DRN-4698118

The complaint

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

What happened

I issued a provisional decision on this complaint earlier this year. An extract from that provisional decision is set out below.

In October 2019 Mr M traded in a trial membership and 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 M complained to Novuna in April 2023. 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 M's complaint, so he escalated it to this Service.

Our investigator considered what had happened but didn't think there was sufficient evidence of misrepresentation or that there had been an unfair relationship. He didn't support Mr M's complaint.

Mr M has asked for a decision to be made by an ombudsman. He says he was told that C would pay management fees; that he could never get the accommodation for the days he wanted, and that he was shown prestige accommodation but it wasn't explained that he would never have enough points to be able to stay in that accommodation.

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 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 (s.140A) of the CCA that Mr M 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 M and the lender.

It's not for me to decide the outcome of a legal claim Mr M 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 M'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 M says he was told that holidays were exclusive to timeshare club members. I've not seen documentation to support that assertion and, on balance, and don't think Mr M's testimony alone is sufficient to demonstrate that representation was likely to have been made.

Mr M says he was told C would pay the annual service charge, he says that he wouldn't have entered into the agreement had he known he would be asked to pay it. The Standard Information Form explains that members are responsible for those charges and sets out what they currently are. While the Welcome Letter sent to Mr M at the start of the agreement explains that C will pay the 2020 "Management Charges (Annual Service Charge)" it does not suggest there was an agreement for C to pay subsequent charges. I think it was clear that those charges would be for Mr M to pay.

It's Mr M's assertion that he was promised he'd be able to book accommodation at the times he wanted and that he was promised he'd be able to secure prestige accommodation. The Standard Information form explains that occupancy rights will be subject to availability and that "the points entitlement each year may be used or saved …to increase the flexibility of choice and destination," I think it's likely Mr M would have understood that the amount of points he'd purchased wouldn't secure accommodation in all resorts and at all times. So, I don't think a court would be likely to uphold a claim for misrepresentation in respect of those issues.

I don't, therefore, think Novuna were unreasonable to reject Mr M'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.

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 M's ability to exercise choice was significantly impaired by the lengthy presentation and any pressure 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 M had already attended a presentation 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 M 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.

Mr M says he should have been given a choice of lender. I don't think C was acting as an agent of Mr M but as the supplier of contractual rights he obtained under the Purchase Agreement. And, in relation to the loan, it still doesn't look like C's role to make an impartial or disinterested recommendation or to give Mr M advice or information on that basis. However, even if it's right to suggest that Mr M should have been presented with a range of lenders to choose from, there's little to nothing to demonstrate that he has suffered a financial loss because he entered into a credit agreement with Novuna rather than another lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship between Mr M and Novuna on this occasion given the facts and circumstances of this complaint.

One of the main aims of both the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR's) was to enable consumers to understand the financial implications of their

purchase so that they were/are put in the position to make an informed decision. If a supplier's disclosure and/or the terms of a bargain didn't recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may amount to unfairness under s.140A.

I don't think the fact that Novuna may have paid C commission was incompatible with its role in the transaction. C wasn't acting as an agent of Mr M, and I don't think it was C's role to make an impartial or disinterested recommendation or to give Mr M advice or information on that basis. What's more, I haven't seen any persuasive evidence that the typical amounts of commission paid by Novuna to suppliers (like C) when loans were interest bearing (as was the case on this occasion) was likely to be high enough to create an unfair debtor-creditor relationship given the circumstances of this particular complaint. I think it's unlikely a court would find that the failure to disclose the actual commission in this case created an unfair relationship under s.140A.

Overall, I'm not persuaded that Mr M'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 s.140A.

Was the loan irresponsible?

Mr M says that Novuna was in breach of its obligations to conduct 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 M 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 M's complaint.

My provisional decision

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

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.

Neither party provided any additional comments, so I've not found any reason to change my provisional decision and that now becomes my final decision on this 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 M to accept or reject my decision before 18 April 2024.

Phillip McMahon
Ombudsman