DRN-3741237

The complaint

Mr L complains that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance ("Novuna") didn't fairly or reasonably deal with claims under Sections 75 and 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a holiday product in May 2011. The purchase was in Mr and Mrs L's name but the loan was taken out by Mr L so he is the eligible complainant. For simplicity, in this decision I will refer to him as the sole purchaser.

What happened

In May 2011 Mr L purchased a timeshare membership from a company I will call C at a cost of £17,907. This was funded by trading in an existing product and a loan from Novuna for £7,208. In December 2018 a claims management company made a claim on Mr L's behalf, but apparently received no response. In November 2020 Mr L made a separate claim. It was alleged that the credit intermediary was not authorised, there had been a breach of contract and the product had been misrepresented. He said he had not been given the availability to accommodation which had been promised.

As no reply was received Mr L made a complaint to this service. Novuna then responded. It said the claims had been brought out of time. It went on to explain that the credit intermediary was authorised and added that the maintenance fees had increased in line with the agreement. It also said that the membership had not been sold in perpetuity and had an end date.

Our investigator obtained further information including details of Mr L's use of his membership which showed 20 holidays booked between 2010 and 2018. Our investigator concluded the claim under s.75 had been made out of time.

Mr L didn't agree and referenced a contract he had entered into with a claims management company to arrange for the contract with C to be ended.

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 L) 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 they choose to.

It's 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.

A claim for misrepresentation against C would ordinarily be made under s. 2(1) of the Misrepresentation Act 1967 (the 'MA'). And it was held in Green v Eadie & Others [2011] EWHC B24 (Ch) ('Green v Eadie') that a claim under s. 2(1) of the MA is an action founded in tort for the purposes of the LA. So, the limitation period expires six years from the date on which the cause of action accrued (see s. 2 of the LA).

Mr L made like claims against Novuna under s. 75 of the CCA and the limitation period for those claims is the same as the underlying misrepresentation claims. As noted in paragraph 5.145 of Goode: Consumer Credit Law and Practice, Novuna may adopt any defence that would have been or 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.

So, this means that Mr L had six years from the date on which the causes of action accrued to make his s. 75 claim.

The date on which the causes of action accrued is the point at which Mr L entered into the purchase and credit agreements. I say this because the Letters of Claim and Complaint say that he entered into the purchase agreements based on the alleged misrepresentations of C.

And as the finance from Novuna in 2011 was used to help pay for the purchases, it was when he entered into the credit agreements that he suffered a loss.

It follows, therefore, that the causes of action accrued in May 2011 – which means that, at the latest, he had six years from when he entered into the relevant credit agreements to make his claims. But as he didn't do that until December 2018, and as I can't see a reason why the limitation period is likely to be postponed in keeping with the LA, his claims are likely to have been too late. And for that reason, I think Novuna has a defence to them under the LA.

The S.140A Claims for an Unfair Relationship

Only a court has the power to decide whether the relationship between Mr L 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. I have not been told if the loan has been repaid or part of it is still outstanding. However, it was for a period of 180 months, and Novuna has not suggested the claim under s.140A was made out of time so I am satisfied it was made in time.

However, I'm not persuaded that Mr L could be said to have a cause of action in negligence against Novuna anyway.

Mr L'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 – over and above ensuring that Mr L could afford to repay what he was borrowing.

Conclusion

Having considered all the information and arguments put to me I do not consider I need ask Novuna to do anything else in respect of these claims.

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 L to accept or reject my decision before 22 August 2023.

Ivor Graham
Ombudsman