DRN-4620682

The complaint

Mr C complains that Mitsubishi HC Capital UK Plc trading as Novuna ("Novuna") unfairly declined his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a loan they provided to him to purchase a timeshare product.

The lender here was originally under a different name. However, for the purpose of my decision, I will refer to Novuna throughout.

What happened

In or around September 2019, Mr C (jointly with another party) purchased a timeshare product from a supplier who I'll refer to as "C". The purchase price agreed was £15,388 which was funded with a fixed sum loan from Novuna in Mr C's sole name.

In or around March 2022, using a professional representative ("the PR"), Mr C submitted a claim to Novuna under sections 75 and 140A of the CCA. Within the claim, the PR allege Mr C purchased the timeshare product in September 2019 having relied upon representations made by C which turned out not to be true. And under section 75 of the CCA ("S75"), Novuna are jointly liable for those misrepresentations. In particular, the PR allege that C told Mr C:

- he had purchased an investment, being a share of a property and he was promised a considerable return on that investment; and
- he *"would have access to the holiday's apartment at any time all around the year".*

The PR say that C illegally sold the product as an investment contrary to regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs"). To support this, the PR refer to a training manual allegedly used by C to highlight the benefits of *"Fractional Ownership".*

The PR went on to allege that a clause within the purchase agreement which addressed default in the event of non-payment of amounts due under the agreement was unfair. And they believe this renders the relationship with Novuna, under the agreements, unfair pursuant to section 140A of the CCA ("S140A).

In addition, the PR alleged that:

- Mr C was introduced to Novuna by a third party who wasn't authorised by the Financial Conduct Authority ("FCA") to carry on regulated activities;
- Mr C *"does not remember any affordability assessment to have been carried out* [sic]*"*
- C's companies are currently in an insolvency process which means Mr C is unable to recover any amounts awarded by the Spanish Courts.

In response to Mr C's claim, Novuna didn't agree there was any evidence to support the various allegations included within his claim, making reference to the purchase agreement, contract and documentation from the time to support their findings. They didn't think there was any reason for Mr C's claim (or complaint) to be upheld.

The PR didn't agree with Novuna's findings so referred Mr C's claim to this service as a complaint. One of this service's investigators considered all the information provided. Having

done so, they didn't think Novuna's failure to uphold Mr C's claim was unfair or unreasonable, given the evidence available.

In response, the PR raised various concerns about the way in which the finance had been sold to Mr C. In doing so, the PR asked that this service obtain and provide them with detailed information and documents from Novuna relating to the provision of finance to fund timeshare products. The PR also provided more information about Mr C's financial situation at the time to support their view that the loan had been provided irresponsibly.

As an informal resolution couldn't be achieved, Mr C's complaint was passed to me to consider further. Having done that, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 16 January 2024, giving both sides the opportunity to respond before I reach my final decision.

In my provisional decision, I said:

> Relevant considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
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> S75 provides consumers with protection for goods or services bought using credit. Mr C paid for the timeshare product under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means Mr C is 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.
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> S140A looks at the fairness of the relationship between Mr C 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. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.
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> It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe Novuna's failure to uphold Mr C's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
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> It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. And as I've already said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.
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> 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

[1] Dispute Resolution: The Complaints sourcebook (DISP)

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.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by C in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that C made false statements of fact when selling the timeshare product. In other words, that they told Mr C something that wasn't true in relation to the allegation raised. I would also need to be satisfied that the misrepresentation was material in inducing Mr C to enter into the contract. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mr C was specifically told (or not told) about the benefits of the products he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the evidence that is available from the time.

The claim submitted by the PR makes specific reference to a fractional timeshare product. They've also provided, what is alleged to be, a script used by C when presenting the product to Mr C during the sales meeting. Again, the script appears to relate to the sale of a fractional timeshare product.

I've seen a copy of the purchase agreement signed by Mr C at the time of the sale. It's clear from this that he didn't purchase a fractional timeshare product. It was, in fact, membership of a timeshare product with points allocated to be redeemed against holiday accommodation and experiences from within a portfolio offered by C. So, I can't see how the alleged script has any relevance to the product Mr C actually purchased, or that it played any part in the presentation of the product actually purchased.

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr C's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says he was told about the specific product he purchased. In particular relating to the product being represented as an investment in property that would provide a considerable return on investment. There's simply no reference to this within any of the purchase documentation I've seen.

In fact, note 5 of the agreement (which Mr C signed) clearly states *"We understand that the purchase of our membership* […] *is a personal right for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as a real estate interest or an investment in real estate, and that* [C] *makes no representation as to the future price or value of the* […] *product"*.

I don't think the product can have been marketed and sold as investment contrary to the TRs simply because there might have been some inherent value to it. And in any event, I've found nothing within the evidence provided to suggest C gave any assurances or guarantees about the future value of the product Mr C purchased. C would had to have presented the product in such a way that used any investment element to persuade him to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

As regards the allegation that Mr C was told he *"would have access to the holiday's apartment at any time all around the year",* I've also seen nothing to support this. Firstly, and as I've already stated, the product purchased provided points, not a defined property. Secondly, the documentation I've seen makes it clear that all

bookings are subject to availability and on a first come first served basis. So, based upon the evidence available, I'm not persuaded the product was misrepresented in the manner alleged.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (Novuna) and the debtor (Mr C) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

I've considered the *"default"* clause that the PR has referred to. Having done so, this appears to relate to the consequences should Mr C not complete the product purchase by making the payment due within 14 days of the date of the agreement. I don't believe this refers to any other or subsequent charges or payments that may be payable. So, I'm not persuaded that a court is likely to find that this particular clause causes unfairness pursuant to S140A.

The authorised status of C

This service's records show that C fell under our compulsory jurisdiction at the time of the product (and loan) sale to Mr C. So, I'm satisfied that they held the necessary authority to arrange the loan. The PR have alleged that the individual who sold the timeshare (and consequently the loan) was self-employed and not an employee of C. They believe this means the individual didn't hold the necessary authority to arrange the loan. However, I've not seen any specific evidence to support that allegation. And Novuna have confirmed that Mr C was introduced to them through C, which is clearly confirmed on the purchase and loan agreements he signed.

In the absence of any other evidence to the contrary, I'm not persuaded that Mr C was introduced to Novuna by a party that didn't hold the necessary regulatory authority to do so.

The impact of C entering an insolvency process

Mr C's claim is submitted pursuant to sections 75 and 140A of the CCA. These specifically relate to instances of misrepresentation, breach of contract or unfairness. I've not seen any evidence that Mr C has submitted a claim to either a Spanish or UK court. So, as far as I'm aware, there's been no ruling or award in his favour. It's possible Novuna could incur a liability under S75 in the event that C is unable to fulfil such a court award. But as there doesn't appear to have been one here, I can't see that Mr C has suffered any proven loss such that Novuna could be held liable for it under S75. So, I don't see the relevance of this particular aspect in Mr C's case.

Were the required lending checks undertaken?

There are certain aspects of Mr C's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Novuna undertook a proper credit assessment. The PR say that Mr C doesn't remember any affordability assessment being carried out. Although not remembering something happening is clearly not the same as something not actually happening.

Regulated lenders each use their own systems, methods and processes when assessing loan applications. These are normally in conjunction with their own lending policies, guidelines and appetite at the time. In responding to Mr C's claim, Novuna have explained, in detail, the checks and tests they undertook when Mr C applied for his loan with them.

If I were to find that the checks and tests they completed didn't comply with the regulatory requirements that applied – and I make no such finding – I would need to be satisfied that had the checks complied, they would've revealed that the loan repayments weren't sustainably affordable for Mr C in order to uphold his complaint here. A simple failure to meet the regulatory requirements wouldn't, in my opinion, lead to the loan being unenforceable.

I've seen copies of some of Mr C's bank statements together with other information to support the PR's belief that the loan was unaffordable. Having considered everything provided, I'm not persuaded there's sufficient evidence to demonstrate that Mr C's financial position was such that it would reasonably lead Novuna to believe the loan wasn't sustainably affordable for him or that he suffered loss as a consequence.

Summary

I would like to reassure Mr C that I've carefully considered everything that's been said and provided in reviewing his complaint. Having done so, and for the reasons explained above, I haven't found anything that leads me to conclude that Novuna's response to his claim was ultimately unfair or unreasonably. Because of that, I don't currently intend to ask them to do anything more here.

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.

Novuna haven't provided any response to my provisional findings. The PR acknowledged receipt, confirming that Mr C doesn't agree with my provisional findings, but didn't provide anything new for me to consider.

The time given for further information and evidence has now passed. Having not received anything that persuades to vary from the findings in my provisional decision, I will not be asking Novuna to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 13 March 2024.

Dave Morgan
Ombudsman