DRN-5053132

The complaint

Mr T has complained about the sale of a timeshare paid for using a loan provided by Shawbrook Bank Limited ("Shawbrook").

What happened

In August 2017, Mr T, along with two others purchased a timeshare membership ("the Timeshare") from a timeshare provider ("the Supplier"). This purchase was funded with a fixed term loan of £13,420 provided by Shawbrook. As the loan was in Mr T's sole name, only he is able to bring a complaint about Shawbrook to our service.

In November 2022, Mr T used a professional representative ("PR") to make a complaint to Shawbrook. It said that the Supplier was not authorised by the Financial Conduct Authority ("FCA") to broker loans and so Shawbrook breached s.19 of the Financial Services and Markets Act 2000 ("FSMA") when it allowed the loan to be brokered by an unauthorised intermediary. PR said that, under ss.26 and 27 FSMA, the loan was unenforceable against Mr T and he was entitled to recover what he had paid under the agreement.

Shawbrook confirmed that the credit intermediary did not have credit licence as it was not incorporated in the UK. It went on to address the sale and did not consider there were any other grounds on which to uphold the claim.

In August 2023 PR referred Mr T's complaint to our service. In the complaint form it submitted it said details of the complaint were contained in a "Detailed letter, pursuant to Sections 75 and 140A of the Consumer Credit Act 1974 (as amended) is attached hereto." The attached letter only referred to the claim that the credit intermediary was not regulated. The complaint was considered by one of our investigators who didn't recommend it be upheld. Having considered s.19 FSMA she concluded that the broker didn't carry out the credit broking of the Credit Agreement (a regulated activity) "in the United Kingdom" and so it fell outside the scope of those provisions.

PR didn't agree and said that the credit intermediaries used by the Supplier were not authorised by the FCA. It then considered s.22 FSMA which addresses regulated activities and said for an activity to be a regulated one it must be "carried on by way of business". It argued that the credit intermediaries had been doing so since 2006. It referenced s.418 FSMA which addresses regulated activities carried on in the UK and said the credit intermediaries were carrying on a regulated activity in the UK.

It based this on the claim that the credit intermediaries had advertised in the UK and that the majority of the borrowers were from the UK. It added that the credit intermediaries had employees working within the UK and money was lent by UK banks and processed by them. All consumers received paperwork as required by the Consumer Credit Act 1974 ("CCA") and the FCA and to all intents and purposes the credit intermediaries were operating in the UK.

Finally, it quoted PERG 2.4.2 in part: "Even with a cross-border element a person may still be carrying on an activity 'in the United Kingdom". I noted that PR didn't include the full

quotation from PERG 2.4.2 which reads:

“Even with a cross-border element a person may still be carrying on an activity 'in the United Kingdom'. For example, a person who is situated in the United Kingdom and who is safeguarding and administering investments will be carrying on activities in the United Kingdom even though his client may be overseas.”

The complaint was passed to me for a decision. I issued a provisional decision as follows: “I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

When deciding what is a fair and reasonable outcome to complaints, I am required by DISP 3.6.4 R of the Financial Conduct Authority’s (“FCA”) Handbook to take into account:

“(1) relevant:
(a) law and regulations;
(b) regulators’ rules, guidance and standards;
(c) codes of practice; and
(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time.”

Although Shawbrook addressed claims that PR did not make and PR alluded to claims under ss.75 and 140A CCA, in its complaint to this service the only issue I believe I can address is whether the loan was arranged by an unauthorised broker. That is because no such claims1 were made to Shawbrook under those provisions, nor was any associated complaint referred to our service.

Was Mr T’s loan arranged by an unauthorised broker?

The relevant provisions that relate to this issue are in FMSA. In short, s.19 FMSA states that “[n]o person may carry on a regulated activity in the United Kingdom” unless they are “an authorised person”. This prohibition is called the “general prohibition”.

S.27 FSMA states that an agreement, such as Mr T’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, a consumer such as Mr T, would be entitled to recover any money paid under the loan agreement and to compensation for any loss suffered as a result of making such payments.

PR said that the Supplier was not authorised by the FCA to broker loans, which was breach of the general provision. That meant, under s.27 FSMA, Mr T was entitled to recover anything paid under the loan, plus further compensation, as the loan was made in consequence of something said or done by the Supplier acting in breach of the general prohibition. Shawbrook did not fully address this claim. However I note that Shawbrook has explained that there was one credit intermediary with [A] Sales S.L. being the broker with [A] Resorts S.L. being the operator. I believe it important not to conflate these two companies. For me to direct Shawbrook to pay Mr T something arising out of the credit intermediary not being authorised, I would need to reach a finding that either Mr T was entitled to a return of what he paid under s.27 FSMA or that Shawbrook needed to pay compensation for some other reason caused by the credit intermediaries’ authorisation status. So I have considered the legal position to see if I agree with PR’s arguments.

Here, the key issue for me to determine is whether the credit intermediary carried out the credit brokering of Mr T’s loan, a regulated activity, within the United Kingdom. On the face

of it, the credit intermediary did not as the loan was arranged in Gran Canaria.

S.418 of FSMA sets out six cases where an activity would be deemed as having taken place within the United Kingdom where they would not otherwise have been regarded as doing so. Each of these cases depends, in one way or another, on the entity carrying on the regulated activity having its registered office, head office or an establishment in the United Kingdom. The FCA also set out in its Handbook guidance on the territorial scope of s.19 FSMA in PERG 2.4 – "Link between activities and the United Kingdom". But, in the circumstances of this complaint, I cannot see that PERG 2.4 expands the scope of s.19 and s.418 of FSMA beyond what I have already set out above.

Here, the credit intermediary was a Spanish business with no such links to the United Kingdom, so I cannot see any of these cases apply to this sale. I have noted the claim that the Supplier had employees located in the UK, but I have seen no evidence of that and PR has not identified if the credit broker had employees here as opposed to other people who worked for the [A] group of companies. Nor has it explained how, even if the Supplier had employees located in the UK, that meant the Supplier, which had no registered office, head office or an establishment in the United Kingdom, would be treated as brokering a loan within the UK, even though the loan was brokered overseas.

PR has also said that the Supplier advertised its services within the UK and has pointed to several newspaper articles that it says were effectively adverts for the Supplier's credit brokering services. On the other hand, Shawbrook has said that the credit broking service was not advertised in the UK and the adverts which PR has provided advertise the resort and not any credit broking service. But again, even if the Supplier advertised its credit brokering service in the UK (and I make no such finding), I fail to see why that meant Mr T's loan was brokered within the UK, when it was actually brokered overseas and I do not think s.418 FSMA applies.

It follows that I do not think the credit intermediary needed to be FCA authorised to broker loans in Spain, as it had no relevant UK presence. That meant it did not breach the general prohibition when arranging Mr T's loan and, in turn, s.27 FSMA is not engaged. So I agree with our investigator that Shawbrook need not to pay anything to Mr T for this reason.
I have also considered whether there is any other reason why Mr T's loan should be set aside, or compensation paid, due to the credit intermediary not being authorised by the FCA. However, I cannot see any other reason why it would be fair for me to direct that to happen, so I do not propose to make any award for this reason."

PR didn't agree and made a number of comments. It said that the credit intermediary used in this matter operated in an identical manner to the one considered in another court decision and whose customers were remediated by another bank. It said that if my provisional decision was correct no credit intermediary need be regulated. PR said that it could not find any evidence that the broker was regulated in Spain and so Mr T was prevented from obtaining justice. It said other banks had made recompense to its customers in identical circumstances. This highlighted the unfairness of my provisional decision.

It also argued that it had provided evidence that the credit intermediary advertised in the UK and those adverts regardless of what they were for meant it fell within UK regulations. It also asked that we make further enquiries with the credit intermediary and suggested that my decision was staggering in its ineptitude.

I issued a second provisional decision as follows:

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

I remain unpersuaded that my provisional decision was wrong. I will explain why. That said I am issuing this as a second provisional decision to allow PR to provide evidence in support of its assertions.

However, firstly I should make it clear that the role of the Financial Ombudsman Service is to resolve individual complaints and to award redress where appropriate. I do not perform the role of the industry regulator and I do not have the power to make rules for financial businesses or to punish them. As such it is not for me to comment on the law, save for its relevance to this complaint.

PR has, in the main, argued that my decision leads to unfairness for Mr T and that others either using other credit intermediaries have been successful in their claims or that other banks have decided to uphold claims relating to this credit intermediary. I can see why it makes those assertions, but my role requires me to take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice, when I make my decision. While other banks may have taken what they describe as a conservative approach to their handling of similar claims that does not mean that I can ignore the law. As I set out in my provisional decision, I do not consider the law as it applies to this complaint allows me to uphold it.

Nor do I think the approach taken by another bank to a different credit intermediary should lead to me reaching the same conclusion. In any event my understanding is that the two credit intermediaries operated in significantly different ways and so any comparison is invidious.

I should point out that the only matter I am considering is the claim made by PR that the credit intermediary was unregulated at the time of sale. In the complaint made to this service PR referred to section 75 and section 140A Consumer Credit Act ("CCA") but I have seen no record of any such claims being made to Shawbrook and so it is not open to me to consider such matters. PR chose to make a specific claim and this is what I am required to consider. It had other routes which would have allowed the sale and the granting of the loan to be considered and so I believe the argument that Mr T is being denied justice is not one that can be applied to either Shawbrook or this service.

On the substance of the claim that the credit intermediary advertised in the UK and so that brought it within the scope of s.418 FSMA I do not think that achieves what PR wishes it to do. Essentially, the legislation requires the credit intermediary to be carrying on the regulated activity to have its registered office, head office or an establishment in the United Kingdom. PR has not provided any evidence that the credit intermediary was registered in the UK or had its head office or establishment in the UK. And I have found no trace of any such establishment.

In certain circumstances a business which does not fall within these criteria may be brought within the ambit of the regulations. To address that it may assist to review the relevant paragraphs of the FCA Handbook.

PERG 2.4.1

Section 19 of the Act (The general prohibition) provides that the requirement to be authorised under the Act only applies in relation to activities that are carried on 'in the United Kingdom'. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a client is outside the United Kingdom or because some other element of the activity happens outside the United Kingdom, the question may arise as to where the activity is carried on.

PERG 2.4.3

Section 418 of the Act (Carrying on regulated activities in the United Kingdom) takes this one step further. It extends the meaning that 'in the United Kingdom' would ordinarily have by setting out additional cases. The Act states that, in these cases, a person who is carrying on a regulated activity but who would not otherwise be regarded as carrying on the activity in the United Kingdom is, for the purposes of the Act, to be regarded as carrying on the activity in the United Kingdom.

(3) The case is where a regulated activity is carried on by a UK-based person and the day-to-day management of the activity is the responsibility of an establishment in the United Kingdom.

(4) The case is where a regulated activity is carried on by a person who is not based in the United Kingdom but is carried on from an establishment in the United Kingdom. This might occur when each of the stages that make up a regulated activity (such as managing investments) takes place in different countries. For example, a person's management is in country A, the assets are held by a nominee in country B, all transactions take place in country B or country C but all decisions about what to do with the investments are taken from an office in the United Kingdom. Given that the investments are held, and all dealings in them take place, outside the United Kingdom there may otherwise be a question as to where the regulated activity of managing investments is taking place. For the purposes of the Act, it is carried on in the United Kingdom.

and

PERG 2.4.6.A person based outside the United Kingdom may also be carrying on activities in the United Kingdom even if he does not have a place of business maintained by him in the United Kingdom (for example, by means of the internet or other telecommunications system or by occasional visits). In that case, it will be relevant to consider whether what he is doing satisfies the business test as it applies in relation to the activities in question.

My understanding is that the key question to be considered is where the regulated activities are carried on. The only evidence I have seen of any connection to the UK is that the resort was advertised in the UK press using a well-known personality. This included a competition where members of the public were invited to attend an event in Manchester. I cannot see how either of those activities could be regarded as a regulated activity.

PR has also asserted that the credit intermediary had employees in the UK, but I have seen no evidence to support that or any detail of what activities these people carried out other than they allegedly visited consumers.

It added that the agreements followed UK rules, were posted to UK addresses as most of the borrowers were UK citizens and were funded by UK banks.

In considering where the regulated activity is carried on one has to consider the business test. PERG 2.3 states: “Whether or not an activity is carried on by way of business is ultimately a question of judgement that takes account of several factors (none of which is likely to be conclusive). These include the degree of continuity, the existence of a commercial element, the scale of the activity and the proportion which the activity bears to other activities carried on by the same person but which are not regulated. The nature of the particular regulated activity that is carried on will also be relevant to the factual analysis.”

In my judgment the peripheral activities carried on in the UK by the Spanish company in the

promotion of its timeshare business are not sufficient to bring the credit intermediary within the ambit of the UK regulations. The loans were brokered in Spain by a Spanish registered company. The activity was not conducted in the UK and the credit intermediary is not registered or, in any significant way, located in the UK. It was, in essence, a Spanish based operation. The fact that Mr T is a UK citizen and the loan was made by a UK bank does not to my mind make the activity one which falls within UK regulations.

As I have pointed out above this decision does not cover claims under sections.75 and 140A CCA which Mr T is entitled to make subject to the relevant rules and legislation."

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.

The bank replied to say it had nothing to add, but PR has not responded. As such I have been given no reason to change my provisional decision as set out above.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 29 October 2024.

Ivor Graham
Ombudsman