DRN-4707564

The complaint

Mr S complains about the outcome of a claim he made to Shawbrook Bank Limited in relation to windows he purchased with finance under a fixed sum loan agreement.

He is represented in this complaint by a third party, but for ease of reference I'll refer to submissions made by the third party as being made by Mr S.

What happened

In November 2015, Mr S was visited by a representative of a company I'll call 'Z' and entered into a contract with them to purchase windows. The order form from Z that was signed by Mr S set out two options. The first was that Mr S would choose to pay for the purchase on 'cash terms'. This meant that the full order price for the windows of £6,910 would be payable. The second option set out what was referred to as a 'Lifestyle Account'.

This would give Mr S a 'Lifestyle Subsidy' of £910 which reduced the order price by that amount. Mr S chose this latter option.

The Lifestyle Subsidy was available only for purchasers who accepted credit, arranged by Z, to purchase products. In Mr S's case it was one of six so-called "subsidies" applied by Z's salesman by way of discounts to a headline price for the windows of £24,860, which was described as the "2 year fixed cost".

Mr S consequently entered into a fixed sum loan agreement with Shawbrook Bank Limited ("Shawbrook") for this purchase. He paid a £100 deposit and the £5,900 balance of the purchase price was financed by the loan. The total amount payable under the loan agreement was £12,994 and Mr S was required to pay 120 monthly payments of £107.45.

Mr S complained to Shawbrook in 2020 saying the following:

- Shawbrook failed in their duty of care to customers by not disclosing the criminal record of one of the directors under the umbrella of companies which included 'Z'.
- Shawbrook should have disclosed the nature of the relationship between themselves and Z.
- There was a court ruling against Z from June 2017 where it was found they had been guilty of offences of price inflation and poor sales tactics under consumer protection legislation.
- Z cold called him and used high pressure sales tactics by being in his house for three and a half hours to force him into the sale of the windows and the fixed sum loan agreement.
- He was offered an unfair incentive to enter into the fixed sum loan agreement.

- He was misled about the benefits of the windows, in particular the savings on energy costs he could make.

- Shawbrook didn't carry out appropriate affordability checks in respect of the fixed sum loan agreement.

- He can no longer benefit from the 10-year warranty attached to the goods as Z has ceased to trade.

Shawbrook didn't uphold Mr S's complaint. They said:

- They were unable to locate the details of the court ruling that Mr S referenced but noted there had been a media article about this which set out there had been ten instances of wrongdoing in 2013 and 2014 by Z's salesmen. These cases involved quoting inflated prices to customers to give them an impression of achieving a bargain, and falsely telling customers that the products were only available for a short period of time.

- The sample size of ten cases wasn't sufficient to assume similar wrongdoing in all sales from that period.

- Mr S purchased the goods in 2016 so this sale didn't occur during the period referred to in the media article.

- The court ruling referenced by Mr S couldn't therefore be used to justify his allegations around mis-selling.

- Shawbrook weren't responsible for the regulation of suppliers such as Z and so didn't fail in any duty of care towards Mr S.

- The nature of the relationship between Z and Shawbrook was a confidential commercial trading one, and they weren't under any obligation to disclose the terms of that relationship to Mr S.

- Z received a commission for introducing Mr S to Shawbrook to enter into the fixed sum loan agreement and there was legitimate justification for Z to reduce the price of the windows via the Lifestyle Subsidy.

- Mr S benefitted from Z's "subsidies" by entering into the loan agreement which in turn allowed him to control the projected total amount payable by making overpayments if he wished which would reduce the term of the loan and the interest payable. He therefore had a chance to save money by purchasing the windows using credit.

- Shawbrook would themselves honour the terms of Z's 10-year warranty.

- There were potentially legitimate reasons why Z's salesman was in Mr S's house for a long period of time. For example, Mr S may have asked questions to help him understand what he was buying and how he was paying for this.
- Mr S was given a cooling off period during which he could decide not to go ahead with the purchase but didn't exercise this option.

- Shawbrook's decision to accept Mr S's finance application was correct and based on their lending criteria.

- The document that Mr S provided around energy savings didn't specify how much money would be saved or make any promise about savings.

Mr S then referred his complaint to our service. He said that Z misrepresented themselves, their products, and the fixed sum loan agreement to him by telling him that:

- They'd been installing products for over 30 years when they'd only been trading for just over seven.

- The discounts applicable to the transaction were only available on the day, otherwise he'd lose them.

- The Lifestyle Account option would save him money - without explaining that if he continued with the finance over the full term, it would cost him much more including interest.

Mr S also said that Z had misrepresented the energy efficiency and savings he could expect by installing the windows and made the following further points:

- He'd suffered a breach of contract as Z had ceased to trade and was unable to honour the warranty associated with the windows.

- Shawbrook and Z breached Section 5 of the Consumer Credit Sourcebook ("CONC) contained with the Financial Conduct Authority's Handbook by failing to carry out appropriate creditworthiness checks to ensure he could afford the loan throughout its duration. In particular, they didn't take his income and expenditure into account.

Mr S said that Z breached the Consumer Protection from Unfair Trading Regulations 2008 by giving false information and promises and showing him information that coerced him into the order. He said he placed the order under duress following a severe amount of oppressive, high pressure and aggressive behaviour from Z's salesman. He was shown information that outlined that the price of the windows would be reduced by over 75% if he signed the order on the day and if he committed to finance this with Shawbrook. Mr S says he was told he would lose these discounts if he didn't sign and wouldn't get the warranty.

Mr S also said that Z breached CONC by not telling him that they would receive a commission for introducing him to Shawbrook and that, had they done so, he wouldn't have placed the order. He wishes to be placed in the position he would have enjoyed if he had never purchased the windows.

Our investigator upheld the complaint. He said Mr S would have had to pay substantially more by way of interest and charges under the finance agreement, if it ran to term, than the amount he saved under the Lifestyle Subsidy; and he hadn't been told this. Our investigator also said there was no warning that Mr S would have to settle the finance agreement within a particular period to benefit from the subsidy.

He also said that the contract should have clearly and prominently explained the incentive for entering into the finance agreement in context of the total charge for credit. Z's failure to do this meant the key features of the agreement weren't explained clearly to Mr S to enable him to make an informed choice. And he felt Z did not communicate appropriately to Mr S the benefits of entering into the finance agreement as set against its risks. He said both these actions contravened the FCA's Principles of Business ("PRIN").

In summarising this view, our investigator thought that a court would likely consider that an unfair relationship existed between Mr S and Shawbrook in view of Z's mishandling of the antecedent negotiations in respect of the sale, for which Shawbrook bore responsibility under Section 56 of the Consumer Credit Act 1974. He didn't, though, uphold the other points that had been made by Mr S; and he noted that Mr S had received the windows and the benefits that this brought to his home. He also noted that there had been no allegation that the windows weren't of satisfactory quality or hadn't been installed correctly.

Our investigator recommended that Shawbrook should bring the finance agreement to an end. He also recommended they ensure that Mr S only ever pays a total of £6,910 to them under the finance agreement, which represented the original £6,000 cost price of the windows and the £910 discount he received for signing up to the Lifestyle Account. Our investigator also said Shawbrook should ensure that reworking the agreement this way didn't result in any adverse information being recorded on Mr S's credit file for this account and that they should honour the 10-year warranty.

Mr S didn't object to the investigator's view or his recommendations. Shawbrook didn't agree, however. They said:

Mr S's Portfolio Agreement and Subsidiary Analysis Document clearly showed the difference between the option to finance the purchase by a loan and the Lifestyle Account option.

- The value of the discount (£910) constituted around 3.67% of the overall fixed two-year cost of £24,860, which meant it was unlikely to have influenced Mr S's decision to enter into the agreement with them or that he would have realised that taking the credit over 10 years as he did would be less beneficial than that discount.

- Mr S was financially sophisticated, and his principal motivation would have been to buy the windows at the best possible price. As such, it was likely he was willing to engage in the various offers and discounts required to do that.

- Mr S likely didn't have an alternative way of paying for the windows and there is no evidence to suggest this was an option. So, it can be challenged that the discounts were the key driver or inducement for him.

- Mr S was aware he could repay the loan early and benefit from this, as ultimately he did in fact repay the loan over the course of two overpayments which he made in October and November 2020.

- Mr S didn't complain about the sale until nearly five years had passed, so they question whether he felt strongly about taking out a loan and how the sales process went.

- It's not reasonable for us to determine that a credit agreement should be effectively "voided" as our investigator proposed as a result of a financial promotion not meeting the requirements of CONC.

- They fundamentally disagree that the way the Lifestyle Account was marketed created any unfairness that should warrant the loan being voided in this way.

- Our service should treat Mr S's testimony around the sale with caution as his representatives have used several similar 'kitchen sink' arguments and allegations in other complaints brought by them. So, they question whether the testimony given to us is really that of Mr S.

- It wouldn't be fair to give Mr S the benefit of an "interest-free loan" as our investigator has proposed, as this would mean Mr S enjoys the benefits he has received but at no cost. They suggest a fairer way to resolve the case would be applying an interest rate to the finance agreement that falls somewhere between the contractual APR and 0%.

I issued my provisional decision on 26 January 2024, in which I said the following:

"In considering the complaint I've had regard to the relevant law and regulations, any regulator's rules, guidance and standards and codes of practice. This includes, but is not limited to, the following:

The Consumer Credit Act 1974 (CCA)

Under section 56 of the CCA, statements made by a supplier in relation to a transaction financed or proposed to be financed under pre-existing arrangements between a credit provider and the supplier are deemed to be made as an agent for the creditor.

Under section 75 of the CCA, Shawbrook Bank are (subject to certain criteria) jointly and severally liable with a supplier for a breach of contract or misrepresentation made by the supplier of goods purchased using the fixed sum loan.

Section 140A of the CCA sets out provisions in regard to determining if a relationship between a creditor and debtor is unfair, and section 140B sets out the powers of the court in relation to an unfair relationship.

The Financial Conduct Authority (FCA)

The FCA Principles for Businesses (PRIN) also applied to Z's acts as credit broker and are of relevance to this complaint.

PRIN 6 says "A firm must pay due regard to the interests of its customers and treat them fairly."

PRIN 7 says "A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading."

The FCA Consumer Credit Sourcebook (CONC) also applies and is of relevance to this complaint. In particular,

"CONC 1.2.2 R

A firm must:

> *(1) ensure that its employees and agents comply with CONC; and*
> *(2) take reasonable steps to ensure that other persons acting on its behalf comply with CONC."*

CONC 2.5.3 R concerning credit brokers states a firm must:

> *(1) "where it has responsibility for doing so, explain the key features of a regulated credit agreement to enable the customer to make an informed choice as required by CONC 4.2.5 R;*
>
> *(2) take reasonable steps to satisfy itself that a product it wishes to recommend to a customer is not unsuitable for the customer's needs and circumstances;*
>
> *(3) advise a customer to read, and allow the customer sufficient opportunity to consider, the terms and conditions of a credit agreement or consumer hire agreement before entering into it.".*

CONC 3.3.1 states that financial promotions have to be "clear, fair and not misleading". In particular, they need to be balanced and not place emphasis on the benefits without giving a fair and prominent indication of any relevant risks, as appears from CONC 3.3.1(1A) and (1B):

> *'(1A) A firm must ensure that each communication and each financial promotion:*
>
> *(a) is clearly identifiable as such;*
> *(b) is accurate;*
> *(c) is balanced and, in particular, does not emphasise any potential benefits of a product or service without also giving a fair and prominent indication of any relevant risks;*
> *(d) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to which it is directed, or by which it is likely to be received; and*
> *(e) does not disguise, omit, diminish or obscure important information, statements or warnings.*
>
> *(1B) A firm must ensure that, where a communication or financial promotion contains a comparison or contrast, the comparison or contrast is presented in a fair and balanced way and is meaningful'.*

CONC 3.3.5 gives guidance which says:

'A firm should ensure that each communication and each financial promotion:

> *(1) is accurate and, in particular, should not emphasise any potential benefits of a product or service without also giving a fair and prominent indication of any relevant risks;*
> *(2) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;*
> *(3) does not disguise, diminish, or obscure important information, statements, or warnings; and*
> *(4) is clearly identifiable as such."*

CONC 3.3.7G says:

"When communicating information, a firm should consider whether omission of any relevant fact will result in information given to the customer being insufficient, unclear, unfair or misleading."

And CONC 3.3.10G says:

"Examples of practices that are likely to contravene the clear, fair and not misleading rule in CONC 3.3.1R include:
…
(9) suggesting that a customer's repayments will be lower under a proposed agreement without also mentioning (where applicable) that the duration of the agreement will be longer or that the total amount payable will be higher."

The sale of the windows

I've firstly considered the documentation that Mr S was given by Z. I've seen a document called 'Portfolio Agreement & Subsidy Analysis' which set out the various discounts Mr S would get if he agreed to buy the goods. This set out the initial price of the goods and the price after various discounts had been applied. There are a few reductions to the price of the goods including one that is specific to signing up to a finance agreement.

The document shows that the price of the goods started at £24,860 and then after various discounts was reduced to £6,910 on condition, it seems, that Mr S agreed to take out the Lifestyle Account. The document names the discounts:

A. Priority Survey Subsidy 3% maximum
B. Priority Installation Subsidy 7% maximum
C. Promotional Subsidy
D. Lifestyle Subsidy (only applicable for Portfolio Customers using the Lifestyle Account)
E. Additional Subsidy including Quantity Subsidy where applicable (Only available on orders over £2000)
F. A further subsidy (maximum £90) to offset the first year's CARE payment.

The 'cash order' price is set out as £6,910 and with the discounts I've set out above applied, the 'Portfolio Price' using the finance is put as £6,000.

I've also seen a document called the 'Customer Purchase Order'. This shows that the 'Cash Terms' were for a total price of £6,910 and the price with the Lifestyle Subsidy (also called 'Lifestyle Price') was £6,000.

As I've set out above, Shawbrook and Z owed certain responsibilities under CONC and PRIN as to the manner in which the loan was marketed and presented to Mr S. And I have taken these into account in my decision.

The finance agreement that Mr S signed set out that this was a 10-year agreement with 120 payments of £107.45. The total charge for credit over the full term was £6,994.00 with the total amount payable being £12,994.00.

A prominent incentive for Mr S to enter into the finance agreement with Shawbrook was for him to receive the 'Lifestyle Subsidy' of £910. However, the APR of 19.91% meant that the total charge for credit is £6,994. This means that if the loan ran to term, Mr S would have paid more than seven times the Lifestyle Subsidy by taking out the finance agreement. Or, to put it another way, instead of paying £6,910 up front, he would pay £13,094 (being the full repayments under the loan plus his £100 deposit) over ten years.

I think that this is something that should have been clearly explained to Mr S, so he understood both the financial benefits and the financial costs and risks that were associated with the proposed arrangement, to enable him to make an informed decision. However, I can't see any documentation that shows Mr S was told that, if the finance agreement ran to term, any saving given by the subsidy, would be substantially outweighed by the interest and charges on the loan running to term. And I also haven't seen any warning in the documentation that Mr S would need to settle the finance agreement within a certain period of time to get any net benefit from the subsidy.

As I've set out above, CONC 3.3.1 states that financial promotions must be "clear, fair and not misleading". And they need to be balanced and not place emphasis on the benefits without giving a fair and prominent indication of any relevant risks. I find though that the information about the Lifestyle Subsidy lacks balance as the discount is presented as a financial benefit where it should have been explained prominently that it came at the cost of entering into a finance agreement where interest charges over the term outweigh the subsidy.

I also find that the information given by Z to Mr S was insufficient and presented in such a way that it would likely be misunderstood by the average member of the group to which it is described or likely to be received. That is contrary to CONC 3.3.1 (1A) (d).

And I find that the information about the Lifestyle Subsidy was unclear and unfair in the presentation of benefits that might not manifest, and disguised the costs upon which said subsidy was conditional, which is contrary to CONC 3.3.1 (1A) (e).

The marketing material and contract should have clearly and prominently explained the incentive for entering into the finance in context of the total charge for credit – and how any savings could be realised in a particular timeframe only. I find that this though wasn't done and as a result, CONC 2.5.3 was contravened, as Z didn't clearly explain the key features of the regulated agreement to Mr S to enable him to make an informed choice. I find this also contravenes the requirement under PRIN 6 to 'pay due regard to the interests of its customers and treat them fairly' as I don't think the marketing of the finance was done with due regard to Mr S's interests or that this treated him fairly. I think the presentation from Z about the Lifestyle Account and the Lifestyle Subsidy unfairly suggested that Mr S would be receiving an overall saving and unfairly obscured the true comparison between costs and benefits which should have been a central feature of Z's presentation of the loan to him.

For the same reason, I find also that the marketing of the finance and the benefits of entering it set against the overall risks and costs were not communicated to Mr S in a way that was clear, fair and not misleading contrary to PRIN 7.

I accept that the finance agreement states what the overall cost of credit is. However, there was a lack of corresponding and balanced information about how any potential savings from the subsidy could be realised in a particular timeframe only by early repayment of the loan. I think it more likely than not that the discussion around the sale led by Z's salesman was based on the savings and incentives Mr S would get and there wasn't a fair presentation of how the benefit of the discounts that were being offered would be impacted through the overall cost of credit.

Because of the nature of the failings that I have set out above, I've thought about whether an unfair relationship has arisen as a result. This ties in with our requirements under DISP 3.6.4R which sets out our obligation to consider relevant law (as well as other considerations, such as a firm's regulatory obligations) when considering what is fair and reasonable in all the circumstances of the case.

So, I've also considered the relevant law relating to Mr S's complaint and in particular, the relevance of the unfair relationship provisions in Section 140A, Section 140B, and Section 140C of the Consumer Credit Act 1974 and whether this is a further reason why Shawbrook may not have acted fairly and reasonably towards Mr S.

Section 140A of the Consumer Credit Act 1974 states:

"(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following:
(a) any of the terms of the agreement or of any related agreement;
(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
(c) 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).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

Section 140B sets out the powers of a court in respect of an unfair relationship and Section 140C sets out how both preceding sections should be interpreted.

The application of s.140A is fact specific, while s.140A(1)(c) allows for anything done or not done by, or on behalf of the creditor either before or after the making of the credit agreement, or any related agreement (such as, in this case, the agreement to purchase the windows), to be considered by a court when determining whether there was an unfair relationship between the parties.

In the leading case of Plevin v Paragon Personal Finance, the Supreme Court considered the nature of the jurisdiction under s.140A, pointing out that it is deliberately framed in wide terms but making some general points about its application (see paragraph 10 of Lord Sumption's judgment). These include the fact that an unfair relationship "will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose". But, on the other hand, that the intrinsic difference in financial knowledge and expertise that normally exists between a commercial lender and a private borrower is not, of itself, a reason to reopen the transaction.

Lord Sumption also went onto consider (at paragraph 17) the relevance, under s.140A, of compliance with regulatory rules. Deciding that this may give some evidence as to "the standard of commercial conduct reasonably to be expected of the creditor", but pointed out that the court's task is a different, and wider one than deciding whether a regulatory rule has been breached. The regulatory rules in issue in the case were the FCA's ICOB rules about the disclosure of commission. Lord Sumption stated:

> *"….the question whether the debtor creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters".*

And, it is on that basis that Lord Sumption addressed the question of whether Mrs Plevin's relationship with Paragon was made unfair by the fact that Paragon (without breaching the ICOB rules) had not disclosed the amount of its commission for arranging the relevant insurance (PPI). He stated (at paragraph 18):

> *"Mrs Plevin's evidence, as recorded by the recorder, was that if she had known that 71.8% of the premium would be paid out in commissions, she would have certainly questioned this. I do not find that evidence surprising. The information was of critical relevance. Of course, had she shopped around, she would not necessarily have got better terms. As the Competition Commissions report suggests, this was not a competitive market. But Mrs Plevin did not have to take PPI at all. Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair".*

Subsequently, in Kerrigan v Elevate Credit International, the High Court decided claims under s.140A brought by claimants whose unaffordable loans had been made by lenders in breach of CONC. The Judge pointed out that s.140A doesn't impose a requirement of causation in the sense that the debtor must show that a breach caused a loss (paragraph 13), stating "the focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss".

And, more recently still, in R (on the application of Shawbrook Bank) v Financial Ombudsman Service, the court reviewed two ombudsmen's decisions which applied s.56 and s.140A to the sales of two timeshares, which had been financed with connected lending. The decisions found there to have been unfair debtor creditor relationships in both cases, caused by the manner in which the timeshare agreements had been sold to the consumers. The Judge held (at paragraph 152):

> *"The ombudsmen…..in my view, correctly concluded on the authorities as they stand that the gateway to the functions conferred by sections 140A and 140B was properly to be regarded as unlocked by s.56, and that it was open to them to proceed to make an assessment as to whether the relationship between the banks and the consumers was made unfair because of the acts or omissions of the timeshare companies in the antecedent negotiations".*

Was there an unfair debtor creditor relationship in this case?

Under s.56 CCA, Z was the agent for Shawbrook in arranging the finance agreement and sale of the windows and carried out antecedent negotiations on their behalf. The fact that such an agent may have committed regulatory breaches isn't decisive as to whether an unfair relationship came into existence, although it can be a relevant factor. In this case, though, I do find it relevant in that unfairness was created as follows:

- *Taking the finance was capable of adding hugely to the total costs of the transaction and Z should (if it had complied with its obligations under CONC) have spelled this out clearly to Mr S but failed to do so.*

- *The purpose of that duty is consumer protection, namely to ensure that consumers have the balanced information, clearly presented, to help make an informed contractual decision.*

- *A reasonable person in the position of Mr S, if presented with a fair and clear comparison between the costs and benefits of the Lifestyle Account, would have been bound to question whether it represented value for money and was a sensible transaction to enter into. That would have raised the option of either not contracting at all, or not borrowing.*

- *Z's conduct deprived Mr S of the opportunity to perform this comparison and this had a fundamental effect on the fairness of the whole transaction, because he was led into it on a distorted basis.*

- *The fact that Mr S was doubtless aware that the loan would incur interest, and could have discovered the total cost of credit from other documents isn't sufficient to negate this unfairness. From all the evidence, it seems that the key commercial presentation by Z to Mr S emphasized the "subsidies", including the Lifestyle Subsidy, rather than the standard-form disclosures contained in the loan documentation, and portrayed the deal as a bargain for him.*

- *The fact that Mr S could limit his exposure to interest charges by pre-paying the loan and ultimately did so, after it had run for around five years, is insufficient to have negated the unfairness (although it has reduced the damage he has suffered as a result).*

- *The argument from Shawbrook that the Lifestyle Subsidy was too small to make any difference to the decision is rejected. Although £910 was only a small percentage of the starting price of £24,860, it was a significant discount (13.1%) when compared to the cash price of £6,910 Z offered Mr S, and that was the way it was presented and must have been perceived. So, it served as a significant inducement. And, as a benefit linked to a "Lifestyle Account", it was presented prominently and in a way that obscured the costs of taking out finance.*

Taking all the circumstances into account, I find that because of the nature of Z's mishandling of the antecedent negotiations, which I have set out in my decision above, a court is likely to conclude that an unfair relationship existed between Mr S and Shawbrook from the inception of the loan up until the point in November 2020 that the debt was repaid and the credit relationship ended.

Mr S did not make any complaint against Shawbrook until December 2020 and a court would have to decide whether he sat on his hands before complaining in knowledge of the relevant facts, whether before or after the ending of the credit relationship; and, if he did, whether that makes it unjust to award him redress. Here, Mr S says he only realised he could make a complaint when he scrutinised what had happened in detail, whereby he realised he had been paying Shawbrook for several years and still owed pretty much what he had borrowed. I think it unlikely that a court would think that Mr S had refrained from making a complaint despite knowing that he could or should have done so.

In any event, even if I am wrong in considering that a court would find there to be an unfair relationship under s.140A, exercising my function of deciding what I consider to be fair and reasonable in all the circumstances, I consider that Z (acting as agent on Shawbrook's behalf) caused Mr S to enter into this purchase and loan, and to incur the associated liabilities unfairly.

For the reasons I've set out above, I intend to uphold Mr S's complaint. I realise that Mr S has made a number of other complaint points about pressure sales tactics, the regulatory status of Z and a prior court case involving Z that he thinks is of relevance. As I intend to uphold Mr S's complaint for other reasons, and those reasons are ones that I see are pivotal to determining the outcome of this complaint, I find it unnecessary to reach a decision on those other arguments put forward by Mr S. Similarly, I don't consider that his allegations under s.75 about alleged misrepresentations made by Z to him during the sale would, if made out, add to the redress I propose to award below. So, I don't find it necessary to decide those allegations.

How I currently intend to ask Shawbrook to put things right

Although I intend to uphold Mr S's complaint, the fact remains that he received the goods and their benefits and has enjoyed these now since the windows were installed in 2016. And there hasn't been any specific allegation that these are defective or weren't installed correctly or in a reasonable time. So, I don't think it would be reasonable to return all the money Mr S paid to Shawbrook as he has requested, as this will mean he would receive goods for free which wouldn't in my view be proportionate.

Another benefit gained by Mr S as a result of acquiring the windows with finance from Shawbrook (albeit only a contingent one) is that he gained a potential right to claim against Shawbrook under Section 75 for breaches of contract. I note, though, that Mr S doesn't appear to have made a claim on in over eight years since the windows were purchased. And I doubt Mr S will benefit from a claim for breach of contract at this stage, bearing in mind there has been no specific allegation that the windows weren't of satisfactory quality.

However, I accept that the failure of Z to clearly explain the nature of the financial arrangement heavily influenced Mr S's decision to enter into the Lifestyle Account finance product given by Shawbrook.

Mr S says he wouldn't have signed up for the Lifestyle Account had he been aware of the true position about this, and I think that is most likely to have been the case. So, he would either have chosen not to buy the goods, and so would have kept his money but not have had the benefit of the windows, or he would have still bought the goods but paid with cash.

It's not possible to say with any certainty which of these he would have done and nor do I consider it necessary to decide that question in order to resolve this dispute fairly and reasonably. Either way, Mr S would have avoided interest and finance charges and it is those charges that represent the damage he has suffered under the unfair relationship.

I think the fairest way to put things right is for Mr S to be refunded the interest and charges that he paid under the finance agreement, but that Shawbrook is allowed to set off the amount of the discount he benefited from under the "Lifestyle Subsidy", as he only received that because he took out the loan with them. It's also fair to take into account that Mr S wouldn't have received this subsidy and so would have paid more for the goods if he hadn't entered into finance with Shawbrook. As Shawbrook points out, the sales documents list a separate price for paying cash and another for using finance. I have no reason to believe that the cash price of £6,910 exceeded the market value of the windows, as protected by a 10-year warranty. So, in receiving the windows and warranty, I believe Mr S obtained a financial benefit in that amount for which he should give Shawbrook credit, provided the warranty is maintained by them for the period remaining under it.

So, having carefully considered the matter, I consider it fair that Mr S's total payments for this product, warranty, and loan be limited to £6,000, which was the basic cost of the goods, and £910 for the discount in taking out the loan.

My provisional decision

My provisional decision is that I uphold this complaint. I intend to direct Shawbrook Bank Limited to:

- *Refund Mr S any amounts he has paid them over £6,910 (£6,000 + £910) with 8% simple yearly interest added to this from the date of each overpayment to the date of settlement and bring the finance agreement to an end (if that has not already happened); or*

- *If Mr S hasn't paid over £6,910, Shawbrook should reduce the outstanding loan so that he does not owe over this amount to them.*

- *Ensure that any re-working of the agreement does not result in adverse information being added to Mr S's credit file.*

- *Honour the 10-year warranty as offered and agreed by them".*

Mr S, via his representative, agreed with my provisional decision.

Shawbrook disagreed and set out their reasons in summary, as follows:

- I failed to consider, or I inappropriately applied, an inconsistent weighting between relevant facts and disclosures.

- I failed to apply, or I misinterpreted and misapplied, relevant law, regulations and regulatory guidance.

- I proposed a redress methodology that would place Mr S in a position that is more advantageous to him than the position he would have been in had he not entered into the credit agreement.

Shawbrook also said that:

- In my findings relating to the alleged breach of PRIN and CONC, I placed an inappropriate amount of reliance on some of the contemporaneous documentation Mr S received and didn't adequately balance this against other documentation he received at the same time as part of the same sales process.

- I failed to consider the legal and regulatory requirements, and regulatory guidance, that regulate the content and form of a regulated consumer credit agreement and pre-contractual adequate explanations.

- I failed to properly assess whether the credit agreement was suitable for Mr S's needs and circumstances.

- I didn't properly consider the evidence as to whether Mr S was induced by the Lifestyle Subsidy to enter into the credit agreement rather than pay the cash amount.

- I should exercise caution in relying on the testimony put forward by Mr S's representative.

- I haven't properly considered the impact of Z's sales materials that they provided to us previously.

- I failed to consider all the documentation received by Mr S in the round to determine the existence of an unfair relationship, which is inconsistent with relevant law.

- I haven't properly considered that a breach of CONC doesn't necessarily give rise to the existence of an unfair relationship under s140A.

- I haven't considered whether other factors exist to suggest there wasn't an unfair relationship between Shawbrook and Mr S.

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.

Having done so, I haven't been persuaded by Shawbrook's arguments to change the outcome I reached in my provisional decision. I will explain why by reference to Shawbrook's specific objections.

My findings on the alleged breaches of PRIN and CONC place an inappropriate amount of reliance on some of the contemporaneous documentation Mr S received and doesn't adequately balance this against other documentation he received at the same time as part of the same sales process

Shawbrook say that I placed greater emphasis on the Portfolio Agreement and Subsidy Analysis document ("PASA") and the Customer Purchase Order ("CPO") than on the other documents Mr S received. Shawbrook has specifically referred to the credit agreement, the Written Adequate Explanation document ("WAE") and the Pre-Contractual Credit Information.

I agree with Shawbrook that the documents to which they refer stated what the total amount payable was if the loan ran to its full term. And the credit agreement does explain how Mr S had the option of settling the agreement early. However, there was no prominent explanation within any of those documents, or within the PASA and CPO, that any saving given by the Lifestyle Subsidy would be substantially outweighed by the interest and charges if the loan ran to term. Setting out what Mr S would pay if the loan ran to term and that Mr S might pay less interest if he settled early, isn't the same thing. Nor is there any persuasive evidence that Z's salesman gave such an explanation. Z's salesman may well have read out the details of the WAE to Mr S. That doesn't mean he explained the specific information I've referred to.

Shawbrook may well be correct that it's common for customers to receive subsidies or discounts and for that to be set out in supporting documents. And I can assure Shawbrook that I considered all of the point-of-sale documentation that Mr S received, of which I have had sight. However, Z's obligations didn't start and end with providing Mr S with standard form disclosures and information required under the consumer credit legislation; there was still an obligation for the material it used to market the loan to him to be fairly presented, as is clear from the CONC rules and guidance to which I've referred. In particular, the presentation has to achieve a balance and shouldn't emphasise any potential benefits of a product or service without also giving a fair and prominent indication of any relevant risks. I set out in my provisional decision why I felt that didn't happen for the Lifestyle Subsidy, and I've not been persuaded by Shawbrook's points here to make me feel otherwise.

The legal and regulatory requirements, and regulatory guidance, that regulate the content and form of a regulated consumer credit agreement and pre-contractual adequate explanations

Shawbrook say I should have considered the legal requirements contained within paragraph 3 of the Consumer Credit (Agreements) Regulations 2010/1014. They say the credit agreement is compliant with their legal obligations under the 2010 Regulations and even materially adopts the highest standard required in law for some regulated consumer credit agreements. Shawbrook say this is an important factor to consider and relevant as to whether an unfair relationship existed between them and Mr S.

At no point though have I said that the credit agreement wasn't compliant with these Regulations, so I'm not entirely sure what point Shawbrook are making here. Mr S was afforded the right to allow him to withdraw from the credit agreement within 14 days of entering into it. But the fact he didn't do this, doesn't negate the failures around disclosure of a key, important element of the financial arrangement which I set out in my provisional decision. I think Shawbrook's arguments here place an unrealistic expectation that Mr S should have discovered this particular omission within 14 days.

Shawbrook say that it's not clear whether I took sufficient account of CONC 4.2.5R and CONC 4.2.6G. In summary, this sets out the requirement to give pre-contractual adequate explanations to a customer so they can make a reasonable assessment on whether they can afford the credit and understand the key associated risks.

I refer Shawbrook back to the point I've made throughout. Mr S wasn't presented with all the relevant information for him to make a reasonable assessment. There was no prominent explanation of all the risks of entering into this arrangement. And Mr S was in my view induced into the arrangement by an unfair presentation of a key component of this; namely that Z failed to disclose that Mr S entering into finance was capable of adding significantly to the total costs of the transaction. The fact that other documents were presented and given to Mr S doesn't detract from that requirement, and the impact of that, in my view.

The suitability of the credit agreement for Mr S's needs and circumstances

Shawbrook say that, in my consideration of how CONC 2.5.3R and CONC 3.3.1R was contravened, I failed to cite and consider CONC 2.2.2G(1) which sets out how PRIN 6 might be breached. The particular provision to which Shawbrook refer mentions how a breach may occur where customers are targeted '*with regulated credit agreements which are unsuitable for them, by virtue of their indebtedness, poor credit history, age, health, disability or any other reason*'.

Shawbrook say this is relevant because Mr S was an experienced businessman, CEO and company director. They go on to highlight that Mr S held seven directorships, was appointed a director of a company in 1991 (24 years before he purchased the windows), which had high-profile and well-known clients, and that Mr S signed their historic annual accounts for and on behalf of the company's directors. Shawbrook also highlighted that Mr S held or currently holds a mortgage.

It seems to me that Shawbrook have set out Mr S's circumstances in this way because they feel he was sufficiently financially sophisticated and literate to understand exactly how the Lifestyle Account and Subsidy would work in practice. And as a result, there was no breach of CONC 3.3.1R.

Quite how Mr S having a mortgage promotes that argument is lost on me and the point is, in my view, weak. I don't see how someone having a mortgage makes them financially sophisticated; it's not an uncommon thing relevant to the average member of the public. And I don't see that Mr S's employment history and experience is as relevant as Shawbrook seeks to claim. The companies he has worked for, and been directors of, aren't to my knowledge ones involved in consumer sales of this sort, or the brokering of credit to purchase goods or services. I've seen nothing to suggest Mr S was familiar with this kind of transaction or particularly capable of identifying for himself the economic trade-offs associated with the Lifestyle Account.

And I think it's important to come back to the point I've made throughout, which is Z's pre-contractual requirements in providing a fair presentation of the benefits and risks of the proposed arrangement. I can't agree that Mr S's experience means there was a reasonable expectation that he should have known everything relevant to the proposed arrangement. Prior to Z's contact with him, Mr S wasn't in the market for windows and Z's presentation (which according to Mr S happened over a fairly long time in his home) in my view only emphasised the benefits of the Lifestyle Account and Subsidy, but not the risks associated with them.

No evidence Mr S was induced by the Lifestyle Subsidy to enter into the credit agreement rather than pay the cash amount

Shawbrook have pointed out that I didn't consider whether Mr S could have paid for the windows in cash. They feel this is important because, if he couldn't have done so, he wasn't induced to enter into the credit agreement by how the Lifestyle Subsidy was presented to him. Rather, Mr S likely entered into the agreement to enjoy some of the inherent benefits of doing so, for example, being able to buy the windows without having to save up for them as well as spreading the costs over time and having consumer protection rights and rights to complain to our service. And I note Shawbrook think it unlikely that Mr S could have paid for the windows in cash, as he settled the loan around five years after entering into it following an inheritance.

However, I still stand by my findings set out in my provisional decision, that I don't need to consider whether Mr S could have paid for the windows in cash. It's eminently possible, had Mr S been given a fair presentation of the benefits and risks of the proposed arrangement by Z, that he simply would have walked away from the deal. As I have said, Mr S wasn't in the market for windows; it was Z who contacted him, not the other way round. So, it wasn't as if Mr S was set on purchasing this from the outset.

I'm satisfied that Mr S would either have walked away from the deal or would have paid in cash if he was able to. And it's not necessary for me to decide whether one option was more likely, bearing in mind that I am satisfied that he was induced by Z's unfair presentation. Both scenarios would have led to Mr S not paying interest or finance charges and as I mentioned in my provisional decision, that is the financial 'damage' that was caused to Mr S as a result of him entering into the arrangement.

Shawbrook have said there is 'no evidence' that Mr S was induced. I've considered Mr S's testimony and the overall circumstances of the sale including the sales documentation he was given. I can't see how it can be said there is 'no' evidence in view of this. So, Shawbrook should perhaps be saying there isn't 'sufficient' evidence of an inducement.

In any event, it's my view that the fairness of the credit relationship was centrally undermined by the unfair presentation of the subsidy, which removed from Mr S of the basis for making an informed decision. In *Plevin* (para 18), the Supreme Court didn't make any finding that the absence of commission disclosed "induced" the claimant to enter into the transaction, as such, only that:

"Any reasonable person in her [the Claimant's] position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair".

That is analogous to what happened in Mr S's case, because it too concerns the omission of a matter whose fair disclosure was necessary in order to allow him fairly to decide whether to contract.

Furthermore, when it comes to remedying an unfair relationship, the Supreme Court has recently emphasised that causation of loss also doesn't have to be proved in the same way it would for a claim made in tort of breach of contract: *Smith v RBS, para 25.*

It follows that no formal causation test, in the sense applied in the law of torts and breach of contract, applies under s.140A. It is legitimate to consider, following *Plevin*, whether Mr S was left in the dark by Z about a key matter that would have made him question whether taking the loan represented a sensible economic decision for him.

Mr S's testimony

Shawbrook have said that I should exercise caution in relying on Mr S's testimony as his representative has made other complaints on the same subject matter using identical, 'kitchen sink' allegations and assertions. So, they doubt that the complaint has been made in Mr S's own words.

I have though in the course of this complaint asked Mr S for his recollections on the meeting he had with Z, and his recollections on when he realised he had suffered a financial loss. He has provided his own recollections about this in his own words. So, I don't agree with Shawbrook that Mr S's testimony isn't his own.

Zenith's sales materials

Shawbrook have, in response to my provisional decision, sent me a large amount of literature relating to the sale that they consider is relevant. In particular, sales materials that were used to train Z's sales representatives in 2019, which Shawbrook say includes:

- A sales pack which contains detailed commentary on potential discussions that a sales representative may have regarding the Lifestyle Subsidy which includes:
    - information relating to affordability and the impact of accelerating loan payments on interest charges.
    - discussions on establishing whether a customer is a cash purchaser and only then discussing the loan financing option.
- Customer-facing documents that include graphs showing the impact of making overpayments.
- A worked example of the length of the loan based on additional repayments being made.

- A certification document summary of the Lifestyle Account benefits that was to be signed by a customer. This includes three points relevant to the customer's understanding of the nature of the products:

  > *"If the Lifestyle Account is not used I/we will pay the full cash price not including the Lifestyle subsidy, stated on the purchase order."*
  >
  > *"Extra payments can be made at anytime which means you reduce both the amount of interest you pay and ultimately reduce the term of the account"*
  >
  > *"Our average customers take advantage of the fact that with the Lifestyle Account, they are in control of the repayment term and as a result our average customer repays their Account between 30-36 months."*

- A template customer lifestyle checklist to be signed by the customer. In doing so they confirm:

  - receipt of the loan agreement and their understanding as to the monthly repayments and the total amount payable under the agreement.
  - they understand that capital repayments can be made to reduce the term and control the amount of interest payable.

- A code of practice for sales representatives. Point 8 of the code states: 'Describe the goods and products truthfully and accurately. Give clear and accurate information about price, all options and promotions including discounts and refunds. Satisfy yourself that the customers have understood their obligations regarding credit….'.

- A brochure relating to the Lifestyle Account, which confirm that interest is paid 'on what (the customers owes)" and includes an illustration of overpayments on the length of the loan term.

Shawbrook feel that it's likely that some of the above information would have existed with Z's internal sales documentation at the time Z met Mr S or would have been discussed with Mr S when Z met him. The documentation was created in 2019 however, some four years after Z met with Mr S. The documentation in question may not have been available to Z's sales representatives in 2015 and what documentation was available and in what form and format isn't known. I don't think that Shawbrook can place much weight on its contents, as opposed to the actual sales documentation that has been provided.

My findings that an unfair relationship existed between Shawbrook and Mr S

Shawbrook have provided three reasons for disagreeing with my findings.

My failure to consider all the documentation received by Mr S in the round to determine the existence of an unfair relationship is inconsistent with relevant law.

I've already explained in this decision that I don't think Z presented all the key information to Mr S to allow him to make an informed decision about the risks and benefits of the arrangement, and that he was induced into the arrangement following an unfair presentation of this by Z. That to me is the fundamental reason why I think an unfair relationship was created between Shawbrook and Mr S – and I set this out in detail in the *'Was there an unfair debtor creditor relationship in this case?'* section of my provisional decision.

Shawbrook have referred to sections of four court judgments, which it says demonstrate that the court's approach is to look at all relevant matters in the round to determine whether an unfair relationship exists for the purposes of s140A.

I've considered the sections from the four cases that Shawbrook have quoted and I agree that the court has to take into account all the relevant circumstances in deciding whether there is an unfair credit relationship. In fact, that point is apparent from the wording of s.140A(2) itself. And that is how I have proceeded in this complaint. However, having done so, I'm still of the view that the failures I've already identified in presenting the Lifestyle Subsidy to Mr S were key to Mr S's contractual decision and, in all the circumstances, brought about an unfair relationship between him and Shawbrook.

A breach of CONC doesn't necessarily give rise to the existence of an unfair relationship under s140A.

I agree that this is the case and at no point have I said that such a breach is determinative in establishing whether an unfair relationship was created. However, it can be a relevant factor. And bearing in mind I haven't found Shawbrook's arguments around the 'other factors' they've put forward in their defence to be persuasive, I am still satisfied that an unfair relationship was created for the reasons I set out in my provisional decision.

No other factors exist to suggest that there was an unfair relationship between Shawbrook and Mr S.

The points Shawbrook have made are ones I have already covered in my decision; namely the documentation Z presented to Mr S, the 14-day withdrawal period contained within the credit agreement, and Mr S's level of financial literacy and sophistication. I see little point in going over that again.

However, I would just reiterate a point I made in my provisional decision about the issue around an unfair relationship. Even if I am wrong in considering that a court would find there to be an unfair relationship under s.140A, exercising my function of deciding what I consider to be fair and reasonable in all the circumstances, I consider that Z (acting as agent on Shawbrook's behalf) caused Mr S to enter into this purchase and loan, and to incur the associated liabilities unfairly. I've carefully considered all of Shawbrook's submissions following my provisional decision, but these haven't changed my view on this.

My approach to redress

Shawbrook disagree with my proposal as to how they should put things right. They say my award is equivalent to an interest-free loan which would confer benefits without any cost to Mr S. And that will mean he would be placed in a better position had he not taken out the loan.

Shawbrook also say that Mr S may make a double recovery through enjoyment because he might have used the money he paid for the windows towards other purchases and investments. And that consideration should be given to the fact that Mr S acquired rights to claim under section 75 by taking out the finance with them.

The award that I've proposed is intended to reverse, so as this can now be done, the unfairness in the credit relationship, without giving either side a windfall. It proceeds on the basis that Mr S would not, if Z had acted properly, have taken any finance, but that he should give credit for the full "cash" price of the windows. On that basis, Shawbrook receives back the funds it advanced, and retains an additional £910 from the repayments Mr S made on the loan. I don't see how my proposal is unfair on either party. As I mentioned in my provisional decision, I don't think it likely that Mr S will make a section 75 claim seeing as there has been no allegation since 2015 that the windows were of poor quality or that his property was damaged by their installation. And Shawbrook themselves offered to honour the warranty that Mr S had in place with Z - and that was a decision they took.

Shawbrook point to the fact that, under my proposed award of redress, Mr S has received the windows whilst not having had to pay cash up front for them. The payment of redress will mean he is in a position of having parted with the cost of the windows over a period of time, rather than all up front, and so (not having paid for that period of credit) he has received a benefit in the form of a period of enjoyment of money that he would have parted with to purchase the windows.

However, I find this argument rather speculative. Firstly, it overlooks the possibility that Mr S would not have bought the windows at all, in which case he would always have enjoyed, rather than parted with, their price. Secondly, even if the proposed redress results in Mr S having, in retrospect, received an extension of free credit, I think that is the proper basis for reversing the unfairness of the relationship. Mr S did not, in fact, enjoy free credit: he was paying Shawbrook almost 20% per annum for the credit he received and there is nothing to suggest that he profited from temporarily having more cash in hand that he would under a cash-purchase arrangement. I'm not persuaded that there is any profit to Mr S I should take into account, nor that the redress I've proposed leads to over-compensation.

It also seems if looked at in another way, that Shawbrook is essentially suggesting that Mr S shouldn't be awarded redress without paying them some interest for the credit they extended to him. But that would be to inflict a bargain on Mr S that he never chose, and which wasn't what Shawbrook offered. That would also seem unfair.

So, for the reasons set out above which includes the reasons I gave in my provisional decision, I will be upholding Mr S's complaint.

Putting things right

I think the fairest way to put things right is for Mr S to be refunded the interest and charges that he paid under the finance agreement (but not the principal), but that Shawbrook is allowed to retain from the payments they have or will receive from Mr S the amount of the discount he benefited from under the "Lifestyle Subsidy", as he only received that because he took out the loan with them. I have no reason to believe that the cash price of £6,910 exceeded the market value of the windows, as protected by a 10-year warranty. So, in receiving the windows and warranty, I believe Mr S obtained a financial benefit in that amount (less his deposit) for which he should give Shawbrook credit, provided the warranty is maintained by them for the period remaining under it.

So, having carefully considered the matter, I consider it fair that Mr S's total payments for this product, warranty, and loan be limited to £6,000, which was the basic cost of the goods, and £910 for the discount in taking out the loan. I must also bear in mind, which I omitted to do in my provisional decision, that Mr S paid a £100 deposit towards the windows, so the principal amount of Shawbrook's loan was £5,900 and not the sum of £6,000 I provisionally used. So Shawbrook should be allowed to retain £5,900 plus £910, i.e., £6,810.

My final decision

I uphold this complaint. I direct Shawbrook Bank Limited to:

- Refund Mr S any amounts he has paid them over £6,810 with 8% simple yearly interest added to this from the date of each overpayment to the date of settlement and bring the finance agreement to an end (if that has not already happened); or

- If Mr S hasn't paid over £6,810, Shawbrook should reduce the outstanding loan so that he does not have to pay, in all, more than this amount to them.

- Ensure that any re-working of the agreement does not result in adverse information being added to Mr S's credit file.

- Honour the 10-year warranty as offered and agreed by them.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 14 June 2024.

Daniel Picken
Ombudsman