DRN-4524875

The complaint

Mr J complains that Shawbrook Bank Limited ('Shawbrook') didn't deal fairly with a claim he made under the Consumer Credit Act 1974 (the 'CCA') in relation to a holiday product he had purchased together with his wife.

What happened

In January 2016, Mr J took out a timeshare membership alongside his wife. They traded in an existing 'trial membership', plus they had to pay an extra £8,250. The additional cost was paid by Mr J taking out a loan with Shawbrook. In exchange they became members of the timeshare scheme. Under this membership, Mr and Mrs J were granted 10,000 'points' that could be exchanged every year to stay at the Supplier's holiday accommodation (or could be exchanged to stay elsewhere through a third-party exchange company).

In June 2018, a professional representative ("PR") wrote to Shawbrook on Mr J's behalf, setting out problems PR said there were with the sale of the membership. Although the membership was bought by Mr J and his wife, as the loan in question was only in Mr J's name, only he was able to make a complaint to Shawbrook about it. In summary, PR set out three fundamental concerns: the first was about a change in ownership of the holiday product supplier ("the Supplier") and the way it had dismissed its salesforce; next, they complained about the lack of available accommodation when Mr J attempted to book holidays; and lastly, they complained about the loss of exclusivity with the same hotel accommodation marketed via online travel agents to non-members.

Shawbrook responded to the complaint but didn't think it needed to pay Mr J anything arising from it. In summary, it said (amongst other things) that:

- The Supplier was acquired by a private equity fund, and this acquisition has had (and would continue to have) no impact on the operation of Mr and Mrs J's membership. Nor would the decision to reduce the European sales and marketing operations.
- Accommodation requests are subject to availability. The difficulties Mr and Mrs J experienced in making successful bookings appears to be partly due to trying to book accommodation in the months and even weeks before their desired check-in date – so, under the terms of the membership, leaving it late to book.
- Mr and Mrs J would've been told about the timeframe in which members may secure bookings at the time they were sold the finance agreement they are complaining about. Members may secure bookings up to 13 months in advance at resorts within their home collections, and up to 10 months in advance for all other resorts.
- The Supplier's resorts have never been used exclusively by their members. Two other timeshare clubs operated by the Supplier that have access to the same portfolio of resorts. And some of the resorts have their own independent timeshare clubs.
- Some of the accommodation is owned by the developer and is used for marketing and promotional purposes, which includes making apartments available for non-members to book through a variety of channels, including internet booking websites.
- It was made clear in the sales documentation that Mr and Mrs J were making a purchase

in future holidays and not a financial investment. Should they later choose to dispose of their points, the Supplier didn't operate a resale or buyback program, meaning any subsequent resale depended on market conditions.

One of our investigators considered the information available, but she didn't think there was any evidence of a misrepresentation, breach of contract, that there was an unfair debtor-creditor relationship or that the lending was unaffordable for Mr J. It followed, our investigator didn't think the complaint should be upheld.

PR, on behalf of Mr J, disagreed. The case was assigned to another investigator in late 2023 for a review, checking that the outcome and reasons behind the outcome still aligned to our current approach to resolving complaints such as this one.

PR asked this investigator to consider the judgment in R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ("the Judicial Review"). It said that, following the judgment, the timeshare membership had been sold to Mr and Mrs J as an investment, it cannot be viewed as a "timeshare contract" as the terms did not fall within the definition of a timeshare contract but as a Collective Investment Scheme, and that the Supplier was neither qualified nor authorised to give advice on or sell investments. It argued that would be enough to cause an unfair debtor-creditor relationship. Therefore, Mr J's complaint should lead to the same outcome as the decisions considered in the Judicial Review.

The Investigator explained that he understood that the Judicial Review established that the timeshare contracts in question were not Collective Investment Schemes. Although PR had not set out the basis for bringing Mr J's complaint against Shawbrook over the Supplier, the Investigator noted the lender had treated the complaint as claims made to it under Sections 75 and 140A of the CCA – so he also proceeded on this basis.

The Investigator didn't see enough to suggest that there were any relevant considerations that might mean the relationship between Mr J and Shawbrook was unfair, and he didn't think it likely a court would conclude otherwise. Noting Mr J's concerns about the service he received and/or might receive from the Supplier, the Investigator also considered if there were grounds for a claim to the lender under Section 75 of the CCA (the way by which he could hold Shawbrook responsible). But on the available evidence, the Investigator was not convinced the Supplier had failed to fulfil one or more of the terms, or that there had been any financial loss even if it had. So, he didn't think Shawbrook needed to do more.

As the parties couldn't come to an informal agreement, the 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 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."

When the evidence is incomplete, inconclusive or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is most likely to have happened given the available evidence and the wider circumstances.

Having considered everything, I don't think there's enough evidence for me to say that this complaint should be upheld – I'll explain my reasons below.

The matters Mr J complained about to Shawbrook

As a reminder, PR set out three fundamental concerns of Mr J's behalf to Shawbrook:

- the change in ownership of the Supplier and the way it had dismissed its salesforce;
- the lack of available accommodation when Mr J attempted to book holidays; and
- the loss of exclusivity with the same hotel accommodation marketed via online travel agents to non-members.

I will deal with each in turn.

Ownership of the Supplier changed after Mr and Mrs J took out their membership. PR pointed to the decision to reduce the European sales and marketing operations and how that was achieved. But I understand that the change in ownership had no impact on the operation of Mr and Mrs J's membership and Mr J hasn't pointed to anything they were entitled to under their membership that they were no longer able to get (before they relinquished their membership). It follows, I can't see that there was any breach of the membership agreement by the Supplier's change in ownership or for any other reason.

Next, PR raised that Mr and Mrs J couldn't get the availability of holidays that they wanted. In response, the Supplier said that the difficulties Mr and Mrs J experienced were mainly due to them trying to book accommodation within a few months or even weeks ahead of their intended stay and pointed to the purchase documentation, which says members may secure a booking 13 months in advance of the desired stay.

I have reviewed the contact history between Mr and Mrs J and the Supplier and I note that Mrs J asked to carry forward their 2016 points allocation to 2017 before attempting to book accommodation – so they hadn't planned to use their points in that year. At the end of September 2016, Mrs J queried the availability of accommodation for January 2017. I've also seen that in January 2017 Mr and Mrs J couldn't reserve accommodation in August 2017 and later, they were unable to secure their choice of accommodation in November 2017. This supports the Suppliers comments about attempting to secure accommodation at too short notice. I have seen that they did stay at the Supplier's accommodation in November 2017 and January 2018.

I'm not persuaded that there was any breach of the membership agreement by the unavailability of accommodation – the agreement provides for a 13-month booking window. I also can't see that Mr and Mrs J were given any assurance that they would be able to book accommodation at any time that suited them. Plainly the Supplier couldn't always guarantee accommodation would be available and I think Mr and Mrs J were able to book holidays as expected. Further, noting Mr and Mrs J's use of the accommodation (as PR has acknowledged in its letter of claim to Shawbrook) before they relinquished their membership in February 2018, I don't think any potential breach led to a loss, which Shawbrook would be liable to answer under Section 75 of the CCA.

Finally, PR raised the loss of exclusivity with the same hotel accommodation marketed via online travel agents to non-members. PR hasn't set out what Mr J was led to believe about

any ‘exclusivity’ at the Supplier’s holiday accommodation at the time of entering the membership agreement. I note PR’s comments about the accommodation at the same resorts being available via internet booking websites. But I haven’t seen anything that I think could have created the impression that the resorts featuring the Supplier’s holiday accommodation were for the exclusive use of its members. And again, I’m not persuaded that there has been any breach or misrepresentation of the membership agreement.

Collective Investment Scheme

PR has sought to introduce a new complaint point that Mr and Mrs J’s timeshare contract shouldn’t be considered a timeshare contract but as a Collective Investment Scheme (“CIS”), which the Supplier was not authorised to sell. In doing so, it has pointed to the Judicial Review.

The Judicial Review has clarified that a timeshare is not a CIS, and that a contract including the periodic holiday accommodation satisfies the definition of a 'timeshare contract' in Reg.7 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ('the Timeshare Regulations'). So for this reason, PR’s most recent submission in response to the Investigator’s assessment must fail on its merits.

PR has also pointed to the outcomes of the specific decisions considered in the Judicial Review and says that Mr and Mrs J’s complaint should lead to the same outcome. I disagree for two reasons. First, the decision of one ombudsman does not bind another. Here I have to assess Mr and Mrs J’s complaint on its own merits, of course taking into account the outcome of the Judicial review. Secondly, the complaints considered in the Judicial Review were about a different type of timeshare which had investment elements inherent to them. I think PR is mistaken in believing Mr and Mrs J’s timeshare membership offered similar fractional ownership rights. Mr and Mrs J’s timeshare membership, however, was fundamentally different those considered in the ombudsman decisions which were judicially reviewed as it was a non-fractional contract – and it only offered rights *of stay* at the scheme’s resorts. So the arguments made are not relevant to the outcome of this complaint.

My final decision

I don’t uphold Mr J’s complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr J to accept or reject my decision before 30 May 2024.

Stefan Riedel
Ombudsman