DRN-5162086

The complaint

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

The finance agreement which is the subject of this complaint was in Mr H's sole name, and as such he is the only eligible complainant here. However, the timeshare which was purchased using the finance agreement was in both Mr and Mrs H's names, so I shall refer to both of them in this decision where applicable.

What happened

On 29 April 2012 (the 'Time of Sale') Mr and Mrs H purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier'). They entered into an agreement with the Supplier (the 'Purchase Agreement') to purchase 1,494 fractional points at a cost of £30,099. But after trading in their existing timeshare towards the purchase, they ended up paying £6,599.

Fractional Club was asset-backed. This meant that in addition to holiday rights, Mr and Mrs H would receive a share in the net sales proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr H financed their purchase of the Fractional Club by taking a £6,599 Fixed Sum Loan Agreement from the Lender in his sole name, which was brokered by the Supplier (the 'Credit Agreement'). The outstanding balance of this Credit Agreement was cleared, and the agreement settled, on 31 October 2012.

Mr and Mrs H traded in their membership of the Fractional Club to which this complaint relates on 4 June 2014, thereby ending the contract formed with the Supplier under the Purchase Agreement.

On 8 October 2019, via a professional representative (the 'PR'), Mr H wrote to the Lender (the 'Letter of Complaint'). In essence he complained about:

- Misrepresentations by the Supplier at the Time of Sale, and a breach of contract by the Supplier, giving him a claim against the Lender under Section 75 of the Consumer Credit Act 1974 (the 'CCA').
- The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
- The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Office of Fair Trading ('the 'OFT') to carry out such an activity.

<u>Mr H's claim under Section 75 of the CCA</u>

[1] At the time the credit was provided, the Lender was trading as 'Hitachi'.

Mr H alleged, in summary:

- The Supplier had made misrepresentations which had induced him and Mrs H to purchase the Fractional Club membership;
- they had experienced difficulties in booking holidays which was contrary to what they had been told by the Supplier.
- the Supplier did not tell them that they would have to pay additional annual management charges; and
- there was no clear indication that the Allocated Property would be sold, and they were not told the Supplier could delay the sale for up to two years at its sole discretion.

Unfair Credit Relationship – Section 140A of the CCA

Mr H alleged that his credit relationship with the Lender had been rendered unfair by:

- the alleged misrepresentation(s) and breach(es) of contract as set out above; and
- The Fractional Club being an Unauthorised Collective Investment Scheme ('UCIS') the promotion and selling of which was prohibited under the Financial Services and Markets Act 2000 ('FSMA').

The Lender was unable to provide Mr H with its response to his complaint within the eight weeks required by the Regulator, so on 20 December 2019 the PR referred his complaint to the Financial Ombudsman Service.

On 18 June 2020 the Lender, having dealt with Mr H's concerns as a complaint, issued its final response, rejecting it on all grounds. Mr H confirmed with this Service that he didn't accept this outcome and wanted his complaint considered by us.

An Investigator, having considered everything that had been submitted, thought that the Lender would have had a defence to all aspects of Mr H's complaint under the Limitation Act 1980 (the 'LA'), so he didn't think the Lender had been unfair or unreasonable in dealing with his complaint in the way it had ('View 1').

Mr H, via his PR, did not agree, and requested that his complaint be considered by an Ombudsman. It also argued why the LA would not apply in the circumstances of Mr H's complaint about his and Mrs H's purchase of the Fractional Club. And it reiterated its point that the Fractional Club was a UCIS, and that following the ruling in '*Shawbrook & BPF v FOS*'[2] it could be seen that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), all of which rendered Mr H's credit relationship with the Lender unfair to him.

The Investigator looked again at everything that had been submitted, and what the PR had submitted in response to his initial view. He then sent all parties his updated opinion ('View 2') in which he said, in summary:

- Mr H's complaint about how the Lender dealt with his claims of misrepresentation and breach of contract by the Supplier under Section 75 of the CCA, ought not to be

[2] *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin)

upheld. He thought the Lender would have a defence under the LA as the claim had not been made within six years of the event in question.

- Mr H's complaint of unfairness under Section 140A of the CCA had been made too late under the rules this Service must follow, so we couldn't consider the merits of this aspect of his complaint.

Mr H again did not agree with what was said in View 2, and pointed out that his complaint that the Supplier had not been correctly authorised to broker the Credit Agreement had not been addressed. As no agreement could be reached, the matter has been passed to me.

Having considered everything, I thought that Mr H's complaint of an unfair credit relationship with the Lender, under Section 140A of the CCA, had been made too late under the Regulator's rules. As decisions relating to our Service's jurisdiction aren't usually published, I dealt with this Service's jurisdiction to consider that aspect of Mr H's complaint in a separate decision.

As regards Mr H's complaint about the way the Lender handled his claims under Section 75 of the CCA, and whether the Supplier was suitably authorised by the OFT to broker the Credit Agreement at the Time of Sale, I didn't think they ought to be upheld. But in order to fairly allow all parties to submit any further evidence and arguments that they wished to, I set out my initial thoughts on these points in a Provisional Decision (the 'PD').

The Provisional Decision

In my PD I began by setting out the legal and regulatory context:

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*
  - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
  - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
  - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
  - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
  - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
  - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
  - *Shawbrook & BPF v FOS.*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

I then went on to consider the merits of Mr H's complaints. In my PD I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75 of the CCA: the Supplier's misrepresentations/breach of contract.

The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr H could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase. The purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 cannot succeed. But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included. I have gone on to say what I think this means in respect of Mr H's Section 75 claim.

The purchase price of Mr and Mrs H's Fractional Club membership was £30,099 which exceeds the maximum sum allowable under Section 75 of the CCA. So, a claim for misrepresentation under Section 75 of the CCA cannot succeed.

But as I've said, Section 75A of the CCA allows for a claim should the price of the purchase be over £30,000, but only in relation to a breach of contract by the Supplier. But I do not think this helps Mr H here anyway. I say this because I think the Lender had a defence to the Section 75 claim under the LA. I'll explain.

As a general rule, creditors such as the Lender can reasonably reject a claim, such as Mr H's, for misrepresentation and/or a breach of contract by the Supplier, if it is first informed about it after the claim is likely to be time-barred under the LA. This is because it wouldn't be

fair to expect creditors to look into such claims so long after the liability arose, and after a limitation defence would be available in court. So, it is relevant to consider whether Mr H's claim for a breach of contract by the Supplier was time-barred under the LA before he put it to the Lender.

The limitation period to make such a claim against the Lender for alleged breach of contract by the Supplier expires six years from the date on which Mr H had everything he needed to make such a claim.

As the Letter of Complaint to the Lender makes clear, Mr H entered into the purchase of the Fractional Club membership on 29 April 2012. The contract was terminated when Mr and Mrs H traded in their membership for a new purchase on 4 June 2014. So, it follows that any alleged breach of contract must have occurred before 4 June 2014. And as the loan from the Lender was used to help finance the purchase, it was when the contract was breached, as Mr H says it was, that he suffered a loss – which means it was at that time that he had everything he needed to make a claim

So, the relevant breach of contract must have occurred prior to 4 June 2014. Mr H first notified the Lender of his claim for alleged misrepresentations and breach of contract by the Supplier on 8 October 2019. As that was more than 6 years after both entering into the Credit Agreement and related timeshare agreement, and by the time the alleged breach of contract must have occurred, I don't think it was unfair or unreasonable of the Lender to reject Mr H's concerns about the Supplier's alleged breach of contract.

So, I do not think Mr H had a valid claim under Section 75 of the CCA, and I think the Lender had a defence under the LA to his claim under Section 75A of the CCA. As a result, given the facts and circumstances of this complaint, I do not uphold this aspect of Mr H's complaint.

The unauthorised credit broker complaint.

The PR, on Mr H's behalf, has stated that the Supplier, which was the entity that brokered the Credit Agreement, was not authorised to do so by the then regulating body, the OFT. The PR contended that as this is the case, the Supplier breached the general prohibition set out in Section 19 of FSMA, so it follows that under Section 27 of FSMA, the Credit Agreement is unenforceable, and Mr H is entitled to compensation for any loss sustained. But I do not agree. I'll explain.

The credit broker named on the Credit Agreement appears to be a subsidiary of the Supplier, and in the form that it is named it does not appear to have been licenced by the OFT at the time. But the Supplier was suitably licenced, and I cannot see a reason why an unlicenced entity would have brokered this particular Credit Agreement, when the sale was completed by the representative of a duly licenced entity, and the same sales company was responsible for and had completed all the other parts of the sale.

But even if I am wrong about this, and an unlicenced entity brokered this particular Credit Agreement (and I don't think I am) it is not something that would warrant compensation being paid to Mr H in any event.

Section 27 of FSMA ("Agreements made through unauthorised persons") only applies to regulated activities, which in this case doesn't cover consumer credit lending prior to 1 April 2014.

In October 2019, the Regulator, the Financial Conduct Authority (the 'FCA') issued explanation and guidance relating to Validation Orders to allow an otherwise unenforceable

credit agreement. This was last updated in October 2024. Insofar as it's relevant to Mr H's complaint, the FCA explanation says (my emphasis):

> *"For agreements entered into before 1 April 2014, a modified regime applies. […] For agreements that were entered into before this date and which are unenforceable against the borrower, the borrower has no right to recover any money paid or other property transferred under the agreement or compensation for loss".*

That aside, if Mr H's Credit Agreement was found to be unenforceable – and I make no such finding – it would normally mean that whilst the obligations under the agreement remain in existence, one or both parties to the agreement can't enforce compliance with it in the courts. So, if the Lender took steps against Mr H to enforce the agreement, he might have a defence. However, I don't think this is relevant in Mr H's case because he repaid all amounts due under the Credit Agreement in full in October 2012. So, no such steps to enforce the agreement appear to have occurred.

In reality, Mr H took the finance from the Lender and subsequently repaid it. Mr H knew he had the finance, the amount borrowed and what it was for (the Fractional Club purchase). So, even if the loan was found to be improperly brokered, I haven't seen anything that persuades me that it resulted in something that would require the payment of compensation.

Conclusion

I don't currently think the Lender was unfair or unreasonable in rejecting Mr H's claim under Section 75 or 75A of the CCA, and I do not think the Lender is liable to pay Mr H any compensation in relation to the brokering of the Credit Agreement.

If Mr H has any further evidence or arguments he wishes to make, I would invite him to do so in response to this provisional decision.

The PR, on behalf of Mr H, acknowledged my PD and said that it had nothing to add in response.

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.

As Mr H had nothing to add in response to my PD, and having reconsidered everything afresh, I see no reason to depart from my findings as set out above in my PD.

My final decision

I do not uphold Mr H's complaint against Mitsubishi HC Capital UK Plc trading as Novuna.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 19 December 2024.

Chris Riggs
Ombudsman