

The complaint

Mr and Mrs G complained to Shawbrook Bank Limited about the sale of a timeshare it had financed. They say, in essence, that Shawbrook acted unfairly and unreasonably as a result.

What happened

In February 2014 ('the Time of Sale') Mr and Mrs G bought a timeshare membership from a timeshare provider ('the Supplier'). This was membership of the Fractional Property Owners Club ('FPOC Membership'). FPOC Membership provided Mr and Mrs G with a number of 'points' every year that they could spend to stay at properties provided by the Supplier. But this was also 'asset backed', which means that their membership was linked to a specific property ('the Property'). Mr and Mrs G had no preferential right to stay at the Property, but after 19 years, the Property would be placed for sale and the net proceeds of sale would be divided amongst the people whose membership was linked to the Property.

Whilst Mr and Mrs G's FPOC Membership was in place they had to pay maintenance fees every year for the running of the membership programme, including the upkeep of the Property. In the first year this charge was set at €949. The FPOC Membership cost £11,494 and Mr and Mrs G paid for this by taking a 15 year loan for the full purchase price from Shawbrook. The total amount payable after charges and interest was £32,641.20.

On 18 June 2018 Mr and Mrs G raised concerns, through their professional representative ('PR'), about the sale of their timeshare and wrote to Shawbrook asking for a refund of the loan it granted them to pay for their timeshare.

In summary, Mr and Mrs G's letter of complaint said:

- At the Time of Sale they were told that how buying fractional points was a "great thing to do for their future" as in 19 years the fractional points would be turned into a lot of money when the property was sold and there would be a large profit on their investment.
- The maintenance fees were very expensive and availability for holidays was low. Whereas booking through an alternative website gave good availability at a much cheaper rate than the maintenance fees.
- When they bought the timeshare they were both employed. Unfortunately in 2015 Mr G lost his job and "pleaded" with the Supplier to cancel the contract but it refused.

Shawbrook rejected the complaint. In summary it said:

- The purchase documentation told Mr and Mrs G that they had a 14 day "cooling off" period in which they could cancel their membership without penalty. There's no evidence Mr and Mrs G sought to cancel their membership within the "cooling off" period so they were happy to become members of the FPOC on the information given.

- Mr and Mrs G were made aware that, after their membership had ended, the property to their FPOC membership will be released for sale by the UK-based Trustee, who is under a fiduciary duty to obtain the best price in the circumstances at that time. Once a property is sold, the sale proceeds are distributed in accordance with the share held.
- Mr and Mrs G weren't misled regarding their share of the potential sale proceeds of the Property, and there's no evidence that the agreement was sold as an investment which would increase in value. Shawbrook referred to wording in Mr and Mrs G's signed Information Statement which it said confirmed the Supplier wasn't providing investment advice or provided any guarantee as to the value of any holiday property. It hadn't seen any evidence that any guarantees were given to Mr and Mrs G that the Property would be sold at a profit once the end date had passed.
- Mr and Mrs G's signed Members Declaration set out the likely management charge, €949 for 2014. So, overall, they were provided with appropriate information about the costs associated with their purchase.
- An appropriate assessment of Mr and Mrs G's creditworthiness was made before they bought FPOC membership. It was completed in accordance with Shawbrook's regulatory obligations. From the information it had at the time of the application, and the credit reference check, the loan was considered to be affordable for Mr and Mrs G.

Unhappy with Shawbrook's response, the PR made a complaint to our service on Mr and Mrs G's behalf. The PR referred to its letter of complaint dated 18 June 2018 to set out what happened and why Mr and Mrs G were unhappy with their timeshare.

One of our Investigators issued her findings on this complaint on 20 November 2020 rejecting the complaint. Mr and Mrs G didn't accept the findings. We told both parties that this case, along with other cases involving fractional timeshare, was put on hold while we awaited the outcome of a Judicial Review involving the sale of timeshares like Mr and Mrs G's.

Following the Judicial Review another of our Investigators asked the PR if it had taken any testimony from Mr and Mrs G before the complaint was made but the PR didn't respond. The Investigator issued her findings on this complaint on 22 November 2023 and rejected the complaint. Mr and Mrs G disagreed and asked for an Ombudman's decision.

In response to the most recent Investigator's assessment, the PR argued that Mr and Mrs G's FPOC membership wasn't actually a timeshare but an unregulated collective investment scheme, which the Supplier wasn't qualified or authorised to give advice on or sell to Mr and Mrs G. The PR said that meant there was an unfair relationship between Mr and Mrs G and Shawbrook under section 140A of the Consumer Credit Act 1974 (the 'CCA'). So, Mr and Mrs G should be given a full refund to be put back to the position they would have been in had they not bought FPOC membership or borrowed the money to do so.

Shawbrook added the following:

- The witness statement and other comments the PR provided for Mr and Mrs G contained phrases that are common in the majority of the PR's claim letters. The PR's comments suggested that Mr and Mrs G were already timeshare members but the Supplier had confirmed that their FPOC membership was their first and wasn't an upgrade. So PR's comments weren't "clear and credible" enough to support what Mr

and Mrs G really thought about the sale of their FPOC Membership without the PR's involvement.

- The letter of complaint said that holiday availability was at "a new low" for FPOC members but the Supplier had told Shawbrook that Mr and Mrs G have never requested a holiday and the only time they have travelled was on their promotional holiday awarded with the purchase, having requested a hotel night.
- The information given to Mr and Mrs G at the Time of Sale made it clear that FPOC Membership hadn't been sold as an investment.

What I provisionally decided – and why

As Mr and Mrs G had raised a new matter in response to our Investigator's recent assessment, I made a provisional decision explaining why I was intending to not uphold this complaint so that the parties had the opportunity to comment before I made my final decision. I said:

'When deciding complaints, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."

Where I need to make a finding of fact based on the evidence, I make my decision on the balance of probabilities. In other words, when I make a finding that something happened, that is because I think it is more likely than not that thing did happen.

As I've said, Mr and Mrs G complained to Shawbrook about the sale of their FPOC membership. The Financial Ombudsman Service's jurisdiction doesn't extend to the Supplier on this occasion given the nature of this complaint. But the CCA introduced a regime of connected lender liability that give Mr and Mrs G a right of recourse against Shawbrook given the fact that it financed their purchase. And as Mr and Mrs G's concerns only fall into one of the relevant provisions in the CCA (Section 140A), it's with that provision in mind that I've considered this complaint.

Shawbrook referred to a witness statement from Mr and Mrs G in its response to the most recent Investigator's assessment. I haven't seen that statement and when we asked the PR for a copy it didn't respond. When the PR made the complaint to us on behalf of Mr and Mrs G it only referred to the contents of the letter of complaint. So, I've considered the contents of that letter as well as the PR's response to our Investigator's findings of 22 November 2023.

Mr and Mrs G say they were told by the Supplier at the Time of Sale that FPOC Membership was a great thing to purchase for their future because in 19 years' time the Property would be sold and they would get a huge profit on their investment.

The sale of timeshares like Mr and Mrs G's was regulated by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Timeshare Regulations"). The regulation most important to this decision is Reg.14(3) which says that:

"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".

Yet, in essence, that is exactly what Mr and Mrs G say the Supplier did at the Time of Sale.

I don't doubt the honesty of Mr and Mrs G's assertion. But the part it plays here comes down to how much it can be relied on given everything else I know about this complaint. And as they have said little to nothing about what was actually said, by who and in what context, there isn't the necessary information to this complaint to find that the Supplier was more likely than not to have sold FPOC membership to them as an investment.

But even if FPOC membership had been sold to Mr and Mrs G as an investment by the Supplier contrary to Regulation 14(3), I'm not persuaded by what I've seen so far that the FPOC's investment element motivated their purchase, such that a breach of Regulation 14(3) was likely to have rendered their credit relationship with Shawbrook unfair to them.

In response to the most recent Investigator's assessment, the PR says that Mr and Mrs G's FPOC membership wasn't really a timeshare but an unregulated collective investment scheme ('UCIS').

To be a UCIS, Mr and Mrs G's FPOC membership would have to not only fall within the definition of a collective investment scheme (CIS) under Section 235 of the Financial Services and Markets Act 2000 but it would also have to fall outside of the definition of arrangements which do not amount to a collective investment scheme set out in the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (the '2001 CIS Order').

If the FPOC purchase agreement entered into by Mr and Mrs G qualified as a 'timeshare contract', it can't have given rise to a UCIS because the '2001 CIS Order' provides in Schedule 1 (Paragraph 13) that arrangements don't amount to a CIS if "[...] *the rights or interests of the participants are rights under a timeshare contract [...]*".

Regulation 7 of the Timeshare Regulations defined a timeshare contract "*as a contract between a trader and a consumer under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation and which has a duration of more than one year [...]*".

An important phrase in this definition in the context of this complaint is "*the consumer...acquires*" (...the relevant rights to use accommodation). To 'acquire' seems to me to have its normal meaning of gaining something or coming into possession of it. And if the FPOC purchase agreement entered into by Mr and Mrs G was a timeshare contract, I think it must have led to them gaining or coming into possession of rights to use overnight accommodation.

Looking at Mr and Mrs G's FPOC purchase agreement, I'm satisfied they paid for the right to use overnight accommodation for more than one period of occupation (including accommodation from a pool of accommodation) under an agreement that had a duration of more than one year. That was a right they acquired for the first time when they bought the product in question. I see no reason why Mr and Mrs G's FPOC purchase agreement wasn't

a timeshare contract.

So, I'm minded to find that Mr and Mrs G entered into a timeshare contract at the Time of Sale. And, for that reason, I think it was excluded from being a CIS which means it can't, by definition, be a UCIS.

Mr and Mrs G say that there's low availability for holidays. But as they haven't elaborated on that allegation it isn't clear whether their concern is relevant to an assessment of unfairness in this complaint. And as the Supplier says that they have never requested a holiday using their FPOC Membership other than a promotional holiday awarded with their purchase of FPOC Membership, I'm not persuaded that this is a reason to conclude that their credit relationship with Shawbrook was rendered unfair by something said and/or done (or not said and/or done) by the Supplier at the Time of Sale.

Mr and Mrs G also say that their annual maintenance fees as FPOC members became very expensive. But it seems likely to me that they were told at the Time of Sale that those fees could go up each year. And while it's possible the Supplier didn't give Mr and Mrs G sufficient information, in good time, on the various charges they could have been subject to as FPOC members in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't seen enough to persuade me that this, alone, rendered Mr and Mrs G's credit relationship with Shawbrook unfair to them.

Other matters

I understand Mr and Mrs G's circumstances changed after the Time of Sale following his redundancy and they asked the Supplier to let them cancel their FPOC Membership, which it refused to do. While I appreciate that's an important issue for Mr and Mrs G, I can't currently see why that's something Shawbrook bears responsibility for.

Conclusion

Overall, I'm not persuaded that Shawbrook, having financed the purchase of Mr and Mrs G's FPOC membership, acted unfairly or unreasonably given the circumstances of this complaint'.

Responses to my provisional complaint

Neither party responded to my provisional complaint.

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 responded to my provisional decision I've no reason to change my mind about the findings and conclusion I reached in my provisional decision. For the reasons I've given in my provisional findings and these findings I'm not persuaded that Shawbrook, having financed the purchase of Mr and Mrs G's FPOC membership, acted unfairly or unreasonably given the circumstances of this complaint.

My final decision

I don't uphold this complaint.

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

Nicola Sisk
Ombudsman