

The complaint

Mr B and Mrs W have complained that Shawbrook Bank Limited (“Shawbrook”) acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under s.140A of the Consumer Credit Act 1974 (“CCA”) and (2) deciding against paying a claim under s.75 CCA.

What happened

On 1 April 2014, Mr B and Mrs W took out a timeshare membership from a timeshare provider (“the Supplier”) called Fractional Property Owners Club (“FPOC”) Membership. This type of membership, as well as allowing members to book holiday accommodation, provided them an interest in the sale proceeds of a timeshare apartment. The cost of the membership was £7,704 (including the first year’s maintenance fees) and Mr B and Mrs W signed a Purchase Agreement to take it out. FPOC Membership was paid for by Mr B and Mrs W taking a loan for the full amount from Shawbrook. The loan was set to run for fifteen years, but it was paid off in full in June 2014.

In March 2023, a professional representative (“PR”) referred a complaint on Mr B and Mrs W’s behalf to our service. Included with that referral was a letter addressed to Shawbrook (“the Letter of Complaint”) dated 14 January 2019 stating that Mr B and Mrs W had a number of complaints for which Shawbrook was answerable. Specifically, it was said that under s.75 CCA, Mr B and Mrs W had a claim for the Supplier’s alleged misrepresentations at the Time of Sale and that there was an unfair debtor-creditor relationship as defined by s.140A CCA, caused by both failings by the Supplier when selling FPOC Membership and Shawbrook when deciding to lend. Alongside the referral was a Complaint Form signed by Mr B on 7 March 2023, stating that he wished to refer his complaint to our service, and a mandate giving his authority for PR to represent him in any complaint against Shawbrook signed on the same date.¹ On that Complaint Form, Mr B said he had not received any response from Shawbrook about his complaint.

After we received Mr B and Mrs W’s complaint, we asked Shawbrook for its response in an email of 17 March 2023. Shawbrook received this, but did not give its formal response until we asked for it again, some time later. It explained that it had not received the Letter of Complaint until it had been sent to it by our service. On 24 January 2024, Shawbrook wrote to PR to provide its final response. In short, it said that the complaint had been made too late as more than six years had passed since both the Time of Sale and from when the loan had been repaid. Shawbrook contacted the Supplier, which said it was not aware of the complaint made in 2019 either. On 5 February 2024, PR sent us a copy of this response to be considered along with Mr B and Mrs W’s complaint.

One of our investigators considered the complaint, but did not think Shawbrook needed to do anything further. She thought that there was not enough to show that the claims made under ss.75 and 140A CCA had been made out, and so she did not recommend Shawbrook pay any compensation. PR, on Mr B and Mrs W’s behalf, disagreed and asked for the matter to be considered again by an ombudsman.

¹ In September 2024, Mrs W provided similar documents signed in her name.

I considered the complaint and, having done so, issued a provisional decision setting out my provisional conclusions on it and I invited both parties to provide me anything further they wished me to consider.

I explained that I did not think the Financial Ombudsman Service has the power to consider the complaint that Shawbrook was a party to an unfair debtor-creditor relationship – I will deal with that further in a separate decision. I found I did have the power to consider Mr B and Mrs W's complaint that Shawbrook unfairly dealt with a claim under s.75 CCA, however I did not uphold their complaint.

In my provisional decision, I noted that Mr B and Mrs W said that the Supplier misrepresented the nature of the membership to them when they bought it and that they have a claim for misrepresentation against the Supplier.

Under s.75 CCA, Shawbrook could be jointly liable for the alleged misrepresentations made by the Supplier. But Shawbrook argued that any claim brought by Mr B and Mrs W for any alleged misrepresentations was made too late. I considered that argument and, having done so, I agreed with what Shawbrook said. For the avoidance of doubt, I explained that I was not deciding whether the limitation period had expired as that would be a matter for the courts should a legal claim be litigated. Rather, I considered whether Shawbrook acted fairly in turning down the claim.

Our service normally thinks it would be fair and reasonable for a creditor to rely on the Limitation Act 1980 ("LA") as an answer to a claim under s.75 CCA. This is because it would not normally be fair to expect lenders to look into a claim that has been made outside of the limitation periods, so long after the liability arose and after a limitation defence would have become available in court.

So I thought it was relevant to consider whether Shawbrook has a limitation defence under the LA when thinking about a fair answer to Mr B and Mrs W's complaint.

It was held in *Green v. Eadie & Ors* [2011] EWHC B24 (Ch) that a claim under s.2(1) of the Misrepresentation Act 1967 is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s.2 LA).

Here Mr B and Mrs W brought a like claim against Shawbrook under s.75 CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim. As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which would be open to the supplier, including that of limitation:

"There is no difficulty in treating the debtor's rights under sub-s (1) as a "like claim" against the creditor. Since the creditor's liability mirrors the supplier's it follows that, to the extent that the supplier has successfully excluded or limited her liability, the creditor may shelter behind that exclusion or limitation. Conversely, the creditor's right to repayment is so closely connected with the supply contract, and the debtor's statutory rights under sub-s (1), that the debtor may assert a right of set-off in diminution or extinguishment of her liability to the creditor, and as a defence in proceedings brought by the creditor (with or without a counter-claim). Any attempt to exclude the right of set-off will fall foul of CCA 1974, s 173(1) (and would in any case fall within [section 13(1)(b) of the Unfair Contract Terms Act 1977])"

Therefore, the limitation period for the s.75 CCA claim expires six years from the date on which the cause of action accrued.

The date on which a 'cause of action' accrued is the point at which Mr B and Mrs W entered into the Purchase Agreement. It was at that time that they entered into an agreement based, they say, on the misrepresentations of the Supplier and suffered a loss. They say, had the misrepresentations not been made, they would not have bought the timeshare. And it was on that day that they suffered a loss, as they took out the loan agreement with Shawbrook that they were bound to and would have never taken out but for the misrepresentations. It followed, therefore, that the cause of action accrued in April 2014, so Mr B and Mrs W had six years from then to bring a claim. But they did not make a claim against Shawbrook until March 2023, which was outside of the time limits set out in the LA. So I thought Shawbrook acted fairly in turning down this misrepresentation claim.

Shawbrook has not provided any further evidence or arguments.

PR, on behalf of Mr B and Mrs W, responded to say it disagreed with my provisional decision. It said that I was wrong to say the Letter of Complaint had not been sent to, or received by, Shawbrook in January 2019. In support of that, it provided a screenshot that showed the letter was created on its systems on 14 January 2019. PR pointed to decisions written by other ombudsmen that used the date of a letter's creation by respondent businesses as evidence of when that letter was sent.

PR also said that in 2019, businesses such as Shawbrook were not sending responses to complaints and at the time PR was not referring complaints, without such responses, to the Financial Ombudsman Service. Instead, it only referred those complaints after judgment was handed down in a Judicial Review claim relevant to Mr B and Mrs W's complaint.

PR did not argue this, but I have taken it to mean that, had the Letter of Complaint been sent in January 2019, the s.75 CCA claim would have been made within six years of the date the cause of action accrued.

What I have 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.

Having considered PR's response, I have not changed my mind from my provisional decision – I will explain why.

PR has pointed to two decisions issued by other ombudsmen. For the avoidance of doubt, each complaint is decided on its own facts and circumstances, so although I have read the decisions to which PR referred, I have decided the outcome of Mr B and Mrs W's complaint based on the facts of their complaint.

Here, PR has provided evidence from its systems that show that the Letter of Complaint was generated on the date on the face of the letter – 14 January 2019. But for me to say that, on balance, I found that this letter was sent and received by Shawbrook I would need to see some evidence that it was sent at that time. But, as I noted in my provisional decision, the other evidence in this complaint does not fit with the complaint being made in 2019. I noted that Mr B and Mrs W did not give their authority for PR to represent them in making such a complaint until several years later and that PR never asked Shawbrook for a response or acknowledgement of the complaint made, instead referring a complaint to the Financial Ombudsman Service in 2023. I find this second point particularly important as PR must have been aware of limitation periods, but I cannot see it did anything to ensure that the claim had been made within the relevant times. Further, despite highlighting these elements, PR has not provided any explanation why the authorities were signed so much later or why it did not chase Shawbrook for an answer or acknowledgement.

On balance, I find that Mr B and Mrs W's complaint was not sent (or received) by Shawbrook before it was forwarded to it by the Financial Ombudsman Service. That meant, for the reasons set out in my provisional decision, I think Shawbrook acted fairly in turning down the s.75 CCA claim.

My final decision

I do not uphold Mr B and Mrs W's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Ms W to accept or reject my decision before 22 November 2024.

Mark Hutchings
Ombudsman