DRN-4797202

The complaint

Mr L has complained about the sale of a timeshare paid for using a loan provided by Shawbrook Bank Limited ("Shawbrook").

What happened

In October 2017, Mr L along with another purchased a timeshare product ("the Timeshare") from a timeshare provider ("the Supplier"). Mr L paid for the Timeshare by taking a loan from Shawbrook. As the loan was in Mr L's sole name, only he is able to bring a complaint about Shawbrook to this service.

In September 2023, Mr L used a professional representative ("the PR") to make a complaint to Shawbrook. Specifically, that the loan was arranged by a credit intermediary – here that was the Supplier – who wasn't authorised to carry out such activities. The PR allege that the credit intermediary didn't hold a credit license with the Office of Fair Trading ("the OFT") and wasn't regulated to carry out the work of a credit intermediary, thus rendering the loan agreement unenforceable.

In response, Shawbrook said that the Supplier (acting as the credit intermediary) wasn't required to hold a credit broking license as they weren't incorporated in the UK and didn't advertise or offer credit in the UK. And because the sale took place outside the UK, the sale (of the loan) was outside of the jurisdiction of the Financial Conduct Authority ("the FCA").

The PR didn't accept Shawbrook's response, so referred Mr L's complaint to this service. Having done so, one of our investigators didn't think Mr L's complaint should be upheld.

The PR disagreed with our investigator's findings. In doing so, they responded at length providing further evidence to support their arguments. In particular, evidence which they believe demonstrates that the Supplier was actively promoting and marketing their products and services in the UK. And as such, required the requisite credit license to do that. But because the supplier didn't hold that license, the sale of the loan breached the general prohibition under section 19 ("S19") of the Financial Services and Markets Act 2000 ("FSMA").

As the PR didn't agree with our investigator's findings, Mr L's complaint was passed to me for a 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 considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

The relevant provisions that relate to this issue are in FSMA. In short, S19 FSMA ("S19") is 'the general provision' and states that *"No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is-*

[1] Dispute Resolution: The Complaints sourcebook (DISP)

(a) an authorised person; or

(b) an exempt person.

Section 27 FSMA ("S27") states that an agreement, such as Mr L's, that was *"made in consequence of something said or done by another person ("the third party") in the course of…a regulated activity carried on by the third party in contravention of the general prohibition"* is unenforceable against the borrower. Further, a consumer such as Mr L would be entitled to recover money paid under the loan agreement and to compensation for any loss suffered as a result of making such payments.

The PR said that the Supplier wasn't authorised by the OFT to broker loans, which was a breach of the general provision. At the time of the sale in 2017, it was the FCA who provided such authorisation rather than the OFT. But the requirement remains unchanged by that. Shawbrook accept that the Supplier (acting as the credit broker) wasn't authorised by the FCA but argue that there was no requirement to be so as all of the relevant activities took place outside of the UK. So, the requirements in FSMA didn't apply in the way alleged.

The key issue for me to determine is whether the Supplier carried out the credit brokering of Mr L's loan (a regulated activity) within the UK. On the face of it, it didn't as the loan was arranged during a meeting with Mr L in Gran Canaria.

Section 418 FSMA ("S418") sets out six cases where an activity would be deemed as having taken place within the UK where they would not otherwise have been regarded as doing so. Each of these depends, in one way or another, on the entity carrying on the regulated activity having their registered office, head office or an establishment in the UK. But here, the supplier was a Spanish business with no such links to the UK, so I can't see any of these cases apply to this sale.

The FCA also set out in their Handbook guidance on the territorial scope of S19 in PERG 2.4 – *"Link between activities and the United Kingdom".* But in the circumstances of this complaint, I can't see that PERG 2.4 expands the scope of S19 and S418 beyond what I've already set out above.

It follows that I don't think the Supplier needed to be FCA authorised to broker loans in Spain, as it had no UK presence. That means it didn't breach the general prohibition when arranging Mr L's loan and, in turn, S27 isn't engaged.

In response to our investigator's view, the PR provided evidence to suggest the Supplier actively marketed within the UK, thus bringing them under the scope of FSMA. I've carefully considered this evidence together with the PR's comments and observations.

The evidence consists of a number of newspaper articles dating back a number of years relating to a Spanish footballer who, at the time, played for an English football team. I understand the footballer was born and raised in a town local to the resort in Spain. The articles appear to focus upon the player albeit refer to a sponsorship deal with the Supplier and that the resort was based in his hometown in Spain.

I understand that the Supplier had no input into these articles. Rather that they were written by journalists. And whilst the footballer appeared in the Supplier's brochures, promotional videos and travel magazines, the footballer didn't market or sell timeshare products. Furthermore, the Supplier has confirmed to Shawbrook that no customers were ever approached by them in the UK and there was never any timeshare marketing, sales or credit offered in the UK. Because of that, I don't think that the footballer's involvement with any advertising of the Supplier's wider business outside of timeshares brings it under FSMA for credit brokering purposes.

I realise Mr L will be very disappointed, but I haven't found anything to suggest that the sale of the loan to him by the Supplier breached the requirements of FSMA. And for that reason, I won't be asking Shawbrook to do anything more.

My final decision

For the reasons set out above, I don't uphold Mr L's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 6 August 2024.

Dave Morgan
Ombudsman