

The complaint

Ms S complains that a timeshare product was mis-sold to her and her partner in 2014. Because the purchase was financed in part with a loan from Hitachi Capital (UK) Plc, she says that it is responsible, along with the seller.

Hitachi Capital (UK) Plc is now Mitsubishi HC Capital UK Plc, which in this case trades as Novuna Personal Finance; I'll refer to it as "Novuna".

Ms S has been represented by a claims management business, which I'll refer to as "F". Where I refer to Ms S's submissions and arguments, I include those made on her behalf.

What happened

In December 2014 Ms S and her partner entered into an agreement with Anfi Sales SL for the purchase of membership of the Anfi Beach Club, a floating timeshare week and membership of an exchange scheme.

Most of the purchase price was provided by a ten-year £11,970 loan from Novuna to Ms S. In October 2019 F wrote to Novuna to say that the timeshare product had been mis-sold. Specifically, F said:

- Ms S had been told that she would have access to a range of holidays, but had never been able to use the timeshare product, due to a lack of availability.
- The sales process had been pressured, and Ms S had not been able to consider the documents before agreeing to the purchase.
- The commission paid to the seller by Novuna had not been disclosed as it should have been.
- Proper affordability checks were not carried out.

It does not appear that Novuna responded to the claim, and so F referred it to this service in June 2021. When Novuna did answer the claim – in August 2022 – it said that it had been brought more than six years after the sale and was therefore out of time. But it noted as well that Ms S had used the timeshare and the exchange scheme. She had signed a declaration to say that the sales process had been fair. And Novuna summarised the checks that had been carried out to ensure the loan was affordable.

One of our investigators considered what had happened but did not recommend that the complaint be upheld, for broadly the same reasons as Novuna had given. Ms S did not agree and asked that an ombudsman review the case.

I did that and issued a provisional decision in which I said:

Affordability

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case.

Novuna has provided information about the checks it carried out. Ms S has however provided no evidence that she has had any real difficulty in meeting the loan payments, or that she has ever raised that with Novuna. In the circumstances, I am not persuaded that I should uphold this part of Ms S's complaint.

Time limits

Part of Ms S's complaint concerns a claim under section 75 of the Consumer Credit Act 1974. Novuna said that any such claim would be out of time under the Limitation Act 1980, because it was made more than six years after any cause of action could have arisen.

By the time Novuna answered the claim, in August 2022, it was nearly eight years since Ms S had bought the timeshare. But she had made the claim in October 2019, well within the six year time limit. It would not in my view be fair to rely on time limits here, especially since the six year limit expired after Ms S had made her claim but before Novuna answered it.

I note that the sale contract was governed by Spanish law, and different time limits might therefore apply. Whether or not that is the case, I do not believe that it would be fair for Novuna to rely on delays for which it was partly responsible.

Our own rules include a similar time limit of six years, which generally runs from the date of the event giving rise to the complaint and ends when the complaint is referred to the respondent. Ms S's section 75 complaint is that Novuna did not agree to meet her claim. That did not happen until the claim was declined, in August 2022.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and*
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

It is clear in this case that the loan financed the purchase of the timeshare product. The loan agreement records that the seller was "Anfi Sales", which I'm satisfied is a reference to the company with which Ms S contracted.

I must therefore consider what F has said about the alleged misrepresentations.

Misrepresentation

A misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

Ms S's contract with Anfi Sales was subject to Spanish law, but I have approached this case on the assumption that Spanish law is not materially different from English law.

F has said that Ms S had not been able to use the timeshare product, contrary to what was said at the time of sale. I have however seen no evidence of any failed attempt to book holiday accommodation or any correspondence with Anfi Resorts (the club manager) or the

club itself indicating any difficulties. I have however seen correspondence between Ms S and the timeshare exchange scheme indicating that, contrary to what she has said, she did use the timeshare product. In the circumstances, I do not believe there was any misrepresentation as alleged.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments.

In considering whether a credit agreement creates an unfair relationship, a court can have regard to any linked transaction.

I am satisfied that the timeshare agreement in this case was a “linked transaction” (that is, linked to the loan agreement) within the meaning of section 19 of the Consumer Credit Act. There was a debtor-creditor-supplier agreement, and the timeshare agreement was financed by the loan.

An ombudsman does not have the power to make an order under section 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable. And I have the power to make a wide range of awards – including, for example, requiring a borrower to refund interest or charges, and to write off or reduce a loan. I am not persuaded however that I should do so here.

Ms S says that she was rushed into agreeing to buy the timeshare and did not have time to read the documents. I don’t accept that. At the time of the sale, she signed a declaration saying that the sales presentation was conducted in a friendly and helpful manner and that she was happy to proceed. That’s not consistent with being pressured into signing the agreement.

Further, in line with EU and Spanish law, Ms S had fourteen days to withdraw from the sale and loan agreements, if she wished to do so. Had she and her partner felt that they had been unduly pressured into the sale, I think they would have exercised that right.

Ms S says too that she was not provided with details of any commission paid to Anfi Sales. She does not suggest that she asked about commission, but I have no reason to think she would not have been told what it was if she had done so.

In any event, Anfi Sales wasn’t acting as Ms S’s agent, but as the seller of the timeshare product and club membership. It also introduced Novuna to Ms S, but it does not appear to me that it was Anfi Sales’ role to make an impartial or disinterested recommendation or to give advice or information on that basis.

Conclusion

It is not for me to say whether Ms S has a claim for misrepresentation against Anfi Sales, or whether she could bring such a claim against Novuna. Nor is it for me to say whether a court would make an order under section 140B of the Consumer Credit Act. They are however matters which I must take into account in deciding what’s fair and reasonable in all the circumstances. Having done that, I believe that Novuna’s response to Ms S’s claims was reasonable.

Novuna accepted my provisional decision, but Ms S did not respond to it within the time I indicated.

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.

As neither party has provided any more evidence or arguments following my provisional decision, I see no reason to reach a different conclusion. In saying that, I stress that I have reviewed the complaint in full before reaching my final conclusion.

My final decision

For these reasons, my final decision is that I do not uphold Ms S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 29 November 2023.

Mike Ingram
Ombudsman