DRN-4389087

The complaint

Mr E, who is represented by a professional representative ("PR") complains that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance ("Novuna") rejected his claim under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. The product was purchased by Mr E and his wife but the loan is in his name alone and so he is the eligible claimant. For simplicity I will refer to him as the sole purchaser.

What happened

In February 2019 Mr E purchased a trial membership of a holiday club from a company I will call C and in December 2019 he purchased a points based holiday product. It cost £16,314 and this was funded by a loan from Novuna and trading in his trial membership.

In February 2023 PR submitted a letter of claim to Novuna. Both parties are aware of the details of claim so in the interest of brevity I will give a short summary here.

PR said that the product had been misrepresented and Mr E was advised that holidays were available at any time, he could get discounted RCI holidays at any time and he could sell the timeshare for a profit later and buy a property as an investment. PR said this was the basis for the claim under s.75 CAA.

PR also made a claim under s.140A CAA. It referenced what it said was C's marketing practices, specifically:

- The sales process was very long.
- Mr E was told by the sales representatives that the membership was for the purposes he required.
- He was told that the membership would only be available on particular terms and/or tied to particular properties for a limited time in order to elicit an immediate decision.
- He was left with the impression from C that he couldn't leave until he agreed to purchase the membership.

PR said that C had breached CPUT Regulations by failing to provide all the material information and it also claimed that C's representatives told Mr E he was purchasing an investment which could be sold at a profit. They argued that the sale included an investment element which contravened the 2010 Timeshare Regulations. Mr E was liable for a range of charges which had not been fully explained. Overall there had been an unfair relationship as set down in s.140A.

Novuna rejected the claims and in May 2023 PR brought a complaint to this service. Novuna provided details of the holidays taken by Mr E. It said he had not been forced to attend the presentation and he had access to over 150 resorts subject to availability. It disputed the claim that the product had been sold as an investment. It also disputed the other elements of the claim and noted Mr E had not made use of the 14 day cancellation period. It challenged

the assertion that there had been an unfair relationship and said the allegations were unsupported by evidence.

The complaint was considered by one of our investigators who didn't recommend it be upheld. He said there wasn't sufficient persuasive evidence to show that there had been misrepresentation. Nor did he consider that there had been an unfair relationship. He said that even if there had been some unfair terms he had not seen that these had been applied unfairly against Mr E.

PR didn't agree and noted that the documentation was confusing as elements needed to be cross referenced to be understood. It thought 14 days was not enough time for the average consumer to understand it. PR pointed out that C allowed consumers to trade in their points towards purchasing property and this amounted to selling an investment. It said that the resorts were not exclusive and could be accessed by non-members at a better price than given to members.

It submitted a statement from Mr E which said he had been subjected to pressure and when he began trying to book holidays he had encountered difficulties in getting what he wanted. He and his wife had taken breaks in the UK as they were unable to find availability abroad. He had been told he could get several holidays a year, but this had turned out not to be true. Overall he could have saved money by buying holidays direct without joining C's club.

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.

Your t 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.

Sections 56 and 75 of the Consumer Credit Act

Under s. 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for

breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and

- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

I do not understand Novuna to dispute that the loan was made under pre-existing arrangements between it and C.

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.

I have noted Mr E's testimony and Novuna's explanation of C's approach to sales.

In short, I am afraid however that I think it most unlikely that Mr E was told he was buying a financial investment. There is no explanation of how that could be the case or why Mr E 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.

I note he initialled the following statement: **"***We understand that the purchase of our membership in Vacation Club Is for the primary purpose of holidays and is not for the purposes 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. 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."*

I think this makes it clear that he was not purchasing an investment and he wasn't purchasing property. Furthermore I am not persuaded by the argument that because he was told he could surrender the points if he subsequently sought to purchase a property from C this meant he was given investment advice. C was merely explaining how the points may be used in a possible future transaction and was not giving investment advice.

I have noted Mr E's testimony. That said I cannot say what was said by the sales representative and I am aware that reference could have been made to the purchase being an investment in future holidays, but I do not consider there is sufficient evidence to say that the product was sold as a financial investment.

I am satisfied the documentation made it sufficiently clear the points were not an investment and given Mr E had a 14 - day cooling off period in which to check any matters which were of particular importance to him, I do not believe it was unreasonable of Novuna to decline his claim under s. 75.

S.140 A

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

His 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 accepted such responsibility – whether willingly or unwillingly.

PR seems to suggest that Novuna owed Mr E a duty of care to ensure that C complied with the 2010 Regulations, but I am not persuaded that it did.

Even if Mr E had a cause of action I do not consider Novuna has been given evidence that there was an unfair relationship. I am not persuaded that Mr E was subject to pressure, nor do I consider he was misled by the documentation, not least when he had 14 days to consider it. I am satisfied that Mr E could have left the presentation at aby time if he so wished and he was under no obligation to make the purchase or to take out the loan. I am sure the sales representatives will have done all they could to encourage him to stay, but that does not mean he was subjected to undue pressure.

Nor have I been told that the terms and conditions were applied unfairly to him. PR has simply said there were terms and conditions which might be used against him. I have not taken a view on the potential impact of the terms and conditions as I do not consider it necessary to do so.

I have noted the claims and allegations, but given Mr E is seeking Novuna pay him a substantial sum it is reasonable for him to provide supporting evidence. I have noted Mr E’s testimony and also C’s rebuttal of the claims and on balance I do not consider Novuna has been given grounds to uphold the claims.

Conclusion

It is not for me to decide whether Mr E has a claim against C, or whether he might therefore have a “like claim” under s. 75 of the Consumer Credit Act. Nor can I make orders under s. 140A and s. 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr E’s complaint. In the circumstances, I think that Novuna’s response to Mr E’s claims was fair and reasonable.

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 E to accept or reject my decision before 19 March 2024.

Ivor Graham
Ombudsman