DRN-4778595

Financial Ombudsman Service

The complaint

Mr H's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance ("Novuna") acted unfairly and unreasonably by (1) participating in an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (the "CCA"), (2) deciding against paying a claim under Section 75 of the CCA, (3) lending irresponsibly having failed to conduct the required affordability checks and (4) enforcing a credit agreement arranged by an unauthorised credit broker.

What happened

Mr H, together with his wife, purchased a timeshare product (the "Timeshare") from a timeshare supplier (the "Supplier") on 4 July 2015 (the "Time of Sale"). The purchase price agreed of £5,735 (the "Purchase Agreement"), of which £4,735 was funded under a fixed sum loan agreement with Novuna[1] (the "Credit Agreement") in Mr H's sole name. All borrowing under the Credit Agreement was repaid in full in October 2015.

On or around 18 November 2022, Mr H wrote to Novuna raising various questions and concerns about the Timeshare purchase and associated Credit Agreement. A copy of that letter hasn't been provided, despite being requested by this service. So, I'm unable to summarise its contents accurately here.

On or around 13 March 2023, using a professional representative (the "PR"), Mr H wrote to Novuna again to expand upon his concerns in relation to the Timeshare purchase and associated Credit Agreement. However, I've also not been provided with a copy of that letter, despite it being requested by this service. So, I'm also unable to accurately summarise its contents in my decision.

On or around 18 August 2023, Novuna responded, in writing, to the various concerns raised in the letters referred to above. Novuna summarised those concerns as follows:

- A request that they provide details of all searches and checks completed when assessing Mr C's loan application.
- A request that they confirm what income assessments had been undertaken having CONC[2] 5.2.1R in mind.
- A request that they confirm what steps were taken to ensure the Supplier complied with the regulations that applied and ensuring Mr H understood the loan terms and conditions.
- A request that they provide evidence that the broker of the Credit Agreement was authorised by the Financial Conduct Authority ("FCA") under the provisions of the Financial Services and Markets Act 2000 ("FSMA").
- A request that they provide details of commission paid to the Supplier including an suggestion that Mr H wasn't made aware that a commission was being paid.

Novuna's response included:

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[1] The original Credit Agreement was provided by another business which has since been acquired and/or subject to a change of name by "Novuna".

[2] The Consumer Credit Sourcebook ("CONC") within the Financial Conduct Authority Handbook.

- that the claims under Section 75 of the CCA ("S75") and Section 140A of the CCA ("S140A") had been brought too late under the provisions of the Limitation Act 1980 (the "LA");
- details of the affordability assessment they'd undertaken when Mr H applied for the loan, albeit they said that it might be too late for this service to consider any complaint that the loan was unaffordable;
- confirmation that the broker of the Credit Agreement was authorised by the FCA under FSMA;
- their disagreement that the Timeshare was presented as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "TRs");
- confirmation that Mr H had been made aware that a commission would be paid to the Supplier; and
- that they didn't agree there was any evidence of unfairness in the Supplier's sales process.

Mr H didn't accept Novuna's findings, so the PR referred his complaint to this service. In doing so, and in addition to the above, the PR summarised Mr H's concerns to include:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Novuna under Section 75 of the CCA, which they'd failed to accept and pay.
2. Novuna being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

(1) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

Mr H says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier told him the Timeshare would:

- provide exclusive access to their holiday resorts around the world;
- permit stays at luxury accommodation at a fraction of the market price;
- provide flexibility to choose any time that suits him; and
- increase I value and could be sold for a profit, therefore being an investment.

Mr H alleges that these representations weren't true and booking (of holidays and accommodation) became increasingly difficult.

(2) Section 140A of the CCA: Novuna's participation in an unfair credit relationship

The PR's referral to this service sets out several reasons why Mr H believes that the credit relationship between him and Novuna was unfair to him under Section 140A of the CCA. In summary, they include the following:

- The broker wasn't authorised under FSMA;
- Mr H was pressured into entering into the Purchase and Credit Agreements by the Supplier;
- Mr H wasn't given time to reasonably read through all of the documentation at the Time of Sale.
- Breaches by both Novuna and the Supplier of their responsibilities under the various regulations and codes that applied.

Having considered all the evidence and information available, one of this service's investigators didn't think Mr H's complaint should be upheld. In particular. Our investigator thought:

- Mr H's complaint suggesting Novuna's participation in a credit relationship that was unfair to him wasn't within the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the limits set out in Rule 2.8.2 R (2) of the Financial Conduct Authority's (the "FCA") Dispute Resolution Rules ("DISP");
- Mr H's complaint suggesting Novuna's decision to lend to him was irresponsible also wasn't within the Financial Ombudsman Service's jurisdiction because it wasn't made in time under the limits set out in DISP 2.8.2 R (2);
- Mr H's complaint about Novuna's decision to reject his concerns about the supplier's alleged misrepresentations was made in time under DISP 2.8.2 R (2). But Novuna didn't act unfairly or unreasonably by not upholding them; and
- there was no evidence to support the allegation that the Supplier didn't hold the necessary regulatory authorisation to introduce the Credit Agreement with Novuna.

Mr H didn't accept our investigator's findings. In summary, the PR said:

- Section 32 of the LA makes provision for limitation to be postponed as facts relevant to Mr H's cause of action under S75 and S140A had been concealed at the Time of Sale and were only revealed when Mr H attempted to use his membership and then sought advice.
- Although amounts owed under the Credit Agreement were repaid in October 2015, his account with Novuna wasn't closed until October 2022, suggesting that the relationship (under S140A) continued up to that point.
- Mr H only became aware of his cause for complaint and/or ability to make a claim once he'd sought legal advice from the PR.

As an informal resolution couldn't be achieved, Mr H's complaint was passed to me to consider further.

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 considering what's fair and reasonable, DISP 3.6.4R of the FCA[3] Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules,

[3] Financial Conduct Authority

guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

S75 provides consumers with protection for goods or services bought using credit. Mr H paid for the Timeshare under a regulated Credit Agreement with Novuna. So, it isn't in dispute that S75 applies (subject to any restriction or limitation). This means Mr H may be afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr H and Novuna arising out of the Credit Agreement (taken together with any related agreements). And because the product purchased was funded under that Credit Agreement, they're deemed to be related agreements.

Given the facts of Mr H's complaint, relevant law also includes the Limitation Act 1980 (the "LA"). This is because the original transaction - the purchase funded by the Credit Agreement with Novuna - took place in July 2015. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered any effect this might also have.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made 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 evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Having considered everything. I decided that the Financial Ombudsman Service's jurisdiction doesn't permit me to consider the merits of Mr H's complaint about Novuna's participation in an unfair credit relationship and the alleged failure to undertake a credit assessment because they weren't made within the time limits set out in DISP 2.8.2 R (2). I've explained my reasons for this to the parties to this complaint in a separate decision.

However, S75 operates quite differently to S140A and, when it applies, it can give borrowers a very different ground for complaint against a lender. Whereas S140A imposes responsibilities on creditors in relation to the fairness of their credit relationships, S75 simply creates a financial liability that the creditor is bound to pay. Liability under S75 isn't based upon anything the lender does wrong. Rather upon misrepresentations and breaches of contract by the Supplier. S75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a S75 claim which is found to be valid, it should pay its liability. And if it fails or refuses to do so, that can give rise to a complaint to this service.

So, when a complaint is referred to this service on the back of an unsuccessful S75 claim, the act or omission that engages this service's jurisdiction is the creditor's failure to respond to, or refusal to accept and/or pay the debtor's claim. This is distinct from anything that occurred before the claim was made such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

Section 2 of the Rules set out in DISP covers whether Mr H's complaint was made in time for the purposes of allowing this service to consider it.

This is what DISP 2.8.2 R says (insofar as its relevant to this complaint.

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

[…]

(2) more than:

(a) six years after the event complained of; or (if later)

(b)three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

Unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgment or some other record of the complaint having been received; […]

unless:

[…]

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R […] was as a result of exceptional circumstances; or […]

As far as Mr H's S75 complaint is concerned, the six- and three-year time limits (under DISP 2.8.2 (2) R) don't usually start until the respondent firm answers and refuses the claim. Here, Novuna didn't accept and reimburse Mr H under the claim initiated in 2023. So, the primary time limit of six years only started once Novuna responded – here that was 18 August 2023. And as this complaint about Novuna's's handling of Mr H's complaint was referred to this service on 16 February 2024, it was made in time for the purpose of the rules on this service's jurisdiction.

<u>Mr H's complaint under S75</u>

Having decided this service is able to consider this aspect of Mr H's complaint, I've considered the various allegations and circumstances further.

Having done so, I don't think it would be fair or reasonable to uphold Mr H's complaint for reasons relating to the S75 claim. As a general rule, creditors can reasonably reject S75 claims that they are first informed about after the claim has been time-barred under the LA. It wouldn't be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court. So, it's relevant to consider whether Mr H's S75 claim was likely to be time-barred under the LA before it was put to Novuna.

As I've explained, a claim under S75 is a "like" claim against the creditor. It essentially mirrors the claim Mr H could make against the Supplier. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim under S75, like this one, is also *"an action to recover any sum by virtue of any enactment"* under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued here was the Time of Sale. I say this because Mr H entered into the purchase of the timeshare product at that time based upon the alleged misrepresentations of the Supplier – which Mr H says he relied upon. And as the Credit Agreement with Novuna provided funding to help finance that purchase, it was when he entered into the Credit Agreement that he allegedly suffered the loss.

It seems Mr H first notified Novuna of the S75 complaint in March 2023. There's no evidence or suggestion this was raised in his letter to Novuna in November 2022. And as more than six year had passed between the Time of the Sale and when he first put the complaint to Novuna, I don't think it was ultimately unfair or unreasonable of Novuna to reject Mr H's concerns about the Supplier's alleged misrepresentations.

<u>Could the limitation period be postponed?</u>

The PR argue that the limitation period should be extended under Section 32 of the LA because facts relevant to Mr H's claim were deliberately concealed from him.

Section 32(1)(b) applies when *"any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant"* [my emphasis]. But the PR haven't provided me with anything persuasive to suggest that the Supplier deliberately concealed anything in relation to the various allegations that Mr H wouldn't have realised well before he submitted the claim. And as I still can't see why, given the allegations fuelling the claim, these particular issues prevented Mr H from making a claim or - at the very least - raising a complaint earlier, my view is that this particular argument by the PR doesn't help Mr H's cause.

Furthermore, the PR suggest that our investigator has *"relied upon the* [LA]*".* It's important to recognise that it isn't this service's role to make legal findings or place reliance upon relevant law. Rather, this service's role is to decide whether Novuna's response to Mr H's complaint appears fair and reasonable taking into consideration *"relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice".* I mentioned this earlier above. So, that's what I've done here. And based upon my findings above, I'm not persuaded that there's any reason why a court might decide time could be extended in keeping with the provisions of the S32 of the LA. Because of that, I don't think that Novuna's response to Mr H's complaint under S75 was unfair or unreasonable.

<u>The credit broker's authorisation</u>

The PR question whether the Supplier (acting as the credit intermediary) was authorised and/or licensed to broker the Credit Agreement with Novuna.

This service's records show that at the Time of Sale, the Supplier came under this service's compulsory jurisdiction. To do so meant they would need to hold the requisite license from the FCA and resultant authorisation under FSMA. The PR have provided no evidence to suggest that wasn't the case. So, I've no reason to conclude that Novuna's response to this particular point was unfair or unreasonable.

<u>Summary</u>

Whilst Mr H's complaint about Novuna's failure to uphold his claim under S75 was made in time under DISP 2.8.2 R (2), I'm not persuaded that Novuna's response to the complaint was ultimately unfair or unreasonable. Furthermore, in respect of any allegation relating to the authorisation (or otherwise) of the Supplier (acting as the broker of the Credit Agreement), I've not found any reasons to support the payment of compensation to Mr H.

I do appreciate that Mr H will be disappointed by my findings, but I won't be asking Novuna to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr H's complaint against Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 2 October 2024.

Dave Morgan
Ombudsman