DRN-4770004

The complaint

Mr W complained that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance ("Novuna"), acted unfairly and unreasonably by participating in an unfair credit relationship with him and turning down his claim under s.75 of the Consumer Credit Act 1974 ("CCA").

What happened

In August 2012, Mr W took out a membership from a timeshare supplier ("the Supplier"). This was a type of timeshare membership called 'fractional membership' that, in addition to enabling members to take holidays, also provided an entitlement to an interest in the sale proceeds of a timeshare property. The cost of membership was £31,900, which Mr W paid for by trading in an existing timeshare and taking a 15-year loan from Novuna for the balance. Mr W repaid his loan in October 2012.[1]

In February 2017, a professional representative wrote to the Supplier on Mr W's behalf to say it was investigating the circumstances in which the timeshare membership was purchased, in particular noting that it could have been mis-sold.

In March 2022, Mr W used a different professional representative ("PR") to make a claim against Novuna on his behalf under the CCA. The claim was made on the basis of a number of issues, but they included, amongst other things:

- The Supplier had misrepresented the nature of the timeshare to Mr W, so Novuna was jointly liable under s.75 CCA.
- The Supplier's sales staff were not employed and therefore were not authorised in their own right to broker loans on behalf of Novuna. was not authorised to broker loans on behalf of Novuna.
- Mr W did not recall any affordability assessment being carried out. The lack of assessment meant the lending was irresponsible.
- The sale breached the Timeshare. Holiday Products. Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"), leading to an unfair debtor-creditor relationship.
- The Supplier was insolvent, so Mr W would not be able to recover any money awarded by a foreign court.
- Some of the terms of the timeshare agreement were unfair, which could again lead to an unfair debtor-creditor relationship.

Novuna responded to say it didn't accept the claim being made. It said the claims for misrepresentation had been made too late under the provisions of the Limitation Act 1980 ("LA"). It also explained why it disagreed with the allegation that there was an unfair debtor-creditor relationship under s.140A CCA. Novuna said that it had carried out credit checks on Mr W at the time the loan was arranged to make sure it was affordable for him and that the Supplier was properly authorised to broker loans.

[1] Mr W took out his membership alongside another, but as the loan was taken in his sole name, only he is eligible to bring this complaint to our service.

Unhappy with Novuna's response, PR referred a complaint to our service on Mr W's behalf.

One of our investigators considered the complaint, but didn't think Novuna needed to do anything further. He thought the claim that there was a misrepresentation under s.75 CCA and that there was an unfair debtor-creditor relationship under s.140A CCA had been made too late under provisions of the LA. He also thought there was no evidence that Novuna had lent money irresponsibly to Mr W or that the Supplier hadn't properly arranged the loan. So he didn't think any part of the complaint should be upheld.

PR responded to our investigator and asked for the complaint to be considered again by an ombudsman. It supplied detailed submissions on why, in this instance, Mr W had more time in which to make his complaint that there was an unfair debtor-creditor relationship.

As the parties didn't agree with our investigator, the complaint was passed to me for a decision. Having considered everything, I issued a provisional decision as I came to a different outcome to our investigator. I didn't think I had the power to consider the complaints Novuna's decision to lend or there had been an unfair debtor-creditor relationship, as these complaints had been made too late. I did consider the rest of Mr W's complaints but, for the reasons I explained, I didn't think Novuna needed to do anything further to answer them.

In this decision will deal solely with the question of Novuna acted fairly in turning down Mr W's s.75 CCA claim and whether the lending was brokered by a properly authorised entity. I'll consider the other complaints raised in a separate 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.

Mr W's complaint that his misrepresentation claim under s.75 CCA was turned down

Mr W said that the timeshare supplier misrepresented the nature of the membership to him when he bought it and that he has a claim for misrepresentation against the Supplier. Under s.75 CCA, Novuna could be jointly liable for the alleged misrepresentations made by the Supplier. But Novuna argued that any claim brought by Mr W for any alleged misrepresentations was made too late. I considered that argument and, having done so, I agreed with what Novuna said and set out why in my provisional decision. For the avoidance of doubt, I didn't decide whether the limitation period has expired as that would be a matter for the courts should a legal claim be litigated. Rather, I considered whether Novuna acted fairly in turning down the claim.

Our service normally thinks it would be fair and reasonable for a creditor to rely on the LA as an answer to a claim under s.75 CCA. This is because it wouldn't normally be fair to expect lenders to look into a claim that has been made outside of the limitation periods, so long after the liability arose and after a limitation defence would have become available in court.

So I thought it was relevant to consider whether Novuna has a limitation defence under the LA when thinking about a fair answer to Mr W's complaint.

It was held in *Green v. Eadie & Ors* [2011] EWHC B24 (Ch) that a claim under s.2(1) of the Misrepresentation Act 1967 is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s.2 LA).

Here Mr W brought a like claim against Novuna under s.75 CCA. The limitation period for the

corresponding like claim would be the same as the underlying misrepresentation claim. As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which would be open to the supplier, including that of limitation:

> *"There is no difficulty in treating the debtor's rights under sub-s (1) as a "like claim" against the creditor. Since the creditor's liability mirrors the supplier's it follows that, to the extent that the supplier has successfully excluded or limited his liability, the creditor may shelter behind that exclusion or limitation. Conversely, the creditor's right to repayment is so closely connected with the supply contract, and the debtor's statutory rights under sub-s (1), that the debtor may assert a right of set-off in diminution or extinguishment of his liability to the creditor, and as a defence in proceedings brought by the creditor (with or without a counter-claim). Any attempt to exclude the right of set-off will fall foul of CCA 1974, s 173(1) (and would in any case fall within [section 13(1)(b) of the Unfair Contract Terms Act 1977])"*

Therefore, the limitation period for the s.75 CCA claim expires six years from the date on which the cause of action accrued.

I said that the date on which a 'cause of action' accrued is the point at which Mr W entered into the agreement to buy the timeshare. It was at that time that he entered into an agreement based, he says, on the misrepresentations of the Supplier and suffered a loss. He says, had the misrepresentations not been made, he would not have bought the timeshare. And it was on that day that he suffered a loss, as he took out the loan agreement with Novuna that he was bound to and would have never taken out but for the misrepresentations. It follows, therefore, that the cause of action accrued in August 2012, so Mr W had six years from then to bring a claim. But he didn't make a claim against Novuna until March 2022, which was outside of the time limits set out in the LA. So I thought Novuna acted fairly in turning down this misrepresentation claim.

I went on to say that even I was wrong about that and Mr W had brought his claim in time, I didn't think s.75 CCA actually applies in his case. That is because s.75 CCA does not apply to a claim relating to a single item to which the Supplier attaches a cash price over £30,000. Here Mr W's membership cost £31,900, which is above that.

PR didn't respond to what I said about how the LA affected Mr W's s.75 CCA claim, and so I see no reason to depart from my findings on that point. It did respond to say that Mr W bought 'three weeks' as part of his membership and so the individual cost of each of the weeks was under £30,000 and therefore s.75 CCA applies. However, having considered that I disagree.

At the relevant time, s.75(3)(b) CCA states that the joint liability for a creditor available under that provision does not apply to a claim "so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000.

Here the 'pricing summary' provided said that Mr W bought three weeks of fractional rights for £31,900, giving the details of the property to which those rights attached. The way that Mr W's membership worked was that he would have been entitled to a share in the proceeds of sale of that properly based on, amongst other things, the value the property sold for and the number of weeks interest he held. So here Mr W held one fractional interest set at three weeks, i.e. he would receive 3/52ths of the proceeds of sale. I think it is an artificial exercise to attempt to break that down into separate weeks as that was not what was sold to him, rather it was one membership with one cash price. It follows, I don't think s.75 CCA applies to his claim.

Mr W's other points of complaint

PR had said that as some of the sales staff were not employed by the Supplier directly, that meant Mr W's loan was brokered improperly. But in my provisional decision, I explained that I'd seen that the Supplier was authorised to broker loans, so I couldn't see what impact this had on the enforceability of the loans as they were arranged under the Supplier's authorisation.

In response, PR argued that the entity named on Mr W's credit agreement wasn't authorised to carry out regulated activities such as brokering loans.

In PR's letter of complaint, it said:

> *"The finance contract (Doc. 2) that my clients have signed states as credit intermediary [the Supplier]. I have checked with the FCA's register and [the Supplier] is authorised to carry on regulated activity such as credit brokering."*

So it is now saying the opposite of what was originally alleged. I've thought about this further.

Mr W's timeshare purchase agreement makes it clear that the Supplier, the entity authorised to broker loans, was also the entity that sold Mr W his timeshare. But on the face of Mr W's loan agreement a different, albeit similarly named, business was named as the supplier and credit intermediary. I also note that in the Information Statement supplied to Mr W at the time of sale, the Supplier is said to be the promotor and seller of the timeshare membership and it had been granted the right to do so by the other business names on the credit agreement, which was described as the founder of the timeshare scheme.

In response to what PR had said, Novuna explained that Mr W's loan was actually brokered by the Supplier and not by the business named on the credit agreement, which it said had never brokered a loan on behalf of Novuna.

On balance, I think it's more likely than not that the loan was brokered by the Supplier. I say that because the other business named on the credit agreement was not a party to the timeshare purchase agreement Mr W entered into, so it was not correct to name it as the supplier, when in fact the Supplier was the relevant party. I see no reason why the other business would broker a loan, when it was not the supplier of the services being bought. Further the Supplier, who sold Mr W the timeshare, was authorised to broker loans and was the actual supplier of the timeshare membership, so I think it likely what Novuna said is correct – that it was the Supplier that brokered the loan. I think the wrong business was recorded as the broker of the loan on the face of the credit agreement and I can't say the loan was improperly brokered.

My final decision

I don't uphold Mr W's complaint that Mitsubishi HC Capital UK Plc, trading as Novuna Personal Finance, unfairly turned down his s.75 CCA claim or that the lending was improperly arranged.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 24 July 2024.

Mark Hutchings

Ombudsman