DRN-4642927

The complaint

Mr S and Ms K's complaint is that Shawbrook Bank Limited ('Shawbrook') acted unfairly and unreasonably when deciding against paying their claims under Section 75 of the Consumer Credit Act 1974 (the 'CCA').

What happened

Mr S and Ms K purchased membership of an asset-backed timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 15 July 2014 (the 'Time of Sale') at a cost of 11,764 euros.

Mr S and Ms K paid for their membership by taking finance from Shawbrook in both of their names. They entered into a consolidated 10-year restricted use Fixed Sum Credit Agreement for £10,000 and the total amount repayable after interest and charges was £17,430 (the 'Credit Agreement').

Under the terms of the membership, Mr S and Ms K could use their Fractional Rights for holidays in specific weekly periods. And, at the end of the projected membership term, they also had a share in the sale proceeds of a property tied to their membership (the 'Allocated Property').

Mr S and Ms K wrote to Shawbrook on 8 April 2019 to complain and make a Section 75 claim. In this letter they said the Supplier had:

- Breached its contract and misrepresented their services.
- Failed to adhere to "corresponding EU directives".
- Hadn't carried out proper due diligence before arranging the loan.

Mr S and Ms K then wrote another letter of complaint dated 30 April 2019 and said that Fractional Club membership had been misrepresented at the Time of Sale because they were sold it as an investment that they could sell in the future for a profit - which doesn't seem likely now given the current market for re-selling timeshares.

They also made the following, more general, points:

- Since the Credit Agreement was signed on the day of the purchase, they were effectively denied a cooling off period which is a breach of Section 5 of the Timeshare Act 1992.
- They referred to EU Directive 2008/112/EC and say this prohibits any payment before the cooling off period, so this directive has also been breached.
- Given their financial situation, along with the length of the loan in comparison to their respective ages at the Time of Sale, they feel the loan was unaffordable for them and if the correct due diligence had been carried out beforehand, the loan would not have been lent to them.

Shawbrook dealt with Mr S and Ms K's concerns as a complaint and issued its final response letter on 16 May 2019, rejecting it.

Mr S and Ms K then wrote another letter to Shawbrook. This letter is un-dated but Shawbrook have confirmed it was received following their final response letter. In that letter, Mr S and Ms K raised a further point of misrepresentation and described that as follows:

- They say they were told by the Supplier that they would be able to claim all of their money back from a previous timeshare they had via the Spanish courts because they were in the process of reversing all previous contracts and deeming them illegal.
- They were led to believe they would be refunded all of their funds from the previous purchase within approximately 6-7 months.
- They say the Supplier gave them a payment of 860 euros to meet the cost of the loan repayments while they were waiting for the court claim to complete, with the idea being that there would be no further payments after that because they'd use the court compensation to settle their loan early.
- They were told they would receive a payout in excess of 26,000 euros for their previous timeshare and the Supplier would cover the costs of recovering that amount.
- The relevant court claim is yet to finish and so they're still having to pay the loan, despite being guaranteed they would only have to do so for six months.

Shawbrook responded to this further point of complaint on 2 July 2019, rejecting it.

Mr S and Ms K then referred their complaint to the Financial Ombudsman Service on 10 July 2019.

The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits on 26 November 2020.

Mr S and Ms K disagreed with those findings and asked for the matter to be referred to an Ombudsman for a final decision to be made, although they didn't give any reasons at that stage as to why.

They sent a further response which said that the only other point they wanted to add was that the Supplier now appears to be completely unreachable, making them even more unsure if they'll be able to sell their Fractional Club membership.

The complaint was then assessed afresh by another Investigator, who also rejected it on 9 February 2024.

Mr S and Ms K disagreed again and said they still wanted the matter to be reviewed by an Ombudsman. They also provided further comments, largely repeating the points they had made previously.

As agreement on the outcome of this complaint could not be reached, the complaint was referred to me to make a final decision.

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.

When making my decision, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's handbook to take into account the:

"*(1) relevant:*

(a) law and regulations;

(b) regulator's 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."

When evidence is incomplete, inconclusive, or contradictory, I make my decision on the balance of probabilities i.e., what I think is more likely than not to have happened based on the evidence available and the wider circumstances of the complaint.

My role as an Ombudsman isn't to address every single point that has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

Finally, when bringing their complaint, Mr S and Ms K didn't set out the full regulatory or legal basis they felt Shawbrook needed to do something to put right what they said went wrong – I make no criticism of them in not doing so as I wouldn't expect them to necessarily know these things. Our Investigator(s) considered the complaint and thought parts of it amounted to complaints that Shawbrook should have considered under the Consumer Credit Act 1974 (the 'CCA') including Section 140A and, having considered everything, I agree. So, I've reflected that in my approach to this complaint.

Mr S and Ms K's complaint about the Supplier's alleged breach of contract

In their original complaint letter, Mr S and Ms K said there had been a breach of contract by the Supplier. But, they didn't mention this point in their further correspondence or submissions. And, they haven't explained what part of the contract they feel was breached or why.

So, given the evidence in this complaint, I'm not persuaded that there was any breach of contract by the Supplier as Mr S and Ms K allege.

Mr S and Ms K's complaint about the Supplier's alleged misrepresentations

Mr S and Ms K say that there were a few elements to the membership that were misrepresented by the Supplier, leading them into their purchase. To reiterate briefly, those were:

- They were sold the timeshare as an investment and were promised that, when the contract ended, they'd be able to sell the timeshare for a profit and make some of their investment back. But that now doesn't seem likely given the current market for re-selling timeshares.
- They say they were told by the Supplier that they would be able to claim all of their money back from a previous timeshare via the Spanish courts which they could then use to settle the loan in question in about 6-7 months from the Time of Sale.

In order to say Fractional Club membership had been misrepresented by the Supplier at the Time of Sale, I would have to be persuaded that Mr S and Ms K were told something that, at that time, was factually untrue. And in that scenario, Shawbrook would be jointly liable with the Supplier for the misrepresentation under the Section 75 of the CCA.

In relation to membership of the Fractional Club being misrepresented as an investment, based on the documentation available and Mr S and Ms K's recollections, there is nothing that makes me think they were told that they were guaranteed a profit in the future. After all, they haven't elaborated on what they were told in this regard, by whom and in what circumstances. And while Mr S and Ms K's signed Information Statement explains that there may be an exchange scheme in operation in the future and that their Fractional Club membership could potentially be transferred or sold for a fee, being able to sell or transfer

their membership was not the same as giving an assurance that such a sale was likely or that a profit would be guaranteed from doing so.

Mr S and Ms K also said that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because they were told they would be able to claim all of their money back from their previous timeshare via the Spanish courts which they could then use to settle the loan in question about 6-7 months from the Time of Sale. But as that claim had still not run its course successfully, they had to cover the loan payments themselves for longer than they thought.

From the information I've seen, at the Time of Sale, Mr S and Ms K had an existing timeshare with another supplier. And as part of the sale that is the subject of this complaint, they signed over their existing timeshare to the Supplier. The Supplier then sought to pursue a claim in relation to that timeshare through the Spanish courts in order to have the relevant purchase agreement deemed unlawful. And from what's been said, neither party disputes that the Supplier started that process, nor that Mr S and Ms K could still use such a payment to settle their loan with Shawbrook if they wished.

So, the only aspect of this Mr S and Ms K allege has been misrepresented to them is how long such a claim would take and when they would receive a payment as a result of that action.

I note Mr S and Ms K have only said they were given an approximation of the length of time such a claim would take. And, beyond making the bare allegation, they haven't elaborated further on this, such as what statements, if any, were made to them about the court process.

I think being told such a claim process would be started and being given an estimate of how long it might take, isn't the same as giving an assurance or guarantee that the claim process would end on a specific date or that any payment due to Mr S and Ms K would be received on a set date. Further, given the nature and usual length of such court proceedings, I don't find it likely the Supplier made such a promise as this would open them up to complaints from customers within a relatively short time after sales had been made.

In short, therefore, I have not seen enough evidence to say, on balance, that any alleged false statements of fact were made to Mr S and Ms K by the Supplier. I recognise that they have concerns about the way in which their membership was sold. But, given the evidence in this complaint, I'm not persuaded that there was an actionable misrepresentation by the Supplier for the reasons Mr S and Ms K allege. And, for that reason, I don't think Shawbrook acted unfairly or unreasonably when it dealt with Mr S and Ms K's Section 75 claim.

Mr S and Ms K's complaint that Shawbrook hadn't treated them fairly

I've already explained why I'm not persuaded that the contract entered into by Mr S and Ms K was breached, or misrepresented by the Supplier. But there are other aspects that, being the subject of Mr S and Ms K's dissatisfaction, I need to explore in more detail. These include the affordability of the loan, being denied a cooling off period to consider their purchase and Fractional Membership being sold to them as an investment.

Affordability of the loan

Mr S and Ms K say no due diligence was carried out in relation to the loan they took out.

Shawbrook said in their final response to the complaint that they did carry out a creditworthiness assessment

However, even if no affordability assessment was carried out, I'm not persuaded it makes a difference to the outcome in this complaint. The reason I say this is that there is no evidence that the loan was objectively unaffordable for Mr S and Ms K at the Time of Sale.

I recognise that Mr S and Ms K say that the loan was unaffordable for them given the term of it and their respective ages at the Time of Sale. But, they haven't expanded on what they mean by this, nor have they explained why Shawbrook shouldn't have lent to them given their financial circumstances at the time.

So, on the basis of the evidence and information I do have, I've not seen anything to suggest the loan was unaffordable for Mr S and Ms K at the Time of Sale or that it was inappropriate for Shawbrook to have lent to them. It follows that I can't say that Mr S and Ms K lost out, even if Shawbrook didn't do all of the checks it should have done, or that this caused an unfairness that requires a remedy in this case.

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

I note Mr S and Ms K said the membership was misrepresented to them by the Supplier at the Time of Sale as an investment - which I've already addressed above.

However, I'm also mindful that Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations' - which were the regulations the Supplier had to comply with at the time of sale) prohibited the Supplier from marketing or selling the Fractional Club membership as an investment. So, had the Supplier breached the Timeshare Regulations, for this reason, that could be said to have rendered the credit relationship between Shawbrook and Mr S and Ms K unfair to them.

I acknowledge that the Supplier's may have positioned Fractional Club membership to Mr S and Ms K as an investment. But, as neither of them have described to any extent what was said to them, by whom and in what circumstances to persuade me that the Supplier breached the prohibition of selling membership as an investment, I don't think it did. But, even if I'm wrong about that, I'm not persuaded it would make a difference to the outcome of this complaint anyway. The reason I say this is because Mr S and Ms K have been clear that the main reason they purchased Fractional Club membership was to exit their existing timeshare. Indeed, they acknowledge that their existing timeshare was something they wanted to remedy at the Time of Sale and that it was this that played a pivotal role in their decision making. They also state that their decision to purchase Fractional Club membership was driven by a desire to escape the issues they were having with their existing timeshare.

I'm not persuaded, therefore, that the investment element of Fractional Club membership was important enough to Mr S and Ms K's purchasing decision to render their relationship with Shawbrook unfair to them had membership, in fact, been sold as an investment.

Mr S and Ms K also say that since the credit agreement was signed on the day of purchase, they were effectively denied a cooling off period. But I can see that they signed a one page "Right of Withdrawal" that quite clearly told them that they had 14 days to withdraw from their purchase if they wanted to. And while Mr S and Ms K also say that the Supplier breached "EU Directive 2008/112/EC" because it took a payment during the 14-day cooling off period, Shawbrook says that payment was not made until afterwards. And as I haven't seen enough to persuade me otherwise, I don't think either of the above points has given rise to any unfairness in the credit relationship between Mr S and Ms K and Shawbrook which requires a remedy.

Conclusion

Overall, taking into account all facts and circumstances of this complaint, I don't think that Shawbrook acted unfairly or unreasonably when it declined Mr S and Ms K's Section 75 claims, and I'm not persuaded that Shawbrook was party to a credit relationship with Mr S and Ms K under the Credit agreement that was unfair to them. And, having taken everything

into account, I see no other reason why it would be fair or reasonable to direct Shawbrook to compensate Mr S and Ms K.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K and Mr S to accept or reject my decision before 13 June 2024.

Fiona Mallinson
Ombudsman