DRN-6147868

Financial Ombudsman Service

The complaint

Mr and Ms P's complaint is, in essence, that Shawbrook Bank Limited 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.

Background to the complaint

Mr and Ms P were members of a timeshare provider (the 'Supplier'). The product at the centre of this complaint is their membership of a timeshare that I'll call the 'Signature Collection' – which they bought on 1 October 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,540 fractional points, for which they paid £20,648 after trading in their existing membership (the 'Purchase Agreement').

Signature Collection membership was asset backed – which meant it gave Mr and Ms P more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Ms P paid for their Signature Collection membership by taking finance of £32,147 from Shawbrook (the 'Credit Agreement'). Some of the funds were used to repay an existing loan they held with Shawbrook, which they'd taken to pay for their previous membership.

Mr and Ms P – using a professional representative ('PR1') – wrote to Shawbrook on 27 June 2022 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

Shawbrook dealt with Mr and Ms P's concerns as a complaint and issued its final response letter on 20 February 2024, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision (the 'PD'). In that decision, I said:

> I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I do not think this complaint should be upheld.
>
> However, 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.

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

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

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. Shawbrook doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

It was said in the Letter of Complaint that Signature Collection membership had been misrepresented by the Supplier at the Time of Sale because Mr and Ms P were:

1. Told that they had purchased an investment that would "considerably appreciate in value".
2. Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.
3. Told that they could sell their Signature Collection membership to the Supplier or easily to third parties at a profit.
4. Made to believe that they would have access to "the holiday apartment" at any time all year round.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

In relation to point 3, it was not possible to sell the timeshare back to the Supplier and this was clearly set out in an Information Statement that Mr and Ms P were given, which they signed, at the Time of Sale. Similarly, with regard to point 4, the contractual documentation made it clear that Mr and Ms P *did* have a preferential right to stay at the Allocated Property – that was a notable benefit of the Signature Collection membership. It also clearly explained that such right existed only for a specified week of the year, and not at any time of the year. I do not find it likely that the Supplier would've suggested things so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr and Ms P.

So, while I recognise that Mr and Ms P – and their representatives – have concerns about the way in which Signature Collection membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think

that Shawbrook acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

Section 140A of the CCA: did Shawbrook participate in an unfair credit relationship?

I've already explained why I'm not persuaded that Signature Collection membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr and Ms P and Shawbrook along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Times of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Ms P and Shawbrook.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

Mr and Ms P's complaint about Shawbrook being party to an unfair credit relationship was made for several reasons.

PR1 said, for instance, that the right checks weren't carried out before Shawbrook lent to Mr and Ms P. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that Shawbrook failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Ms P was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with Shawbrook was unfair to them for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for the Mr and Ms P.

Connected to this is the suggestion that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that Shawbrook wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr and Ms P knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Signature Collection membership. And as the lending doesn't look like it was

unaffordable for them, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mr and Ms P suffering a financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell Shawbrook to compensate them, even if the loan wasn't arranged properly.

Overall, therefore, I don't think that Mr and Ms P's credit relationship with Shawbrook was rendered unfair to them under Section 140A for any of the reasons above – or that any such unfairness might have arisen in such a manner in connection with any related credit agreement. But there is another reason, perhaps the main reason, why Mr and Ms P's representatives say the credit relationship with Shawbrook was unfair to them. And that's the suggestion that Signature Collection membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

<u>The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations</u>

Shawbrook does not dispute, and I am satisfied, that Mr and Ms P's Signature Collection membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Signature Collection membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr and Ms P's representatives say that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr and Ms P were told by the Supplier that Signature Collection membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

A share in the Allocated Property clearly constituted an investment as it offered Mr and Ms P the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Signature Collection membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract <u>as an investment</u>. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Signature Collection. They just regulated how such products were marketed and sold.

To conclude, therefore, that Signature Collection membership was marketed or sold to Mr and Ms P as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Signature Collection

membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Signature Collection membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Signature Collection as an 'investment' or quantifying to prospective purchasers, such as Mr and Ms P, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Signature Collection membership as an investment. So, I accept that it's equally possible that Signature Collection membership was marketed and sold to Mr and Ms P as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

Would the credit relationship between Shawbrook and Mr and Ms P have been rendered unfair to them had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Ms P and Shawbrook under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Ms P and Shawbrook that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Mr and Ms P have said in the course of their complaint about how the membership was sold to them and their motivation for purchasing it.

Within the Letter of Complaint, it was said that Mr and Ms P were told that they had purchased an investment that would increase in value. There was no further detail underpinning these statements within the Letter of Complaint, which are rather generic in nature. In fact, such assertions were made in an identical fashion by PR1 in a number of other complaints.

When referring the complaint to us, PR2 included two statements from Mr and Ms P with their recollections from the Time of Sale. There are some noticeable and

important differences between them. I'll come back to this issue in more detail later.

In its response to our Investigator's assessment, PR2 highlights that within the second of the two statements, Mr and Ms P said:

> "*We were told that the deal was a(n) investment as after 19 years the property would be sold and we would get our money back, this we presumed taking in to the value* (sic) *would increase in 19 years and would at the very least* (we) *may get all our money returned maybe more due to rising costs in property.*"

This related to their 2015 purchase, but it is a relevant consideration for me in assessing the fairness of the credit relationship into which Mr and Ms P entered in 2017 given it pertains to a related credit agreement (with that 2015 purchase underpinned by a loan with Shawbrook that was refinanced by the loan at issue). And in relation to the 2017 purchase, PR2 highlights that Mr and Ms P said:

> "*Again we were told that this was a better investment with a better return when sold*."

And of both, that:

> "*We both feel as we were backed in to these agreements not fully understanding the implications as we were force fed information for hours at a time and not been able* (sic) *to understand fractional jargon fully, other than this was been* (sic) *sold as an investment rather than a membership with a return at the end of the agreed period*."

These comments, taken at face value, support the allegation that the Supplier positioned the membership as an investment opportunity to Mr and Ms P. But they do not say – at least not explicitly – that this was a material factor in Mr and Ms P's decision to purchase either membership. It could be argued that its prominence in Mr and Ms P's statement suggests that this was something of importance to them and was therefore something that motivated them to purchase each product.

However, as I mentioned above, this was the second of two statements made by Mr and Ms P. The first of the two did not include any of the comments cited by PR2 as quoted above.

This difference makes it difficult for me to place much weight on what Mr and Ms P have said – particularly in the second, revised statement. Particularly bearing in mind the timing of each: in that the first was, in all likelihood, prepared at or around the time the complaint was originally made (2022) and the second some considerable time later (2024). Significantly, these points in time straddle the influential judgment in the case of *Shawbrook & BPF v FOS*[1]. That the amendments to Mr and Ms P's initial statement relate almost entirely to matters concerning the promotion of the membership as an investment – and are such a significant departure from their earlier comments – make it hard for me to ignore the risk that the content of the second statement were influenced by the widespread publicity following the outcome of the judicial review, directly or otherwise. More so as I've not been provided with evidence I requested to help me understand how these changes were made.

[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)

Given this, I consider the first statement given by Mr and Ms P to be more reliable evidence of their memories from the Time of Sale (and in respect of the previous sale, which is relevant for the reasons I've noted above). And on my reading of that statement, the prospect of a financial gain from their memberships with the Supplier was not an important and motivating factor when they decided to go ahead with either purchase.

In recalling their memories of the 2015 sale, Mr and Ms P made no mention of anything related to the investment element (of their "fractional club" membership, which was asset-backed in a similar way to the Signature Collection membership). Rather, they spoke about how the Supplier persuaded them "*how much cheaper it would be if we became members … than paying for vacations*" and that the prospective membership would "*give us the holidays we need*".

And of the 2017 sale, it seems to me that Mr and Ms P were motivated to upgrade to the Signature Collection membership to improve the holiday options available to them – given they say:

> "*We were told at this meeting … that the initial purchase was no longer fit for purpose as it did not give us enough points to use effectively, we were told that there as a new level of accommodation available called Signature Collection which would work better for us*…"

The Signature Collection provided Mr and Ms P with a number of additional benefits to their existing fractional club membership, including a higher standard of accommodation. As Mr and Ms P allude to in their statement, as part of the upgrade they also increased the number of points they held (and therefore their 'purchasing power' when it came to their holiday options). They traded in their 1,200 *bi-annual* points to 1,540 *annual* points.

Weighing all of this up, I am not persuaded that the prospect of a financial gain was a material factor in Mr and Ms P's purchasing decisions. That doesn't mean they weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Ms P themselves don't persuade me that either purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decisions they made.

On balance, therefore, even if the Supplier had marketed or sold the memberships as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Ms P's decision to purchase them was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with each purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationships between Mr and Ms P and Shawbrook were unfair to them even if the Supplier breached Regulation 14(3).

<u>The provision of information by the Supplier at the Time of Sale</u>

Within the Letter of Complaint, PR1 said that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms.

> As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.
>
> I can't see that any contract terms in the Purchase Agreement have been operated unfairly against Mr and Ms P in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms governing Signature Collection membership are likely to have led to an unfairness that warrants a remedy.

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Ms P's Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

The Lender responded to the PD and accepted it.

The PR also responded to say that Mr and Ms P did not accept the PD.

Having received the relevant responses from both parties, I'm now finalising my decision.

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.

The legal and regulatory context that I think is relevant to this complaint is, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

<u>The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

<u>The FCA's Principles</u>

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6

- Principle 7
- Principle 8

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.

While both parties responded to my PD, neither provided me with any further comments or evidence to take into account. Having reviewed everything afresh, I see no reason to depart from my initial conclusions as set out above. So this final decision simply confirms my provisional findings.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Ms P to accept or reject my decision before 12 March 2026.

Ben Jennings
Ombudsman