DRN-4684929

The complaint

Mr J complains about the sale of a timeshare. He says that Mitsubishi HC Capital UK Plc, trading as Novuna, financed the purchase and that he therefore has claims against it.

Mr J has brought his complaint through a representative, so references to his submissions and arguments include those made on his behalf.

What happened

I issued my provisional decision on this complaint in February 2024. An extract from that provisional decision is set out below.

In October 2019 Mr J purchased a timeshare membership with a company I will call "C". The purchase was funded through a fixed sum loan with Hitachi (UK) PLC who are now Mitsubishi HC Capital UK Plc, trading as Novuna.

Mr J complained to Novuna in November 2022. His claim was detailed but in essence he said he had a claim under sections 75 and 140A of the Consumer Credit Act 1974 (CCA) as the agreement had been misrepresented to him and there had been an unfair relationship. He also said that Novuna hadn't performed adequate checks to ensure that the agreement was affordable for him.

Novuna didn't uphold Mr J's complaint, so he escalated it to this Service.

Our investigator considered what had happened. He thought the cash price of the timeshare was too high for a valid claim to be made under section 75 of the CCA and he wasn't persuaded there was sufficient evidence to support a claim under section 140A of that Act. He didn't think Mr J had provided sufficient evidence that, even if the business hadn't performed the requisite affordability checks, would suggest the credit was unaffordable for him.

Mr J didn't agree. His representatives referred us to an EU directive that they said meant it was the amount of credit provided, and not the cash value of the service that was important when deciding if a valid claim could be made. It was their assertion that the claim for misrepresentation was, therefore, valid. Mr J asked for a decision by an ombudsman.

What I've provisionally 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.

I'm issuing a provisional decision here as it's been some time since the investigator provided his view and I can see we didn't respond to all of the issues. I'm not currently expecting to uphold the complaint.

I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards;

codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.

The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under the Financial Services and Markets Act 2000 (FSMA). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my decision.

The claim under the CCA

When something goes wrong and the payment was made with a fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the CCA says that in certain circumstances, the borrower under a credit agreement has a right to make the same claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier.

From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

Section 56 of the CCA is relevant in the context of section 140A of the CCA that Mr J also relies on, as the pre-contractual acts or omissions of the credit broker or supplier will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair relationship exists between Mr J and the lender.

It's not for me to decide the outcome of a legal claim Mr J may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether the lender was reasonable to reject Mr J's claims.

The claim under section 75 of the CCA

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.

Mr J says the agreement was misrepresented to him as an investment and that he was promised his share of the property would increase in value. He also says he was promised he could sell it back, and that he would have availability anytime of the year.

Mr J's claim was made under section 75. For a valid claim to be made under that section of the Act the cash price of the goods or service must be more than £100 but no more than £30,000. The cash price of Mr J's timeshare was over £40,000 and a valid claim can't, therefore, be made under section 75.

Mr J's representatives have referred me to Consumer Credit Directive 2008/48/EC (articles 2 and 15). While a Directive requires member states to accomplish a set of goals it doesn't dictate the means to do so, whereas an EU Regulation does. The Consumer Credit (EU Directive) Regulations 2010 (S.I. 2010/1010) implemented various provisions of the EU Consumer Directive into UK law. Section 75 footnotes suggest that the text has been amended by virtue of The Consumer Credit (EU Directive) Regulations 2010. I'm persuaded that it's, therefore, likely a court would consider section 75 of the Consumer Credit Act to have taken the relevant EU Regulations into account, and to decide that a claim under section 75 was not possible because the cash price was in excess of the maximum value.

And, even if I'm wrong about that, I don't think there is sufficient evidence to suggest this agreement was misrepresented to Mr J. I understand he asserts otherwise but I don't think his testimony alone is sufficient to persuade me the misrepresentations he claims were made, had been.

I don't, therefore, think Novuna were unreasonable to reject Mr J's section 75 claim.

The claim under section 140A of the CCA

Section 140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

I do not consider it likely that a court would conclude that the lender's acts and/or omissions, or those of the supplier or credit broker as agents of the lender, generated an unfair debtor – creditor relationship.

Mr J says that he was offered a special one off, time limited, price to accept the agreement and that was an aggressive sales practice. I've not seen any supportive evidence to suggest that was the case and I don't, therefore, think Novuna were unreasonable to reject that complaint point.

We know it is common that these sales presentations often lasted for a number of hours. I've therefore considered whether there is evidence that Mr J's ability to exercise choice was significantly impaired by the lengthy presentation and the pressure he says he experienced as that may have created an unfair relationship between him and the supplier.

Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) seems to expand on the everyday definition of pressure. At the time of sale, Regulation 7 stated that a commercial practice was aggressive if, in its factual context and taking account of all of its features and circumstances, it:

a. significantly impaired or was likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence; and b. caused or was likely to cause the consumer to take a transactional decision they would not have taken otherwise as a result.

Regulation 7(2) went on to say that consideration must be given to the timing, location, nature and persistence of the practice. And when thinking about whether "undue influence" was applied, Regulation 7(3) said that thought must be given as to whether the Supplier exploited "a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly [limited] the consumer's ability to make an informed decision."

Mr J had already attended presentations from the same supplier, so I think he would have been likely to have had an understanding of the approach that would be taken. I don't think I've been provided with sufficient information to suggest Mr J didn't understand he didn't have to say yes to the agreement or that he didn't understand he could walk away without entering into it. He was also provided with a 14 day cooling off period and I think, even if he wasn't allowed much time to think during the presentation, the cooling off period allowed him to reflect and withdraw from the agreement and the loan if he wished.

Overall, I'm not persuaded that Mr J's ability to exercise choice was – or was likely to have been – significantly impaired contrary to the CPUT Regulations.

And I don't think there is sufficient evidence of an unfair relationship so, in my opinion,

Novuna were not wrong to reject the claim under s140A.

Was the loan irresponsible?

Mr J says that Novuna was in breach of its obligations to carry out an adequate credit assessment to determine whether he could afford to repay the loan.

However, when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So even if I was persuaded that the lender 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 the credit granted by them was likely to be unaffordable and that Mr J suffered a loss as a result. As there's little evidence that he would have found it difficult to repay what he was lent by Novuna, I'm not persuaded the agreement was unaffordable for him. I am not, therefore, persuaded that Novuna were unreasonable to reject that element of Mr J's complaint.

My provisional decision

For the reasons I've given above, I'm not expecting to uphold this complaint.

Further comments and/or evidence

Novuna didn't respond to my provisional decision, but Mr J's representatives did. They thought my provisional decision was ill founded. Their additional comments ran to several pages, and it isn't practical to repeat them here, but I have read and considered those comments in full. In summary Mr J's representatives:

- Repeated the statements they had made to this Service in their letter of 5 June 2023.
    - They explained again that the Consumer Credit (EU Directive) Regulations 2010 (CCD) defined the scope of a creditor's liability by reference to the amount of credit and not the cash price. They suggested I was wrong to say a court would consider section 75 had taken the relevant EU regulations into account, especially as the CCD post-dated the CCA.
    - And they reminded me that I had a remit to decide what was fair and reasonable under FSMA and the FCA's dispute rules (DISP).
- They said that *"in this case, our clients have claimed that an unfair creditor debtor relationship, under section 140A of CCA 1974, existed, and the timeshare agreement was a "related agreement". Thus, the limit in section 75(3)(b) of CCA 1974 is not applicable. So, as our clients have made a claim for misrepresentation, which are asserted to be worth more than £30,000.00, the limit in section 75(3)(b) CCA 1974 does not apply. In British Credit Trust Ltd v Scotland [2014] EWCA Civ 790, Kitchin LJ stated as follows: -*

  "Section 75 imposes on the creditor under a debtor-creditor supplier agreement liability for misrepresentations and breaches of contract by the supplier provided that the particular conditions 8 set out in the section are satisfied. But I can see no reason whatsoever for concluding that simply because this section provides a remedy for particular misrepresentations (or breaches) they are to be excluded from an assessment under section 140A.

The inquiry under section140A is focused on the relationship between the debtor and the creditor and the court must consider whether it is unfair because of one or more of the matters identified in section 140A (1) and having regard to all matters the court thinks relevant. There is nothing in this provision to suggest that the court's consideration is limited to those matters in respect of which no alternative claim can be pursued."

They said that the limit in section 75(3)(b) of CCA 1974 is not applicable where an unfair creditor debtor relationship, under section 140A of the CCA is claimed. And they suggested that that was the case in Mr J's claim.

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.

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

In my provisional decision I explained I was aware of my remit under FSMA to decide what was fair and reasonable. I also explained:

"Mr J's representatives have referred me to Consumer Credit Directive 2008/48/EC (articles 2 and 15). While a Directive requires member states to accomplish a set of goals it doesn't dictate the means to do so, whereas an EU Regulation does. The Consumer Credit (EU Directive) Regulations 2010 (S.I. 2010/1010) implemented various provisions of the EU Consumer Directive into UK law. Section 75 footnotes suggest that the text has been amended by virtue of The Consumer Credit (EU Directive) Regulations 2010. I'm persuaded that it's, therefore, likely a court would consider section 75 of the Consumer Credit Act to have taken the relevant EU Regulations into account, and to decide that a claim under section 75 was not possible because the cash price was in excess of the maximum value."

I didn't suggest section 75 had taken into account the CCD when the CCA came into force, only that footnotes suggest that the text was subsequently amended by virtue of the Consumer Credit (EU Directive) Regulations 2010 and that I, therefore, thought it likely a court would consider section 75 to have taken the relevant EU Regulations into account, and to decide that a claim under section 75 was not possible. I've not been persuaded otherwise by Mr J's representative's repetition. But as I also explained, even if I'm wrong about that, I don't think there is sufficient evidence to suggest this agreement was misrepresented to Mr J. I understand he asserts otherwise but I don't think his testimony alone is sufficient to persuade me the misrepresentations he claims were made, had been, and I can't see that either Mr J or his representatives have provided any further evidence that would persuade me otherwise.

While there are financial limits that apply to a claim made under section 75 there are no such limits when considering a claim under section 140A and consequently, in my provisional decision, I considered under section 140A, aspects of Mr J's claim that may have had potential to have created an unfair creditor debtor relationship. I'm not persuaded the case law Mr J's representatives have referred me to would suggest I should do more. But even if I'm wrong about that, other than Mr J's testimony there is no corroborative evidence of the misrepresentations he says were made and I don't think his claim alone would lead a court, or should have led Novuna, to conclude otherwise.

Ultimately, I have not found reason to uphold Mr J's complaint.

My final decision

For the reasons I've given above, I don't uphold this complaint.

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

Phillip McMahon
Ombudsman