DRN-5502257

The complaint

Mr M, using a professional representative ("the PR"), has complained that MBNA Limited ('the Lender') acted unfairly and unreasonably by (1) declining to pay a claim under Section 75 of the Consumer Credit Act 1974 (the 'CCA') and (2) participating in an unfair credit relationship with him under Section 140A of the CCA.

What happened

Mr M owned a points-based timeshare he purchased from a timeshare provider ("the Supplier"). By 2009, he held 60,000 points which he could use in exchange for holiday accommodation.

On 11 October 2016 ("the Time of Sale"), Mr M attended a sales meeting with the Supplier. He agreed to take out a membership which provided him with 24,000 points that could be used to book holiday accommodation (the 'Purchase Agreement'). These points were in addition to the 60,000 points he already held with the Supplier. Mr M funded the purchase by paying the full amount of £6,850 using his credit card provided by the Lender (the 'Credit Agreement').

The PR wrote to the Lender on 23 February 2024 to raise a claim under Section 75 CCA on behalf of Mr M. It also said the relationship between Mr M, the Lender and the Supplier was unfair to him.

In summary, the PR raised concerns about the sale of the membership in 2009. It also said that Mr M was told by the Supplier at the Time of Sale that, by entering the Purchase Agreement:

- He would not need to pay maintenance fees after 2020.
- He would be able to exit the Purchase Agreement after five years.
- He would have access to a wide range of luxury accommodation in a range of resorts at any time he wanted.
- He was pressured into entering the Purchase Agreement.

The PR also says that Mr M was told it was necessary to enter the Purchase Agreement in order to be released from his existing timeshare. It says that this was a misrepresentation as it was false.

The Lender rejected the claim on 19 April 2024, saying the claim was raised too late.

The PR then raised a complaint about the Lender's handling of the Section 75 claim (the "Letter of Complaint") on 18 June 2024. The PR also suggested that the relationship between Mr M and the Lender was unfair as the Supplier concealed information from him that was relevant to his purchasing decision. The Lender provided its final response to the complaint on 30 July 2024, reiterating that it believed the claim under Section 75 CCA was raised too late.

As both parties did not agree, the PR referred the complaint to the Financial Ombudsman Service.

One of our investigators considered the complaint and thought our service could look into the Lender's handling of the claim under s.75 CCA but thought that the Lender had a complete defence to the claim due to the time limits set out in the Limitation Act 1980 ("the LA"). As the PR disagreed, it has asked for the matter to be referred to an Ombudsman.

I agreed with the outcome reached by the Investigator, but wished to expand the reasons for doing so, therefore I issued a provisional decision (the 'PD') setting out why I thought the complaint ought to be rejected.

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

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').*
- *The Consumer Rights Act 2015.*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT').*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *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').*
    - *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').*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

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

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Having considered everything, I currently do not think the Lender needs to do anything further to answer the complaint.

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's to decide what's fair and reasonable in the circumstances of this complaint. During the course of this claim and complaint, the PR has written at least four letters to the Supplier and two letters to our Service. Each letter frames the PR's arguments in slightly different ways. I have read and considered everything in these letters and will focus on what I think are the most important points. So, if I have not commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

What's more, I've made my decision on the balance of probabilities, which means I've based it on what I think is more likely than not to have happened given the evidence available and the wider circumstances.

Mr M's claim under s.75 of the CCA

Under s.75 CCA, the Lender could be jointly liable for the alleged misrepresentations and/or breaches of the contract made by the Supplier[1]. But it has argued that any claim brought by Mr M for any alleged misrepresentations was made too late.

It would be for a court to decide whether the limitation period for such a claim as set out in the LA has expired[2], but I have thought about this argument as I think it is relevant in considering whether the Lender acted fairly in turning down the claim.

A claim under s.75 CCA is a "like" claim against the creditor. It essentially mirrors the claim the consumer 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 s.2 LA).

But a claim, like Mr M's, under s.75 is also an "action to recover any sum by virtue of any enactment" under s.9 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. I say this because Mr M entered the Purchase Agreement at that time based on the alleged misrepresentations

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[1] I note that Mr M's Purchase Agreement is between him and a company I'll call "LD" but his credit card statement shows that the payment was made to another entity, which I'll call "PL". For a claim to succeed under Section 75 CCA, there needs to be, among other things, a debtor-creditor-supplier relationship. Here, I've not made a finding on whether LD and PL are sufficiently linked in order to keep this relationship intact for the purposes of the claim. But I don't need to make a finding on this point as I don't think the claim ought to succeed for other reasons.

[2] Here, I note that Mr M resides in Scotland, so I have also considered the Prescription and Limitation (Scotland) Act 1973, which provides *five* years from the date on which the action accrues, not six. Again, it would be for a court to decide whether the limitation period for Mr M's claim under Section 75 CCA has expired, but I think this is relevant for the same reasons as I've given above.

of the Supplier – which the PR says he relied on. And as the Credit Agreement with the Lender provided the funding to finance the purchase, it was when he used his credit card to make the payment that he suffered a loss.

The PR says the time limits should be extended by s.32 LA as it argues in its Letter of Complaint:

"…our clients only became aware of the misrepresentations and the unfair relationship in recent years when there was continuous lack of availability to book the holidays they wanted which crystallised with them becoming aware of the Judgment[3], and taking legal advice on the same, in 2024."

S.32 has the potential to postpone (not extend) the relevant limitation period in cases of fraud, concealment, or mistake. I have thought about that here, but as Mr M says that the timeshare was misrepresented to him because he couldn't holiday in the way the Supplier promised he could, that would have been clear to him not long after the Time of Sale. So, even if it could be said that s.32 is likely to have postponed the limitation period until he first discovered that the availability of holidays was not what he thought it would be (and I make no such finding that it would), I'm not persuaded that would make a difference here.

Mr M first raised his claim with the Lender on 23 February 2024. And as more than six years had passed between the Time of Sale and the date he first put the claim to the Lender, I don't think it was unfair or unreasonable of the Lender to reject Mr M's concerns about the Supplier's alleged misrepresentations or breaches of contract under Section 75 of the CCA.

<u>Mr H's complaint about an unfair relationship under s.140A CCA</u>

In its response to the Lender's rejection of the claim under s.75 CCA, the PR says that the Lender was party to an unfair relationship with Mr M. The PR hasn't specifically referred to the relevant legislation, but I think it has raised this matter under s.140A CCA.

A court may make an order under s.140B CCA in connection with a credit agreement if it determines that the relationship between the creditor (here, the Lender), and the debtor, (here, Mr M), is unfair to the debtor because of any of the terms of the agreement or any related agreement (such as the Purchase Agreement).

Only a court has the power to make a determination under s.140A, but as it's relevant law, I've considered it when looking at the various allegations.

A claim under s.140A is a claim for a sum recoverable by statute, which is also governed by s.9 LA. As such, the time limit for making such a claim is also six years from the date on which the cause of action accrued[4].

However, in determining whether or not the relationship complained about was unfair, the High Court held in Patel v Patel [2009] EWHC 3264 (QB)[5] decided that this could only be determined by "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 the date of the trial, or otherwise the date the credit relationship ended.

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[3] *Shawbrook & BPF v FOS*'.

[4] I have once again considered the Prescription and Limitation (Scotland) Act 1973, which provides *five* years from the date on which the action accrues, not six. Again, it would be for a court to decide whether the limitation period for Mr M's claim under Section 140A CCA has expired, but this would not make a difference as I have approached this aspect of Mr M's complaint on the basis that his account was open at the time the complaint was first raised.

[5] Which was more recently approved by the Supreme Court in the case of *Smith v RBS*

So, the upshot of this is that the complaint under s.140A CCA needed to be raised within six years of the date of the end of the Credit Agreement, or in other words, the date Mr M's credit card account was closed. Here, based on what I've seen, his account was open at the time of the Letter of Complaint, so I think that Mr M's complaint was therefore raised in time. I will explore his concerns on this basis.

In determining whether the relationship between Mr M and the Lender is unfair under s.140A, I need to consider the reasons the PR has given for this alleged unfairness. This includes the alleged misrepresentations, even if I think these are likely to have been raised too late for the purpose of his claim under s.75 CCA[6]. So, I've considered these allegations further in addition to the other points raised in the Letter of Complaint.

In order for me to conclude that the relationship between Mr M and the Lender was rendered unfair for the reasons alleged by the PR in its letters, I would need to conclude that the Supplier (1) made false statements of fact when selling Mr M the Purchase Agreement and (2) that those false statements were material to his decision to enter the Purchase Agreement.

I would also like to set out my thoughts on the evidence provided by the PR on Mr M's behalf during the course of this complaint, as well as the contents of the Letter of Complaint.

I appreciate that the Letter of Complaint was probably prepared by the PR following a conversation with Mr M. After all, it contains personal information that only he would know. However, a letter of complaint (or claim) is not evidence – especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations.

Direct testimony from the consumer, in full and in their own words, is important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. Here, that simply isn't possible – I see little reference to anything which could reflect what is said to have happened at the Time of Sale. It's also important that the decision-maker can see that the Letter of Complaint is a genuine reflection of the consumers concerns and what they say happened. Again, that simply isn't possible in this case, as no testimony has been provided.

I also note that the PR's initial s.75 claim letter refers to Mr M paying the money and signing the Purchase Agreement in Spain, but the supporting paperwork shows that this sale actually took place in Portugal. To me, this error further erodes the reliability of what the PR says as it has clearly not provided a fully accurate account of the circumstances relevant to Mr M's complaint.

With all this considered, I'm unable to place much evidentiary weight on the Letter of Complaint or any subsequent letters sent by the PR. So, I have relied on the paperwork that's been provided, and the particular circumstances of the case.

<u>The allegation that the Supplier misrepresented the exit options available to Mr M</u>

The PR asserts that the Supplier misrepresented Mr M's options to him at the Time of Sale in relation to an existing timeshare he purchased in 2009. Specifically, it says that Mr M was told that he would have to enter the Purchase Agreement in order to surrender his existing timeshare after five years, but this was untrue as he could have notified the Supplier of his intention to relinquish that timeshare by quoting Section 20 of the Timeshare Regulations.

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[6] See Scotland & Reast v British Credit Trust Limited [2014] EWCA Civ 790

There are several problems with the PR's reasoning here. Firstly, I can't see that the Lender has any responsibility or liability in relation to the existing timeshare purchase as it didn't provide any finance towards that purchase. Secondly, the Timeshare Regulations did not come into effect until February 2011, so I don't see how they applied to the purchase Mr M made with the Supplier in 2009. Thirdly, I think the PR has misunderstood the relevant Regulation, which reads:

"20. – (1) A consumer may withdraw from a regulated contract by giving the trader written notice of withdrawal during the withdrawal period."

Section 21 of the Timeshare Regulations explains what is meant by the withdrawal period:

"21. –(1) The withdrawal period for a regulated contract –
(a) Begins on the start date, and
(b) Ends on the date which is 14 days after the start date…"

Mr M did have a 14-day period in which to withdraw from the Purchase Agreement. But as far as I can see, the Timeshare Regulations did not provide him with the right to withdraw from his existing contract at the Time of Sale in the way the PR appears to believe.

In any case, there is no testimony or other evidence from Mr M which says he was told something by the Supplier to make him believe he had to enter the Purchase Agreement in order to be able to exit his previous purchase. So, there is simply no evidence to show me that the Supplier told Mr M that he needed to proceed with the purchase in order to surrender his existing timeshare contract.

The PR has called the Purchase Agreement a "Surrender Contract" and a "5-year exit plan". But these descriptions are not reflected in the contractual documents, which make it clear that Mr M was purchasing 20,000 additional points which he could exchange for holiday accommodation. In addition, I can see that the contract did allow him to surrender his points, in part or in full, from the fifth year of the membership, provided that he paid his annual fees for a minimum of five years. This doesn't mean he was purchasing the right to surrender his points. It is merely a clause in the Purchase Agreement that he did not appear to have in his existing contract.

Perhaps most importantly, I've not been provided with any evidence to show me that Mr M was unable to surrender his points as stated in the contract, or that he continued to be charged his annual fees beyond 2021. Indeed, I've only seen evidence to show that he paid the fee in 2017. I've seen an email from the Supplier to Mr M which reiterates that Mr M would have the right to surrender his entire allocation of points after five years, provided that he continued to pay the annual fees until 2021.

Overall, I currently find that there is simply no evidence that the Supplier told Mr M that the only way to exit his existing membership was to enter the Purchase Agreement, that the Lender has any responsibilities or liabilities relating to the existing agreement, that the Supplier said anything about Mr M's ability to surrender his points that was untrue, or that he only entered the Purchase Agreement because the Supplier provided him with false information.

<u>Other alleged misrepresentations</u>

The PR says the Supplier made the following promises:

- *Mr M would receive regular and exclusive holidays at luxury resorts, but that was false as he faced significant obstacles when attempting to book any holidays with the Supplier.*
- *Booking would be simple with accommodation readily available.*
- *Mr M would be able to surrender the timeshare at no additional cost.*
- *The management fees would escalate slower than they did.*

Again, there is simply no evidence to support these allegations. For example, Mr M has not provided any evidence to show that he was unable to receive the holidays he was promised. I accept that he may not have always been able to secure his preferred accommodation on his preferred dates, but there's no evidence to show that he couldn't use the points to obtain holidays. There's no evidence to show that Mr M (1) could not surrender the points, or (2) that he incurred any extra costs in doing so. And I've only been shown evidence of one management fee payment, which was an amount of £1,316.00, paid in June 2017. The PR says that Mr M was unable to access his bank statements for the other years, but I think he could have shown proof of any further payments if he had made any. So, I can't agree that the fees have increased year on year because there is no evidence to support that allegation and Mr M has only shown evidence of one payment.

The allegation that the sale was pressured

The PR says that Mr M "felt very pressured into agreeing to the fresh contract in exchange for 5-year surrender clause". But I haven't been presented with any evidence to support this allegation. And as I haven't seen anything to suggest that Mr M only went ahead with the purchase because he felt he had no choice, I'm not persuaded that the Supplier pressured him into the purchase.

Responses to the PD

The Lender accepted my findings and had nothing further to add.

Neither the PR nor Mr M responded to my PD.

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 I've not received anything new to consider from either party, I see no reason to depart from the findings and conclusion I reached in the PD.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr M's Section 75 claim, and I'm not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him 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 him.

My final decision

For the reasons I've given above, I don't uphold Mr M's complaint against MBNA Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or

reject my decision before 12 August 2025.

Andrew Anderson
Ombudsman