DRN-4552172

The complaint

Mrs M, who is represented by a professional representative ("PR") complains that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance ("Novuna") rejected her claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. It appears that the product was purchased with another person, but as the loan is in Mrs M's name she is the eligible complainant and for simplicity, in this decision, I will refer to her as the sole purchaser.

What happened

In March 2019 Mrs M purchased a trial membership of a holiday product from a company I will call C. In July 2019 she upgraded this to a full membership and it is this purchase which is the subject of this complaint. It cost £17,052 and this was funded by a loan from Novuna.

C says that in November 2021 Mrs M made enquiries about relinquishing her membership due to financial pressure caused by the covid pandemic. In August 2022 PR submitted a letter of claim 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:

- Mrs M was told she was purchasing an investment, contrary to the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 ("the Regulations").
- She was under the impression that she would have a share in the property, which would increase in value.
- Mrs M was led to believe she could sell the timeshare back to C or sell it for a profit.
- She thought she would have access to the holiday accommodation at any time.
- C wasn't authorised to carry out regulated activity such as credit brokering.
- No affordability checks were done to ascertain whether Mrs M could afford the loan.
- C had gone into liquidation and could not provide the service which Mrs M 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, credit reports, a pay slip and income and expenditure details. Our investigator raised a number of issues with this information and PR provided

further details. Our investigator was not minded to change his view so 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 will explain why.

I should point out first of all that Mrs M has provided very limited documentation in support of her claim. I do not, for example, have a copy of the purchase documents. 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 Mrs M's purchase. Novuna has also provided further detail. I have also taken account of Mrs M's testimony.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mrs M) 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 she 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 Mrs M was able to use the timeshare as usual after that date.

On the face of it, therefore, the services linked to Mrs M's purchase of the points remain

available to her 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 Mrs M's contract since I have not seen a 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 Mrs M was told that her 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 Mrs M believed that the purchase of points would be an investment. If she had been told that – or had otherwise believed that to be the case – I would have expected her to ask for more information.

Although I am aware of the types of agreement used by C I cannot be certain what Mrs M 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 Mrs M. 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, but I cannot say what was contained in the agreement signed by Mrs M as a copy has not been supplied. Novuna has said the signed Member's Declaration contained the following: *'We understand that the purchase of our membership in Vacation Club is for the primary purpose of holidays and is not for the purpose of 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"*.

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 Mrs M 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 s. 140A is "an action to recover any sum recoverable by virtue of any enactment" under s. 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 Mrs M could be said to have a cause of action in negligence against Novuna anyway.

Mrs M's alleged loss isn't related to damage to property or to her 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 Mrs M 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 Mrs M was not prevented from accessing 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. Looking at these I do not consider the loan could be regarded as unaffordable at the time it was granted. I appreciate that following the outbreak of covid Mrs M's circumstances may have changed but that is not something I would have expected Novuna to have taken into account at the inception of the loan.

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 Mrs M lost out as a result of its failings. I do not consider I have seen this.

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 Mrs M to accept or reject my decision before 15 February 2024.

Ivor Graham
Ombudsman