DRN-5096823

The complaint

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

What happened

In August 2019, Mr D purchased a timeshare membership ("the Timeshare") from a timeshare provider ("the Supplier"). This purchase was funded with a fixed term loan of £9,800 provided by Shawbrook.

In October 2023, Mr D 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 D and he was entitled to recover what he had paid under the agreement.

Prior to this Mr D, using PR, made a separate claim/complaint about the sale which was rejected. This was referred to this service and the matter has been resolved.

In February 2024 PR referred Mr D's complaint to our service. It said that the credit intermediary was unregulated as set out in its letter of claim to Shawbrook and that the claim had been made in time.

Shawbrook confirmed that the credit intermediary is entirely based overseas and has no UK presence through any subsidiary, branch or other establishment or place of business, therefore it did not need to be authorised by the FCA under s.19 FSMA because it was not carrying on a regulated activity "in the United Kingdom."

The complaint was considered by one of our investigators who didn't recommend it be upheld. Having considered s.19 FSMA he 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.36 FSMA which covers credit broking as a regulated activity and said where the activity is unregulated it infects the regulated credit agreement. It noted that the credit intermediary had been regulated by the Office of Fair Trading ("OFT") previously and queried why it had ceased to be regulated when it was carrying on the same activities. It suggested the broker should have been regulated.

PR argued that the same approach should taken as had been taken by another bank dealing with a different credit intermediary after several court decisions. It went on to review s. 19 FSMA and the Perimeter Manual ("PERG") and said the By Way of Business test meant that the credit intermediary was in effect carrying on business in the UK. It said that the brokering of the loan took place both in Spain and the UK.

It said that the process was initiated in Spain and then the bank liaised with the intermediary before approving the loan. The credit intermediary then provided the client with the loan agreement and when these were returned duly signed they were passed to the bank. After 14 days the bank issued the loan.

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."

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 alluded to claims under ss.75 and 140A CCA, in its complaint to this service but no claims were made to Shawbrook under ss.75 and 140A CCA. Although, in its response Shawbrook addressed issues PR did not make in its claim on behalf of Mr D the only issue I believe I can address is whether the loan was arranged by an unauthorised broker.

Was Mr D'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 D'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 D, 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 a breach of the general provision. That meant, under s.27 FSMA, Mr D 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 before the complaint was brought to this service.

For me to direct Shawbrook to pay Mr D something arising out of the credit intermediary not being authorised, I would need to reach a finding that either Mr D 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 D'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.

PR has argued that the activities of this credit intermediary are identical to another for which another bank has agreed to remediate its customers. 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 a different 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.

In any event my understanding that the two credit intermediaries operated in significantly different ways and so any comparison is invidious.

Essentially the legislation requires the credit intermediary to be carrying on the regulated activity having 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.

As PR has pointed out in certain circumstances a business 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. I do not consider PR has put forward any evidence that the credit intermediary was carrying out activities in the UK. The fact the bank lent money from the UK to UK customers does not show that the credit intermediary was operating in the UK.

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 I don't consider the link with Shawbrook which operates in the UK is 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 D 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.

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 D's loan and, in turn, s.27 FSMA is not engaged. So I agree with our investigator that Shawbrook need not pay anything to Mr D for this reason.

I have also considered whether there is any other reason why Mr D'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 did not agree and it raised two new arguments/claims. Firstly, it said that the agreement with the credit intermediary had been underwritten by an arm's length Fiduciary company which was a UK limited company. It had a legal duty to act in the best interests of Mr D. If it fails in its duty then damages may be payable. It went on to say that as the credit intermediary is in bankruptcy administration and Shawbrook lent on the say so of the Supplier it should refund that amount relating to the remaining years of the unused timeshare.

Secondly, it said that the Fixed Sum Loan Agreement ("FSLA") stated that "*If your holiday accommodation cost more than £100 and no more than £30,000 and is unsatisfactory or does not conform with the contract for it then you have a right to sue the supplier, us or both and you have a right to seek redress from us if you are unable to obtain redress from the supplier.*" As Supplier is in liquidation Mr D was claiming the money back for the unused period.

Shawbrook had no comments to make.

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.

I have considered the arguments raised by PR and I have to point out that the complaint that I have to address is Shawbrook's rejection of the claim made by Mr D that the credit intermediary "*was not regulated by the FCA or OFT in breach of S19 FSMA. As a result, under S27 FSMA the Banks credit agreement was unenforceable as the Bank arranged these loans using an unauthorised credit intermediary*."

None of the arguments put forward by PR addresses that claim which the bank rejected.

The first argument is based on an extract from the sales agreement which reads: " *[The Supplier] has an agreement underwritten with a Fiduciary company, out with the [Credit Intermediary], called [X], in order to guarantee independently a strict control of the inventory of the Suites; as well as the normal use of the right/s acquired by the Member in relation to the accommodation (for more information, see the information Document)"*.

I do not see how this supports the claim made that the credit intermediary was not regulated and so the claim should succeed. This seems to be a wholly different matter which has not been put to Shawbrook for its consideration. If PR considers there has been a breach of contract, then that is something it should address with Shawbrook. That said, I make no comment on whether this is something which has any merit.

The second argument is in essence that Mr D has a claim under section 75 Consumer Credit Act 1974 for breach of contract due to the Supplier allegedly going into liquidation. Again, if that is a claim Mr D wishes to make it is one he should put to Shawbrook. However, I do not consider it has any relevance to my provisional decision on the actual claim made by Mr D. As such I do not consider it causes me to change my view.

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 D to accept or reject my decision before 19 November 2024.

Ivor Graham
Ombudsman