DRN-4111254

The complaint

Mr H, who is represented by a professional representative ("PR") complains that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance ("Novuna") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. The purchase was made by Mr H and his wife, but as the loan is in Mr H's name he is the eligible complainant and for simplicity, in this decision, I will refer to him as the sole purchaser.

What happened

In November 2018 Mr H purchased a trial membership of a holiday product from a company I will call C. It says that he chose to cancel the agreement within the 14-day cooling off period. In July 2019 he purchased another holiday product from C at a cost of £18,465 which was funded by a loan from Novuna.

C says that Mr H took four holidays with it and had another five booked but these were cancelled, possibly due to the covid pandemic. In August 2022 PR submitted a letter of claim to Novuna which is similar to other submissions made by PR to Novuna. Both parties are aware of the details of that claim and as such I will set out a brief summary of the key points. PR said:

- Mr H was told he was purchasing an investment, contrary to the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 ("the Regulations").
- He was under the impression that he would have a share in the property, which would increase in value.
- Mr H was led to believe he could sell the timeshare back to C or sell it for a profit.
- He thought he would have access to the holiday accommodation at any time all around the year.
- C wasn't authorised to carry out regulated activity such as credit brokering.
- No affordability checks were done to ascertain whether Mr H could afford the loan.
- C had gone into liquidation and could not provide the service which Mr H had purchased.
- Clause D of the 'Fractional Purchase Agreement Terms and Conditions' was an unfair term under s. 140A CAA.

Novuna provided a detailed response rejecting the claim and PR then brought a complaint to this service. It was considered by one of our investigators who didn't recommend it be upheld. He didn't consider there was sufficient evidence that there had been either a breach of contract or misrepresentation, nor did he think there had been an unfair relationship. He said he had not been given evidence to show the lending had been unaffordable.

PR didn't agree and submitted bank statements, and income and expenditure details. Our investigator raised a number of issues with this information and PR provided further details including a credit report from May 2023 and personal testimony from Mr H. Our investigator did not consider his view needed to be changed and the matter has been referred to me.

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.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld.

I should point out first of all that Mr H has provided very limited documentation in support of his claim. I have been given a single page Acquisition Agreement and a pricing sheet, but not the other documentation I believe Mr H would have been given. However, this service has seen a number of complaints about C's sales from around the same time. As is to be expected, the sellers and Novuna used largely standard contract wording. I have presumed that the same standard wording was used for Mr H's purchase. Novuna has also provided further detail. I have also noted Mr H's testimony.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr H) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (Novuna) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should he choose to.

It is important to note that, as Novuna was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

Breach of Contract

I do not believe that the liquidation of one of C's companies led to a breach of contract. I

gather new management companies were appointed, and Mr H was able to use the timeshare as usual after that date.

On the face of it, therefore, the services linked to Mr H's purchase of the points remain available to him and are unaffected by the liquidation. Indeed the agreements used by C usually allow for the liquidation of C and its replacement by another provider. That said, I cannot say if this was in Mr H's contract since I have not seen a full copy of it.

Misrepresentation

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 materially influenced the other party to enter into the contract.

PR has said that Mr H was told that his purchase was an investment. While I was not present I do not consider that I am able to conclude the product was misrepresented. I have seen no explanation of how that could be the case or why Mr H believed that the purchase of points would be an investment. If he had been told that – or had otherwise believed that to be the case – I would have expected him to ask for more information.

Although I am aware of the types of agreement used by C I cannot be certain what Mr H signed. PR has suggested that it is likely C sold the product as an investment, but I don't believe that is sufficiently persuasive to allow me to require Novuna to refund the costs to Mr H. PR is asking that Novuna refund a significant sum of money, but has not given sufficient evidence in support of its claims.

I am aware that some sales representatives have referred to these products as investments in future holidays, but that does not mean they were sold as financial investments. However, the paperwork usually explains that the products are not financial investments. The single page I have seem contains the following: "*We understand that the purchase of our membership in Vacation Club is a personal right for the primary purpose of holidays and Is neither specifically for direct purposes of a trade in nor as a real estate interest or an investment in real estate, and that CLC makes no representation as to the future price or value of the Vacation Club Holiday product. We understand that if we consider trading in some of our Points and It Is not possible because of circumstances or due to availability of suitable properties, we still hold our points to use on holiday reservations."*

In short I do not believe I can say that there was misrepresentation such that I can uphold this complaint.

S. 140A claims

Only a court has the power to decide whether the relationships between Mr H and Novuna were unfair for the purpose of s. 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 a claim under Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 9 of the LA, I've considered that provision here.

It was held in Patel v Patel [2009] EWHC 3264 (QB) ('Patel v Patel') 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. The limitation period is six years and the claim was made within this period.

However, I'm not persuaded that Mr H could be said to have a cause of action in negligence

against Novuna anyway.

Mr H'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 or nothing to persuade me that Novuna assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that Novuna owed Mr H a duty of care to ensure that C complied with the Regulations and it argues at length that the payment of commission created an unfair relationship. None of this allows me to conclude there was an unfair relationship. I would add that I cannot see any clear evidence that shows C breached the Timeshare Regulations. I have noted that the training manual submitted by PR relates to a different product and has no bearing on this complaint.

Novuna has confirmed that C was an authorised credit broker and accommodation was available on a first come first served basis and Mr H was not prevented from seeking holiday accommodation at any time.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Novuna says it did carry out checks and set out what it did in some detail in its final response letter. I have also reviewed the financial details provided by PR and Mr H's testimony. In that he explains that he had just come out of an individual arrangement ("IVA"). His credit score in 2023 is shown as good and there is no reference to the IVA. An IVA is usually removed from a person's credit report six years after it was taken out. He also obtained a new mortgage in August 2019 some £22,000 larger than his previous one which he explains was to clear a personal loan, but this does not necessarily indicate financial difficulties. Incidentally, I could not identify the personal loan in the credit report.

Overall looking at the financial records and his testimony I do not consider the loan could be regarded as unaffordable at the time it was granted.

When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if Novuna did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr H lost out as a result of its failings. I do not consider this to be the case.

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 H to accept or reject my decision before 15 February 2024.

Ivor Graham
Ombudsman