

The complaint

Mr P complained that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance ("Novuna"), acted unfairly and unreasonably by turning down his claim under s.75 of the Consumer Credit Act 1974 ("CCA").

What happened

In March 2012, Mr P took out a membership from a timeshare supplier ("the Supplier"). This was a type of timeshare membership called 'fractional membership' that, in addition to enabling members to take holidays, also provided an entitlement to an interest in the sale proceeds of a timeshare property. The cost of membership was £13,999, which Mr P paid for by taking a 15-year loan from Novuna. Mr P repaid his loan in September 2015.

In November 2021, Mr P used a professional representative ("PR") to make a claim against Novuna on his behalf under the CCA. The claim was made on the basis of a number of issues, but they included, amongst other things:

- Novuna paid a commission to the Supplier which wasn't declared to Mr P.
- The Supplier failed to conduct a proper assessment of Mr P's ability to repay the loan.
- There was a pressured sale and the Supplier misrepresented the nature of membership.
- The membership was marketed and sold as an investment, in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations").

PR said that all of that meant Mr P had a valid claim against Novuna under s.75 and that Novuna was a party to an unfair debtor-creditor relationship, as defined in s.140A CCA. PR also said that Mr P had complained as soon as he was aware he had cause for complaint in May 2021, so this had not been made too late.

Novuna responded to say it didn't accept the claim being made. It said the claims for misrepresentation had been made too late under the provisions of the Limitation Act 1980 ("LA"). It also explained why it disagreed with the allegation that there was an unfair debtor-creditor relationship under s.140A CCA. Novuna said that it had carried out credit checks on Mr P at the time the loan was arranged to make sure it was affordable for him.

Unhappy with Novuna's response, PR referred a complaint to our service on Mr P's behalf. In addition to what was said before, PR argued that The Supplier was in liquidation, which was a breach of contract.

One of our investigators considered the complaint, but didn't think Novuna needed to do anything further. She thought the claim that there was a misrepresentation under s.75 CCA and that there was an unfair debtor-creditor relationship under s.140A CCA had been made too late under provisions of the LA. She also thought there was no evidence that Novuna had lent money irresponsibly to Mr P, so she didn't think that part of the complaint should be upheld.

PR responded to our investigator and asked for the complaint to be considered again by an ombudsman. It supplied detailed submissions why, in this instance, Mr P had more time in which to bring his claim.

I considered the complaints made and issued a provisional decision. I explained that I thought that some parts of the complaint fell outside of our jurisdiction and, for those parts that I could consider, I thought Novuna didn't need to do anything further.

Neither party responded to my provisional decision.

Having considered matters again, I came to a different conclusion on which parts of Mr P's complaint I had the power to consider. So I issued a second provisional decision explaining that I didn't think the Financial Ombudsman Service has the power to consider the complaint that Novuna lent to Mr P irresponsibly or that Novuna was a party to an unfair debtor-creditor relationship. I thought I did have the power to consider the rest of Mr P's complaint that Novuna unfairly dealt with a claim under s.75 CCA, but I didn't think Novuna needed to do anything further to answer it.¹

In my second provisional decision, in so far as it related to the claim made under s.75 CCA, I started by considering Mr P's complaint that his misrepresentation claim was turned down.

I noted that Mr P said that the timeshare supplier misrepresented the nature of the membership to him when he bought it and that he has a claim for misrepresentation against the Supplier. Under s.75 CCA, Novuna could be jointly liable for the alleged misrepresentations made by the Supplier. But Novuna argued that any claim brought by Mr P for any alleged misrepresentations was made too late. I considered that argument and, having done so, agreed with what Novuna had said. For the avoidance of doubt, I noted that I hadn't decided 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 Novuna had acted fairly in turning down the claim.

I said that our service normally thinks it would be fair and reasonable for a creditor to rely on the LA as an answer to a claim under s.75 CCA. That was because it wouldn't 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 Novuna had a limitation defence under the LA when thinking about a fair answer to Mr P'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 was an action founded on tort for the purposes of the LA; therefore, the limitation period expired six years from the date on which the cause of action accrued (s 2 LA).

Here Mr P brought a like claim against Novuna 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 his liability, the

¹ I've formally considered the issue of what parts of Mr P's complaint I can't consider in a separate decision.

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 his 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 expired six years from the date on which the cause of action accrued.

The date on which a ‘cause of action’ accrued was the point at which Mr P entered into the agreement to buy the timeshare. It was at that time that he entered into an agreement based, he said, on the misrepresentations of the Supplier and suffered a loss. He said, had the misrepresentations not been made, he would not have bought the timeshare. And it was on that day that he suffered a loss, as he took out the loan agreement with Novuna that he was bound to and would have never taken out but for the misrepresentations. It followed, therefore, that the cause of action accrued in March 2012, so Mr P had six years from then to bring a claim. But he didn’t make a claim against Novuna until November 2021, which was outside of the time limits set out in the LA. So I thought Novuna acted fairly in turning down this misrepresentation claim.

I considered whether the limitation period could be extended and noted that the LA provides for extensions of the time limits in certain circumstances. In my first provisional decision, I considered the facts of this complaint and I didn’t think the time limits could be extended under any of the provisions of the LA. PR didn’t respond to that provisional decision, so it wasn’t clear to me whether it still relied on its arguments on limitation, most of which applied to the claim that there was an unfair debtor-creditor relationship. But I dealt with the argument that applied to a s.75 CCA claim.

PR said that, under the DISP rules, a consumer can make a complaint to a business within six years of the event happening or three years of when a consumer realised they had a reason to complain. But the rules PR refers to set out the time limits within which a consumer needs to complain to a business or the Financial Ombudsman Service about a regulated financial activity. Those rules apply to FCA governed complaint handling, which in the current context, was a complaint that Novuna unfairly turned down Mr P’s claim under s.75 CCA. But the reason it decided to turn down the claim was because it didn’t think it was legally liable due to the operation of the LA, so that was why I considered that legislation. So DISP 2.8.2R didn’t extend the time to bring a claim in terms of the LA.

Finally, I noted that PR had said that the Supplier became insolvent and that was a breach of contract. I couldn’t see this was something that was raised with Novuna in the original claim. So this was not a claim that had ever been made or one that Novuna had the opportunity to answer. It followed, it wasn’t something I could consider in this complaint. So I didn’t think Novuna needed to do anything further to resolve Mr P’s complaint.

Neither party responded to my second provisional decision.

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 I’ve not been given anything further to consider by either party, I see no reason to depart from the findings in my second provisional decision as set out above.

My final decision

I don't uphold Mr P's complaint that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance failed to fairly or reasonably deal with his claim made under s.75 CCA.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 24 April 2024.

Mark Hutchings
Ombudsman