DRN-4615123

The complaint

Miss C, who is represented by a professional representative ("PR") complains that Shawbrook Bank Limited ("Shawbrook") rejected her claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product purchased in June 2019. I gather the purchase was made by Miss C and her former partner, but as the finance agreement was in Miss C's name she is the eligible complainant. In this decision for simplicity I will refer to Miss C as the sole purchaser.

What happened

In June 2019 Miss C purchased a points based holiday product from a company I will call CLC. It cost £33,010 and this was funded by a loan from Shawbrook. In January 2022 PR submitted a letter of claim to Shawbrook. The details are well known to both parties so in the interests of brevity I will provide a short summary in this decision. PR said:

There had been misrepresentation by CLC. It said Miss C had been told she had purchased an investment which would appreciate in value. She was told she would have a share in a property and CLC would buy it back. She was also told she could access the property at any time.

- It said that CLC's sales representatives were self-employed and unauthorised.
- The sale was illegal as the product was sold as an investment. It offered CLC's training manual as evidence.
- CLC had gone into liquidation.
- Miss C didn't recall an affordability assessment being undertaken.
- The contract contained unfair terms since it allowed CLC to rescind it if any payment was not made in time.

Shawbrook rejected the claim. It pointed out that Miss C had not made use of the 14 day withdrawal period. It added that there had been no misrepresentation and the product had not been sold as an investment. It quoted the Member's Declaration signed by Miss C which stated:

"4. We understand that CLC World does not and will not run any resale or rental programmes and will not repurchase Vacation Club Points other than as a trade in against future property purchases."

It said that CLC did not provide investment advice and did not sell Miss C a collective investment scheme. Miss C had access to accommodation all year round subject to availability.

It said CLC was authorised as a credit broker and the liquidation of a company within the CLC group did not affect Miss C's access to accommodation. It disputed the agreement

contained an unfair term and said the Member's Declaration informed Miss C she could have details of any commission paid is she made a request for this information. Shawbrook also said it hac carried out appropriate affordability checks prior to granting the loan.

PR brought a complaint to this service on behalf of Miss C broadly on the same grounds as the letter of claim. It was considered by one of our investigators who didn't believe it should be upheld. She noted that the claim under s.75 failed since it exceeded the financial limits. Nor did she consider there had been an unfair relationship and she had been given no evidence that the loan was unaffordable.

PR didn't agree and submitted a current income and expenditure summary along with bank statements from 2019 and Miss C's tax returns and computations. PR claimed Miss C had not been told about the ongoing maintenance costs at the time of sale. It argued that the agreement allowed CLC to confiscate the product if these were not paid. PR said that failure to disclose commission rendered the relationship unfair under s.140A. Miss C had been subjected to undue pressure during an eight hour presentation and had signed the contract under duress. PR also said that Miss C said that the initial loan application was in joint names, but that failed and so it was made in her name alone without her consent.

I issued a provisional decision as follows:

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

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld.

I should point out first of all that Miss C has provided very limited documentation in support of her claim. I do not, for example, have a copy of the purchase documents. However, this service has seen a number of complaints about CLC's sales from around the same time. As is to be expected, the sellers and Shawbrook used largely standard contract wording. I have presumed that the same standard wording was used for Miss C's purchase. Shawbrook has also provided some extracts from documentation it says was provided to Miss C. If that (or any other assumption I have made) is incorrect, the parties can explain that and provide the necessary evidence in their response to this provisional decision.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Miss C) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (Shawbrook) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should he choose to.

It's important to note that, as Shawbrook was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

However, there is an upper financial limit for claims under s.75 CAA which is £30,000 and this purchase exceeded that sum. This means that Miss C has no claim under s.75 CAA.

S.140 A

Only a court has the power to decide whether the relationships between Miss C and Shawbrook were unfair for the purpose of s. 140A. But, as it's relevant law, I do have to consider it if it applies to the credit agreement – which it does.

However, as a claim under Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 9 of the LA, I've considered that provision here.

It was held in Patel v Patel [2009] EWHC 3264 (QB) ('Patel v Patel') that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. The limitation period is six years and the claim was made within this period.

However, I'm not persuaded that Miss C could be said to have a cause of action in negligence against Shawbrook anyway.

Her alleged loss isn't related to damage to property or to her personally, which must mean it's purely financial. And that type of loss isn't usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a claimant against that type of harm.

Yet I've seen little or nothing to persuade me that Shawbrook assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that Shawbrook owed Miss C a duty of care to ensure that CLC complied with the 2010 Regulations and it argues that the payment of commission created an unfair relationship. In my experience payments of commission in this industry were relatively low and as such do not lead to an unfair relationship as suggested by PR.

It also suggested the terms were onerous in that if maintenance payments were not made the contract would be terminated. I understand form other complaints that this is incorrect and the term referred to only relates to the purchase price and in any event Miss C can rely on her statutory rights. Again I can see no basis for concluding there was an unfair relationship.

Unauthorised Broker

As our investigator has pointed out PR has not supplied evidence that CLC was unauthorised or its representatives were unauthorised. Shawbrook has explained that CLC

was authorised to carry on broking activities by the relevant authority and PR has not explained why that was incorrect.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Shawbrook has said that it obtained details from Miss C and conducted the appropriate credit checks before approval.

Our investigator said that she could not see any evidence that Miss C found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if Shawbrook did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Miss C lost out as a result of its failings.

I have reviewed the financial details supplied by Miss C and these do not support the claim made by PR. I have noted she had significant investment income in addition to her income from her employment and income from property. I appreciate subsequent events could have caused her financial distress, but there is no basis for concluding that these could have been anticipated by Shawbrook.

On balance I do not consider Miss C has provided evidence that shows the loan was unaffordable at the time it was taken out."

Shawbrook said it had nothing to add and PR said that Miss C disagreed, but wished to pursue her the matter through alternative means.

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.

Shawbrook said it had nothing to add and PR said that Miss C disagreed, but wished to pursue her the matter through alternative means. In the circumstances it follows that as I have not been given any reason to amend my provisional decision it stands.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 11 March 2024.

Ivor Graham
Ombudsman