under s.140A CCA.

I have considered the entirety of the credit relationship between Mrs and Mr C and Elderbridge along with all the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A CCA. When coming to that conclusion, and in carrying out my analysis, I have looked at the provision of information by the Supplier, including the contractual documentation, the evidence provided to me by both parties, and the inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mrs and Mr C and Elderbridge.

The allegation that the timeshare was misrepresented to Mrs and Mr C

In order to determine if the relationship is unfair under s.140A, I think the alleged misrepresentations are relevant here, despite not considering as a claim under s.75 CCA[4]. So, I will first consider whether the alleged misrepresentations would mean that a court might find that the relationship between Elderbridge and Mrs and Mr C was unfair.

The PR alleges that the Supplier told Mrs and Mr C that the membership would give them 1,501 points which could be used in exchange for superior and exclusive accommodation in holiday resorts anywhere and at any time they wanted. They also say that they were told they were purchasing an investment.

I have not been given much detail about what Mrs and Mr C were told, or not told, about the benefits of the membership. I have not been told about any specific times they were unable to book the holidays they wanted. And I haven't been given enough details of what they were told about the possibility of reselling the membership, or that they tried and were unsuccessful in selling the membership. I haven't been given any supporting testimony or documentary evidence to substantiate these allegations.

The PR says that the Supplier breached Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') when it sold the timeshare product to Mrs and Mr C, meaning that the Supplier misrepresented it to them as an investment. The Timeshare Regulations that are central to the PR's arguments did not come into force until 23 February 2011, so it is wrong to suggest that the Supplier could have breached the Timeshare Regulations. But, in any case, I have considered what the PR says about how the membership was sold, and I will explain why I am not persuaded by the argument that the Supplier sold the membership as an investment to Mrs and Mr C.

The PR says:

[4] See *Scotland and Reast*

"As a result of the sales tactics used by your agent [the Supplier], [Mrs and Mr C] wholeheartedly believed that through making the investment with [the Supplier], they would achieve returns which would not only allow them to make important savings on their holidays, but also achieve a return through investing in assets which could be passed down to their children".

When the PR wrote to the Financial Ombudsman Service about the First Complaint, it sought to expand the complaint to include the argument that the Purchase Agreement was misrepresented to Mrs and Mr C. But that letter did not suggest that the Supplier sold the membership to them as an investment. I am unsure why the PR would have left that out of that letter at the time if the Supplier had made that misrepresentation. I also note that the Second Complaint letter heavily relies on the judgment on Shawbrook & BPF v. FOS, so I am persuaded that Mrs and Mr C's recollections of events at the Time of Sale as retold by the PR are, at best, coloured by the judgment in that case.

In addition, the PR's Second Complaint letter does not give much detail about what Mrs and Mr C were told at the Time of Sale that led them to believe they were purchasing an investment that would provide them with a profitable return at some point in the future. The PR says I ought to place significant weight on Mrs and Mr C's recollections, but it has presented the complaint to me without any testimony in their own words. And I don't find the allegation as put by the PR to be plausible or persuasive. The PR says Mrs and Mr C were told they could expect a "return" which would help them to save money on their holidays, but they have not explained how they were told they could expect to make a return while also using the membership to take holidays. And they say they would receive a return through "investing in assets which could be passed down to their children", but again, they don't explain what assets they thought they were investing in – given their membership only provides them with points to exchange for holiday accommodation. And they don't say how they were told they would achieve a financial return in the future from the sale of those assets. They say they were given a discount as they traded in their trial membership at the Time of Sale, and that in their mind, this gave them "equity", but they have not said this was something the Supplier told them, so I don't think it was.

I have also considered what I know about the product itself. I don't find Mrs and Mr C's argument that they were told they were purchasing "assets" to be very plausible or persuasive as I think it is unlikely that the Supplier would have said this when the Purchase Agreement makes it very clear that they were only purchasing 1) a membership with the Supplier and 2) point rights, which were to be used each year to gain holiday accommodation. The Purchase Agreement does not suggest that they were also acquiring a tangible asset, such as a property, and in the absence of any compelling evidence to the contrary, I am not persuaded that the Supplier said or implied that the membership and/or the points were an investment.

So, I can't reasonably say that the Supplier misrepresented the Purchase Agreement to Mrs and Mr C at the Time of Sale.

The Supplier's sales and marketing practices at the Time of Sale

The PR says Mrs and Mr C weren't made aware that they had the right to cancel the timeshare agreement. They say they were pressured into purchasing the membership. And they say they were rushed into signing the paperwork. But I can see that the Purchase Agreement provided them with the right to cancel the agreement within 14 days, and they have signed the document directly below this information, so I think they would have read this. I've not been given an explanation as to why they did not exercise the right to cancel if they felt they only went ahead with the purchase because they felt under pressure. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs and Mr C made the decision to purchase their membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The provision of information by the Supplier at the Time of Sale

The PR refers to what it says was a breach of Regulation 6 of the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations'), which it says with reference to the judgment in Shawbrook & BPF v FOS. The PR says the "valuation information" Mrs and Mr C relied upon at the Time of Sale was a) material to their purchasing decision and was false, and b) omitted at the Time of Sale. But the CPUT Regulations did not come into force until 26 May 2008, so did not apply at the Time of Sale. In any case, I have considered everything provided to me and am not persuaded that the Supplier misled Mrs and Mr C at the Time of Sale.

Lastly, the PR has referred to the Resort Development Organisation Code of Conduct (the 'RDO Code'), which it says require the Supplier to not mislead consumers like Mrs and Mr C, but that it did just that. But the RDO Code only came into effect in 2010, so this sale predates the RDO Code. And, in any case, I have not been given sufficient evidence to persuade me that the Supplier misled Mrs and Mr C at the Time of Sale.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mrs and Mr C was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

The responses to the PD

Elderbridge responded to say it accepted the PD and had nothing further to add.

Neither Mrs and Mr C, nor their PR, responded by the deadline I gave them.

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.

As neither party provided me with any further submissions, I see no reason to depart from the conclusion I reached in my PD.

I don't think Elderbridge acted unfairly or unreasonably when it dealt with Mrs and Mr C's Section 75 claim. And I am not persuaded that the credit relationship between Elderbridge and Mrs and Mr C was unfair to them for the purpose of s.140A CCA. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

My final decision

My decision is that I do not uphold Mrs and Mr C's complaint about Elderbridge Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs and Mr C to accept or reject my decision before 17 July 2025.

Andrew Anderson
Ombudsman