DRN-4702456

The complaint

Mrs J complains that she and her partner were mis-sold a timeshare product and the loan used to pay for it. The loan was provided by Hitachi Capital (UK) Plc, which is now MitsubishiHC Capital UK Plc and trades as Novuna Personal Finance; for simplicity I'll refer to the lender as Novuna. Mrs J has been represented in bringing this complaint by a claims management business, so any reference to her arguments and submissions include those made on her behalf.

What happened

In September 2019 Mrs J and her partner bought from Club La Costa (UK) Sucursal en Espaňa (a UK company with registration in Spain) a 15-year membership of the Club La Costa Vacation Club, a holiday and timeshare club, and 1,300 holiday points (of which 200 were described as bonus points). Mrs J and her partner could trade the holiday points annually for holiday accommodation and other benefits over the membership period.

To pay for the membership and points, Mrs J took out a loan for £18,562. That took into account the trade-in value of a trial membership which Mrs J and her partner had taken out, and the outstanding balance of the loan used to pay for it – also with Novuna. The September 2019 loan was brokered by Club La Costa (UK) Plc.

In December 2022 Mrs J complained to Novuna. She said that she and her partner had been misled about the sale of the holiday club membership and the holiday points they had bought. They had, she said, been led to believe that they were buying a share in a property, that it would be an investment, and that they would be able to access club property at any time of the year.

Mrs J also said: Novuna had not properly assessed whether the loan was affordable for her; the credit intermediary and the individuals working for it had not been properly authorised; Club La Costa was going through liquidation proceedings in Spain and so was in breach of contract; and the loan created an unfair relationship.

Mrs J said that the effect of the Consumer Credit Act 1974 (and in particular sections 75 and 140A) was that Novuna was responsible for the actions of Club La Costa.

After referring the matter to Club La Costa for comment, Novuna did not accept Mrs J's claims, and she referred the matter to this service. One of our investigators considered what had happened, but did not recommend that the complaint be upheld. Mrs J did not accept the investigator's recommendation and asked that an ombudsman review the case.

I did that and issued a provisional decision, in which I said:

Affordability

Mrs J has said that Novuna did not properly assess whether the loan was affordable for her; she was not asked any questions about her income or expenditure. Novuna says that it carried out appropriate checks, including by asking Mrs J about her income and other debts

at the time. Having done that, it was satisfied that Mrs J's disposable income was sufficient to meet her commitments under the loan agreement.

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case. I am satisfied that Novuna did ask Mrs J about her income and expenditure in this case, even though she may not recall it. The information which Novuna has provided includes details of Mrs J's income, as well as her mortgage repayments and other debts, so it is clear that some questions were asked of her.

In assessing whether a loan is affordable, lenders should consider not just whether it is affordable when it is taken out, but whether it is likely to remain affordable. They should, for example, consider whether there are any future events which might have an impact on a borrower's ability to pay – such as retirement, for example.

As part of the sales process, Mrs J signed a one-page declaration which included, at paragraph 9:

"We understand clearly what we have purchased and, having carefully considered this and our other financial commitments, are able to pay the amounts due on the dates agreed and in the case of purchases made with the assistance of finance agree that we are not aware of any future event that may prevent us from meeting the monthly repayments."

Novuna did therefore address the possibility of future events affecting Mrs J's ability to repay the loan – albeit partly by seeking a reassurance from her.

I note in addition that it appears that Mrs J has been able to meet the loan payments and other financial commitments. That does not necessarily mean that Novuna carried out appropriate checks, but it is an indication that the loan was affordable. It follows that, even if more detailed checks had been carried out, it is likely that loan would still have been granted.

Authorisation of the credit intermediary

Consumer credit broking is, and was in 2019, a regulated activity under the Financial Services and Markets Act 2000. That is, entities carrying out consumer credit broking must be properly authorised by the regulator, the Financial Conduct Authority ("FCA"). A consumer credit loan which is brokered by an unauthorised party is not enforceable (although the lender can apply to the FCA if it wishes to enforce it).

Mrs J's representative said that the intermediary named in the loan agreement was not on the FCA's register. That allegation however refers to Club La Costa Exhibition Centre. The intermediary named on the loan agreement was Club La Costa (UK) Plc, which was properly authorised at the time.

Mrs J's representative says as well that the individuals in the sales force were self-employed. Club La Costa, on the other hand, says its staff (including the individual who dealt with Mrs J) were employed. I think it more likely that the regulated entity is aware of its staff's employment status than Mrs J's representative is, but in any event her representative has not explained why self-employed individuals representing a regulated business cannot carry out regulated activities on its behalf.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- *that the lending financed the contract giving rise to the claim; and*
- *that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

I am satisfied that the necessary conditions were met in this case, and so will discuss what has been said about misrepresentation and breach of contract.

Misrepresentation and breach of contract

A 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 induces the other party into the contract.

A breach of contract occurs when one party to a contract does not fulfil its obligations to the other. That is, it does not do what it has agreed to do or does not provide what it has agreed to provide.

Mrs J says that the membership and points were sold to her as an investment. In support of that contention, those representing her have provided a copy of some of the seller's presentation materials. They relate however to the sale of fractional timeshare interests (where timeshare properties are sold after a set number of years and the proceeds shared amongst those who have bought timeshare weeks in those properties). That is not however what Mrs J purchased, and I find that material of very limited assistance; it was not used in the sales presentation which Mrs J and her partner attended.

In addition, the Acquisition Agreement included, at paragraph 5 on page 1:

"We understand that the purchase of our membership in vacation club 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 CLC makes no representation as to the future price or value of the Vacation Club Holiday product…"

Further, the one-page declaration (referred to under the Affordability heading above) included a near-identical statement, which Mrs J signed and initialled.

In the circumstances, I think it most unlikely that the club membership was sold as an investment, or that Mrs J thought that was what she was buying. I note as well that there is no evidence of any attempt on the part of Mrs J to sell the membership and points.

Mrs J says she was told he could book holidays at any time of the year. But that was true – albeit subject to availability of accommodation and Mrs J having sufficient points. Between buying the holiday club membership and making this complaint, it appears that Mrs J has booked eight holidays and cancelled three – possibly as a result of travel restrictions imposed because of the Covid-19 pandemic.

In general, the allegations of misrepresentation are generic and unsupported by evidence. I do not find them particularly convincing. I also note that the Member's Declaration included, at paragraph 11:

"We understand that this Member's Declaration, together with the Agreement, is the entire written contract between the parties, anything additional shall only be valid if signed and stamped on behalf of the Company."

In my view, the inclusion of an "entire agreement" provision was an attempt to ensure that anything on which Mrs J sought to rely was included in the contract itself. Such provisions are not uncommon, even in consumer contracts, as they can help to provide clarity about the parties' rights and obligations. I am not persuaded in this case that Mrs J was misled, but, if I were to take a different view on that, I would need to consider the effect of that declaration.

Mrs J says that Club La Costa is in liquidation and she therefore has a claim for breach of contract. It is correct that liquidation proceedings were started in Spain in or around December 2020. But those concerned sales companies. I understand however that the Club is still operating and that its facilities remain available. The liquidation of the sales companies does not constitute a breach of contract.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties, refunding payments and re-opening an agreement which has come to an end. In considering whether a credit agreement creates and unfair relationship, a court can have regard to any connected agreement, which in this case could include the sale contract.

An ombudsman does not have the power to make an order under section 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable. And I have the power to make a wide range of awards – including, for example, requiring a borrower to refund interest or charges, and to write off or reduce the balance of a loan. I am not persuaded however that I should do so here.

Much of Mrs J's case that the loan agreement created an unfair relationship is based on fundamental misunderstandings – the identity of the credit intermediary; that Mrs J was buying a fractional timeshare, which was sold as an investment; that there was a breach of contract when sales companies within the Club La Costa group were placed into liquidation.

Mrs J says that the timeshare sale was pressured. But it was very clear from the sales documents that she could cancel both the sale and the loan agreement for 14 days after she signed them. Paragraph 12 of the Member's Declaration said:

"We have received a copy of our Agreement together with the notices and Information Statement (which we have had adequate time to review before signing) required under the EU Timeshare Directive 2008/122/EC."

The Directive referred to was incorporated into UK law by The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, which requires customers to be given 14 days in which to cancel a timeshare contract. Mrs J was told that she could cancel and was provided with a form by which she could do so. If, as she says, she was genuinely pressured into buying something she did not understand, I might have expected her to explain when she brought this complaint why she didn't exercise his right to cancel.

Mrs J's representative has also referred to clause D of the Acquisition Agreement, by which the seller can rescind the Agreement if any sum due under it remains unpaid for 14 days. Her representative says that similar clauses have been found unfair and has referred to a case in which the court, as a result, made an order under section 140B. I note however that the only sum payable under the Acquisition Agreement was the sale price for the Club membership and holiday points. Mrs J's case appears to be, therefore, that, had she not paid, it would have been unfair for her membership and points to have been withdrawn. That is a rather different position from the case law on which she seeks to rely. Be that as it may, Mrs J did pay (through the loan) and the sale contract was not rescinded by Club La Costa.

It is not for me to decide whether Mrs J has a claim against Club La Costa, or whether she might therefore have a "like claim" under section 75 of the Consumer Credit Act. Nor can I make orders under sections 140A and 140B of the same Act.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mrs J's complaint. In the circumstances of this case, however, I do not believe that it would be fair to require Novuna to do any more to resolve things.

I indicated that I would consider any further arguments and evidence which the parties provided before issuing a final decision, and I gave them until 14 March 2024 to send me any further submissions. Neither party has provided any additional information for me to consider.

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 I have been provided with no further evidence or arguments following my provisional decision, I do not believe there is any good reason to reach a different conclusion. In saying that, I stress that I have considered everything afresh before issuing this final decision.

My final decision

For these reasons, my final decision is that I do not uphold Mrs J's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J to accept or reject my decision before 24 April 2024.

Mike Ingram
Ombudsman