DRN-4737453

The complaint

Mrs G's complaint is that Mitsubishi HC Capital UK Plc (trading as Novuna Personal Finance) ('Mitsubishi') acted unfairly and unreasonably when deciding against paying her claim under Section 75 of the Consumer Credit Act 1974 (the 'CCA').

The complaint is only in Mrs G's name as only she was named on the Credit Agreement (in her maiden name). But, I will refer to both Mrs and Mr G throughout this decision as the timeshare in question was in both of their names.

What happened

Mrs G and her husband Mr G purchased membership of an asset-backed timeshare called the Fractional Property Owners Club ('FPOC') from a timeshare provider (the 'Supplier') on 10 January 2018 (the 'Time of Sale'). They bought 1,300 Fractional Points at a cost of £17,433. According to the Supplier, they had purchased a Trial Membership previously but this had been cancelled within the 14-day cooling off period. The Supplier has said they were given a promotional holiday to take, which was where they were sold the FPOC.

Mrs and Mr G paid for their FPOC membership by taking finance from Mitsubishi in Mrs G's (maiden) name. She entered into a 15 year restricted use Fixed Sum Credit Agreement for £17,433 and the total amount repayable after interest and charges was £36,244.80 (the 'Credit Agreement').

The purchase agreement dated 10 January 2018 (the 'FPOC Purchase Agreement') was made between one of the timeshare provider's sales companies and Mrs and Mr G. The sales company, which had the right to promote and sell Fractional Rights in the FPOC, was the supplier for the purposes of the CCA (the 'Supplier'). Under the FPOC Purchase Agreement, Mrs and Mr G agreed to be bound by the club rules (the 'FPOC rules') and by the management agreement relating to the club (the 'FPOC Management Agreement').

Under the terms of the FPOC, Mrs and Mr G could exchange their Fractional Points for holidays. And, at the end of the projected membership term, they also had a share in the sale proceeds of a property tied to their membership (the 'Allocated Property'). As their interest in the Allocated Property was limited to a share in its net sale proceeds, they didn't have any preferential rights to stay in the Allocated Property or use it in any other way.

Mrs G, using a professional representative ('BSE'), wrote to Mitsubishi on 31 January 2019 (the 'Letter of Complaint') to complain about misrepresentations by the Supplier at the Time of Sale giving her a claim under Section 75 of the CCA.

Mrs G says that the Supplier made a number of misrepresentations at the Time of Sale, which are as follows:

- They were told by the sales representative during the sales presentation that if they purchased the FPOC, they would always be able to stay in the same resort that they stayed in during their promotional week (the 'Monterey Royale').
- They were told that the annual management charges would only increase by the rate of inflation (approximately 3% at that time), whereas they have actually increased by 40% since the Time of Sale.

- They were told they would get seven holidays per year which would be discounted but, although they tried to book a holiday, there was never any availability.
- They say they have now been on holiday but, instead of the resort they were promised during their promotional week (as above), they were sent to a different resort which was very cold and the accommodation itself was of poor standard.

Mitsubishi dealt with Mrs G's concerns as a complaint and issued its final response letter on 7 March 2019, rejecting it.

Mrs G then referred the complaint to the Financial Ombudsman Service on 25 March 2019. In the complaint form submitted to our Service, they also added to their reasons for believing there had been misrepresentations by the Supplier:

- They were told by the salesperson the FPOC would be an investment as the Allocated Property would be sold "*in ten or so years*".
- They have tried on many occasions to access the "*varied and cheaper holidays*" they were promised by the salesperson but found there was little variety and holidays were definitely much cheaper to purchase via the "*high street*".

The complaint was assessed initially by an Investigator who, having considered the information on file, rejected the complaint on its merits on 5 January 2021.

The complaint was then assessed again by a second Investigator. Prior to issuing their findings, they asked Mrs G's representative, BSE, to provide a witness statement regarding what happened at the Time of Sale.

This was requested on 15 November 2023, but no response or witness statement was received.

The Investigator therefore proceeded to issuing their findings on 22 November 2023, again rejecting the complaint on its merits.

BSE disagreed with the Investigator's assessment and asked for the matter to be referred to an Ombudsman for a final decision to be made. They did not provide any further submissions or evidence.

As agreement on the outcome could not be reached at this stage, the complaint has been referred to me to make a final decision.

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 3.6.4 R of the Financial Conduct Authority's handbook to take into account the:

"*(1) relevant:*

(a) law and regulations;

(b) regulator's 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."

Where evidence is incomplete, inconclusive, or contradictory, I make my decision on the balance of probabilities i.e., what I think is more likely than not to have happened based on the evidence available and the wider circumstances of the complaint.

My role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my decision.

I appreciate this may come as a disappointment to Mrs G, but having taken all of the above into account, I agree with the outcome reached by the Investigator, and for broadly the same reasons. I'll set out my findings below.

Section 56 of the CCA: Antecedent negotiations

Section 56 of the CCA created a statutory agency relationship between the Supplier and Mitsubishi because it states that any negotiations between Mrs G (as debtor) and the Supplier (CLC) before a transaction (membership of the FPOC) financed by a debtor-creditor-supplier agreement (Mrs G's restricted-use Fixed Sum Loan Agreement) are deemed to have been conducted by the Supplier as an agent of Mitsubishi (as the creditor). And in light of what the High Court had to say on the matter in *Shawbrook & BPF v FOS*, I'm satisfied that the Supplier was acting 'on behalf of' Mitsubishi during the negotiations leading up to Mrs G's purchase of FPOC membership at the time of sale, such that the Supplier's pre-contractual acts and/or omissions are relevant to this complaint.

Mrs G's Section 75 complaint

Mitsubishi doesn't dispute that Mr and Mrs G entered into a contract with the Supplier for services financed by a debtor-creditor-supplier agreement in Mrs G's name. As I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs G, Mitsubishi (as the creditor) is also liable.

This part of the complaint was made for several reasons which, being familiar to both sides, it's not necessary to repeat here.

I've carefully considered all available evidence, including the Supplier's comments about the Time of Sale and the specific points raised by Mrs G.

Looking at the Time of Sale documentation, I can see that Mrs and Mr G's signed Member's Declaration document made clear the date of sale of the Allocated Property and that the cost of the Supplier's holidays may not necessarily be cheaper than elsewhere.

Mrs and Mr G's signed Information Statement also made clear the date of sale of the Allocated Property, explained that all holidays were subject to availability and stated that the annual management charges were subject to increases or decreases as determined by the actual management costs. No guarantees were made in the documentation that certain resorts or holidays would always be available.

Furthermore, telling prospective members that they were buying a fraction or share of one of the timeshare provider's properties was accurate - Mrs and Mr G's share in the Allocated Property clearly constituted an investment in a share of the net proceeds of the sale of a specific property in a specific resort and they did acquire such an interest.

So, without more detailed testimony from Mrs and Mr G about what was said, by whom and in what context (along with any supporting evidence), I haven't seen sufficient evidence to say that, on the balance of probabilities, there were any false statements of fact made to them by the Supplier as alleged. I recognise that they have concerns about the way in which their FPOC membership was sold. But, given the evidence in this complaint, I'm not persuaded that there was an actionable misrepresentation by the Supplier for the reasons Mrs G alleges. And, for that reason, I don't think Mitsubishi acted unfairly or unreasonably when it declined Mrs G's Section 75 claim.

Section 140A

As outlined above, I've taken into account all relevant law when deciding this complaint and this includes Section 140A of the CCA.

I've explained above why I'm not persuaded that the contract entered into by Mrs and Mr G was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA. But, I also need to consider that Mrs and Mr G have said the product was sold to them as an investment.

Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') prohibited the Supplier from marketing or selling the FPOC membership as an investment. At the Time of Sale, the provision said:

"*A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulate contract.*"

However, Mrs G hasn't described in any detail what was said to her, by whom and in what circumstances to support the suggestion in question. And with that being the case, I don't think it's likely the Supplier breached the prohibition on selling timeshares as investments. Even if I'm wrong about that, based on what I've seen, I'm not persuaded that the investment element of the FPOC membership was important enough to Mrs G's purchasing decision to render her relationship with Mitsubishi unfair to her if the membership had, in fact, been sold as an investment.

Conclusion

Overall, taking into account all facts and circumstances of this complaint, I don't think that Mitsubishi acted unfairly or unreasonably when it declined Mrs G's Section 75 claim, and I'm not persuaded that Mitsubishi was party to a credit relationship with Mrs G under the Credit agreement that was unfair to her for the purposes of Section 140A. And, having taken everything into account, I see no other reason why it would be fair or reasonable to direct Mitsubishi to compensate Mrs G.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 10 May 2024.

Fiona Mallinson
Ombudsman