DRN-4541156

The complaint

Ms H and Mr S complain that Shawbrook Bank Limited ('Shawbrook') treated them unfairly and unreasonably when it rejected their claim under Section 75 of the Consumer Credit Act 1974 (the 'CCA').

What happened

Ms H and Mr S were existing customers of a timeshare provider (the 'Supplier') and owned a total of 16,000 European Collection Points ('ECP'). These points renewed every year and Ms H and Mr S were able to exchange them for use of the Supplier's holiday accommodation.

On 18 September 2013 Ms H and Mr S purchased membership of an asset-backed timeshare called the Fractional Owners Club ('FOC') from the Supplier (the 'Time of Sale1'). They bought 16,500 Fractional Points at a cost of £27,720 but after trading in their existing ECP, they ended up paying £11,536 for membership of the FOC. The points worked in the same way as their existing ECP, but in addition they also had a share in the net sales proceeds of a property tied to their membership (the 'Allocated Property') which would be realised at the end of their membership term. As their interest in the Allocated Property was limited to a share in the net sales proceeds, they didn't have any preferential rights to stay in the Allocated Property or use it in any other way.

Ms H and Mr S paid for their FOC membership by taking finance in their joint names from Shawbrook. They entered into a 10-year restricted use Fixed Sum Credit Agreement for £11,536 with the total amount repayable after interest and administration charges being £22,145 ('Credit Agreement A').

On two occasions during 2014 Ms H and Mr S purchased some ECP from the Supplier, totalling 11,500 points at a cost of £9,381. These were paid for in full.

In January 2015 Ms H and Mr S traded in these ECP towards the purchase of an additional 14,000 Fractional Points from the Supplier. They paid for these via a loan from a different provider.

On 25 November 2016 (the 'Time of Sale2') Ms H and Mr S purchased an additional 19,500 ECP from the Supplier for £16,884. These additional ECP were paid for by taking finance in their joint names from Shawbrook. They entered into a 10-year restricted use Fixed Sum Credit Agreement for £16,884 with the total amount repayable after interest being £27,225.60 ('Credit Agreement B'). As this was an ECP arrangement these points could be exchanged for holiday accommodation, but did not have an associated interest in the sale proceeds of a property.

Ms H and Mr S, using a professional representative ('BS') wrote to Shawbrook on 13 June 2018 to complain about misrepresentations at both sales and make a claim under Section 75 CCA for both Credit Agreement A and Credit Agreement B. In summary they said:

- They bought the Fractional Points as they didn't want to keep the European Points

and were told by the salespeople that buying Fractional Points was the only way to do this. This was untrue.

- They were told the Fractional Points would be sold and they would make a profit when this happened.
- They were told FOC was an exclusive members only club, but in fact the holidays were freely available to anyone, and as a result there was limited availability left for members.
- The Supplier no longer exists, having been sold to another business, and all the sales staff have been made redundant, so there is no way of selling the Fractional Points, so no way of making a profit.

Shawbrook were unable to give their final response to Ms H and Mr S's claim within eight weeks of receiving it, so BS complained to our Service.

On 29 October 2018 Shawbrook sent its final response to Ms H and Mr S's claim. It dealt with the claim as a complaint which it did not uphold. It said, in summary:

- Given their experience with how this type of product worked, Ms H and Mr S were familiar with the sales processes of the product operators.
- Ms H and Mr S had agreed to take finance for a number of their holiday purchases, so it was reasonable to consider they were familiar with how it operated and how it fitted in with their personal and financial circumstances at the time.
- They were provided with all the appropriate documentation and decided to progress with their memberships. They were aware of the 14 day "cooling off" period and they had not sought to utilise this.
- There was no evidence to say that Ms H and Mr S were told that purchasing Fractional Points was the only way to exit from their existing timeshare, and this has never been the case in any event.
- Ms H and Mr S were told that once the term of the FOC membership had elapsed, the Allocated Property would be released for sale by the UK-based Trustee, who had a duty to obtain the best price possible at the time. The sale date could only be extended if all the FOC holders agreed. Once sold, the sale proceeds would be distributed in accordance with the fractional rights held.
- Ms H and Mr S were not told they would be buying an interest in a specific parcel of real property, and the purchase price related primarily to the provision of memorable holidays.
- Ms H and Mr S were not misled regarding their share of potential sales proceeds and there was no evidence that the agreement was sold as an investment which would increase in value.

Ms H and Mr S's complaint was considered by two investigators at this Service who both determined that it should not be upheld. The Investigators thought that Shawbrook hadn't acted unfairly when it had decided to reject their claims under Section 75 CCA.

Ms H and Mr S did not agree and asked for their complaint to be referred to an Ombudsman – so it has been 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.

And when doing that, the Regulator – the Financial Conduct Authority's (FCA) handbook, under DISP 3.6.4R requires me to take into account:

1) *relevant:*
    a) *law and regulations;*
    b) *regulator's rules, guidance and standards;*
    c) *codes of practice; and*
2) *([when appropriate) what [I consider] to have been good industry practice at the relevant time.*

I have seen that Ms H and Mr S entered into a contract with the Supplier for services financed by a debtor-creditor-supplier agreement, in joint names, for both the purchase of FOC membership (Time of Sale1) and the ECP (Time of Sale2). So I am satisfied that Section 75 applies. This means that if I find the Supplier is liable for having misrepresented something to Ms H and Mr S, Shawbrook – as the creditor – is jointly liable.

BS, on behalf of Ms H and Mr S made several complaint points in order to substantiate their claim under Section 75. For ease of reference, I've repeated a summary of these below, and will deal with each point in turn:

1) They bought the Fractional Points as they didn't want to keep the European Points and were told by the salespeople that buying Fractional Points was the only way to dispose of the ECP. This was untrue.
2) They were told the Fractional Points would be sold and they would make a profit when this happened.
3) They were told FOC was an exclusive members-only club, but in fact the holidays were freely available to anyone, and as a result there was limited availability left for members.
4) The Supplier no longer exists, having been sold to another business, and all the sales staff have been made redundant, so there is no way of selling the Fractional Points, so no way of making a profit.

Having read and considered everything, I do not think this complaint should be upheld. I understand this will come as a disappointment to Ms H and Mr S, so I'll explain.

As I've said, Section 75 CCA applies to both sales. But all the points of claim submitted to Shawbrook by BS relate exclusively to FOC, and the fractional points. There is no reference to ECP at all, and nothing to suggest Ms H and Mr S have any concerns with the way the ECP was sold to them in November 2016. Therefore, I can't see any claim has been made in relation to the November 2016 sale of ECP to Ms H and Mr S, nor am I persuaded that there is an actionable misrepresentation by the Supplier in relation to that sale.

With respect to the earlier sale, I am unable to say with any degree of certainty what Ms H and Mr S were told by the sales agent involved in the sale of their FOC membership in 2013. But what I can see is that together Ms H and Mr S had some experience of timeshares gained over several years since 2006 and had purchased the ECP-type of timeshare points on four occasions, and used them multiple times, before they bought their FOC membership in 2013. So I think it is fair to assume that both Ms H and Mr S had a reasonable understanding of how the timeshare sales process was operated, how the points worked, and how and where they could use them. I have held that in mind when thinking about the specific allegations made.

1) BS say that Ms H and Mr S were told that buying Fractional Points was the only way of getting out of the ECP. But based on the available evidence, on balance, I am unable to say this is something they were told. Plainly, buying Fractional Points was a way of ending their ECP membership, but I cannot say with any certainty they were told that was the only way to do so.

Having considered everything, and without a more detailed description of the conversation(s) and circumstances surrounding the alleged misrepresentation, or any supporting evidence, it doesn't have sufficient weight to succeed. And, in addition, Ms H and Mr S made a further purchase of ECP in 2016 (Credit Agreement B) and made similar purchases in January and October 2014, so it seems that far from wishing to end their ECP membership, shortly afterwards Ms H and Mr S were buying more points. So even if such a statement was made, I cannot see how it led them to buying FOC membership.

2) The FOC Purchase Agreement, purchased on 18 September 2013, was a different type of timeshare agreement to those (ECP) Ms H and Mr S had bought previously, because this entitled Ms H and Mr S to a fractional share of the future sale price of the Allocated Property, meaning at the end of their membership they would get something back. So, as this product contains the potential for a return of some money at the end of the contract term, I can understand why Ms H and Mr S thought they may gain a profit from the FOC membership purchase. But the *potential* for a profit is different from a *guaranteed* profit, so I've looked at the FOC sale agreement to try and understand what might have been said at the time, and whether there was a misrepresentation made by the Supplier.

The FOC sale agreement is signed and dated by Ms H and Mr S, as is the section titled "*Terms and Conditions"* and *"Right of Withdrawal".* And the first provision under the Terms and Conditions section states:

> *"You should not purchase your* [FOC] *as an investment in real estate. The Purchase Price paid by you relates primarily to the provision of memorable holidays for the duration of Your ownership."*

And within the Customer Compliance Statement, which is signed and dated by Ms H and Mr S, there are nine individual statements, all of which were ticked indicating they had been read and understood. Number five states:

> *"We understand that the purchase of our* [FOC] *points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners club (and to which our [FOC] points have been attributed) will depend on market conditions at the time, that property prices can go down as well as up and that there are no guarantees as to the eventual sale price of the Property."*

I can see there is an element of investment in the FOC given there was the potential to realise a return from the eventual sale of the property. And given that was the main difference between the FOC and ECP arrangement that Ms H and Mr S changed from, I think it is most likely that the fractional element of membership was a significant driver for them. But for me to say there was a misrepresentation made by the sales agent in the sale of the FOC, I would have to say that there is evidence that Ms H and Mr S were told something that was not true.

Based on the documents available from the Time of Sale1 and Ms H and Mr S's recollections provided by BS, there is nothing that makes me think Ms H and Mr S were told the 'Fractional Points' (as they've been described in the letter of complaint), would be sold and they would make a profit. I think it is probable that Ms H and Mr S were told that the

Allocated Property would be sold at the end of the contract period, and that they would be given their fractional share of the proceeds, which was a factual description of how FOC membership worked. But importantly, I've not seen anything which leads me to think that they were told a profit from the sale was guaranteed.

3) Other than what was said in their claim to Shawbrook, I have not seen any supporting evidence which leads me to believe Ms H and Mr S were told the FOC membership was an *"exclusive members only club"* which brought with it the right to stay in accommodation which was only and exclusively available to FOC members. Further, I have not been provided anything to show that non-members were able to stay at the Supplier's accommodation. So based on the available evidence, I cannot say any such representation was untrue.

4) If Ms H and Mr S were unable to continue to enjoy their holidays as they were entitled to under either the FOC membership, or the ECP due to a change in the status of the Supplier, then that may be construed as a breach of contract, and remedy may be due. This is also true if Ms H and Mr S were unable to sell or otherwise dispose of their FOC membership or ECP, either during the term of the contract, or at its conclusion. However, Ms H and Mr S have not pointed to any term of their agreement that they say was breached.

I've seen no evidence, and Ms H and Mr S have provided no evidence, which leads me to believe that Ms H and Mr S were no longer able to take advantage of either their FOC membership or their ECP and take the holidays they are entitled to take, or to dispose of them, as a result of this change.

I've also not seen anything which makes me think this change means the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. So, the status of the Supplier has no effect in this regard.

As a result, I'm satisfied that there is no evidence of a breach of contract in this regard.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I'm not persuaded that there was an actionable misrepresentation by the Supplier at either Time of Sale1 or Time of Sale2, and I cannot see there has been a breach of contract. This means I do not think that Shawbrook acted unfairly or unreasonably when it declined Ms H and Mr S's Section 75 claim.

My final decision

I do not uphold Ms H and Mr S's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H and Mr S to accept or reject my decision before 17 April 2024.

Chris Riggs
Ombudsman