DRN-4893271

The complaint

Mr E complains that Mitsubishi HC Capital UK PLC trading as Novuna[1] ('Novuna') is liable to pay him compensation following a complaint made about a timeshare bought using credit provided by Novuna.

As the credit provided by Novuna was taken in Mr E's sole name, he is the only eligible complainant here. However, as the timeshare membership in question was bought in the names of Mr and Mrs E, I shall refer to both in this decision where applicable.

What happened

In October 2011, Mr and Mrs E bought membership of a timeshare from a timeshare company (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 'Allocated Property').

Following the trade in of a trial membership that Mr E owned, the cost of the membership was £21,389 which included the first year's membership fees of £998. The purchase was made using finance from Novuna, taken in Mr E's sole name. He entered into a restricted used Fixed Sum Loan Agreement (the 'Credit Agreement') for £24,718, which consolidated a previous credit agreement with Novuna taken out for the purchase of the trial membership.

This Credit Agreement was paid off and cleared by Mr E on 20 January 2012.

On 3 May 2019, using a professional representative ('PR'), Mr E complained to Novuna. He complained that the Supplier, at the time of sale, was not authorised to broker credit. He also said the Supplier had made the following misrepresentations:

- The management charges and booking fees they had had to pay now totalled £8,351.98. This hadn't been explained to them.
- They were pressured during the sales process and weren't given the opportunity during the sales process to decide if the FPOC was the right product for them.
- They were told that the Allocated Property would be sold by the trustees in 16 years' time. They have since discovered that there is no clear indication as to the duty of care of the trustees nor the Supplier to actively market or sell the property.
- The sale could be delayed for up to two years, and management charges would continue to be incurred.
- It was not explained that their beneficiaries would inherit the management fee liability.

[1] At the time of sale Mitsubishi HC Capital UK PLC was trading as Hitachi. However as it is now known as Novuna, I shall refer to it as Novuna throughout.

PR went on to describe how the Fractional membership was an Unregulated Collective Investment Scheme ('UCIS') and that the Supplier was not authorised or regulated to provide investment advice. PR said that the promotion and financing of the fractional membership (as it was a UCIS) was therefore unlawful and in breach of the regulations under the Financial Services and Markets Act 2000 ('FSMA'). And as Novuna is deemed the principle of the Supplier, Novuna is liable for such breaches.

Novuna acknowledged Mr E's complaint but didn't send a substantive response, so on 20 November 2019 PR referred Mr E's complaint to our Service. PR said that, in essence, Mr E had made a claim to Novuna under Section 75 of the Consumer Credit Act 1974 (the 'CCA') due to misrepresentations made by the Supplier, and because the sale of the fractional product, it being a UCIS, was a breach of FSMA. He also had made a complaint that the credit relationship between himself and Novuna was unfair to him due to the acts and omissions of the Supplier.

On 2 December 2012 Novuna sent Mr E its final response to his complaint, which it did not uphold. It said:

- Mr E's claim under Section 75 of the CCA had been made more than six years after the event complained about, so had been made too late under the Limitation Act 1980 (the 'LA').
- The Supplier, at the time of sale, was licensed to broker credit by the Office of Fair Trading (the 'OFT').
- The Supplier had made the sales process as comfortable and pleasant as possible, given the regulatory requirements to provide a detailed explanation of the product, which by necessity is a large amount of information.
- Mr and Mrs E were given sufficient time to read the documentation and ask further questions prior to signing. Everything was confirmed with them by a Compliance Officer who went through everything again with them.
- Mr and Mrs E were given a 14-day recission period during which they were able to cancel both the purchase and credit agreements without penalty.
- The Supplier did not purport to be an investment adviser, and the contractual documentation clearly states that the membership is not a monetary investment and should be used for the purposes of holidays.
- The fractional membership is not a UCIS.

One of our Investigators considered the complaint, and didn't think Novuna needed to do anything further. He thought that Mr E's complaint that the credit relationship with Novuna was unfair to him, under Section 140A of the CCA, had been made too late for our Service to consider under the rules by which we must operate.

However, he did think our Service had jurisdiction to consider Mr E's complaint under Section 75 of the CCA, as that complaint was regarding how Novuna dealt with his claim. And he also thought that we were able to look at the complaint regarding the licencing of the Supplier to broker credit.

Having considered everything he thought Novuna was not unfair or unreasonable when it declined to accept Mr E's claim under Section 75 of the CCA, as more than six years had passed between the events which caused the claim, and the claim itself.

And in relation to Mr E's complaint that the Supplier was not correctly licenced to broker credit at the time of sale, he hadn't seen anything to persuade him that the Supplier was not correctly licenced at the time.

PR responded to our Investigator and asked for the complaint to be considered again by an Ombudsman. It gave detailed submissions on why, in this instance, Mr E had more time in which to make his complaint that there was an unfair debtor-creditor relationship. In summary:

- Mr E's complaint of an unfair relationship under Section 140A of the CCA is as a result of the Supplier promoting the fractional timeshare as an investment, contrary to Section 14(3) of the 2010 Timeshare Regulations. This is what caused Mr E severe financial detriment.
- Mr E is a lay person and could not reasonably have known of such technical breaches of the law. Mr E only became aware of this issue when he contacted PR, and the claim to the bank was made within three years of this knowledge.
- Mr E had extra time to make a complaint under Section 140A and a claim under Section 75 of the CCA. It thought this as Section 32 of the CCA relates to the extension of time for starting action if fraud, mistake or concealment are found. The time limit only began when Mr E discovered that fraud, concealment or mistake.
- PR claimed that the Supplier 'concealed' the fact that the fractional membership was an investment, and the Supplier promoted it as an investment, while labelling it as a timeshare. The Supplier deliberately concealed the fact that the fractional membership was an investment.
- The limitation period only commenced when this concealment was revealed to Mr E by PR.
- Mr E's credit relationship with Novuna did not end when the loan balance was cleared on 20 January 2012. PR thought this because there was an account statement, provided by Novuna dated 9 August 2019 which it said showed the account was still operational.
- The loan agreement was for 180 months, so would have normally ended on 30 October 2026. This is when the relationship between Mr E and Novuna would have legally ended.
- The Supreme Court Judgement of *Smith v RBS* made clear that a client's relationship ended at the date when any sum was payable, or may become payable under the credit agreement. So Mr E's credit relationship with Novuna remained until 30 October 2026 as Novuna could have at any time provided additional advances under the loan agreement.
- There was no record of the Supplier, as the credit intermediary, being regulated by the OFT at the time of sale.

Mr E's complaint was passed to me for a decision.

As decisions regarding our Service's jurisdiction are not usually published, I have dealt with whether our Service has jurisdiction to consider Mr E's complaint of an unfair debtor-creditor relationship with Novuna, under Section 140A of the CCA, in a different decision.

However, it is not disputed that our Service has jurisdiction to consider Mr E's complaint about Novuna's handling of his claim under Section 75 of the CCA, and that the Supplier was not correctly licenced to broker credit at the time of sale. And it is those matters that I am dealing with in this 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.

Mr E's complaint about Misrepresentations made by the Supplier.

In this part of Mr E's complaint, he is alleging that Novuna was unfair and unreasonable in refusing to allow his claim under Section 75 of the CCA. He says Novuna ought to have allowed it as there were misrepresentations made by the Supplier at the time of sale, and these misrepresentations induced him into making the purchase. Novuna, in response to his claim, said it had a defence under the LA.

The LA imposes time limits for people to start legal proceedings – and there are different time limits for different types of claims. Essentially, this means that if someone waits too long to make a claim, the court will usually say it's 'time-barred'. For this reason, if a consumer makes a claim after the relevant time-limit has expired, we'd usually say it was fair for the creditor to rely on the LA to decline the claim.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim a consumer could make against the Supplier. The limitation period to make such a claim against Novuna for alleged misrepresentations by the Supplier expires six years from the date on which Mr E had everything he needed to make such a claim.

As the letter of complaint to Novuna makes clear, Mr E entered into the purchase of the timeshare on 30 October 2011 based on the alleged misrepresentations of the Supplier, which he says he relied on. And as the credit arrangement from Novuna was used to help finance the purchase, it was when Mr E entered into the Credit Agreement that he suffered a loss – which means it was at that time that he had everything he needed to make a claim.

Mr E first notified Novuna of his claim for alleged misrepresentations by the Supplier on 3 May 2019. As that was more than 6 years after he entered into the Credit Agreement and related timeshare agreement, I don't think it was unfair or unreasonable of Novuna to rely on the LA to decline Mr E's claim.

Mr E's complaint that the credit broker was unlicenced

At the time the finance agreement was brokered by the Supplier, the brokering of such credit agreements was regulated by the OFT. I've seen no evidence which persuades me that the Supplier was not correctly licenced at the time of sale to broker the Credit Agreement, so I cannot say, on the balance of probability, that Mr E's complaint ought to be upheld.

But there is no provision in the regulatory regime at the time which would afford someone in Mr E's position redress anyway. So even if I were to find that the Supplier was not properly licenced to broker credit in October 2011, (and I make no such finding) I would not be able to tell Novuna to pay Mr E any compensation here.

My final decision

I do not uphold this complaint against Mitsubishi HC Capital UK PLC trading as Novuna.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 5 August 2024.

Chris Riggs
Ombudsman