DRN-4917628

The complaint

Mr and Mrs Cs complaint is, in essence, that Shawbrook Bank Limited ("Shawbrook") acted unfairly and unreasonably by enforcing a credit agreement arranged by an unauthorised credit broker.

What happened

In or around September 2019, Mr and Mrs C purchased a timeshare product (the "Timeshare") from a timeshare provider (the "Supplier"). They paid for the Timeshare by taking a loan from Shawbrook.

In March 2024, Mr and Mrs C used a claims management company (the "CMC") to make a complaint to Shawbrook. Specifically, that the loan was arranged by a credit intermediary – here that was the Supplier – who wasn't authorised to carry out such activities. The CMC allege that the credit intermediary didn't hold a credit license with the Office of Fair Trading ("the OFT") and wasn't regulated to carry out the work of a credit intermediary by the Financial Conduct Authority (the "FCA"), thus rendering the loan agreement unenforceable.

Having not received any acknowledgement or response from Shawbrook, the CMC referred Mr and Mrs C's complaint to this service. Having done so, one of our investigators didn't think Mr and Mrs C's complaint should be upheld.

The CMC disagreed with our investigator's findings. In doing so, they responded at length providing further evidence to support their arguments. In particular, evidence which they believe demonstrates that the Supplier was actively promoting and marketing their products and services in the UK. And as such, required the requisite credit license to do that. But because the supplier didn't hold that license, the sale of the loan breached the general prohibition under section 19 ("S19") of the Financial Services and Markets Act 2000 ("FSMA").

As the CMC didn't agree with our investigator's findings, Mr and Mrs C's complaint was passed to consider.

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 considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

The relevant provisions that relate to this issue are in FSMA. In short, S19 FSMA is 'the general prohibition' and states that *"No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is-*

(a) an authorised person; or

(b) an exempt person.

[1] Dispute Resolution: The Complaints sourcebook (DISP)

Section 27 FSMA states that an agreement, such as Mr and Mrs C's, that was *"made in consequence of something said or done by another person ("the third party") in the course of…a regulated activity carried on by the third party in contravention of the general prohibition"* is unenforceable against the borrower. Further, consumers such as Mr and Mrs C would be entitled to recover money paid under the loan agreement and to compensation for any loss suffered as a result of making such payments.

The CMC said that the Supplier wasn't authorised by the OFT to broker loans, which was a breach of the general provision. At the time of the sale in 2019, it was the FCA who provided such authorisation rather than the OFT. But the requirement remains unchanged by that.

The key issue for me to determine is whether the Supplier carried out the credit brokering of Mr and Mrs C's loan (a regulated activity) within the UK. On the face of it, it didn't as the loan appears to have been arranged during a meeting with Mr and Mrs C in Gran Canaria.

Section 418 FSMA sets out six cases where an activity would be deemed as having taken place within the UK where they would not otherwise have been regarded as doing so. Each of these depends, in one way or another, on the entity carrying on the regulated activity having their registered office, head office or an establishment in the UK. But here, the supplier was a Spanish business with no such links to the UK, so I can't see any of these cases apply to this sale.

The FCA also sets out in its Handbook guidance on the territorial scope of S19 FSMA in PERG 2.4 – *"Link between activities and the United Kingdom".* But in the circumstances of this complaint, I can't see that PERG 2.4 expands the scope of S19 and S418 of FSMA beyond what I've already set out above.

It follows that I don't think the Supplier needed to be FCA authorised to broker loans in Spain, as it had no UK presence. That means it didn't breach the general prohibition when arranging Mr and Mrs C's loan and, in turn, S27 of FSMA isn't engaged.

In response to our investigator's view, the CMC provided evidence to suggest the Supplier actively marketed within the UK, thus bringing them under the scope of FSMA. I've carefully considered this evidence together with the CMC's comments and observations.

The evidence consists of a number of newspaper articles dating back a number of years relating to a Spanish footballer who, at the time, played for an English football team. I understand the footballer was born and raised in a town local to the resort in Spain. The articles appear to focus upon the player albeit refer to a sponsorship deal with the Supplier and that the resort was based in his hometown in Spain.

I understand that the Supplier had no input into these articles. Rather that they were written by journalists. And whilst the footballer appeared in the Supplier's brochures, promotional videos and travel magazines, the footballer didn't market or sell timeshare products. Furthermore, I'm aware that the Supplier has previously confirmed to Shawbrook that no customers were ever approached by them in the UK and there was never any timeshare marketing, sales or credit offered in the UK. Because of that, I don't think that the footballer's involvement with any advertising of the Supplier's wider business outside of timeshares brings it under FSMA for credit brokering purposes.

The CMC have referenced similar complaints submitted to other lenders who, it is alleged, provided loans brokered by the Supplier here. They suggest that in those cases, the lenders upheld the consumers' complaints. However, in considering Mr and Mrs C's complaint, I can only consider the evidence and circumstances provided that specifically relate to their own individual experience and circumstances. And in doing so, it wouldn't be appropriate for me to consider the alleged circumstances and facts relating to the complaints of other (unrelated) parties.

I realise Mr and Mrs C will be very disappointed, but I haven't found anything to suggest that the sale of the loan to them by the Supplier breached the requirements of FSMA. And for that reason, I won't be asking Shawbrook to do anything more.

My final decision

For the reasons set out above, I don't uphold Mr and Mrs C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr C to accept or reject my decision before 30 October 2024.

Dave Morgan
Ombudsman