DRN-3591032

The complaint

Mr and Mrs R complain that they were mis-sold timeshare products and the loans used to finance the purchases. The loans were provided by Shawbrook Bank Limited.

Mr and Mrs R have been represented by a claims business, which I'll refer to as "M". Where I refer to Mr and Mrs R's submissions and arguments, I include those made on their behalf.

What happened

Mr and Mrs R were existing members of the Diamond Resorts European Collection ("DREC"), having originally bought a timeshare product from its predecessors in 2004. DREC is a timeshare and holiday club.

Mr and Mrs R made further purchases in 2006 and 2015, increasing their membership points and, therefore, improving their options for using their membership points to book holiday accommodation and other benefits.

In June 2016 they bought an additional 19,000 points, funded in part with a loan from Shawbrook. In August 2016 they bought another 15,000 points, again funded in part with a loan from Shawbrook. The purchase agreements in each case recorded that the seller was Diamond Resorts (Europe) Limited ("DRL").

In January 2020 Mr and Mrs R complained to Shawbrook, and that complaint was referred to this service shortly afterwards. In summary, Mr and Mrs R's complaint is:

- DRL misrepresented the club membership. They therefore have a claim against DRL and, under section 75(1) of the Consumer Credit Act 1974, a like claim against Shawbrook.
- The sales process was pressured, and they did not have a proper opportunity to consider the sale and finance documents.
- The loan agreements created an unfair relationship within the meaning of section 140A of the Consumer Credit Act.
- Shawbrook had not carried out proper checks to ensure that the loans were affordable.
- Membership of DREC was of little or no value.

The misrepresentations alleged by Mr and Mrs R included that they would have additional availability of holiday accommodation, that resorts were for the exclusive use of members and that management and maintenance fees would only increase in line with inflation.

Shawbrook sought comments from DRL, which rejected the claims made. In summary, it said:

- The claim had referred to purchases in 2014, 2015 and 2016. In fact, Mr and Mrs R had made no purchase in 2014; the 2015 purchase had not been financed by Shawbrook; and there had been two purchases in 2016.

- The sales process was lengthy, but that was necessary to ensure full explanations were given and to comply with The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.
- It denied the sales tactics were pressured or unfair. Mr and Mrs R were not obliged to attend presentations.
- Customers have a 14-day cooling-off period in which to withdraw from any agreement, should they wish to do so.
- Mr and Mrs R had been timeshare owners since 2004, so would have been familiar with the way the club operated.
- Mr and Mrs R knew that accommodation was available on a first-come, first-served basis and had never raised any concerns about non-availability. They had made regular bookings
- Mr and Mrs R were made aware of the maintenance fees and how they would be calculated.
- They also knew that a commission might be paid and could have asked how much it would be.

Shawbrook said that it was satisfied it had properly assessed whether the loans were affordable.

When the case was referred to this service, one of our investigators considered what had happened but did not recommend that it be upheld. Mr and Mrs R did not accept the investigator's assessment and asked that an ombudsman review the case.

I did that and issued a provisional decision, in which I said:

I note that M's original complaint letter referred to purchases in 2014, 2015 and 2016, all funded by Shawbrook. Both DRL and Shawbrook say however that, although the 2015 purchase was initially to be funded by Shawbrook, Mr and Mrs R pulled out of the loan within the 14 day cancellation period and used an alternative means of payment. There was no 2014 agreement.

In my view, that is a fairly significant error to make, and one which must call into question Mr and Mrs R's recollection of other matters at around the same time.

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 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.*

Both 2016 purchase agreements were made between Mr and Mrs R as buyer and DRL as seller. They were agreements for the sale and purchase of Points Rights in DREC. DRL is also named as the supplier in Shawbrook's documentation.

I am satisfied therefore that the loans were arranged by DRL under existing arrangements with Shawbrook. Indeed, that does not appear to be in dispute. I must therefore consider what Mr and Mrs R have said about the actions of DRL.

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 do what it has agreed to under the contract. There can be a breach if it is clear that one party will not do what it has agreed to do.

In order to establish whether a party has a valid claim for breach of contract or misrepresentation, it is necessary therefore to consider the contract terms.

Contractual documents

I note that Mr and Mrs R say that the Points Rights were poor value for money, because they could have secured the same accommodation more cheaply. I make no comment on that, save to say that poor value is not, of itself, a ground for a claim.

The sale and purchase contracts were based on a standard form produced by DRL. Each contract included a 3-page purchase agreement, a Key Information document, and a Customer Compliance Statement.

By clause 4 of the Terms and Conditions Mr and Mrs R acknowledged receipt of the Key Information Document, Inventory Schedule, Withdrawal Form, Annual Global Reservations Directory, Resort Disclosure Booklet, the Governing Documents Booklet and the Rules and Regulations of the Club.

Clause 6 was an entire agreement clause, telling buyers that if they were relying on verbal promises, they should be put it in writing.

Clause 7 said that, if any part of the contract was invalid, illegal or unenforceable, the rest of the contract would remain valid and enforceable.

Part 1, section 4 of the Key Information document said that the club would be dissolved on 31 December 2054. Part 3, section 4 provided information about termination of the contract. It explained that membership could be transferred in some circumstances. In exceptional circumstances it might be possible to relinquish membership.

Part 1, section 8 outlined the Management Charge and explained how it would be calculated. It said expressly that the charge was not linked to inflation.

The Customer Compliance Statement comprised 22 statements about the sale and loan. The statements included:

- *a statement that, having looked at the Points tables, the member was aware of the possibilities available with the number of Points allocated to them (1);*
- *a statement that the points system offered flexibility, <u>subject to availability</u> (my emphasis) (4);*
- *confirmation that they were unable to meet the financial commitments under any finance agreement (17);*

- *a statement that the member understood that DRL worked with credit providers and that it was entitled to receive a commission in respect of credit brokered (18);*
- *confirmation that they had been treated courteously, had been given time to consider whether the product was right for him, and had not been put under pressure (20);*
- *confirmation they had read the purchase agreement, key information and any finance document and were happy to proceed (21);*
- *confirmation that they understood that the documents constituted the entire agreement and that no oral or written representations had been made on which they had relied (22).*

A signature on these statements does not of course mean that they were true. But if they were not true, I would have expected Mr and Mrs R, in bringing this complaint and addressing Shawbrook's response to it, to explain why they signed the documents and why, having done so, they did not exercise their right of withdrawal if they were unhappy. In saying that, I note that they had exercised their right of withdrawal – at least in respect of a loan agreement – the previous year.

I note that some of the contractual provisions – for example, that Management Charges were not linked to inflation – were completely at odds with what Mr and Mrs R say they were told. And, as existing members since 2004, they would have known how they were calculated.

It is relevant too that the purchase contracts were clear that Mr and Mrs R would not be able to rely on any oral representations and that they confirmed [they] had been given plenty of time to consider the purchases. If Mr and Mrs R felt they had been rushed into the agreements, [they] had 14 days in which to review things and withdraw if they weren't happy.

In the circumstances, I think it unlikely that a misrepresentation claim against DRL would succeed in this case.

It follows that Shawbrook's decision not to uphold Mr and Mrs R's claim under section 75(1) of the Consumer Credit Act 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 and refunding payments.

In deciding whether to make orders under these provisions, a court can consider any linked agreement – which in this case would include the contracts with DRL. For the reasons I have explained, I think it unlikely that a court would make an order under section 140B on the basis of misrepresentation or breach of contract.

M says that the commission paid to DRL for introducing the loans had not been disclosed. DRL told Mr and Mrs R that commission might be paid, but it was under no duty to say how much it would be unless asked. This was not a case where DRL was acting on behalf of Mr and Mrs R in introducing or recommending a financial product from a range of products. It was selling Points Rights on its own account and providing Mr and Mrs R with payment options. And they knew from their experience the previous year that they did not have to take that option. Indeed, they paid part of the purchase price by other means in both June and August 2016.

In any event, I have no reason to think that, if Mr and Mrs R had asked about the level of commission, [they] would not have been told what it was.

I make similar observations in respect of M's allegation that Shawbrook procured a breach of fiduciary duty on the part of DRL. DRL was not acting as Mr and Mrs R's agent and, as a seller of Points Rights, owed them no such duty.

For these reasons, I think it unlikely that a court would make orders under section 140B of the Consumer Credit Act. It follows again that Shawbrook's Capital's response to this part of the complaint was reasonable.

Affordability

Mr and Mrs R say that proper assessments were not made to ensure they could afford the loan.

Mr and Mrs R have not suggested however that they have had any difficulty in making repayments. The Customer Compliance Statement indicates that DRL did discuss the loans with them, although it was for Shawbrook to assess whether they were suitable and affordable.

The fact that Mr and Mrs R have been able to meet the loan repayments does not, of itself, mean that the loans were in fact affordable, still less that Shawbrook properly assessed them. It is however an indication that they were, and that more detailed assessments are unlikely to have made any real difference overall.

Conclusion

I stress that it is not for me to decide whether Mr and Mrs R have a claim against DRL or, therefore, whether they have a claim under section 75(1) of the Consumer Credit Act against Shawbrook. Nor do I have any power to make orders under section 140A and section 140B; only a court can do that. They are however matters which I must take into account in deciding what I consider is fair and reasonable in all the circumstances. I have done that and concluded that Shawbrook's response to Mr and Mrs R's claims was reasonable.

Neither Shawbrook nor Mr and Mrs R had anything to add in response to my provisional 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.

As neither party has provided any more arguments or evidence for me to consider, I see no reason to reach a conclusion which differs from that set out in my provisional decision. I stress however that I have considered everything afresh before reaching this decision.

My final decision

For these reasons, my final decision is that I do not uphold Mr and Mrs R's complaint and 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 Mrs R and Mr R to accept or reject my decision before 1 November 2023.
Mike Ingram

Ombudsman