DRN-4162386

The complaint

Mr B and the estate of Mrs B complain that it was wrong of Shawbrook Bank Limited to provide a loan so they could purchase a holiday club membership ("the product") and then refuse to accept their claims under Sections 75 and 140 Consumer Credit Act ("CCA"). Sadly Mrs B passed away after this complaint was raised and in this decision I will refer to Mr B throughout as the sole purchaser, but I recognise the purchase was made jointly. Mr B is represented by a professional representative ("PR") but I will refer (generally) to everything that's been said on his behalf as if Mr B had said it himself, to keep things simple.

What happened

Mr B first became involved with the holiday company which I will call ("C") in 2006 when he purchased a Trial Membership. In December 2006 he traded in the Trial Membership for a Vacation Club membership, however then decided to cancel this purchase within the statutory fourteen day rescission period.

In April 2008 he purchased a Vacation Club membership, for which he went on to purchase additional points in June 2009.

In December 2010 Mr B traded in part of the points towards the purchase of a Freehold property whilst at the same time, and independently to this purchase, he opted to purchase additional points for their existing membership to increase their membership level.

In June 2012 Mr B traded in the membership for the Fractional Points Ownership ("FPOC") membership, which is the subject of this complaint, which increased their Membership level even further. This was funded by a loan from Shawbrook for £10,924.

In August 2013 Mr B traded in one of the fractions towards a further property purchase with C. Mr B then surrendered his remaining five fractions in August 2019 for health reasons. C has said that Mr B had 13 holiday weeks between 2012 and 2016.

In the complaint made to Shawbrook PR said:

- Shawbrook's' agent wasn't authorised by the Financial Conduct Authority.
- Mr B was finding it more difficult to secure holidays
- Management charges increased each year
- Mr B had been told the product would be sold in 19 years but there was no duty of
- care that required to C or its partner to actively market and sell the property. Until it was sold they would incur management charges.
- Mr B was not told C could postpone the sale by up to two years.
- Mr B was not told that his beneficiaries would inherit the management liability.

- The product was an Unregulated Collective Investment Scheme ("UCIS") which was promoted by C without proper care.

Shawbrook rejected the claim saying Mr B had been given the appropriate documentation including a right of withdrawal. It said there was no forced inheritance and the trustee which held the property was under a fiduciary duty to sell the property after19 years. The two year extension would only apply if all the Fractional holders agreed unanimously.

It added that at no time was Mr B told he was purchasing a specific property. Rather they "purchased from [the] Sales Company the exclusive rights of use (Fractional Rights) for the number of Weekly Periods equivalent to Fractional Points." Shawbrook said Mr B had not been misled about the potential sale.

He had been sold the right to holidays and not a particular property. He had also been made aware of the management charges and that these could increase. No investment advice had been given as this was not an investment.

It confirmed that C, under its trading name was permitted to act as a credit broker until 31 March 2015. It rebutted the claims made by PR in some detail and set out the relevant parts of the Financial Services Management Act.

PR brought a complaint to this service on behalf of Mr B. It said that C wasn't authorised to give investment advice and reiterated the points it had made in the claim to Shawbrook. It didn't submit any detail from Mr B about his purchase or use of the product other than he had been coerced into making the purchase and he had found it difficult to source holidays.

The complaint weas considered by one of our investigators who didn't recommend the complaint be upheld. She considered that the claims under s. 75 and 140 CCA had been made out of time.

PR didn't agree. It said that in the case of Patel v Patel a claim for relief under s.140B could be made with an action under a speciality more than 12 years after the relationship ended. It said the relationship with C continued after the loan was repaid and so this meant the claim was in date. It argued that the CCA deemed any negotiation carried on by C was done on Shawbrook's behalf and so an ongoing connection with C also applied to Shawbrook.

It also said that it had proved the product was a UCIS and so it had been misrepresented to Mr B. It argued that C through unfair and misleading sales tactics had created an unfair relationship. It referred to a sales presentation used by C without providing any evidence that it was used when the sale was made. However, I have no reason to doubt it is a document which comes from C.

It says this shows that C made comparisons between three options, renting a holiday home, buying one and becoming a member of FPOC. Two slides in this deck of some 40 slides reference investment. The first states that owning your own holiday home can be an investment. The second says FPOC allows you to enjoy both the benefits renting and owning by becoming a FPOC member. PR argues that this shows that FPOC membership was marketed as an investment. It goes on to say Mr B believed he was buying an investment. However, the product was being sold as both an investment and a right to access holiday accommodation. It concluded that C provided incomplete, misleading and inconsistent information.

It also added a point which had not been raised with Shawbrook, that it had not carried out an appropriate income and affordability assessment.

PR made further submissions to the effect that C had not complied with the Timeshare Regulations 2010. It said that there had been a breach of s. 27 FSMA as it believed the selling of the FPOC was a regulated activity. It said that the legislation covered two activities, advising on investments and arranging investments.

I issued a first 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.

Where evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision about the merits of this complaint on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

PR has made very detailed submissions which include reference to various regulations, legislation and caselaw (amongst other things). I have to take account of the law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice, when I make my decision. And I want to assure Mr B that I have considered everything that's been said and sent to us. If I don't address every single point that's been raised that's because I'm going to concentrate in this decision on what I think is relevant and material to reaching a fair and reasonable outcome. The rules of our service – which provides a free alternative to the courts - allow me to do this.

Mr B brings claims against Shawbrook pursuant to s. 241 and 138D of FSMA and s. 56, 75 and 140A of the CCA (amongst other things). Our investigator considers any right he has to do so is probably out of time under the LA. If that's right, I think it's something Shawbrook could reasonably take into account when considering Mr B's claims. But I want to make it clear at the outset that I'm not deciding if any right that Mr B may have to bring a claim has expired under the LA - that's a matter for the courts. In this decision, I'm considering whether Shawbrook should reasonably have accepted liability for the claims.

Was the product an unregulated credit agreement?

If the product was a UCIS, that could mean the credit agreement between Mr B and Shawbrook (taken alongside the product it was used to finance) led to an unfair debtor/creditor relationship between Mr B and Shawbrook. Although I've gone on to consider whether Mr B is able to bring a claim under section 140A CCA for an unfair debtor/creditor relationship, I think it is useful to set out whether I think the product could amount to a UCIS That is because it has been alleged Shawbrook may have breached certain legal provisions by financing a UCIS.

In order to be a UCIS, I think this product would have to not only fall within the definition of a collective investment scheme (CIS) under FSMA (section 235) but outside of the definition of arrangements which do not amount to a collective investment scheme set out in the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 ("the CIS order").

If the Purchase Agreement qualified as a 'timeshare contract', it can't have given rise to a CIS because the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (the '2001 CIS Order') provides in Schedule 1 (Paragraph 13) that arrangements don't amount to a CIS if "...the rights or interests of the participants are rights under a timeshare contract...".

Regulation 7 of the Timeshare, Holiday Products, Resale and Exchange Contracts and

Regulations 2010 (the 'Timeshare Regulations') define a timeshare contract "as a contract between a trader and a consumer under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation and which has a duration of more than one year …".

An important phrase in this definition, in the context of this complaint, is "the consumer...acquires" (…the relevant rights to use accommodation). To 'acquire' seems to me to have its normal meaning of gaining something or coming into possession of it. And, if the agreement was a timeshare contract, I think it must have caused Mr B to have gained or come into possession of rights to use overnight accommodation.

Looking at the documentation, I'm satisfied Mr B paid for the right to use overnight accommodation for more than one period of occupation (including accommodation from a pool of accommodation) under an agreement that had a duration of more than one year.

That was a right he acquired for the first time when he bought the product in question. And, with that being the case, I see no reason why the Purchase Agreement wasn't a timeshare contract (such that it wasn't excluded from being a CIS). For the reasons set out, I'm minded to find the product is a timeshare contract and it is therefore excluded from being a CIS which means it can't, by definition, be a UCIS.

Sections 56 and 75 CCA

Broadly speaking section 56 provides that any pre-sale negotiations conducted by the supplier in relation to the product purchase financed by the loan Shawbrook provided were conducted by the supplier as Shawbrook's agent. And, under s. 75, a borrower has an equal right to claim against a credit provider and a supplier if there's been a breach of contract or misrepresentation by the supplier, in certain circumstances.

Amongst other things, s. 75 requires a debtor-creditor-supplier agreement to be present. I haven't considered if this relationship is in place here because I'm not minded to uphold the complaint for other reasons – as I'll explain below.

PR says the supplier made a number of misrepresentations when he agreed to buy the product and take out the loan and I think s. 2, and 9 of the LA are relevant. Section 2 applies to a claim (founded in tort) for damages under s. 2(1) of the Misrepresentation Act 1967 and s. 9 applies to causes of action for sums recoverable under statute. I'm satisfied that both sections impose a limitation period of six years from the date that a cause of action accrues.

I think the date on which the cause of action accrued in this case will be the same as the date upon which the misrepresentations alleged became actionable – that is the date damage is suffered. I say this because I'm satisfied that any relevant damage would have been incurred when Mr B purchased the product and took out the loan - in June 2012.

Amongst other things, it was then he paid for the benefits which he says were misrepresented and incurred liability for management fees.

In light of the above, I think Mr B would have needed to bring any misrepresentation claim within six years of the date he purchased the product. I'm satisfied that more than six years had passed since that date before Mr B contacted Shawbrook, in October 2019. I think the period within which Mr B had to bring an action for misrepresentation had likely run out by this point. And I can't reasonably conclude that Shawbrook should accept responsibility for such claims.

Section 140A CCA

Under this section a court may make an order under s. 140B in connection with a credit agreement if it decides that the relationship between the lender and the creditor arising out of the agreement is unfair. Only a court has the power to make such a determination but I think this is relevant law and I have taken it into account.

I'm satisfied that the time limit within which Mr B had to bring such a claim is six years from the date the debtor-creditor relationship ended. That is because the claim Mr B brought is an action for sums recoverable under statute to which s. 9 of the Limitation Act applies, not s. 8. The loan was repaid in April 2013. And I'm not persuaded the fact they paid any management fees beyond that date means their relationship with Shawbrook continued. I think this means Mr B needed to bring any claim under s. 140A no later than April 2019. I'm satisfied he didn't raise his claim with Shawbrook until October 2019. That's more than six years after time started running and I'm minded to find any right Mr B had to bring a claim under s. 140A had probably expired at that stage.

So I'm not persuaded it's unreasonable for Shawbrook to decline the s. 140A claim.

Was the time Mr B had to bring his claims extended?

I have considered s. 32 of the LA – which relates to the extension of time for starting an action if fraud, mistake or concealment are found or could with reasonable diligence have been discovered.

I'm not persuaded that this assists Mr B in the circumstances here for the reasons I've explained below.

As far as I can see, Mr B was making full use of the membership. PR has not supplied any evidence to show that Mr B had any grounds for dissatisfaction with the product. On balance, I think Mr B probably had enough information to realise that misrepresentations might have been made, and start the clock running, not long after he purchased the product in June 2012. He would have been aware of the alleged difficulty in obtaining access to accommodation and the increase in the management charges. I consider this information would likely have been sufficient to enable Mr B to bring his claims and I don't think it's unreasonable to expect him to have done so within the relevant time limits.

PR argues that an unfair relationship with the timeshare provider continued beyond April 2013, so the time to bring a claim against Shawbrook did not start to run until later. But, s. 140A looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

Once Mr B repaid the loan in full, the agreement between them and Shawbrook ended. And, as it was only the relationship between them and Shawbrook that could be found unfair, limitation started to run when the credit agreement ended.

FSMA and S.14 A Claim

PR has argued that the product was marketed as an investment therefore s. 14 A has effect. S. 14A of the LA provides a "Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual". PR says that this provision applies to Mr B's claims. But I disagree.

S. 14A provides for a second period in which a claim for negligence can be made. But having looked at what happened at the time of the 2012 purchase, C wasn't acting as agent of Mr B but as the supplier of contractual rights they obtained under the relevant purchase agreement. And, in relation to the loan, based on what I've seen, I don't think it was C's role

to make an impartial or disinterested recommendation or to give Mr B advice or information on that basis.

So, while there might have been an obligation on C to provide the right information and enough of it in good time so that Mr B could make an informed choice, I'm not persuaded that there was a duty of care that could give rise to a claim to which s. 14A of the LA could be applied.

Unaffordable lending

In its response to our investigator's view, PR says Shawbrook failed to undertake any proper affordability checks before providing this loan. It's not clear to me if this has been raised previously with Shawbrook – so I'm not certain that Shawbrook has had a chance to consider the issue and respond. I think it's reasonable to deal with it now however – in light of my findings below - and it's open to Shawbrook to let me know if it has any objections.

I accept Shawbrook was required to undertake checks to satisfy itself that Mr B was likely to be able to afford to repay what he borrowed without too much difficulty. And I think some sort of affordability assessment was probably carried out. However, I don't have much information about what checks were undertaken exactly. Even if I were to accept however that Shawbrook didn't do all that it should have before lending, I'd still need to be satisfied that this loan was actually unaffordable for Mr B in order to reasonably uphold this part of the complaint.

I have not seen much evidence about his financial situation at the relevant time. But he hasn't suggested that he was struggling financially when he took the loan out – or indicated that he had any difficulties meeting repayments. I'm satisfied that Mr B was able to pay off the loan about 10 months after he took it out – which doesn't suggest he was having financial issues at that time. And, on the information I have at the moment, I don't think there's enough evidence to reasonably conclude that this loan was unaffordable for Mr B.

So, I'm unable to reasonably uphold this part of his complaint.

Conclusion

It's for the courts to decide if any claims that Mr B may have against the supplier or Shawbrook have expired under the LA. For the reasons I've given above, I think the claims that Mr B might have against Shawbrook have most likely exceeded the time limits set out in the LA. I think it is reasonable to take this into account in these particular circumstances.

And, I'm not presently persuaded that there are sufficient fair and reasonable grounds to uphold this complaint. I don't think Shawbrook has treated Mr B unfairly or acted unreasonably and I can't properly require Shawbrook to compensate Mr B or do anything else."

PR did not agree with my provisional and made a lengthy submission. This made four arguments:

- The timeshare product may not be an Unregulated Collection Investment Scheme (UCIS) but it is an investment. It said this has already been confirmed by another decision by this service.

- C breached the FSMA (Financial Services and Markets Act) regulations by promoting the product as an investment.

- Under the Consumer Credit Act ("CCA"), the Bank loan agreement is a linked agreement with the timeshare agreement. Therefore, under CCA, C is an agent of the Bank and the Bank is responsible for the actions of the agent. The breaches of the FSMA regulations and the 2010 Timeshare Regulations by CLC and the Bank, means the Bank was negligent and breached its duty of care to Mr B. Under the CCA s140A, the relationship between the Bank and CLC was unfair.

- Due to the Bank negligence, S14A of the Limitation Act allows the time to be extended to three years from the date Mr B was made aware of the Bank's breaches – this was when he engaged PR and so the claim is not time barred.

I issued a second provisional decision as follows:

"*I have noted the points PR has made about the product and whether it is, or was an investment. However, the complaint was not upheld because the claim was made out of time. Therefore I consider I need to address the grounds put forward for the time limit being extended.*

Grounds to Extend Time

Section 14A of the LA provides claimants with a "Special time limit for negligence actions [in which] facts relevant to cause of action are not known at date of accrual". And PR says that this provision gives Mr B more time to make his claims. In its view, Shawbrook acted negligently when it paid the Supplier in June 2012 because it owed Mr B a duty of care to ensure that the 1992 Act and FSMA were complied with by the Supplier.

It isn't entirely clear whether PR is saying that both types of CCA claim made by Mr B (i.e., his Section 75 and Section 140A claims) were made in time because of Section 14A of the LA or one over the other. But either way, I don't think Section 14A gave Mr B more time to make any of his claims.

A claim for negligence is a cause of action in tort. And as noted in paragraph 32.35 of Goode: Consumer Credit Law and Practice, Section 75 of the CCA can't found a claim in tort against the creditor except on the basis of a fraudulent or negligent misrepresentation. But on my reading of this complaint, Mr B's allegations of misrepresentation don't set out in any detail the representations that are said to have been made by the Supplier – let alone assert, with that detail in mind, that the Supplier owed him a relevant duty of care when making such representations. So, to the extent that there were s. 75 claims for misrepresentation, s. 14A of the LA doesn't help Mr B's cause.

As for Mr B's s. 140A claims, when they were made to Shawbrook and referred to the Financial Ombudsman Service, they related to PR's allegation that the Credit Agreement was "null and void" because the purchase agreements Mr B entered into didn't provide certain information as required under the 1992 Act and were sold as a UCIS. In my view, therefore, his Section 140A claims were only concerned with breaches of a statutory duty by the Supplier rather than Shawbrook's negligence. And as Section 14A of the LA doesn't apply to such breaches, I don't think it helps Mr B's cause here either.

However, even if I'm wrong about the nature of Mr B's Section 140A claims, I'm not persuaded that Mr B could be said to have a cause of action in negligence against Shawbrook anyway.

Mr B's alleged loss isn't related to damage to property or to him personally, which must mean it's purely financial. And that type of loss isn't usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a

claimant against that type of harm.

Yet I've seen little to nothing to persuade me that Shawbrook assumed such responsibility – whether willingly or unwillingly – over and above ensuring that Mr B could afford to repay what he was borrowing.

PR seems to suggest that, because the Supplier was Shawbrook's statutory agent under Section 56 of the CCA, Shawbrook owed Mr B a duty of care to ensure that the Supplier complied with the 1992 Act and FSMA. And PR says that Shawbrook breached that duty by failing to carry out – before granting Mr B credit and paying the Supplier – the due diligence necessary to ensure that the products purchased by Mr B weren't sold by the Supplier in breach of the 1992 Act or as a UCIS.

However, English law recognises that there can't be a duty of care owed to everyone, in every situation and against all forms of harm. And there are legal tests to ascertain whether a duty of care is owed to someone in a given situation. They are:

1. A three-stage test set down in Caparo Industries v Dickman [1990] – which asks whether:

i. The damage was foreseeable.

ii. There was a sufficiently proximate relationship between the parties.

iii. It's fair, just and reasonable in all the circumstances to impose a duty of care.

2. The "assumption of responsibility test" in Henderson v Merrett Syndicates Ltd [1995], which was concerned with whether the defendant had taken on the responsibility of exercising reasonable care and skill towards the claimant.

3. Situations in which a duty of care was owed to the claimant by the defendant because such a duty had already been established by the courts.

Yet despite PR's lengthy submissions, it hasn't persuaded me with reference to any of these tests or relevant authorities that a lender owed a debtor and the purchaser of a timeshare a duty of care to ensure that the product they were purchasing wasn't sold by the supplier in breach of a relevant regulation – particularly one that imposed a criminal sanction.

As things stand, therefore, I can't see why any of Mr B's claims were likely to have been made in time under the LA."

PR disagreed and raised new points and responded to those made in my provisional decision. It referenced the judgment in a recent judicial review of two decisions on complaints about finance provided for the purchase of timeshare products. It argued that this said that the court had concluded that s.56 CCA allowed s.140A and s.140B to have effect. This meant that this service could consider that the breaches by C led to an unfair relationship.

It said that s.14 LA meant the time limit being extended to three years from the date Mr B became aware of Shawbrook's alleged negligence. It took this view as it considered s.14A applied to breaches by C.

It also said that the claim under s.140A was a result of C selling a fractional as an investment. This meant it was property loss and so the loss was recoverable in a claim of negligence from the bank. The breach of the 2010 Regulations created an unfair relationship.

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.

Firstly I would like to address what PR has said about the findings of the High Court following the recent judicial review of the Financial Ombudsman Service and the approach PR thinks it should take to this complaint, which in simple terms is that I should take an identical approach.

As I set out in my provisional decision I consider that Mr B's claims under s.75 and s.140A were made out of time and as the question of limitation wasn't part of the judicial review it isn't directly relevant to this complaint. The High Court did affirm that my fellow ombudsman's findings on s.56 CCA and the extent to which it creates a statutory agency relationship between a creditor and a supplier when there is a debtor-creditor-supplier agreement in place – such that any negotiations between Mr B and C before his purchase are deemed to have been conducted by C as an agent of Shawbrook. PR argued this complaint should be treated in the same way, but I do not agree.

Quite simply, the issue for this complaint is whether the claims were made in time and the judgement in the High Court does not assist in establishing whether the time limits could be extended as PR suggests. In essence PR suggests that the judgement supports the claim that the relationship between the bank and Mr B was unfair. I do not agree for the reasons given below.

S.140 A claim for an Unfair Relationship and s.14 LA

PR has argued that breaches in the 2010 Regulations made the relationship unfair and so it should be unwound. However, I think PR is conflating and confusing the part played by s.56 CCA in an assessment of unfairness under s.140A with limitation and whether Mr B's claims were made in time under the LA.

Mr B's claims under s.140A weren't made under a provision of the CCA intended to reproduce, against a creditor, the relevant damages claim which a complainant enjoys against a supplier (like s.75 does). However, claims under s.140A are only concerned with whether there was an unfair debtor-creditor relationship. And while C's alleged breaches of the 2010 Regulations (and alleged negligence) would undoubtedly be relevant to an assessment of unfairness because of the statutory relationship created by s.56 between C and Shawbrook, PR hasn't pointed me to any relevant authorities to demonstrate that a claim under s.140A that happens to involve allegations of negligence by a timeshare provider changes that claim, for the purpose of limitation, from an 'action to recover any sum recoverable by virtue of any enactment' governed by s.9 of the LA, to a claim for negligence governed by s.14A. In short, I have followed PR's line of argument which attempts to link s.14 to s.140A but as pointed out above it does not do so.

As such I am not persuaded that s.14A LA gave Mr B more time to make his s.140A claims.

In conclusion I remain unpersuaded that this complaint should be upheld or that Shawbrook should respond differently to the claim made by Mr B.

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 B and the

estate of Mrs B to accept or reject my decision before 31 August 2023.

Ivor Graham
Ombudsman