DRN-5210086

The complaint

Mr P's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

Mr P is the only eligible complainant here as the relevant Credit Agreement was only in his name. However, as he purchased the product in question in joint names with Mrs P, I'll refer to them both throughout, where relevant.

What happened

Mr and Mrs P had purchased several timeshare memberships from a timeshare provider (the 'Supplier') since 2005. These previous purchases are not the subject of this complaint and have been included for background purposes only.

Mr and Mrs P then purchased a new type of membership (the 'Signature Collection') from the 'Supplier') on 30 December 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £28,069 (the 'Purchase Agreement'). But after trading in 1,100 points of their existing timeshare (the 'Vacation Club'), they ended up paying £13,769 for membership of the Signature Collection.

Signature Collection membership was asset backed – which meant it gave Mr and Mrs P more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends. Signature Collection membership also had other benefits, namely more luxurious accommodation than that which was available through their existing membership, and a right to stay in the Allocated Property while on holiday, with guaranteed availability for this on a certain week.

Mr and Mrs P paid for their Signature Collection membership by taking finance of £13,769 from the Lender in Mr P's name only (the 'Credit Agreement').

Mr P – using a professional representative (the 'PR') – wrote to the Lender on 22 February 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr P says that the Supplier made a number of pre-contractual misrepresentations at the

Time of Sale – namely that the Supplier:

1. told them that the only way they could exit their existing membership was to purchase 'fractional points', but this wasn't true as they could exit their membership in different circumstances.
2. told them that Signature Collection membership had a guaranteed end date when that was not true.

Mr P says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr P.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr P says that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property.

As a result of the above, Mr P says that he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr P.

(3) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr P says that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

1. The contractual terms setting out (i) the duration of their Signature Collection membership, (ii) the amounts they were obliged to pay under their membership and (iii) that membership would be forfeited and any amounts already paid under the agreement could be kept by the Supplier if Mr and Mrs P failed to make a payment due under the agreement, were unfair contract terms under the Consumer Rights Act 2015 ('CRA')[1].
2. They were pressured into purchasing Signature Collection membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

As the Lender did not send a response to the complaint within the relevant timeframe required by the Regulator, Mr P referred his complaint to the Financial Ombudsman Service.

The Lender subsequently dealt with Mr P's concerns as a complaint and issued its final response letter on 15 October 2018, rejecting it on every ground. The aforementioned PR was later removed from Mr P's complaint.

The complaint was then assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

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[1] The PR made some of these points in relation to the claim for a breach of contract. But, on my reading of them, the points made about unfair terms seem to be one of the reasons Mr P feels the credit relationship was unfair under Section 140A of the CCA. Further, the PR also referred to the Unfair Terms in Consumer Contracts Regulations 1999. But, as this sale took place in 2016, it is the CRA which applies here.

The Lender 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 on 28 November 2024. In that decision I said:

"*Mr P's complaint about the Supplier's misrepresentations*

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.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr P could make against 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. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs P at the Time of Sale, the Lender is also liable.

The PR said the Supplier told Mr and Mrs P that their membership had a guaranteed end date when that was not true. No further evidence has been provided beyond the bare allegation made here, but in any event, I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions generally set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed by the unanimous written consent of all fractional owners, in which Mr and Mrs P are included.

The PR also said the Supplier told Mr and Mrs P that the only way they could exit their existing membership was to purchase 'fractional points', but this wasn't true as they could exit their membership in different circumstances. But, beyond the bare allegation, they haven't provided any evidence to support it, such as what exactly they were told, by whom and in what context. And, in any event, Mr and Mrs P didn't fully exit their existing membership by trading in all of their Vacation Club points at the Time of Sale. They kept 401 Vacation Club points which they then surrendered to the Supplier in December 2018. So, while I recognise that Mr and Mrs P have concerns about the way in which their Signature Collection membership was sold, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for this reason either.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs P by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr P any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Mr P's complaint about the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives Mr P a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mr P says that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that they're saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr P any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Mr P's complaint that the Lender hadn't treated him fairly

I've already explained why I'm not currently persuaded that the contract entered into by Mr and Mrs P was misrepresented or breached by the Supplier. But there are other aspects that, being the subject of Mr and Mrs P's dissatisfaction, I need to explore in more detail.

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

Mr P has suggested that the Supplier pressured them into making the purchase.

From what I know of the Supplier's general sales practices at this time, I don't doubt that the sales process Mr and Mrs P attended was lengthy. But they say little about what was said or done by the Supplier during the process which meant they felt they had to purchase when they simply did not want to. So, I don't think the testimony provided sufficiently supports that any malicious or undue pressure was applied to them during the sale, such as to cause them to buy something they otherwise wouldn't have done.

It is also important to note that Mr and Mrs P were given a 14-day 'cooling off' period following the sale, during which time they could cancel the purchase and the associated Credit Agreement without penalty. And, they haven't provided a credible explanation for why they didn't cancel during this time, if, as they attest, they only made the purchase due to the pressure placed on them by the Supplier. I also note that the Lender has explained that in the notes made following the sale, Mr and Mrs P told the Supplier they were happy with their purchase and said they had had enough time to consider it. And further, I can see Mr and Mrs P had already attended a similar presentation in December 2013 where they had started a purchase of a similar product and then changed their minds and cancelled on the same day. So, it would seem they were already aware they could refuse to purchase if they wished.

So, I don't think this is a reason to uphold this complaint given its circumstances.

Mr P also suggests that the right checks weren't carried out before the Lender lent to him. 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 the Lender 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 P was actually unaffordable at the Time of Sale before also concluding that he lost out as a result, and then consider whether the credit relationship with the Lender was unfair to him for this reason. And I've not seen anything which makes me think this was the case, although I note that Mr P has suggested that the loan became unaffordable for him in the years since the Time of Sale, due to changes in personal circumstances. I also note that the loan has now been paid off in any event.

So again, from the information provided, I am not satisfied that the lending was unaffordable for Mr P. If there is any further information on this (or any other points raised in this provisional decision) that Mr P wishes to provide, I would invite him to do so in response to this provisional decision.

So, I'm not currently persuaded, therefore, that Mr P's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But in some of the comments provided to our Service following the removal of his PR, Mr P has also suggested Signature Collection membership was marketed and sold to them as an investment at the Time of Sale, and I will now address that point.

Was Signature Collection membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

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

As noted above, Mr P has suggested in some of his comments that membership was sold to him and Mrs P as an investment. And, this was also the reason the Investigator originally upheld this complaint. I appreciate this may come as a disappointment to Mr and Mrs P but I don't currently agree with this. I'll explain why.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Signature Collection 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 in some of Mr P's comments he suggests that the Supplier did sell or market membership to them as an investment at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS[2], the parties agreed that, 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" at [56]. I will use the same definition.

Mr and Mrs P's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But 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 as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or

[2] 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').

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 Mrs 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.

I'm aware that there were usually disclaimers in the contemporaneous paperwork relating to the sale that states that membership was not sold to consumers like Mr and Mrs P as an investment.

But with that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Signature Collection membership as an investment. And while that was not alleged by either Mr P nor his PR when he first complained about a credit relationship with the Lender that was unfair to him, he has said subsequently that this is what happened. So, I accept that it's possible that Signature Collection membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Signature Collection membership without breaching the relevant prohibition.

Nonetheless, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

<u>Was the credit relationship between the Lender and Mr P rendered unfair?</u>

As the Supreme Court's judgment in Plevin[3] makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney[4] and Kerrigan[5] (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

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[3] The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).
[4] Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').
[5] Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. 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. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr P and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr P, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led him (and Mrs P) to enter into the Purchase Agreement and him into the Credit Agreement is an important consideration.

As I've already said, there was no suggestion in the original Letter of Complaint that the Supplier sold Signature Collection membership to Mr and Mrs P as an investment from which they would make a financial gain nor was there any indication that they were induced into the purchase on that basis. In addition, Mr P's handwritten comments on the complaint form submitted to this Service stated that they "only purchased to get an end date".

It's possible that Mr and Mrs P were interested in both holidays and the investment element, which wouldn't be surprising given the nature of the product at the centre of this complaint, but from what I have seen and been told to date, I don't think the investment element of the membership was the reason for their purchase. I'll explain.

In October 2023, Mr P provided some further comments to the Investigator about why he was unhappy with the membership and the investment element wasn't mentioned. Instead, he described the alleged pressure of the sale and issues with the process of obtaining the loan as being reasons why they were unhappy with their membership now.

Our Investigator then spoke with Mr P over the phone, again in October 2023. In this call, Mr P described how the maintenance fees had been increasing over time for their existing membership which they were unhappy with. He explained that when they first bought membership in 2005, they were paying about 300 Euros in maintenance fees each year but by 2016, at the time they bought the Signature Collection, this had gone up to 1,450 Euros. And, he also said that the membership term was very lengthy, and they didn't want to have to continue with that and were worried about leaving that liability to their children. He said at the Time of Sale in 2016, they were told that Signature Collection membership 'would help them come out of' their existing membership so they didn't have to pay the fees for as long. Mr P also said they were told the maintenance fees would be cheaper under the new membership.

Mr P went on to say that they didn't want to purchase initially but did so due to the alleged pressure of the sale and because they were worried about paying the maintenance fees for the longer term. He said the 'worst thing' is that they were promised at the Time of Sale the

maintenance fees would be cheaper with their new membership and more manageable for them but that hasn't turned out to be the case.

So, from what's been said on this call, it seems Mr and Mrs P purchased the Signature Collection membership due to the shorter membership term and cheaper fees it offered.

I acknowledge that Mr P did briefly mention on this call the Allocated Property being sold and described 'getting their share' and that if they wanted to sell their share at the end of the membership term, they could. However, this is just a description of how the Allocated Property aspect of the membership worked. It doesn't mean that it was pitched as something that could provide Mr and Mrs P with a profit and doesn't suggest to me that the prospect of a financial gain was material to their purchasing decision.

Following this call, Mr P provided written comments by email which reflects the above conversation.

I also spoke with Mr P over the phone in October 2024. And, I acknowledge that in this call Mr P mentioned being told there was a 'very good chance to make a good investment return', and mentioned 'getting something for their old age'. But, as I've said, this was not something that was mentioned in any previous comments made to this Service, and Mr P then went on to describe their unhappiness with the maintenance charges on their existing membership and said 'the important thing' was the shorter membership term. So, again, I think it's likely Mr and Mrs P purchased the Signature Collection membership for the shorter membership term and cheaper fees it offered.

With all of the above being the case, on balance, even if the Supplier had marketed or sold the Signature Collection membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs P's decision to purchase Signature Collection membership at the Time of Sale 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 their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr P and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

<u>Unfair term(s)</u>

Mr P said that the Purchase Agreement contains unfair contract terms (under the CRA) in relation to the Supplier's ability to terminate membership where they failed to pay their annual management charges. He also mentioned concerns about the duration of the membership and what they had to pay under the membership.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr P and the Lender unfair to him, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mr and Mrs P in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs P, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mr P have led to any unfairness in the credit relationship between him and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot

currently see that the relevant terms in the Purchase Agreement were actually operated against Mr and Mrs P, let alone unfairly."

So, overall, taking into account all facts and circumstances of this complaint, I didn't think that the Lender acted unfairly or unreasonably in declining Mr P's claims, and I was not persuaded that the Lender was party to a credit relationship with Mr P under the Credit Agreement that was unfair to him. 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 Mr P.

Neither the Lender nor Mr P responded, or provided any further evidence or arguments they wished to be considered.

What I've decided – and why

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

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

My final decision

For these reasons, I do not uphold Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 13 January 2025.

Fiona Mallinson
Ombudsman