DRN-4421608

The Complaint

Mr B says that Mitsubishi HC Capital UK Plc (trading as Novuna) ('Novuna') didn't fairly or reasonably deal with claims he made under the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a timeshare on 12 February 2012 (the 'Time of Sale') using finance from Novuna. He's also unhappy with Novuna's decision to lend to him.

Background to the Complaint

Mr B purchased membership of a timeshare from a timeshare provider (the 'Supplier') at the Time of Sale and used a loan from Novuna to pay for it (the 'Credit Agreement''). Novuna says he repaid the loan on 3 September 2013.

Unhappy with the purchase, Mr B – using a professional representative ('PR') – wrote to Novuna on 20 December 2021 (the 'Letter of Claim') to make claims for misrepresentation and an unfair relationship under Sections 75 and 140A of the CCA. The allegations fuelling those claims at that time are familiar to both sides. So, it isn't necessary to set them out here.

Mr B also complained about Novuna's decision to lend to him at the Time of Sale. And PR said the following in the Letter of Claim to support that allegation:

"No affordability checks were carried out on our client's ability to afford the loan being offered. No income and expenditure information were requested let alone proof of income. To our client's knowledge no credit checks were carried out."

It doesn't look like Novuna responded to the Letter of Claim. So, a complaint was referred to the Financial Ombudsman Service. The reasons for the complaint at that time concerned Mr B's Section 75 and 140A claims for misrepresentation and an unfair relationship. But PR also introduced a new claim for breach of contract following the Supplier's alleged liquidation.

Having notified Novuna of the complaint and given it a copy of the Letter of Claim, it issued a final response arguing that Mr B's CCA claims for misrepresentation and an unfair relationship were made out of time under the Limitation Act 1980 (the 'LA') while his lending complaint was out of time under the Financial Ombudsman Service's separate six and three-year time limit.

The complaint was then looked at by an investigator who, having considered the information before her, thought that Mr B's CCA claims for misrepresentation and an unfair relationship were likely to have been made too late under the LA – giving Novuna a complete defence to those claims. And while she wasn't persuaded that Mr B's lending complaint was out of time under the Financial Ombudsman Service's own six and three-year time limit, she didn't think it should succeed on its merits anyway.

Mr B disagreed with the investigator's assessment and asked for an ombudsman's decision – which is why it was passed to me.

I issued a Provisional Decision ('PD') on 12 September 2023 in which I concluded that:

1. Mr B's complaint about Novuna's decision to lend to him was made out of time under the Financial Ombudsman Service's six and three-year time limit and there weren't any exceptional circumstances that justified why it was late.
2. Mr B's CCA claims for misrepresentation and an unfair relationship were likely to have been made out of time under the LA. That gave Novuna a complete defence to them and, as a result, I wasn't persuaded that Novuna had to take any steps to put anything right.

Novuna had nothing new to add in response to my PD. PR disagreed and responded at length. It did so with reference to different consumers. But insofar as PR's response relates to Mr B's overall complaint, I'll summarise it here:

- The timeshare in question was marketed and sold to Mr B by the Supplier at the Time of Sale as an investment contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). Yet he was led to believe by the Supplier that the sale was lawful. With that being the case, in PR's view, Novuna's decision to reject Mr B's complaint about an unfair relationship under Section 140A of the CCA continued to "conceal" that fact.
- The Court of Appeal's judgment in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339 ('*Potter*') made it clear that the creation of an unfair relationship under Section 140A can amount to a breach of duty and, for the purposes of Section 32 of the LA, limitation doesn't run until the facts related to the unfair relationship could have been discovered with reasonable diligence. But in PR's view, it would have been impossible for Mr B to make a competent and relevant claim until the law in relation to the sale of timeshares was clarified – which it was in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd* and *R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 ('*Shawbrook & BPF v FOS'*).

The complaint was then passed back to me to reconsider. Having done that, I issued a Jurisdiction Decision ('JD') on 20 October 2023 that focused on Mr B's lending complaint because that required a different type of decision to his complaint about his CCA claims – which I'll address in this Final Decision.

But as I said in my JD, as Mr B's Section 75 claim for breach of contract wasn't put to Novuna before this complaint was referred to the Financial Ombudsman Service, I don't intend to address a complaint about that claim in this decision.

My Findings

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

And having done that, I still think Mr B's CCA claims for misrepresentation and an unfair relationship were made out of time under the LA – giving Novuna a complete defence to them. And for that reason, I still don't think this complaint should be upheld.

Section 75: Misrepresentation

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967 (the 'MA'). And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

A claim under Section 75 of the CCA is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against the supplier provided it satisfies certain conditions, which includes being made inside the relevant limitation period i.e., six years.

But this claim under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

As Mr B made a like claim against Novuna for misrepresentation under Section 75, he had six years from the date on which the cause of action accrued to make the claim. As I said in my PD, the date on which the 'cause of action' accrued was the Time of Sale. I say this because he entered into the purchase agreement based on the alleged misrepresentations of the Supplier – which he relied on. And as the loan from Novuna was used to help finance the purchase, it was when he entered into the Credit Agreement that he suffered a loss.

It follows, therefore, that he had six years from the Time of Sale to make a claim for misrepresentation. But as he didn't put his claim to Novuna until 20 December 2021, his claim was likely to have been late even if it had been submitted to court – giving Novuna a complete defence to it.

Section 140A: Unfair Relationship

Only a court has the power to decide whether the relationship between Mr B and Novuna was unfair for the purpose of Section 140A. But, as it's relevant law, I do have to consider it if it applies to the Credit Agreement – which it does.

However, as I said in my PD, the LA also applies to claims under Section 140A. It was held in *Patel v Patel* [2009] EWHC 3264 (QB)[1] that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. And as this claim under Section 140A is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA, the limitation period is six years.

As this claim, like Mr B's Section 75 claim, was only put to Novuna on 20 December 2021, I think Novuna is entitled to rely on the LA as a defence to it too, as Mr B still doesn't dispute that the Credit Agreement he entered into at the Time of Sale ended on 3 September 2013.

[1] This wasn't changed by the more recent judgment in *Smith v Royal Bank of Scotland* [2023] UKSC 34.

With that said, PR did say in the Letter of Claim that the Supplier may have received undisclosed commission from Novuna. And I acknowledge that, in light of *Potter*[2], there could be circumstances in which the limitation period applicable to a Section 140A claim could be postponed under Section 32 of the LA because of undisclosed commission.

To the extent that it's relevant, this is what Section 32 of the LA says:

"(1)…where in the case of any action for which a period of limitation is prescribed by this Act, either:

(a) the action is based upon the fraud of the defendant; or
(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty…"

Had such a payment of undisclosed commission been made by Novuna at the Time of Sale, I haven't seen anything to suggest it would have breached a duty by making it – nor have I seen anything to suggest Novuna was under a regulatory duty to disclose the amount of commission paid in these circumstances.

As I've said before, Novuna also says that the average rate of commission it paid when funding the purchase of timeshares was 5.94%. And, as it says that the highest rate of commission it paid was 13.6%[3] on one occasion, in the absence of evidence to the contrary, I still think it's unlikely that the levels of commission likely to have been paid at the Time of Sale (if such a payment was made) were high enough to put Novuna on notice that not disclosing commission to Mr B risked making their debtor-creditor relationship unfair under Section 140A.

In response to my PD, PR also says that Section 32 of the LA gave Mr B more time to make his Section 140A claim because the Supplier marketed and sold the timeshare in question as an investment, contrary to Regulation 14(3) of the Timeshare Regulations – which PR says was a deliberate breach that falls under Section 32(2) of the LA. And as PR also argues that Novuna's decision to turn down Mr B's Section 140A claim without acknowledging that there had been a breach of Regulation 14(3) continued to conceal from him the fact that the relevant timeshare had been sold in contravention of that regulation, that, in PR's view, amounted to a fresh breach of that provision.

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[2] *Potter* is the subject of an appeal in the Supreme Court. But, as I understand it, as of the date of this decision, judgment hasn't been handed down.
[3] Novuna provided the Financial Ombudsman Service with information on its commission rates – which I accept in confidence under DISP 3.5.9 [R]. But, in keeping with that rule, one of Novuna's Managing Directors (who is responsible for its consumer finance and who is a FCA Approved Person) confirmed, in summary, the information I included in the paragraph above.

In addition, PR says that *Potter* made it clear that the creation of an unfair relationship under Section 140A can amount to a breach of duty and, for the purposes of Section 32 of the LA, limitation doesn't run until the facts related to the unfair relationship could have been discovered with reasonable diligence. But in PR's view, it would have been impossible for Mr B to make a competent and relevant claim until the law in relation to the sale of timeshares was clarified – which only happened when *Shawbrook & BPF v FOS* was heard by the High Court.

Having considered PR's submissions, I'm not persuaded a court would conclude that Mr B had more time to make his Section 140A claim than the six-year limitation period I've set out above.

Potter concerned a claim about the defendant not disclosing to the claimant a large amount of commission it received from the sale of an insurance policy. It was held that the defendant's failure to disclose the amount could constitute concealment for the purposes of Section 32(1)(b) of the LA. It was also held that the concealment was deliberate, and that Section 32(2) of the LA could apply to the claim.

However, the issue in dispute in Mr B's complaint is very different to that in *Potter*. He alleges that the Supplier marketed and sold his timeshare as an investment at the Time of Sale. Yet it isn't clear how that fact was 'deliberately concealed' from him. After all, it must be because he remembers the timeshare being marketed and sold by the Supplier that he's now unhappy about it. I understand that he might not have realised that there was a prohibition on selling timeshares as investments. But I can't see why his understanding of the law is a relevant consideration under Section 32 of the LA when he was aware of the underlying facts needed to make his claim.

I'm also conscious that *Shawbrook & BPF v FOS* was heard in March 2023 and the judgment handed down in May that year. Yet, in the Letter of Claim, Mr B alleged that the Supplier had sold membership to him as an investment in breach of Regulation 14(3) of the Timeshare Regulations – thus giving rise to an unfair debtor-creditor relationship under Section 140A of the CCA.

So, I find PR's claim that Mr B wasn't able to make the claim in question before he knew the outcome of *Shawbrook & BPF v FOS* confusing and difficult to explain.

What's more, as there still isn't enough evidence to persuade me that the Supplier had, in fact, marketed and sold Mr B's timeshare as an investment at the Time of Sale, it remains my view that his Section 140A claim wasn't viable for longer than the usual limitation period.

Overall, therefore, as I can't see any other reason why the limitation period applicable to Mr B's Section 140A claim was likely to have been postponed under the relevant provisions of the LA, I stand by my provisional finding that Novuna was and is entitled to rely on the LA as a defence to his claim.

Conclusion

Ultimately, only a court can decide whether Mr B's claims were made out of time under the LA. But as it's relevant law, I have to take it into account when deciding a fair and reasonable outcome to this complaint. With that being the case, I think Novuna had and has a complete defence to Mr B's claims under the LA given their timing. And as I can't see any other reason to uphold this complaint, I don't think there's anything Novuna needs to do to put things right here.

My Final Decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 24 November 2023.

Morgan Rees
Ombudsman