DRN-4515422

The complaint

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

What happened

In September 2014, Mrs H purchased timeshare membership from a timeshare provider ("the Supplier"). This membership was known a "fractional" membership as, when the timeshare membership ended, Mrs H was entitled to the share of the proceeds of sale of a holiday property. The membership cost £16,934, which was paid by Mrs H taking a loan from Novuna for the full purchase price.[1] Although the loan was set to run for fifteen years, it was repaid early in June 2015.

In March 2022, Mrs H made a claim to Novuna with the help of a professional representative ("PR"). It was said that the Supplier had misrepresented the nature of the timeshare to her, so Novuna were jointly responsible to answer a claim about that under s.75 CCA. In addition, PR argued the relationship between Mrs H and Novuna was unfair, as set out under s.140A CCA, due to a hidden commission being paid to the Supplier. It was also said, amongst other things, that the membership was presented to Mrs H as an investment and that she wasn't provided with sufficient information at the time of sale, which was a breach of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). PR argued that the timeshare agreement was voidable due to the breaches of the Timeshare Regulations. Finally, PR said no affordability checks were carried out at the time of the lending to see whether Mrs H could afford to repay the loan.

Novuna didn't reply to Mrs H, and so PR referred a complaint to our service that Novuna hadn't dealt with Mrs H's complaint properly. When doing so, PR also said that the Supplier was in liquidation, meaning it had breached its agreement with Mrs H. After we asked Novuna to respond, it set out its position. It said the claims had been made too late under the provisions of the Limitation Act 1980 ("LA"), so it had a defence to any claim. Novuna also set out details of the affordability checks it undertook when deciding to lend to Mrs H.

One of our investigators considered the complaint, but didn't think Novuna needed to do anything further. He agreed with Novuna that it had a defence to any claim under the LA, Further, he said that there was nothing to suggest Mrs H had found the lending unaffordable.

Mrs H disagreed with the view and asked for the matter to be considered by an ombudsman. On her behalf, PR raised a number of reasons why it thought the investigator was wrong. It said:

- Mrs H subsequently bought two more memberships from the Supplier, again funded by loans from Novuna. This means the unfairness arising out of the September 2014 purchase continued and all of the loans were "linked transactions" or "related

[1] Although Mrs H bought the membership alongside another, as the loan was in her name only she is able to make this complaint.

agreements" as set out in ss.140C and 19(1)(c) CCA. Mrs H had made claims about these later loans within the relevant limitation periods.

- The question of limitation needed to be reconsidered in light of *Smith v. Royal Bank of Scotland Plc* [2021] EWCA Civ 1832.

- Any limitation period can be postponed by virtue of s.32 LA. As set out in *Canada Square Operations Ltd v. Potter* [2021] EWCA 339, the creation of an unfair relationship under s.140A CCA was a breach of duty by Novuna for the purposes of the LA and time does not run until the facts relating to that unfair relationship could have been discovered. Here the problems with the product were complex and involved the breaches of legislation of which Mrs H wouldn't have been aware.

Our investigator responded to explain why he didn't think this made a difference to his view. In particular, he didn't think the fact there were subsequent loans meant this changed the relevant limitation period. As the complaint wasn't resolved informally, it was passed to me for a decision.

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 Mrs H'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 Mrs H 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 Mrs H'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.[2]

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

I noted that Mrs H said that the timeshare supplier misrepresented the nature of the membership to her when she bought it and that she 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 Mrs H 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 Mrs H's complaint.

[2] I've formally considered the issue of what parts of Mrs H's complaint I can't consider in a separate decision.

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 Mrs H 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 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 Mrs H entered into the agreement to buy the timeshare. It was at that time that she entered into an agreement based, she said, on the misrepresentations of the Supplier and suffered a loss. She said, had the misrepresentations not been made, she would not have bought the timeshare. And it was on that day that she suffered a loss, as she took out the loan agreement with Novuna that she was bound to and would have never taken out but for the misrepresentations. It followed, therefore, that the cause of action accrued in September 2014, so Mrs H had six years from then to bring a claim. But she didn't make a claim against Novuna until March 2022, 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 Mrs H'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 Mrs H'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 Mrs H's complaint that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance failed to fairly or reasonably deal with her claim made under s.75 CCA.

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

Mark Hutchings
Ombudsman