DRN-4880290

The complaint

Mrs C complained that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance ("Novuna"), acted unfairly and unreasonably by participating in an unfair credit relationship with her and turning down her claim under s.75 of the Consumer Credit Act 1974 ("CCA").

What happened

In June 2014, Mrs C took out a membership from a timeshare supplier ("the Supplier"). This was a type of timeshare membership called 'fractional membership' that, in addition to enabling members to take holidays, also provided an entitlement to an interest in the sale proceeds of a timeshare property. The cost of membership was £11,294, which Mrs C paid for by taking a ten-year loan from Novuna. Mrs C repaid her loan in May 2015.[1]

In October 2021, Mrs C used a professional representative ("PR") to make a claim against Novuna on her behalf under the CCA. The claim was made on the basis of a number of issues, but they included, amongst other things:

- The Supplier had misrepresented the nature of the timeshare to Mrs C, so Novuna was jointly liable under s.75 CCA.
- The Supplier's sales staff were not employed and therefore were not authorised in their own right to broker loans on behalf of Novuna.
- Mrs C did not recall any affordability assessment being carried out. The lack of assessment meant the lending was irresponsible.
- The sale breached the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"), leading to an unfair debtor-creditor relationship.
- The Supplier was insolvent, so Mrs C would not be able to recover any money awarded by a foreign court.
- Some of the terms of the timeshare agreement were unfair, which could again lead to an unfair debtor-creditor relationship.

Novuna responded to say it didn't accept the claim being made. It said the claims for misrepresentation had been made too late under the provisions of the Limitation Act 1980 ("LA"). It also explained why it disagreed with the allegation that there was an unfair debtor-creditor relationship under s.140A CCA. Novuna said that it had carried out credit checks on Mrs C at the time the loan was arranged to make sure it was affordable for her and that the Supplier was properly authorised to broker loans.

Unhappy with Novuna's response, PR referred a complaint to our service on Mrs C's behalf.

One of our investigators considered the complaint, but didn't think Novuna needed to do anything further. He thought the claim that there was a misrepresentation under s.75 CCA and that there was an unfair debtor-creditor relationship under s.140A CCA had been made

[1] Mrs C took out her membership alongside another, but as the loan was taken in her sole name, only she is eligible to bring this complaint to our service.

too late under provisions of the LA. He also thought there was no evidence that Novuna had lent money irresponsibly to Mrs C or that the Supplier hadn't properly arranged the loan. So he didn't think any part of the complaint should be upheld.

PR responded to our investigator and asked for the complaint to be considered again by an ombudsman. It supplied detailed submissions on why, in this instance, Mrs C had more time in which to make her complaint that there was an unfair debtor-creditor relationship. PR also now said that the credit intermediary named on the loan agreement was not authorised to broker loans.

The complaint was passed to me for a decision and, having considered everything, I issued a provisional decision as I came to a different outcome to our investigator. I didn't think I could consider the merits of the complaints about Novuna's decision to lend or its participation in an allegedly unfair debtor-creditor relationship, as these complaints had been made too late under the time limits I'm required to consider as part of the Financial Conduct Authority's Dispute Resolution Rules ("DISP"). I did consider the rest of Mrs C's complaints but, for the reasons I explained, I didn't think Novuna needed to do anything further to answer them.

In this decision I'll deal solely with the question of whether Novuna acted fairly in turning down Mrs C's s.75 CCA claim and whether the lending was brokered by a properly authorised entity. I'll consider the other complaints raised in a separate decision.

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.

Mrs C's complaint that her misrepresentation claim under s.75 CCA was turned down

Mrs C said that the timeshare supplier misrepresented the nature of the membership to her when she bought it and that he has a claim for misrepresentation against the Supplier. Under s.75 CCA, Novuna could be jointly liable for the alleged misrepresentations made by the Supplier. But Novuna argued that any claim brought by Mrs C for any alleged misrepresentations was made too late. I considered that argument and, having done so, I agreed with what Novuna said and set out why in my provisional decision. For the avoidance of doubt, I didn't decide whether the limitation period has expired as that would be a matter for the courts should a legal claim be litigated. Rather, I considered whether Novuna acted fairly in turning down the claim.

Our service normally thinks it would be fair and reasonable for a creditor to rely on the LA as an answer to a claim under s.75 CCA. This is because it wouldn't normally be fair to expect lenders to look into a claim that has been made outside of the limitation periods, so long after the liability arose and after a limitation defence would have become available in court.

So I thought it was relevant to consider whether Novuna has a limitation defence under the LA when thinking about a fair answer to Mrs C's complaint.

It was held in *Green v. Eadie & Ors* [2011] EWHC B24 (Ch) that a claim under s.2(1) of the Misrepresentation Act 1967 is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s.2 LA).

Here Mrs C brought a like claim against Novuna under s.75 CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim.

As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which 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. Conversely, the creditor's right to repayment is so closely connected with the supply contract, and the debtor's statutory rights under sub-s (1), that the debtor may assert a right of set-off in diminution or extinguishment of his liability to the creditor, and as a defence in proceedings brought by the creditor (with or without a counter-claim). Any attempt to exclude the right of set-off will fall foul of CCA 1974, s 173(1) (and would in any case fall within [section 13(1)(b) of the Unfair Contract Terms Act 1977])"*

Therefore, the limitation period for the s.75 CCA claim expires six years from the date on which the cause of action accrued.

I said that the date on which a 'cause of action' accrued is the point at which Mrs C entered into the agreement to buy the timeshare. It was at that time that she entered into an agreement based, she says, on the misrepresentations of the Supplier and suffered a loss. She says, had the misrepresentations not been made, she would not have bought the timeshare. And it was on that day that she suffered a loss, as she took out the loan agreement with Novuna that she was bound to and would have never taken out but for the misrepresentations. It follows, therefore, that the cause of action accrued in June 2014, so Mrs C had six years from then to bring a claim. But she didn't make a claim against Novuna until October 2021, which was outside of the time limits set out in the LA. So I thought Novuna acted fairly in turning down this misrepresentation claim.

PR didn't respond to what I said about how the LA affected Mrs C's s.75 CCA claim, and so I see no reason to depart from my findings on that point.

<u>Mrs C's other points of complaint</u>

PR said that the loan was not properly arranged, so I looked at the businesses involved in the sale to see what I think most likely happened.

I looked at the timeshare purchase agreement and it showed that sales company was named as the Supplier and it was the business that sold the membership to Mrs C. So that business was the supplier for the purposes of the CCA. The Supplier was authorised by the Office of Fair Trading ("OFT") prior to April 2014 and, at the time of sale, it fell within our jurisdiction. That meant it was authorised to undertake certain regulated financial activities and, on balance, I thought it was authorised to broker loans at the time of sale.

I had seen an unsigned credit agreement that gives the names of two businesses as the credit intermediary – "Business A" and "Business B". Business A was not a trading name registered with either the Financial Conduct Authority or the OFT at the time of sale, but it does appear in the membership rules as "the Vendor", which was the business set up to operate the timeshare. Business B was a trading name registered with the OFT and the FCA, which was authorised to broker loans at the time of sale.

Having considered everything, I thought the inclusion of Business A on the loan agreement was most likely a mistake, I noted that it is not named on the purchase agreement as the supplier, nor was it a business that sold timeshares or brokered loans. I thought it was more likely than the loan was brokered by one of the two named entities that were actually

authorised to broker loans. But even if Business AB did broker the loan, there was no automatic right to a refund as it could apply to the FCA for a validation order. Further, I couldn't see what harm has actually been caused to Mrs C by the brokering in the circumstances of this complaint.

PR said that as some of the sales staff were not employed by the Supplier directly, that meant Mrs C's loan was brokered improperly. But I'd seen that the Supplier was authorised to broker loans, so I couldn't see what impact this had on the enforceability of the loans as they were arranged under the Supplier's authorisation.

In response, PR argued that the entity named on Mr C's credit agreement wasn't authorised to carry out regulated activities such as brokering loans and that this had caused an unfairness. PR also said it disagreed the inclusion of Business A on the credit agreement was simply a mistake.

But Mrs C's timeshare purchase agreement makes it clear that the Supplier, the entity authorised to broker loans, was also the entity that sold Mrs C her timeshare. But on the face of Mrs C's loan agreement two different were named named as the supplier and credit intermediary. After I asked, Novuna explained to our service that Business A had never brokered a loan on behalf of Novuna.

On balance, I think it's more likely than not that the loan was brokered by the Supplier. I say that because the other businesses named on the credit agreement were not a party to the timeshare purchase agreement Mrs C entered into, so it was not correct to name it as the supplier, when in fact the Supplier was the relevant party. I see no reason why the other businesses would broker a loan, when they were not the supplier of the services being bought. Further the Supplier, who sold Mr W the timeshare, was authorised to broker loans and was the actual supplier of the timeshare membership, so I think it likely that it was the Supplier that brokered the loan. I think the wrong businesses were recorded as the broker of the loan on the face of the credit agreement and I can't say the loan was improperly brokered.

My final decision

I don't uphold Mrs C's complaint that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance, unfairly turned down her s.75 CCA claim or that the lending was improperly arranged.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 26 July 2024.

Mark Hutchings
Ombudsman