DRN-4489210

The complaint

Mr and Mrs T complain that they were mis-sold a timeshare product and the loan used to pay for it. The loan was provided by Shawbrook Bank Limited ("Shawbrook"). Mr and Mrs T are represented by a claims management business, which I'll call "C". Where I refer to Mr and Mrs T's submissions, I include those made on their behalf.

What happened

In or around August 2019 Mr and Mrs T bought a trial membership of Club La Costa Holiday Vacation Club Limited ("the Club"). As part of that trial membership, they were entitled to a holiday in Tenerife, which they took in December the same year.

While they were in Tenerife, Mr and Mrs T attended a presentation, at the end of which they bought from Club La Costa (UK) Sucursal ("CLC") full membership of the Club and 1,450 Points Rights (including 200 bonus points), which they could trade in annually for holiday accommodation and other benefits.

Mr and Mrs T paid a total of £19,847, which included a trade-in of their trial membership, valued at £4,395. To pay for their purchase, they took out a loan of £23,909 from Shawbrook; that borrowing included a consolidation of the loan they had taken out to pay for the trial membership.

In January 2021 Mr and Mrs S complained to Shawbrook. They said, in summary:

- The Club membership had been misrepresented to them. They later expanded on this allegation to say that they had not been told it was a timeshare product.
- CLC was in breach of contract.
- CLC was in breach of the fiduciary duty it owed to them, and Shawbrook had facilitated that breach. They said specifically that the commission paid to CLC had not been disclosed as it should have been.
- The loan was not affordable, and Shawbrook hadn't taken the steps necessary to ensure it was.
- The loan created an unfair relationship within the meaning of section 140A of the Consumer Credit Act 1974.

Shawbrook did not uphold Mr and Mrs T's complaint, and C referred it to this service. One of our investigators considered what had happened and issued a preliminary assessment. She did not recommend that the complaint be upheld. Mr and Mrs T did not accept that assessment and asked that an ombudsman review the case.

I did that and, on 8 November 2023, issued a provisional decision in which I said:

I would first of all make the general observation that there is very little detail in this case about what happened and – perhaps more significantly – almost no evidence directly from Mr and Mrs T about their experience of the timeshare sales process and subsequent events.

Further, my role as the ombudsman dealing with Mr and Mrs T's complaint is primarily to decide how it should be resolved in a way which I consider to be fair and reasonable in all the circumstances of the complaint. C has made a number of wider observations about what it considers to be failings in the timeshare industry. I have noted its comments, but C has to a large extent not explained how its observations apply to Mr and Mrs T's own experience.

I turn therefore to the specifics of this case.

Affordability

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case.

I have not seen any evidence to suggest that the loan was not affordable for Mr and Mrs T. As far as I'm aware, they have not suggested they have had difficulty making payments or, if they have, when and how those difficulties began. They certainly do not suggest that they contacted Shawbrook to seek help with making the loan payments between December 2019, when they took the loan out, and January 2021, when they complained about it and the timeshare product.

The fact that a borrower has been able to meet loan repayments does not necessarily show that the lender did carry out appropriate checks before agreeing the loan. That is likely to indicate however that a borrower has suffered no loss as a result of taking the loan out. It also indicates that, even if more detailed checks had been made, it's likely the loan would have been granted in very similar terms in any event.

I am not persuaded on the basis of what I've seen so far that the loan was not affordable. In order to reach a different view on that, I believe I would need to see concrete evidence of any difficulties Mr and Mrs T have experienced.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- *that the lending financed the contract giving rise to the claim; and*
- *that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

The seller in this case was CLC; the credit intermediary was named in the loan documents as Club La Costa Exhibition Centre, so it is that entity which had pre-existing arrangements with Shawbrook. Its name appears to be a trading style, rather than a company name, so it is not entirely clear whether the seller and the intermediary are one and the same. Shawbrook has not however suggested that the necessary section 75 conditions were not met, and I have considered this complaint on the basis that they were.

Misrepresentation and breach of contract

A misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

A breach of contract occurs when one party to a contract does not fulfil its obligations to the other. That is, it does not do what it has agreed to do or does not provide what it has agreed to provide.

Mr and Mrs T have not alleged any specific breach of contract here. I think it likely that they would have had difficulty using their membership of the Club before they complained to Shawbrook in January 2021, simply because of travel restrictions due to Covid-19. But they have not provided any information about what happened between the purchase of the timeshare product and their complaint to Shawbrook.

The only detail which Mr and Mrs T have provided in respect of this allegation is that they say they were not told they were buying a timeshare product. In respect of this point, I do not believe that CLC was under any obligation to use the word "timeshare" in its presentation or sales pitch. Be that as it may, Mr and Mrs T signed a Member's Declaration which included, at paragraph 13:

"We have received a copy of our Agreement together with the notices and Information Statement (which we have had adequate time to review before signing) required under the EU Timeshare Directive 2008/122/EC."

The Information Statement included a Standard Information Form, which is a requirement under The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the 2010 Regulations"), by which the EU Directive is incorporated into UK law. The Standard Information Form included a description of the product which Mr and Mrs T were buying and the nature of Points Rights.

Mr and Mrs T may not have appreciated that the definition of "timeshare contract" in regulation 7 of the 2010 Regulations is wide enough to include the product they bought, but I don't believe there was any misrepresentation about that. They signed and initialled a statement referring to the Timeshare Directive. And of course, the fact that their purchase was a timeshare contract meant that they had (and have) the protection of the 2010 Regulations. The Regulations in turn required CLC to provide specified information about what they had bought – and which, on the face of it, it did.

Mr and Mrs T have not provided any evidence to support their unspecified claims of misrepresentation on the part of CLC.

It is not for me to say whether Mr and Mrs T have a claim for breach of contract or for misrepresentation against CLC or, therefore, whether they have a claim against Shawbrook under section 75 of the Consumer Credit Act. They are however matters I must take into account in deciding what's fair and reasonable in all the circumstances. Having done that, I believe that Shawbrook's response to those claims was reasonable.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties, refunding payments and re-opening an agreement which has come to an end. In considering whether a credit agreement creates and unfair relationship, a court can have regard to any connected agreement, which in this case could include the contract with CLC.

An ombudsman does not have the power to make an order under section 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable. And I have the power to make a wide range of awards – including, for example, requiring a borrower to refund interest or charges, and to write off or reduce the balance of a loan. I am not persuaded however that I should do so here.

There were arrangements between Shawbrook and the CLC companies. I do not believe however that this led to a conflict of interest in respect of their relationship with Mr and Mrs T. CLC was selling club membership, and it appears that another Club La Costa company was acting as intermediary (and as Shawbrook's agent). Whilst it introduced finance options, it was not acting as Mr and Mrs T's financial adviser or agent and was under no obligation to make an impartial or disinterested recommendation or to give advice or information on that basis.

C says that Shawbrook did not disclose the commission paid to the intermediary. The Member's Declaration however included, at paragraph 6:

"We acknowledge that where we have purchased with the assistance of finance and were introduced to one of CLC World's approved external finance companies that no other introductions or recommendations will be made. We have received the Pre-contract Credit Information document (PCCI) and have had adequate time to consider the information contained there on and any questions we have raised arising from this document have been explained to our satisfaction prior to signing and receiving a copy of our finance agreement. CLC has a commercial arrangement with the lender who is providing the loan you have requested and as part of those commercial terms we may be entitled to a commission from the lender. Details of commission in respect of your loan are available on request by you quoting your contract number."

Mr and Mrs T had therefore been told that a commission might be paid and had been invited to ask for details if they wanted more information. They did not do so, but Shawbrook says in any event that any commission paid was very low. I note as well that C did not seek information about any commission paid before alleging that Shawbrook chose not to disclose it.

Mr and Mrs T say too that the sale was pressured. They have not elaborated on that., but I note that, in line with the 2010 Regulations, Mr and Mrs T had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. If they thought they had agreed to either of those agreements as a result of undue pressure, it is not clear to me why they didn't take advantage of the option to withdraw.

It is not for me to decide whether Mr and Mrs T have a claim against CLC, or whether they might therefore have a "like claim" under section 75 of the Consumer Credit Act. Nor can I make orders under sections 140A and 140B of the same Act.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr and Mrs T's complaint. In the circumstances of this case, however, I think that Shawbrook's response to the claims was fair and reasonable.

I gave the parties until 6 December 2023 to provide me with any further evidence or arguments they wanted me to consider. Shawbrook said it had nothing to add. I have not however received anything further from or on behalf of Mr and Mrs T.

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 I have received no further evidence or arguments, I see no reason to reach a different conclusion from that set out in my provisional decision. In saying that, I stress that I have reviewed the case in full before reaching this final decision.

My final decision

For these reasons my final decision is that I do not uphold Mr and Mrs T's complaint and I do not require Shawbrook Bank Limited to do anything more to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T and Mrs T to accept or reject my decision before 1 February 2024.

Mike Ingram
Ombudsman