DRN-3719906

The complaint

Mr Q, who is represented by a professional representative ("PR") complains that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance ("Novuna") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product purchased in August 2019. I gather the purchase was made by Mr Q and his partner, but as the finance agreement was in Mr Q's name he is the eligible complainant. In this decision for simplicity I will refer to Mr Q as the sole purchaser.

What happened

In August 2019 Mr Q purchased a points based holiday product from a company I will call C. It cost £18,735 and this was funded by a loan from Novuna. In February 2022 PR submitted a letter of claim to Novuna. The details are well known to both parties so for reasons of brevity I will provide a short summary in this decision.

- There had been misrepresentation by C. It said Mr Q had been told he had purchased an investment which would appreciate in value. He was told he would have a share in a property and C would buy it back. He was also told he could access the property at any time.
- It said that C's sales representatives were self-employed and unauthorised.
- The sale was illegal as it was sold as an investment. PR offered C's training manual as evidence.
- C had gone into liquidation.
- Mr Q didn't recall an affordability assessment being undertaken.
- The contract contained unfair terms since it allowed C to rescind it if any payment was not made in time.

Novuna consulted C and rejected the claim. It said that there had been no misrepresentation and the product had not been sold as an investment. The training manual was for a different product and had no relevance to the one purchased by Mr Q. He had not been sold a share in a property but he did have access to accommodation all year round subject to availability.

It said C was authorised as a credit broker and the liquidation of a company within the C group did not affect Mr Q's access to accommodation. It disputed the agreement contained an unfair term since the opportunity to rescind the contract related to a failure to pay the purchase price and it did not affect Mr Q's statutory rights. Novuna also set out the checks it had carried out prior to granting the loan.

PR brought a complaint to this service on behalf of Mr Q. It was on the same grounds as the letter of claim. It was considered by one of or investigators who didn't believe it should be upheld. She didn't believe PR had established there had been misrepresentation or a breach of contract. Nor did she consider there had been an unfair relationship and she had been

given no evidence that the loan was unaffordable.

PR didn't agree and submitted an income and expenditure summary which it said was based on 2019 figures along with bank statements from 2019 and a credit report. A new investigator reviewed the case and noted that the bank statements didn't support the figure put in the income and expenditure summary. He also noted the credit report which didn't reflect Mr Q's status at the time of sale.

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 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.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr Q) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (Novuna) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should he choose to.

It's important to note that, as Novuna was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

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.

PR has claimed that misrepresentation arose when Mr Q was led to believe he was buying

an investment. However, I have seen no evidence to support that claim. The documentation provided at the time contains the following: “Membership is for the purposes of reserving holidays and confers personal rights to use the Points Rights and does not grant any real estate or lease interest given the involvement of the Trustee.” I do not see how Mr Q could have believed he had bought a financial investment or that he had acquired a share of a property.

While I was not present at the time of the sale I do not consider that I am able to conclude the product was misrepresented. I have seen no explanation of how that could be the case or why Mr Q 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 also have noted that the training manual submitted by PR has no bearing on the product sold to Mr Q.

Breach of Contract

I do not believe that the liquidation of C led to a breach of contract. I gather new management companies were appointed, and Mr Q was able to use the timeshare as usual after that date.

On the face of it, therefore, the services linked to Mr Q’s purchase of the points remain available to them and are unaffected by the liquidation. Indeed the agreements used by C usually allow for the liquidation of C and its replacement by another provider.

Given I have not been persuaded that the product was sold as a financial investment I cannot conclude that the removal of a sales service by C can been regarded as a breach of contract.

S.140 A

Only a court has the power to decide whether the relationships between Mr Q 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 s. 140A is “an action to recover any sum recoverable by virtue of any enactment” under s. 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 Q 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 assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that Novuna owed Mr Q a duty of care to ensure that C complied with the 2010 Regulations and it argues that the payment of commission created an unfair

relationship. However, I believe Novuna did not as a matter of course pay any commission so I cannot say that payment of commission created an unfair relationship. Even if it did, in my experience payments of commission in this industry were relatively low.

It also suggested the terms were onerous in that if maintenance payments were not made the contract would be terminated. Novuna has explained that this is incorrect and the term referred to only relates to the purchase price and in any event Mr Q can rely on his statutory rights. Again I can see no basis for concluding there was an unfair relationship.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Novuna has said that it obtained details from Mr Q and carried out the appropriate credit checks before approval.

Our investigator said that she could not see any evidence that Mr Q found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if Novuna did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr Q lost out as a result of its failings. I have reviewed the expenditure and income details and I agree that the information contained in them is not supported by the bank statements. For example it is assumed that Mr Q is responsible for the mortgage costs without taking into account his partner's income.

On balance I do not consider Mr Q has provided evidence that shows he found the loan difficult to repay.

Conclusion

I appreciate Mr Q is dissatisfied with his purchase and he has my sympathies for this, but, in summary I cannot see why any of his claims were likely to have succeeded. So overall I think that Novuna acted reasonably in declining the claims under s.75 and s. 140A CCA.

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 Q to accept or reject my decision before 26 January 2024.

Ivor Graham
Ombudsman