DRN-3853177

Complaint

Mr N has complained that Shawbrook Bank Limited ("Shawbrook") acted unfairly towards him when providing him with a fixed sum loan to purchase a timeshare with his wife in May 2017.

Mr N, who is being assisted with his complaint by his wife who I'll refer to as Mrs N, said that no affordability checks were undertaken so no procedure was followed. He has also complained about what he's described as the aggressive and pressured sales tactics employed by Shawbrook's agent.

Background

Shawbrook provided Mr N with, at least, two fixed sum loans to purchase fractional rights in Club La Costa's ("CLC") Fractional Property Owners Club ("FPOC").

Mr N has confirmed that he is limiting his complaint to the fixed-sum loan agreement he entered into in May 2017

The agreement

Shawbrook provided Mr N with a loan to facilitate the purchase of 1200 points in the FPOC for £7,377.00. The loan was in Mr N's sole name but the FPOC membership was jointly held by Mr and Mrs N. The 1200 points provided Mr and Mrs N with two weeks of property rights in the allocated property of 436-3, which was in the Benal Beach resort. Mr N and Mrs N received a £600 contribution to their first year's holiday expenses as a result of agreeing to this purchase.

Mr N had an existing agreement with Shawbrook for a timeshare purchased in March 2016. There was an outstanding balance of £16,196.00 on that agreement. Mr N's May 2017 loan included funds to settle the balance on the March 2016 agreement. So the total amount advanced to Mr N in May 2017 was £23,573.00.

Mr N's loan had a fixed interest rate of 11.3% per year, which translated into an APR of 11.9% and a 180 month (or 15-year term). This meant that the total amount repayable of £49,030.20, which included interest, fees and charges of £25,457.20, was due to be repaid in 180 monthly instalments of £272.39. It's also worth noting that as part of the terms and conditions of the FPOC Mr N was required to pay annual management charges. The annual management charge at the time of the agreement was €1,160.00.

The information provided suggests that Mr N's ceased making payments from June 2018, after his direct debit mandate was cancelled in May 2018. The account eventually defaulted in May 2019 and the outstanding debt was eventually sold to a third-party debt purchaser.

Mr N's initial complaint and Shawbrook's response to it

Mr N (and Mrs N) complained to Shawbrook in April 2018. The content of the letters suggests that it was written by Mrs N on their behalf and paragraphs 2 to 4 of the letter of complaint say:

Our finance agreement is linked with a Holiday Club Membership with Club La Costa ("CLC") which was opened in 2016 when we attended CLC's offices in London under a very forceful sales process. There was no representative present on that day, nor when we took our first prelude holiday with CLC. We were again subject to a similarly aggressive sales pitch by CLC and again no representative from Shawbrook. We were not taken through any affordability check and the only contact we had with Shawbrook was when you spoke to my husband, Mr N [name removed for anonymisation purposes], *in order to verify his identification. At this time the payments were affordable.*

On our second prelude holiday through CLC in May 2017 we were taken through yet another forceful and aggressive sales pitch during which our membership was upgraded. At this particular time I was not working and CLC were fully aware of this. As before, we were not taken through and affordability process and there was no representative from Shawbrook. My husband spoke briefly once again to you to verify his identification. CLC gave us £600 as a "sweetener" towards the next stage of payments whilst my new business took off. At this time on our holiday, my business had not started.

Unfortunately my business was not successful and whilst my husband has been able to make the payments, we are now severely struggling financially. Whilst we have made every effort to make the payment each month, this is now putting a strain on our finances and he can no longer to afford to make these payments.

Our complaint mainly relates to the fact that we were mis-sold this finance agreement through CLC seeing as no affordability checks were undertaken on either occasion so no procedure was followed. We have struggled to keep our payments up-to-date but are now unable to continue due to my having been out of work for a considerable period of time.

Shawbrook issued its final response, which didn't uphold Mr N's complaint, on 11 December 2018. In summary, its response said Mr N:

- had previous experience which meant that he would have been familiar with how such timeshare schemes worked and that he was under no obligation to purchase.
- was provided with appropriate documentation to decide whether the scheme was right for him and he could have cancelled within the cooling off period if he didn't wish to proceed.
- signed a members declaration to confirm that he read and understood the management fees that would be applicable under the agreement.
- wasn't provided with any guarantees that properties would be sold at a profit at the end of the scheme.
- did have a creditworthiness assessment completed on him in line with Shawbrook's regulatory obligations. From the information, it as aware of at the time and the credit checks it carried out, it considered the loan was affordable for Mr N.

Mr N remained dissatisfied at Shawbrook's response and referred the complaint to our service.

Our investigator's assessment and Shawbrook's response

Mr N's complaint was then considered by one of our investigators. And she concluded that:

- Shawbrook failed to carry out reasonable and proportionate checks before agreeing to lend to Mr N.

- reasonable and proportionate checks would more likely than not have shown Shawbrook that Mr N was not in a position to make the payments to this agreement in a sustainable manner.

- Shawbrook unfairly entered into this fixed-sum loan agreement with Mr N.

Our investigator then set out a method of putting things right for Mr N, which she found addressed Shawbrook's failings and Mr N's resulting loss.

Shawbrook didn't accept our investigator's assessment. It provided an initial response, on 24 June 2022, which was divided into sections and which I have repeated. And in summary its response said:

The proper approach to considering this complaint

- The requirement for the Ombudsman Service's decision to be fair and reasonable in all the circumstances of the case is important as it requires a balancing exercise to be undertaken by the Ombudsman Service to consider the evidence and information before it and make a decision (having regard to that evidence and no further) on what is fair and reasonable in all the circumstances.

- The Ombudsman Service is not an inquisitorial tribunal. It is a tribunal which must decide a complaint in accordance with its statutory obligation under the adversarial system. This is clear from the fact that the Ombudsman Service can, if it does not consider a complaint can be fairly determined without having a hearing, invite the parties to take part in a hearing under DISP 3.5.5R and give oral evidence.

Mr N's purchase

- Mr N (in a letter written by Mrs N) complained to Shawbrook saying that when agreeing to enter both loan agreements with Shawbrook they were not taken through an affordability check.

- Shawbrook did carry out an appropriate creditworthiness assessment of Mr N's application for the May 2017 loan. This assessment took no account of any income Mrs N may have then been earning from her newly established business as it had only been established 1 year.

- Mr N confirmed that he had a gross annual income of £50,000.00 and also confirmed his employer. Mr and Mrs N also signed the Member's Declaration confirming that they understood the annual Management Charge and that they would be sent an invoice for this. The declaration also confirmed that Mr and Mrs N understood what they were purchasing and having considered this as well as their other financial commitments were able to pay the amounts due and as their purchase was made with the assistance of finance they agreed they could meet the monthly repayments.

Shawbrook's creditworthiness assessment

- Shawbrook accepts that it was required to undertake a creditworthiness assessment in accordance with the relevant provisions of the Financial Conduct Authority's ("FCA") Consumer Credit Sourcebook ("CONC") as it stood in May 2017. These provisions did not and could not go further than the provisions in Section 55B of the Consumer Credit Act 1974 ("CCA"), as it was not permissible to go further than European Union law.

- It is important to have regard to (and irrational not to have regard to) the fact that: Shawbrook used industry standard assessment tools; Mr N had a gross annual income of £50,00.00; the May 2017 loan consolidated Mr N's existing March 2016 loan and only increased his payments by just £84.12; Mr N's debt to income ratio was just 87% compared to the maximum 130%; Mr N's monthly debt commitments going forward were only £1,825.48; Mr N wasn't using one of his overdrafts at all and the other was well within its limit; the industry standard "Risk Navigator" scores showed that the possibility of Mr N being unable to make his repayments as they fell due and in a sustainable manner without incurring further financial difficulties or experiencing adverse consequences was only 4%; Mr N was the owner occupier of a home with substantial equity; there was no evidence of any late payments.

- Bearing in mind everything obtained the only fair and reasonable conclusion which can be reached is that Shawbrook undertook a reasonable and proportionate creditworthiness assessment.

Causation

- It is irrational to conclude that Mr N would not have purchased his (and Mrs N's) membership of the FPOC had Shawbrook not provided him with this agreement. On the contrary, Mr N approached Shawbrook for finance because he wanted the benefits of the FPOC in the first place.

- So even if it is concluded that Shawbrook shouldn't have provided this loan to Mr N (which Shawbrook doesn't accept) there's no basis for providing a remedy which seeks to put Mr N in the position he would now be in if he hadn't taken the FPOC membership in May 2017 – especially as there appears to be no dispute that the March 2016 agreement was affordable.

Shawbrook then provided a further response on 5 August 2022. I won't repeat the parts of this letter which restated the content of the 24 June 2022 submission. In summary the 5 August 2022 response said:

- The investigator is not an underwriter. Shawbrook's underwriters re-reviewed the checks carried out at the time and still concluded that there was nothing exceptional about Mr N's applications to have warranted additional checks.

- Mr N was an existing customer who had a clear payment history and he'd never previously raised any issues with respect to financial difficulties or affordability. No evidence has been provided to show that he was in an unstable financial position.

- The borrowing was not significant. Mr N had an annual income of £50,000.00 and existing unsecured debt of £19,714.00 (most of which was going to be consolidated) and a mortgage of £243,000 on a property he had substantial equity in. The loan size was well within the industry standard maximum of £25,000 for unsecured lending. The monthly payments for this loan were only £84.12 more than the payments for

loan 1 (Mr N spent more than double this amount in restaurants and coffee shops in May 2017 and May 2017). Equally the loan was repayable over 15 years and could be settled earlier without penalty.

- The investigator relied on bank statements in support of her view that the loan was unaffordable. However, while one of the accounts was in Mr N's name it is clearly being used and funded by Mrs N. So the bank statements suggest that the bills weren't being covered solely by Mr N as the investigator suggested. And no evidence has been provided to support the fact that Mrs N wasn't working.

- Mr N was receiving an annual income of £50,000.00 and this was confirmed by his statements.

- It is agreed that Mr N was using an overdraft. But only a portion of the spending relate to regular payments – some £2,049.55 against Mr N's salary of £3,019.50. The remaining debits for Mr N's account are discretionary expenses.

- It is Shawbrook's position that if Mrs N was unemployed, he kept this information from it at the time of the application. However, Mrs N has had a business since 2017, which according to its website continues to trade. And if the Ombudsman is going to take into account that Mrs N wasn't working, the evidence provided shows that she was.

- Even if the loan had been refused Mr N was already tied to an existing FPOC membership and the associated loss. So the question of any loss should be limited to the extra Mr N had to pay, rather than the whole amount.

- No evidence, other than the assertions of Mr and Mrs N, has been provided that the loan was unaffordable. Rather, it seems as though two years into the membership Mr and Mrs N decided they no longer wanted the product and sought a way to exit it.

- The investigator's proposed remedy of writing off the loan and refunding the payments made plus 8% interest wouldn't be fair and reasonable, as it would leave Mr N receiving a windful having paid nothing for the benefits he enjoyed. Furthermore refunding the property management fees, which were paid as a completely separate agreement which Shawbrook wasn't a party to is also unfair.

- If FOS investigators are going to re-assess whether, in their view, the Loan was affordable then they must consider all of the relevant financial circumstances -- not just a very narrow snapshot. The availability of credit, savings, the amount of equity in a home and whether there is a mortgage, investments, the customer's purchasing and borrowing history as an indicator of their financial sophistication, other bank accounts which are not disclosed or explained -- these are all relevant to affordability and any purported re-assessment of affordability using only one or two current accounts, without considering those other circumstances, is incomplete, flawed and open to scrutiny.

My provisional decision of 3 November 2022

I issued a provisional decision – on 3 November 2022 - setting out why I intended to uphold Mr N's complaint. I won't copy that decision in full, but I will instead provide a summary of my findings.

I started out by setting out the regulatory framework in place at the time Shawbrook lent to Mr N.

The regulatory framework

Shawbrook entered into this fixed-sum loan agreement with Mr N after regulation of Consumer Credit Licensees had transferred from the OFT to the Financial Conduct Authority ("FCA") on 1 April 2014. Shawbrook initially obtained interim permission to provide consumer credit before it went on to successfully apply for authorisation as a consumer credit provider.

Shawbrook's interim permission to provide consumer credit and its eventual authorisation to do so meant that it was subject to the FCA rules and regulations from 1 April 2014.

- *the FCA Principles for Business ("PRIN")*

The FCA's Principles for Business set out the overarching requirements which all authorised firms are required to comply with.

PRIN 1.1.1G, says

The Principles apply in whole or in part to every firm.

So Shawbrook needed to comply with the principles in all of its dealings with Mr N. The principles themselves are set out in PRIN 2.1.1R. I think that some of the key principles for me to set out here are:

Principle 1 which states:

A firm must conduct its business with integrity.

Principle 2 which states:

A firm must conduct its business with due skill, care and diligence.

And Principle 6 which states:

A firm must pay due regard to the interests of its customers and treat them fairly.

- *the Consumer Credit sourcebook ("CONC")*

This sets out the rules and guidance which apply to firms specifically when carrying out credit related regulated activities - such as entering into a regulated credit agreement as a lender like Shawbrook did with Mr N here. These rules have changed over time and where I refer to provisions of CONC I refer to them as they were at the time Shawbrook entered into this agreement with Mr N in May 2017.

It's clear there is a high degree of alignment between the Office of Fair Trading's ("OFT") Irresponsible Lending Guidance ("ILG") and the rules set out in CONC 5. As is evident from the following extracts, the FCA's CONC rules specifically note and refer back to sections of the OFT's *Irresponsible Lending Guidance* on many occasions.

Section 5.2.1R(2) of CONC sets out what a lender needs to do before agreeing to give a borrower a loan. It says a firm must consider:

> *(a) the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and*
> *[**Note**: paragraph 4.1 of ILG]*
>
> *(b) the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement, to make repayments within a reasonable period.*
> *[**Note**: paragraph 4.3 of ILG]*

CONC 5.2.3G contains guidance on the scope of pre-contract assessments. It says:

The extent and scope of the creditworthiness assessment *or the assessment required by* CONC 5.2.2R (1)*, in a given case, should be dependent upon and proportionate to factors which may include one or more of the following:*

> *(1) the type of credit;*
> *(2) the amount of the credit;*
> *(3) the cost of the credit;*
> *(4) the financial position of the customer at the time of seeking the credit;*
> *(5) the customer's credit history, including any indications that the customer is experiencing or has experienced financial difficulties;*
> *(6) the customer's existing financial commitments including any repayments due in respect of other credit agreements, consumer hire agreements, regulated mortgage contracts, payments for rent, council tax, electricity, gas, telecommunications, water and other major outgoings known to the firm;*
> *(7) any future financial commitments of the customer;*
> *(8) any future changes in circumstances which could be reasonably expected to have a significant financial adverse impact on the customer;*
> *(9) the vulnerability of the customer, in particular where the firm understands the customer has some form of mental capacity limitation or reasonably suspects this to be so because the customer displays indications of some form of mental capacity limitation (see CONC 2.10).*
> *[**Note**: paragraph 4.10 of* ILG*]*

CONC also includes guidance about 'proportionality of assessments'. CONC 5.2.4G(2) says:

A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation.
***[Note**: paragraph 4.11 and part of 4.16 of ILG]*

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability.

CONC 5.3.1G(1) says:

In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit.
*[**Note**: paragraph 4.2 of ILG]*

CONC 5.3.1G(2) then says:

The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.
*[**Note**: paragraph 4.1 (box) and 4.2 of ILG]*

CONC 5.3.1G(6) goes on to say:

For the purposes of CONC "sustainable" means the repayments under the regulated credit agreement can be made by the customer:

(a) without undue difficulties, in particular:
(i) the customer should be able to make repayments on time, while meeting other reasonable commitments; and
(ii) without having to borrow to meet the repayments;

(b) over the life of the agreement, or for such an agreement which is an open-end agreement, within a reasonable period; and

(c) out of income and savings without having to realise security or assets; and

"unsustainable" has the opposite meaning.
*[**Note**: paragraph 4.3 and 4.4 of ILG]*

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) has a reference to paragraphs 4.13, 4.14, and 4.15 of ILG and states:

(a) it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure on a statement of those matters made by the customer.

And CONC 5.3.7R says that:

A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).
*[**Note**: paragraph 4.31 of ILG]*

CONC 5.3.8G provides an example of the above and says:

An example of where a firm *ought reasonably to suspect that the* customer *has not been truthful may be that the information supplied by the* customer *concerning income or employment status is clearly inconsistent with other available information.*

Other relevant publications

CONC sets out the regulatory framework that firms carrying out consumer credit activities have to adhere to. But I'm also required to take into account any other guidance, standards, relevant codes of practice, and, where appropriate, what I consider to have been good industry practice.

Shawbrook is a member of the Finance and Leasing Association ("FLA"). The FLA has been publishing its own Lending Codes since, at least, as far back as 2006. Indeed, the 2006 code had a section entitled '*5 Credit assessment'* and it said:

As responsible lenders, under this Code (section 1C.1) we must make sure that all loan applications (including pre-approved loans and credit-card cheques) go through a sound and proper credit assessment. This assessment may look at a combination of:

- *your credit commitments;*
- *your ability to repay your loan;*
- *how you have handled your financial affairs in the past;*
- *information from credit reference agencies;*
- *with your permission, information from other people, for example, employers, other lenders and landlords;*
- *information you have supplied, including proof of your identity and why you are applying for the loan;*
- *the results of credit assessment techniques, for example, credit-scoring;*
- *your income;*
- *your age;*
- *where you live, although this will not be the only thing that affects your application and will not outweigh the other factors; and*
- *any security you have provided (such as your home).*

We may also consider factors which may show a high risk of experiencing financial difficulty which include:

- *having four or more credit commitments;*
- *spending more than 25% of your gross income (before deductions) on consumer credit; and*
- *spending more than 50% of your gross income on consumer credit and mortgages.*

A credit-scoring system generally takes account of information you have given us, any information we may hold about you, and information from credit reference agencies (CRAs). The credit-scoring system gives points for each piece of relevant information and adds these up to produce a score. If we use this system, we will tell you. The FLA leaflet 'Your credit decision explained' explains how credit scoring works. You can get copies from us or FLA.

The equivalent section of the 2017 version of the Lending Code, which was in force in at the time Shawbrook lent to Mr N is entitled *'1D Lending you money'* and it says:

Applications

1D.1 Whenever you apply to us for a loan:

- *we will make our own assessment of your ability to repay it, so that we do not lend you more than what we think you can afford;*

- *we will give you enough information to allow you to make informed decisions about the loan offered to you;*
- *if we refuse your application, we will tell you the main reason why, if you ask us. You will have a right to ask us to review our decision and we will tell you whom to contact if you want us to do this; and*
- *if our decision to refuse your application was influenced by information obtained from a credit reference agency (CRA) search, we will tell you how to contact the CRA in question so that you can get a copy of the information which it has about you.*

Assessing your ability to repay

1D.2 When we assess your ability to repay, we may look at a combination of:

- *the type of loan and the amount of credit requested;*
- *your income;*
- *your existing credit commitments and financial situation;*
- *how you have handled your financial affairs in the past;*
- *with your permission, information from other people, for example employers, other lenders and landlords;*
- *your personal circumstances and any likely future changes which you have told us about;*
- *information you have supplied, including proof of your identity and why you are applying for the loan;*
- *information from credit reference agencies (CRAs);*
- *the results of credit assessment techniques, for example, credit-scoring: a credit-scoring system generally takes account of information you have given us, any information we may hold about you, and information from CRAs. The system gives points for each piece of relevant information and adds these up to produce a score. An FLA leaflet 'Your credit decision explained' explains how credit scoring works. You can find a link to the leaflet in Section 4 of this Code.*
- *your age;*
- *where you live, although this will not be the only thing that affects your application and will not outweigh the other factors; and*
- *any security you have provided (such as your home).*

After setting out the regulatory framework in place I then went on to set out how I would be determining Mr N's complaint.

Shawbrook had relied on *R (Fisher) v Financial Ombudsman Service* [2014] EWHC 4928 (Admin) ("*Fisher*") in support of its argument that the Financial Ombudsman Service wasn't and isn't an inquisitorial tribunal. However, I explained that in *Fisher* the judge was considering whether the Ombudsman was required to seek independent legal advice when determining a case. It wasn't held by the Court that the Financial Ombudsman Service is a tribunal required to decide a complaint under the adversarial system. This is especially as this judgement referred to paragraph 26 of Irwin J's judgement in *R (on the application of Williams) v Financial Ombudsman Service* [2008] EWHC 2142 (Admin) which stated:

These two passages, the rest of the judgments in the Heather Moor case and the other authorities which have been cited, are all consistent and they emphasise, in my judgment, the following really rather straightforward points. ***The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial*** [my emphasis]***.*** *There is a wide latitude within which the ombudsman can operate. He can depart from the common law if justified, but must explain the extent to which the reasons for*

any such departure. Next, he can import his knowledge of good industry practice at the time, that being stipulated in the rules and emphasised by the judgment of Stanley Burnton LJ in the Heather Moor case. Next, he must be fair and reasonable in his approach to the case and his conclusions. Next, he cannot be perverse or merely subjective, and will be susceptible to judicial review if he is, both as to the manner in which the decision is reached and as to the outcome.

So I wasn't persuaded by Shawbrook's arguments on my jurisdiction to determine Mr N's complaint. And I kept in mind my inquisitorial remit when determining Mr N's complaint.

Bearing in mind all of the circumstances and taking into account the relevant rules, guidance, good industry practice and law, I thought that there were two overarching questions I needed to consider in order to decide what was fair and reasonable in the circumstances of Mr N's complaint. These questions were:

- Did Shawbrook complete reasonable and proportionate checks to satisfy itself that Mr N would be able to repay his loan in a sustainable way?
    - If so, did it make a fair lending decision?
    - If not, would those checks have shown that Mr N would've been able to do so?
- Did Shawbrook act unfairly or unreasonably in some other way?

I started by considering the first of those overarching questions.

Did Shawbrook complete reasonable and proportionate checks to satisfy itself that Mr N would be able to repay his loan in a sustainable way?

I explained that the rules and regulations in place when Shawbrook lent to Mr N required it to carry out a reasonable and proportionate assessment of whether he could afford to repay the credit he was being advanced in a sustainable manner. I pointed out that this assessment is sometimes referred to as an "affordability assessment" or "affordability check".

The checks had to be "borrower focused" – so Shawbrook had to think about whether repaying the loan sustainably would cause difficulties or adverse consequences *for Mr N*. In other words, it wasn't enough for Shawbrook to simply think about the likelihood of it getting its money back, it had to consider the impact of the repayments on Mr N.

Checks also had to be "proportionate" to the specific circumstances of the loan application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the consumer (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different applications.

In light of this, I thought that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to make any loan repayments to a given loan amount from a lower level of income);

- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);

- the *longer* the term of the loan (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for an extended period); and

- the *greater* the number and frequency of loans, and the longer the period of time during which a customer has been given loans (reflecting the risk that repeated refinancing may signal that the borrowing had become, or was becoming, unsustainable).

I then explained that there could also be other factors which could influence how detailed a proportionate check should've been for a given loan application – including (but not limited to) any indications of borrower vulnerability and any foreseeable changes in future circumstances.

I then went on to think about all of the relevant factors in this case.

Shawbrook's checks before it agreed to Mr N's loan

Shawbrook said that it assessed Mr N's creditworthiness using assessment tools which were industry standard at the time. As I understood it, the checks it carried out showed:

- Mr N had a gross annual income of £50,000.00.

- Mr N's debt to income ratio was 87% compared to the maximum 130%.

- the possibility of Mr N being unable to make his repayments as they fell due and in a sustainable manner without incurring further financial difficulties or experiencing adverse consequences was only 4%;

- Mr N was the owner occupier of a home with substantial equity and there was no evidence of any late payments.

Were Shawbrook's checks reasonable and proportionate?

I'd previously explained that the rules and guidance in place at the time provided guidance on the proportionality of affordability/creditworthiness assessments. The rules and guidance suggested that the risk of any credit not being sustainable directly related to the amount of credit granted and the total charge for credit relative to the customer's financial situation.

Shawbrook said that the lending wasn't significant and it repeatedly referred to its assessment being based on Mr N's gross annual income. However, I explained that Mr N was being lent approaching £24,000.00. And while Mr N had a gross annual income of £50,000.00, what he took home after deductions was significantly less than that and the amount advanced was more than half Mr N's nett annual income. So I didn't agree that the amount being advanced wasn't significant even though some of what Mr N was borrowing was being used to settle an outstanding loan balance with Shawbrook.

I thought that it was also worth noting that by settling Mr N's previous loan this way Shawbrook was recapitalising the balance and restructuring it over 15 years. This was even though he was reaching the point where more of his monthly payment was going towards the capital owed, as the loan had less than 14 years left on the original term, and he would

now once again be in a position where the amortisation schedule meant more of his monthly payment would be going towards paying interest.

I also thought that Shawbrook was somewhat overstating matters when it said that the amount advanced was well within the industry standard maximum of £25,000.00 for unsecured lending. Indeed I thought that it was more accurate to describe the amount lent as approaching the maximum rather than well within it.

Furthermore, the amount of interest that Mr N would have had to pay if the loan ran to term was over £25,000.00. All of this meant that the total amount to be repaid was more than Mr N's annual take home salary and he was being asked to commit to repayments over a 15-year term. I had also seen Shawbrook's reference to the fact that Mr N's monthly debt commitments going forward would only by £1,825.48. But this was pretty much 60% of his monthly take home pay. And Shawbrook would also have been aware that he had the associated costs of the management fees for the property to pay too.

I did accept that Shawbrook may have been prepared to accept the credit risk of this transaction. But I wasn't looking at whether the credit risk it accepted was reasonable. What I was considering in this case was whether Shawbrook did enough such that it was reasonably entitled to conclude that Mr N would be able to affordably and sustainably make the repayments to this agreement as and when they fell due. And it seemed to me that Shawbrook's checks (especially the reliance upon previous repayment data) were focused more on whether Mr N had met his commitments in the past, rather than the amount of disposable income he had to make his payments to this loan going forward.

Shawbrook's conflation of these matters suggests to me that it considered creditworthiness and affordability to be one and the same. But while I understood why Mr N having met his credit repayments in the past might have provided Shawbrook with increased confidence that it would also receive the payments to this loan, I didn't think that it automatically followed that these payments were affordable.

Indeed, it was not immediately clear to me why a borrower who previously managed lower repayments would then automatically be deemed, without any additional understanding about other non-credit related expenditure, to be able to make increased payments on further lending. It seemed to me that this logic would likely lead to continually increased lending, unless or until problems arose

In any event, I also thought it was pertinent to remember that this application was initially submitted as an application with Mr N and Mrs N as joint borrowers. However, the joint application was declined because Mrs N had a credit card utilisation rate of 158% and this was considered outside of Shawbrook's criteria to lend. As a result of this, Shawbrook chose to remove Mrs N from the application, even though she remained on the FPOC membership, and the loan application was resubmitted and then reassessed solely in Mr N's name.

From what I could see, the fact that Mr N had maintained the payments on the 2016 loan agreement together with the rest of the information already obtained and the size of the loan being within the mandate of the underwriting team led to Shawbrook determining that the application could proceed without any further referrals or assessments.

I considered what Shawbrook had said. But it seemed to me that it simply removed Mrs N from the initial application and proceeded on the basis of the same information that it had before. So it in effect rewound matters and almost treated the application as if Mrs N had never been part of it in the first place.

At that point, I thought that it would be helpful for me to explain that a less detailed affordability assessment, without the need for significant verification, was broadly speaking more likely to be fair, reasonable and proportionate in circumstances where the amount to be repaid was relatively small, the consumer's financial situation was stable and they would be indebted for a relatively short period.

But, in circumstances – such as here – where the information provided raised some quite significant questions - in this case Mrs N's indebtedness such that Shawbrook refused to accept her as part of a joint application – and where a customer was being expected to maintain a higher monthly payment for an extended period of time, I thought that it was far more likely that any affordability assessment would need to be more detailed and contain a more significant degree of verification, in order for it to be fair, reasonable and proportionate.

In these circumstances, I didn't think that the additional steps Shawbrook says it took went far enough. I didn't think the fact that Mr N had maintained the payments on the previous agreements was new information, as Shawbrook would have considered Mr N's previous history of credit repayments as part of the initial joint application.

Furthermore, while the debts removed from the new sole application were in Mrs N's name and therefore were, at least, from a legal standpoint her responsibility, this new loan was being provided to facilitate the purchase of a joint FPOC membership. So it was clearly a joint commitment coming from the household budget – that was precisely the reason why a joint application was made in the first place. I didn't think that it was fair and reasonable or proportionate to remove and then ignore, what Shawbrook described as Mrs N's over-indebtedness, when the payments to these debts would nevertheless coming out of the same household funds.

I couldn't see how Shawbrook could reasonably have concluded that Mr N would be able to make his repayments on time, without difficulty, in circumstances where this loan was being used to finance a joint purchase, without first getting some kind of understanding as to the effect of Mrs N's indebtedness on the household expenditure and finances.

I had seen Shawbrook's reference to Mr N being a joint homeowner with substantial equity. But I failed to see the relevance of this because, at this time, CONC defined lending as being sustainable when the repayments could be made by the borrower without undue difficulties. In particular, this meant that the customer should be able to make repayments on time, while meeting other reasonable commitments; without having to borrow to meet the repayments; and out of income or savings and without having to realise assets or security. So Shawbrook shouldn't have been considering the possibility of Mr N releasing equity from his home to make his payments, or repay this loan, as part of its affordability assessment.

Taking all of this into account, I thought that Shawbrook needed to get a better understanding of Mr N's financial position, including his non-credit related expenditure, in order to properly assess whether he'd be able to sustainably make the loan payments he was committing to. This was especially as its refusal of the initial application based on information on Mrs N's credit file – on its own and irrespective of anything else - demonstrated that there was a realistic possibility Mr N's household finances meant he wasn't in a position to take on this additional commitment.

So as well as asking Mr N about the details of his income and expenditure, I thought that Shawbrook needed to take steps to verify what it was being told by Mr N. It could have done this by asking for information such as bank statements, copies of bills, or even proof of Mr N's income. But what it needed to do was get an understanding of Mr N's household expenditure given what it knew about Mrs N.

I had also seen what Shawbrook had said about obtaining such information and in particular that it wasn't industry practice to obtain bank statements from a customer or a list of detailed income and expenditure. But while I understood its position, I explained that there wasn't anything within CONC which referred to this being a relevant factor when determining the extent and scope of any affordability assessment and what was likely to be proportionate.

Equally I pointed out that as the rules, regulations and good industry practice required checks to be proportionate to the circumstances, I didn't see how a one size fits all approach, notwithstanding the use of what Shawbrook described as an industry standard product, would automatically comply with this requirement every time, without any adaptation to the circumstances.

I went on to make it clear that it wasn't my finding that a lender would always need to carry out an affordability assessment in relation to a prospective applicant's spouse or partner as part of an application for credit. But given that any application was required to be proportionate to the circumstances, where a lender became aware of factors which may impact on a prospective borrower's ability to make payments (such as what Shawbrook learned about Mrs N here), I did think that it was fair and reasonable to expect the lender to apply a level of curiosity and take further steps to ascertain that the monthly payments were affordable. This is especially where the lender knew the funds from the loan would be used to facilitate a joint purchase.

As it appeared as though Shawbrook didn't do anything further other than remove Mrs N's circumstances from the equation and resubmit the application in M N's sole name, I explained that it was my intention to find that it didn't complete fair, reasonable and proportionate affordability checks before providing this loan.

Would reasonable and proportionate checks have indicated to Shawbrook that Mr N would have been unable to sustainably repay this loan?

As reasonable and proportionate checks weren't carried out before this loan was provided, I couldn't say for sure what they would've shown. So I needed to decide whether it was more likely than not that a proportionate check would have told Shawbrook that Mr N would have been unable to sustainably repay this loan.

Mr N had provided us with evidence of his (and his household's) financial circumstances at the time he applied for this loan. I accepted that different checks might show different things. And just because something showed up in the information Mr N had provided, it didn't mean it would've shown up in any checks Shawbrook might've carried out. But in the absence of anything else from Shawbrook showing what this information would have shown, I thought that it was perfectly fair, reasonable and proportionate to place considerable weight on it as an indication of what Mr N's financial circumstances were likely to have been like at the time.

I also made it clear that I wasn't considering the bank statements Mr and Mrs N had provided because I thought that Shawbrook was required to obtain these before lending to Mr N. I was considering the bank statements Mr and Mrs N had provided because I needed to recreate what a reasonable and proportionate check would more likely than not have looked like, a number of years after the loan was provided and bank statements had most, if not all, of the information I required to do this.

I then started my consideration of the information by setting out that Shawbrook was required to establish whether Mr N could sustainably make his loan repayments over the term – not just whether the loan payments were technically affordable on a strict pounds and pence calculation. I did acknowledge that the loan payments being affordable on this basis might have been an indication that a consumer could sustainably make the repayments.

But it didn't automatically follow that this was the case. And as a borrower shouldn't have to borrow further in order to make their payments, it followed that a lender should realise, or it ought fairly and reasonably to realise, that a borrower wouldn't be able to sustainably make their repayments if it was on notice that they were unlikely to be able to make their repayments without borrowing further.

I carefully considered the information Mr N had provided in light of all of this.

There had been some debate and a significant amount of back and forth between Shawbrook, Mr and Mrs N and our investigator about the precise circumstances of Mr N's household finances at the time that he entered into the agreement in May 2017. Our investigator concluded that Mr N was covering the vast majority of the household expenditure because Mrs N wasn't working. Shawbrook had made extensive submissions on why it thought that Mrs N was working and why it believed that she was still running her business even now. I considered what Shawbrook had said and explained that I had managed to obtain further information and supporting evidence regarding Mrs N's financial circumstances.

I thought that the first thing for me to state was that Shawbrook's position in relation to Mrs N's income wasn't entirely clear. This might be because of the number of different submissions it had made through the course of the complaint. Nevertheless, it had on the one hand said that Mrs N's income and employment played and should continue to play, no part in its assessment of Mr N's application as it wasn't considered at the time. On the other hand, it has also argued that Mrs N was working and that she was contributing to the household expenditure.

In any event, having reviewed the further information provided, I was satisfied that Mrs N was working on a temporary basis and was receiving around £900 to £1,000.00 in the period leading up to this application. Although this appeared to have ceased around the time the loan was provided. However, while Mrs N had been working and was transferring some funds to the account the household expenditure was going from in the lead up to this application, I did think it was important to keep in mind the reason why Shawbrook declined the initial application in joint names.

Shawbrook had confirmed that the joint application was declined because Mrs N was over-indebted on her credit cards. The bank statements she had provided for her sole account also showed that she was significantly overdrawn at the time of this application, had increased her overdraft limit to £3,900.00 and even then she was struggling to stay within this and was incurring unarranged or unauthorised overdraft charges.

I appreciated that Shawbrook entered into this agreement solely with Mr N. But I didn't think that this meant that Mrs N's circumstances no longer mattered. I said this because Shawbrook was aware of Mrs N's indebtedness and it had said this was the reason it declined the joint application. I couldn't see how Shawbrook could fairly and reasonably argue that removing Mrs N from the loan application resulted in it being able to disregard what it already knew about her circumstances. In my view, Shawbrook couldn't unsee what it had already seen especially as this loan was essentially provided to facilitate what it knew to be a joint purchase.

So while I accepted that Mrs N did have an income and in theory may have been contributing to the household expenditure, I was satisfied that the connected way in which Mr and Mrs N were running their finances, together with Mrs N's indebtedness and Mr and Mrs N's household expenditure meant that the repayments for this agreement were more likely than not unaffordable for Mr N.

It looks like Mr and Mrs N were meeting their credit commitments and household expenditure jointly, in the way that many families do. And when all of this was taken into account, including the likelihood that Mr N had to flex-up his proportion of the monthly household expenditure, he didn't have sufficient monthly disposable income to be able to sustainably make the monthly repayments required on this agreement.

Bearing all of this in mind and most importantly what Shawbrook already knew about Mr and Mrs N's circumstances, I was satisfied that reasonable and proportionate checks would more likely than not have demonstrated that Mr N would not have been able to make the repayments to this agreement without suffering undue financial difficulty or having to borrow further. And, in these circumstances, I set out my intention to find that reasonable and proportionate checks would more likely than not have alerted Shawbrook to the fact that Mr N would not have been able to make the repayments to this loan.

Did Shawbrook act unfairly or unreasonably towards Mr N in some other way?

I carefully thought about everything provided. I had seen that Mr N had said that he was pressured into taking out this timeshare by Shawbrook's agent for the purposes of this transaction. In particular, he'd said that he was taken to a show apartment in an attempt to impress him with the standard of accommodation. And the representative was intent on him signing up without going away to think about it.

I thought about what Mr N had said. But in truth, what he'd described seemed more akin to sales tactics encouraging him to upgrade. And it wasn't strong enough for me to be able to reasonably conclude that Mr and Mrs N had no choice other than to sign up for the upgraded membership – especially as they agreed to be booked in for a further presentation after saying that they'd been made to feel that way during a presentation the previous year.

Bearing in mind of all of this, I was not persuaded that Mr N (as well as Mrs N) was unfairly pressured into signing up for the FPOC membership in circumstances where he clearly did not wish to do so.

So overall I found that Shawbrook didn't act unfairly or unreasonably towards Mr N in some other way.

Conclusions

Overall and having carefully thought about the two overarching questions, earlier in my provisional decision, I intended to issue a final decision which found that:

- Shawbrook *didn't* complete reasonable and proportionate checks on Mr N to satisfy itself that he was able to repay his loan;
- reasonable and proportionate checks *would* more likely than not have shown that Mr N was unable to sustainably make the repayments for this loan;
- Shawbrook didn't act unfairly or unreasonably towards Mr N in some other way.

The above findings left me intending to conclude that Shawbrook unfairly and unreasonably provided Mr N with this loan.

Did Mr N lose out as a result of Shawbrook unfairly and unreasonably providing him with this loan?

Shawbrook had argued that it wasn't its decision to lend to Mr N which caused Mr and Mrs N to purchase the FPOC membership, but rather it was Mr and Mrs N's desire to purchase the membership which led to Mr N approaching Shawbrook for a loan in the first place. And in these circumstances, it was neither fair and reasonable nor was it rational to conclude that Mr and Mrs N would not have purchased the FPOC had Mr N not been provided with the funds from the 2017 loan.

I understood and appreciated the argument Shawbrook had advanced. But I explained that this was something of a circular argument as it overlooked the fact that the loan it entered into with Mr N and the FPOC membership CLC sold to Mr and Mrs N were inextricably linked. Indeed, given I had found that Mr N couldn't afford the monthly payments to the agreement, I think it was unlikely that Mr and Mrs N had the funds to purchase the FPOC membership (or pay the additional sum required just to cover the upgrade) without a loan to facilitate the purchase. So in the first instance I was satisfied that Mr N wasn't in a position to purchase the FPOC membership without being lent the funds to do so.

Shawbrook had also argued that as Mr and Mrs N wanted the FPOC membership, they would have approached another lender to finance their purchase and any conclusion on Mr N's loss had to take account of the High Court's approach in *Kerrigan & Others v Elevate Credit International Limited (t/a Sunny) (in administration)* [2020] EWHC 2169 (Comm) ("*Kerrigan*").

In *Kerrigan* the High Court held that where a claimant alleges breach of statutory duty – which is what a claim alleging a breach of the rules in CONC such as Mr N's complaint – the claimant had to show that on the balance of probabilities the defendant's breach of the relevant rules caused them to suffer loss. The Court agreed that a claimant's claim for loss could, in certain circumstances, be discounted where another lender would have lent to them.

I considered the principles from the *Kerrigan* judgement as well as the facts and circumstances of this case.

In the first instance, I thought it was important to note that it wasn't enough to simply establish that another lender would have lent to a claimant or complainant. What needed to be established was that another lender would have lent whilst in compliance with the relevant rules in CONC. Shawbrook said that Mr N would have obtained finance from another lender had it decided against lending to him. And as I understood it CLC had a panel of lenders that it was able to arrange finance for Mr N, with in order to facilitate the purchase of Mr and Mrs N's FPOC membership.

As CLC submitted a joint finance application to Shawbrook in order to facilitate a joint FPOC membership, I thought it was fair and reasonable to assume that CLC would have submitted an initial application to any of the lenders on its panel on the same basis. And given what Shawbrook has said about its industry standard creditworthiness tools, I don't think it's unreasonable to conclude that any joint application for the finance to facilitate the purchase of Mr and Mrs N's FPOC membership would also have been declined, by the other lenders on CLC's panel, for similar reasons.

So I thought that any other lender on CLC's panel would also more likely than not have become aware of Mrs N's indebtedness and would have been required to take this into account in any subsequent application made by Mr N. As this was the case, it seemed to me that the other lenders on CLC's panel would more likely than not, also have had to obtain

further information and evidence on Mr N's expenditure, which would have shown the monthly payments to be unsustainable for Mr N, in order for its checks to have been proportionate. So it was not immediately apparent to me that Mr N would more likely than not have been able to obtain finance for Mr and Mrs N's FPOC membership from another lender on CLC's panel.

Furthermore, I was not necessarily persuaded that the result would have been much different even if Mr N had decided to approach another lender independent of CLC's panel. Firstly, it was my understanding that the expectation was Mr and Mrs N would sign up for FPOC membership at or just after the presentation. So from a practical point of view, it wasn't clear to me how Mr and Mrs N would have been able to approach a lender not on CLC's panel.

In any event, and most importantly, I was mindful of the circumstances of the borrowing here and that CONC 5.2.4G referred to the potential risks to the customer being determinative of the factors a lender should consider when assessing whether it is reasonable to lend. In this case, the amount of credit being advanced and the total charge for credit meant that Mr N would have to repay more than his annual salary.

So I thought that any lender would also have had to find out about and kept in mind Mr N's payments for mortgage or rent, council tax, electricity, gas, telecommunications, water and other major outgoings as part of its affordability assessment. And this in turn is likely to have shown Mr N's increased expenditure in light of the reduction in the household income and meant that Mr N would have found it difficult to obtain a loan from a lender correctly complying with CONC. So while I kept in mind the principles from *Kerrigan,* I didn't think that these principles meant that Mr N's losses should be discounted on the basis that he would still have taken out the same loan with another lender, had Shawbrook not lent to him.

That said, while I was not persuaded that Mr N would have been able to obtain a loan for £23,573,00 in circumstances where a lender carried out reasonable and proportionate checks and made a fair lending decision, I nonetheless did still need to consider the extent of Mr N's losses. And in doing so, I was mindful that Mr (and Mrs N) hadn't complained about the affordability of the monthly payment on Mr N's March 2016 agreement with Shawbrook. In fact the letter of complaint Mr and Mrs N initially sent to Shawbrook in April 2018, which I'd included extracts from earlier on in my provisional decision, said that the payments on the first loan were affordable at least at the time the loan was provided in March 2016.

So as there didn't appear to be a dispute about the March 2016 loan, it seemed to me that it was more likely than not that Mr and Mrs N would have retained the original timeshare they purchased from CLC, had Mr N not been provided with the funds to purchase the FPOC membership they did in May 2017. Accordingly I was satisfied that Mr N's loss as a result of Shawbrook's decision to unfairly lend to him in May 2017 wasn't the entire monthly payment of £272.39, but rather the extra £84.12 a month Mr N had to pay from May 2017 onwards. And it was only fair and reasonable for my proposed award, which I would set out in the next section of this decision, to reflect this.

Overall and having carefully thought about everything provided and what was fair and reasonable in the circumstances of this case, I was left intending to issue a final decision that found that Mr N did lose out because Shawbrook entered into a loan with unaffordable loan payments with him in May 2017. And this meant I intended to find that Shawbrook needed to put things right.

Fair compensation – what I thought that Shawbrook needed to do to put things right for Mr N

I started out this section of my provisional decision by explaining that where I find that a business did something wrong, I'd usually expect that business – in so far as is reasonably practicable – to put the consumer in the position they would be in now if that wrong hadn't taken place. In essence, in this case, this would mean Shawbrook putting Mr N in the position he'd now be in if he hadn't been given the funds to purchase the FPOC membership for him and Mrs N in May 2017. I kept this in mind and considered what had happened since the loan was provided and determined how I thought Shawbrook should put things right.

Mr N's balance

I explained that in circumstances where a borrower was provided with finance to purchase goods or services they couldn't afford to make the payments for, it was usually appropriate for the goods to be returned or the service to cease, the agreement to be ended and the payments refunded to the borrower. It was then a case of working out what the lender could retain for the borrower having had use of the goods or received the service.

However, in this case, it was my understanding that Mr N's agreement with Shawbrook was terminated sometime in 2019 as a result of Mr N not having made any payments since May 2018. And as Mr and Mrs N had already surrendered their FPOC membership to CLC, they no longer had to pay any membership fees. So as far as I could see there were no agreements to unwind or terminate and it seemed to me that the only matter which remained to be determined here was what, if anything, Mr N should have to repay on his defaulted loan, given I thought that he shouldn't have been provided with it in the first place.

I started my consideration of what, if anything, Mr N should have to repay Shawbrook on his defaulted loan balance by taking account of his loss. I'd already explained that as all parties accepted that Mr N's payments for the March 2016 agreement he entered into with Shawbrook were affordable, I was satisfied that Mr N would simply have continued with his existing membership and loan, had Shawbrook not lent to him in May 2017.

In these circumstances, I thought that the amount Mr N owed Shawbrook going forward needed to reflect what would have happened had the March 2016 agreement remained in force. So Shawbrook needed to remove the effect of the extra funds it lent Mr N in May 2017 and it needed to do this by doing the following.

Firstly, it needed to work out what Mr N's balance would have been had £188.27 of the monthly payment, (the monthly payment for the March 2016 agreement), been used to continue making payments to that loan after May 2017. Secondly, while I was satisfied that Mr N could afford the monthly payments for the March 2016 agreement at the time he entered into it, the change in his family circumstances – i.e. Mrs N ending her permanent employment and the effect that this had on the household finances – would, in any event, have had impacted his ability to make the repayments going forwards.

In other words, I thought that the material change in Mr N's circumstances meant that he would more likely than not have had difficulty with his payments and defaulted on the agreement he had whether he was paying the original £188.27 due monthly on the first agreement, or the £272.39 due monthly as a result of the increased borrowing in May 2017. So I thought that Mr N would still have defaulted but he would instead have defaulted on a smaller amount.

As this was the case, I was satisfied that Shawbrook should reduce what Mr N now owes to the amount he would have owed had the March 2016 agreement continued up until he stopped making payments to his May 2017 agreement and £188.27 of the monthly payment

for the second agreement been used to continue making payments to the first one. Shawbrook then needed to add interest (at 8% a year simple) to the extra £84.12 Mr N paid each month from the date each payment was made to the date of settlement. This total amount then needed to be used to further reduce the amount Mr N owes.

Mr N's credit file

I explained why I thought that Mr N was always going to run into difficulty making the payments to his March 2016 agreement because of the reduction in his household income and the severe financial struggles Mr and Mrs N had described having as a result. As this was the case, I thought it was more likely than not that Mr N would have ended up defaulting on a Shawbrook loan, of some description, whether or not additional funds were provided in May 2017.

However, I thought that what is now recorded on Mr N's credit file should be amended to reflect what Mr N will owe after the adjustments I was telling Shawbrook to make to Mr N's outstanding balance.

Shawbrook's response to my provisional decision

Shawbrook accepted that it didn't carry out fair and proportionate checks in this specific case. However it provided some further information in relation to the industry tools that it used as this relates to our understanding on affordability assessment tools and how redress is calculated.

Mr N's response to my provisional decision

Mr N also responded to my provisional decision. He agreed with my conclusion that Shawbrook unfairly and unreasonably provided him with his loan.

However, he disagreed with the method I set out for Shawbrook to put things right. On these matters, Mr N's response can be summarised as:

- A lender cannot unilaterally reinstate a loan if all parties are not in agreement as this is a legal impossibility;

- Shawbrook's decision to provide the May 2017 loan directly led to him ceasing to pay for the initial timeshare. So he should be placed in the position where he didn't purchase a timeshare at all as my proposed method of putting things right will result in him suffering a loss as he no longer has use of the initial timeshare.

My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I thank the parties for their responses to my provisional decision.

As Shawbrook has accepted that it didn't carry out fair and proportionate checks in this instance, it is unclear to me why it has provided further information about the tools it used. I can only assume that it has provided this information in support of its position on other cases. However, as it has accepted my findings in relation to the checks that it carried out before lending to Mr N in May 2017, I don't think that this information provides anything new and it doesn't change my view that Shawbrook shouldn't have lent to Mr N in May 2017.

I now turn to Mr N's comments in response to my provisional decision.

The first thing for me to say is that I did not state that Shawbrook should reinstate Mr N's first agreement in my provisional decision. I agree that as the first agreement was settled in full in May 2017 it is not possible, or even appropriate, to reinstate it at this stage. What my provisional decision actually instructed Shawbrook to do, is to reduce what Mr N owes on the May 2017 loan to the amount that he would have owed had he continued making payments on his initial agreement until June 2018.

Mr N says that this doesn't go far enough and that he should instead be placed in the position where he didn't purchase a timeshare at all. But placing Mr N in this position would ignore the fact that Mr N did purchase an initial timeshare and all parties accept that the first timeshare was affordable. I've already set out that, in his initial letter of complaint, Mr N made it clear that the payments to the first agreement were affordable and that it was the second agreement, provided at a time when Mrs N was not working, that was the problem.

The initial timeshare was due to run for 15 years. And I've not been provided with anything at all to suggest that Mr N would have cleared the balance on his initial agreement earlier than this had Shawbrook not entered into the May 2017 agreement with him. So I'm satisfied that Mr N would have been in the position where he would have been required to pay £188.27 a month until around March 2031, had Shawbrook not provided the funds for the second loan and I don't think that it would be fair and reasonable for me not to reflect this in my direction to Shawbrook.

Mr N says that what I asked Shawbrook to do in my provisional decision will leave him in a position where he's losing out because he will still owe an outstanding balance to Shawbrook and he no longer has use of the initial timeshare. I accept that this is the position Mr N will be left in. However, what needs to happen here is that Shawbrook, in so far as is reasonably practicable, needs to place Mr N in the position he would be in now had it not lent to him in May 2017.

As I explained in my provisional decision, while I'm satisfied that Mr N was able to afford the monthly payments for the March 2016 agreement when Shawbrook provided him with the funds, the change in his family circumstances – i.e. Mrs N ending her permanent employment and the effect that this had on the household finances – impacted his ability to make the repayments going forwards. In other words, I've accepted that there was a material change in Mr N's circumstances which meant that it was not only unlikely that he'd be unable to repay the £272.39 due monthly, as a result of the increased borrowing in May 2017, but that he would also have been unable to make the original monthly payments of £188.27 due on the first agreement by June 2018.

I think that it would be unfair and also unreasonable in its logic if I were to accept Mr N's submissions, regarding being in a position where his household is "*now severely struggling financially",* in relation to my findings and then not reflect this in relation to what Shawbrook needs to do to put things right. Directing Shawbrook to write off the entire amount Mr N owes here, in the way that he has asked, would not be, as far as reasonably practicable, placing him in the position he would be in now had Shawbrook not lent to him in May 2017. I'm satisfied that making such a direction would place Mr N in a far more advantageous position and I don't think that this would be fair and reasonable in all the circumstances.

So while I accept that Mr N is unhappy that he will be left in a position where he still has an outstanding debt to Shawbrook, without having further use of a timeshare, I nonetheless think that this is the position he would more likely than not be in now, had Shawbrook not lent to him, for a second time, in May 2017.

As this is the case, while I've considered the further points Mr N has made in response to my provisional decision, I've not been persuaded to alter my conclusions. And I remain satisfied that it would be fair and reasonable for Shawbrook to put things right in the way that I've set out below.

Fair compensation – what Shawbrook needs to do to put things right for Mr N

Having carefully considered everything, I remain satisfied that it would be fair and reasonable in all the circumstances of Mr N's complaint for Shawbrook to put things right by:

- reworking the amount Mr N owes by:

    A. working out what Mr N's balance would have been had the March 2016 loan continued running and he paid £188.27 to it from June 2017 until he stopped making payments from June 2018;

    B. adding interest at 8% simple per year† to the extra £84.12 Mr N paid each month from May 2017 to May 2018;

    C. subtracting B from A.

- amending the default on Mr N's credit file to reflect what he now owes.

† HM Revenue & Customs requires Shawbrook to take off tax from this interest. Shawbrook must give Mr N a certificate showing how much tax it has taken off if he asks for one.

I understand that Shawbrook may have sold the outstanding balance on Mr N's account to a third-party debt purchaser. If it has, it will need to either buy the account back from the third-party concerned and make the adjustments set out above, pay an amount to the third party in order for it to make the necessary reductions, or pay Mr N an amount – such that he can settle a portion of his debt with the third-party that corresponds with his loss - to ensure that it fully complies with this direction.

My final decision

For the reasons I've explained above and in my provisional decision of 3 November 2022, I'm upholding Mr N's complaint. Shawbrook Bank Limited should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 10 January 2023.

Jeshen Narayanan
Ombudsman