DRN-3714017

The complaint

Mr and Mrs P complain through their professional representative, ("PR"), that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance ("Mitsubishi") didn't fairly or reasonably deal with their claims under sections 75 and 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a holiday product in July 2014.

What happened

In July 2014 Mr and Mrs P purchased a holiday product from a company I will call D at a cost of £11,553. This was funded in full by loan with Mitsubishi. In February PR submitted a letter of claim to Mitsubishi under s.75 CCA and s.140 CAA. It said that:

• They were told the contract had a guaranteed end date.

• They were told they were buying an interest in a specific parcel of real property.

• It was sold as an investment.

• The were pressured into purchasing the product.

• They were told the membership would only be available for a limited time in order to elicit an immediate decision.

• They believed they could not leave until they agreed to the purchase.

• They were not provided with the key information that was material to understanding the product.

• The ongoing payments they agreed to make as part of the membership were unclear.

Mitsubishi rejected the claim. It said the claim under s.75 had been made too late and there was no evidence that the product had been sold as a financial investment.

PR brought a complaint to this service on behalf of Mr and Mrs P. It said Mitsubishi had failed to carry out a proper assessment of the ability to afford the loan and had paid commission to D. Finally, it said that the pressure exerted during the sales process rendered the relationship unfair under s.140A.

Our investigator did not recommend the complaint be upheld. He said the s.75 claim had been made out of time and there was insufficient evidence to show that there was an unfair relationship. He also thought there were no grounds to conclude the loan had been unaffordable.

PR didn't agree and submitted a generic counsel's opinion. Subsequently it wrote to express concern about the way finance was sold to its clients including Mr and Mrs P and suggested we obtain further information from Mitsubishi.

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.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr and Mrs P) 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 (Mitsubishi) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should they choose to.

It's important to note that, as Mitsubishi 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.

However, under the Limitation Act an action (that is, court action) based on misrepresentation cannot generally be brought after six years from the date on which the cause of action accrued. Any statements which might have induced Mr and Mrs P into the contract were made in July 2014, but no claim was made until February 2022, more than six years later. I think it very likely therefore that a court would conclude that any claim for misrepresentation against D would be outside the relevant time limit in the Limitation Act.

In the circumstances, I think that Mitsubishi's response was reasonable.

S.140 A

Only a court has the power to decide whether the relationships between Mr and Mrs P and Mitsubishi 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 and Mrs P could be said to have a cause of action in negligence against Mitsubishi anyway.

Their alleged loss isn't related to damage to property or to them 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 Mitsubishi assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that Mitsubishi owed Mr and Mrs P a duty of care to ensure that D complied with the 2010 Regulations. And PR says that Mitsubishi breached that duty by failing to carry out – before granting Mr and Mrs P credit and paying D – the due diligence necessary to ensure that the product purchased by Mr and Mrs P wasn't sold by D in breach of the 2010 Regulations. It also suggests that D's representative told them the product was an investment and subjected them to pressure. But I have seen no evidence of that. There is no testimony on these matters and PR has put forward generalised claims.

The documentary evidence does not support the claims, for example it states that: "You should not think of Your points as an investment.." As for the issue of commission Mitsubishi has not denied that commission was paid. In my experience of this industry the sums paid were not such that they could be said to have led to an unfair relationship.

I appreciate Mr and Mrs P are dissatisfied with their purchase and they have my sympathies for this, but, in summary I cannot see why any of their claims were likely to have succeeded. So overall I think that Mitsubishi acted reasonably in declining the claims under s.75 and s. 140A CCA.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible.

Our investigator said that he could not see any evidence that Mr and Mrs P found the loan unaffordable. 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 Mitsubishi 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 and Mrs P lost out as a result of its failings. Following the issue of our investigator's view PR has made generic points about affordability, but has not provided evidence that they would have found, or did find, it difficult to repay the loan, so I do not need to consider this point further.

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 P and Mr P to accept or reject my decision before 11 December 2023.

Ivor Graham
Ombudsman