DRN-5009841

## The complaint

Mr O's complaint is, in essence, that Mitsubishi HC Capital UK PLC ("Mitsubishi") acted unfairly and unreasonably by enforcing a credit agreement arranged by an unauthorised credit broker.

## What happened

In or around July 2014, Mr O, together with his wife, purchased a timeshare product (the "Timeshare") from a timeshare provider (the "Supplier"). They paid for the Timeshare by taking a loan from Mitsubishi in Mr O's sole name.

In November 2023, Mr O used a claims management company (the "CMC") to make a complaint to Mitsubishi. Specifically, that the loan was arranged by a credit intermediary – here that was the Supplier – who wasn't authorised to carry out such activities. The CMC allege that the credit intermediary didn't hold a credit license with the Office of Fair Trading ("the OFT") and wasn't regulated to carry out the work of a credit intermediary by the Financial Conduct Authority (the "FCA"), thus rendering the loan agreement unenforceable.

Mitsubishi didn't uphold Mr O's complaint. They said that the Supplier was incorporated and operated outside of the UK. And as the sales process and credit brokering activities also took place outside of the UK, there was no requirement for the Supplier to hold FCA authorisation. Mitsubishi didn't agree there'd been a breach of the General Prohibition under section 19 ("S19") of the Financial Services and Markets Act 2000 ("FSMA").

Mr O didn't agree with Mitsubishi's findings, so the CMC referred his complaint to this service. Having done so, one of our investigators didn't think Mr O's complaint should be upheld.

The CMC disagreed with our investigator's findings. In doing so, they responded at length providing further evidence to support their arguments. In particular, evidence which they believe demonstrates that the Supplier was actively promoting and marketing their products and services in the UK. And as such, required the requisite credit license to do that. But because the supplier didn't hold that license, the sale of the loan breached the general prohibition under S19.

As the CMC didn't agree with our investigator's findings, Mr O's complaint was passed to 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.

When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

[1] Dispute Resolution: The Complaints sourcebook (DISP)

The relevant provisions that relate to this issue are in FSMA. In short, S19 FSMA is 'the general prohibition' and states that *"No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is-*

*(a) an authorised person; or*

*(b) an exempt person.*

Section 27 FSMA states that an agreement, such as Mr O's, that was *"made in consequence of something said or done by another person ("the third party") in the course of…a regulated activity carried on by the third party in contravention of the general prohibition"* is unenforceable against the borrower. Further, consumers such as Mr O would be entitled to recover money paid under the loan agreement and to compensation for any loss suffered as a result of making such payments.

The CMC said that the Supplier wasn't authorised by the OFT to broker loans, which was a breach of the general provision. At the time of the sale in 2014, it was the FCA who provided such authorisation rather than the OFT. But the requirement remains unchanged by that.

The key issue for me to determine is whether the Supplier carried out the credit broking of Mr O's loan (a regulated activity) within the UK. On the face of it, it didn't as the loan appears to have been arranged during a meeting with Mr O and his wife in Gran Canaria.

Section 418 FSMA sets out six cases where an activity would be deemed as having taken place within the UK where they would not otherwise have been regarded as doing so. Each of these depends, in one way or another, on the entity carrying on the regulated activity having their registered office, head office or an establishment in the UK. But here, the supplier was a Spanish business with no such links to the UK, so I can't see any of these cases apply to this sale.

The FCA also sets out in its Handbook guidance on the territorial scope of S19 FSMA in PERG 2.4 – *"Link between activities and the United Kingdom".* But in the circumstances of this complaint, I can't see that PERG 2.4 expands the scope of S19 and S418 of FSMA beyond what I've already set out above.

It follows that I don't think the Supplier needed to be FCA authorised to broker loans in Spain, as it had no UK presence. That means it didn't breach the general prohibition when arranging Mr O's loan and, in turn, S27 of FSMA isn't engaged.

In response to our investigator's view, the CMC provided evidence to suggest the Supplier actively marketed within the UK, thus bringing them under the scope of FSMA. I've carefully considered this evidence together with the CMC's comments and observations.

The evidence consists of a number of newspaper articles dating back a number of years relating to a Spanish footballer who, at the time, played for an English football team. I understand the footballer was born and raised in a town local to the resort in Spain. The articles appear to focus upon the player albeit refer to a sponsorship deal with the Supplier and that the resort was based in his hometown in Spain.

I understand that the Supplier had no input into these articles. Rather that they were written by journalists. And whilst the footballer appeared in the Supplier's brochures, promotional videos and travel magazines, the footballer didn't market or sell timeshare products. Furthermore, I'm aware that the Supplier has previously confirmed that no customers were ever approached by them in the UK and there was never any timeshare marketing, sales or credit offered in the UK. Because of that, I don't think that the footballer's involvement with any advertising of the Supplier's wider business outside of timeshares brings it under FSMA for credit brokering purposes.

The CMC have referred to similar complaints submitted to other lenders who, it is alleged, provided loans brokered by the Supplier here. They suggest that in those cases, the lenders upheld the consumers' complaints. However, in considering Mr O's complaint, I can only

consider the evidence and information provided that specifically relate to Mr O's individual experience and circumstances. And in doing so, it wouldn't be appropriate for me to consider the alleged circumstances and facts relating to the complaints of other (unrelated) parties.

I realise Mr O will be very disappointed, but I haven't found anything to suggest that the sale of the loan to him by the Supplier breached the requirements of FSMA. And for that reason, I won't be asking Mitsubishi to do anything more.

## My final decision

For the reasons set out above, I don't uphold Mr O's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 30 October 2024.

Dave Morgan
**Ombudsman**