DRN-5194571

The complaint

Mrs W's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Novuna Personal Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mrs W purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 7 April 2013 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 1,932 fractional points at a cost of £25,993 (the 'Purchase Agreement'). But after trading in her existing timeshare, she ended up paying £9,482 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mrs W more than just holiday rights. It also included a share in the net sale proceeds of a property named on her Purchase Agreement (the 'Allocated Property') after her membership term ends.

Mrs W paid for her Fractional Club membership by taking finance of £9,482 from the Lender in her sole name (the 'Credit Agreement'). This loan was settled in full on 5 July 2013.

Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 10 May 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Office of Fair Trading ('the 'OFT') to carry out such an activity.

(1) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

Mrs W says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told her that she had purchased an investment and that the timeshare would considerably appreciate in value when that was not true.
2. told her that she would have a share of a property and its value would considerably increase, therefore she was promised a considerable return on investment.
3. told her that she could sell the timeshare back to the resort or easily sell it at a profit.
4. made her believe that she would have access to the holiday apartment at any time all year round.

Mrs W says that she has a claim against the Supplier in respect of one or more of the

misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs W.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mrs W says that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020, meaning that she would not be able to recover any amounts expected to be awarded by the Spanish courts.

As a result of the above, Mrs W says that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs W.

(3) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mrs W says that the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to her as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms which set out that the Supplier could rescind the agreement and keep any money paid to them in the event that Mrs W failed to make a payment due under the agreement was an unfair contract term under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. The decision to lend was irresponsible because the Lender didn't carry out any creditworthiness assessment.

The Lender dealt with Mrs W's concerns as a complaint and issued its final response letter on 22 June 2022, rejecting it on every ground.

Mrs W then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, concluded that while Mrs W's Section 75 claim was within our Service's jurisdiction to consider, they felt the Lender likely had a valid defence to such a claim under the Limitation Act 1980 (the 'LA'). The Investigator also said that Mrs W's complaint regarding an unfair credit relationship had been made too late in respect of the time limits for bringing a complaint under the Financial Conduct Authority (FCA) DISP rules. So, our Service could not consider that aspect of the complaint.

Mrs W disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

At this stage, the PR provided some further comments. They said, in summary, they didn't think the LA applied to the complaint about an unfair credit relationship and provided further comments as why they thought the membership had been sold to Mrs W as an investment at the Time of Sale. And, they reiterated that they thought the Credit Agreement was unenforceable because it was not arranged by a credit broker regulated by the OFT or FCA to carry out such an activity.

I have already dealt with whether our Service has jurisdiction to consider Mrs W's complaint that the credit relationship between herself and the Lender was unfair to her under Section 140A of the CCA, in a separate decision. This decision only considers the merits of Mrs W's

complaint about the way the Lender handled her claims under Section 75 of the CCA and her complaint about the Credit Agreement being arranged by an unauthorised credit broker.

I considered those points and issued a provisional decision on 25 November 2024. In that decision I said:

"***Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale***

In this part of Mrs W's complaint, she is alleging that the Lender was unfair and unreasonable in refusing to allow her claim under Section 75 of the CCA. Her complaint is that the Lender ought to have allowed it as there were misrepresentations made by the Supplier at the Time of Sale, and these misrepresentations induced her into making the purchase.

The Investigator in this case felt it would be reasonable for the Lender to reject this claim as they would have a defence to it under the LA.

Creditors can reasonably reject Section 75 claims that they're first informed about after the claim has become time-barred under the LA. The reason being, that it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court.

Having considered everything, I think Mrs W's claim for misrepresentation was likely to have been made too late under the relevant provisions of the LA, which means it would have been fair for the Lender to have turned down a Section 75 claim for this reason.

A claim under Section 75 is a 'like' claim against the creditor. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And, the limitation period to make such a claim expires six years from the date on which the cause of action accrued, as per Section 2 of the LA.

But a claim like this one under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. The limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because Mrs W entered into the membership at that time based on the alleged misrepresentations by the Supplier, which Mrs W says she relied on. And, as the loan from the Lender was used to finance this membership, it was when Mrs W entered into the Credit Agreement that she suffered a loss.

Mrs W first notified the Lender of her Section 75 claim on 10 May 2022. Since this was more than six years after the Time of Sale, I don't think it would be unfair or unreasonable of the Lender to reject Mrs W's concerns about the Supplier's alleged misrepresentations at the Time of Sale.

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives Mrs W a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

It is unclear when the alleged breach(es) occurred in this case, and this is necessary information to have when considering whether the Lender might have a defence under the LA, just as it did against Mrs W's concerns of misrepresentation. The contract in question here seems to have been in existence until October 2015, when Mrs W made a further purchase, so for a breach to have occurred it must have been before this date. However, the PR says the Supplier went into liquidation in December 2020 and this affected Mrs W. So, it

is possible that the alleged breach(es) occurred within six years of the date Mrs W notified the Lender of the claim, but from the evidence provided, I cannot say that with any degree of certainty.

However, I don't find it necessary to make a finding on this point because, as I go on to explain, I don't think the Lender acted unfairly or unreasonably in not accepting Mrs W's claim anyway. I'll explain.

Mrs W says that the Supplier went into liquidation in December 2020. And, this meant she wouldn't be able to recover any amounts that are expected to be awarded by the Spanish Courts. But her argument is difficult to square with the claim that seems to be made here under Section 75. After all, suing the Supplier in a Spanish court follows from, and is separate to, the rights and obligations that the parties to a contract might have.

I've considered the arguments the PR has made here but, in light of the Supplier's apparent liquidation, neither they nor Mrs W have suggested or provided evidence to demonstrate that she is no longer:

1. *A member of the Fractional Club;*
2. *able to use her Fractional Club membership to holiday in the same way she could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when her Fractional Club membership ends.*

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs W any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not regulated by the OFT to carry out that activity

The PR, on Mrs W's behalf, has stated that the Supplier, which was the entity that brokered the Credit Agreement, was not authorised to do so by the then regulating body, the OFT.

The PR therefore says that the Supplier breached the general prohibition set out in Section 19 of FSMA, so it follows that under Section 27 of FSMA, the Credit Agreement is unenforceable, and Mrs W is entitled to compensation for any loss sustained. But I do not agree. I'll explain.

The credit broker named on the Credit Agreement appears to be a subsidiary of the Supplier, and in the form that it is named it does not appear to have been licenced by the OFT at the time. The Lender says this was simply an administrative error on their part and the credit broker in this case was Continental Resort Services SLU who did hold the appropriate licence from the OFT at the Time of Sale.

Further, the Supplier was suitably licenced, and I cannot see a reason why an unlicenced entity would have brokered this particular Credit Agreement, when the sale was completed by the representative of a duly licenced entity, and the same sales company was responsible for and had completed all the other parts of the sale.

But even if I am wrong about this, and an unlicenced entity brokered this particular Credit Agreement (and I don't think I am) it is not something that would warrant compensation being paid to Mrs W in any event.

Section 27 of FSMA ("Agreements made through unauthorised persons") only applies to regulated activities, which in this case doesn't cover consumer credit lending prior to 1 April 2014.

In October 2019, the Regulator, the Financial Conduct Authority (the 'FCA') issued explanation and guidance relating to Validation Orders to allow an otherwise unenforceable credit agreement. This was last updated in October 2024. Insofar as it's relevant to Mrs W's complaint, the FCA explanation says,

> *"For agreements entered into before 1 April 2014, a modified regime applies. […] For agreements that were entered into before this date and which are unenforceable against the borrower, the borrower has no right to recover any money paid or other property transferred under the agreement or compensation for loss".*

That aside, if Mrs W's Credit Agreement was found to be unenforceable – and I make no such finding – it would normally mean that whilst the obligations under the agreement remain in existence, one or both parties to the agreement can't enforce compliance in the courts. So, if the Lender took steps against Mrs W to enforce the agreement, she might have a defence. However, I don't think this is relevant in Mrs W's case because she repaid all amounts due under the Credit Agreement in full in July 2013. So, no such steps to enforce the agreement appear to have occurred.

In reality, Mrs W took the finance from the Lender and subsequently repaid it. Mrs W knew she had the finance, the amount borrowed and what it was for (the Fractional Club purchase). So, even if the loan was found to be improperly brokered, I haven't seen anything that persuades me that it resulted in something that would require the payment of compensation."

So, in conclusion, I didn't think the Lender was unfair or unreasonable in rejecting Mrs W's claims under Section 75 of the CCA, and I didn't think the Lender was liable to pay Mrs W any compensation in relation to the brokering of the Credit Agreement.

The Lender did not respond to the provisional decision or add anything further. The PR did respond with some further comments, but only in relation to the Credit Agreement being unenforceable, which I'll address in more detail below.

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 neither party has provided any new evidence or arguments in relation to the merits of Mrs W's complaint about the way the Lender handled her Section 75 claims, I don't believe there is any reason for me to reach a different conclusion on those elements from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

As explained above, the PR responded with some further comments in relation to the Credit Agreement being unenforceable because it was arranged by a credit broker that was not authorised or regulated at the Time of Sale to carry out that activity.

They said in summary, that they do not accept the Lender's explanation of there being an administrative error because they think the Supplier of the purchase was an entity called Paradise Trading SLU and the Lender didn't have any agreement with them. But, having

looked at the Financial Ombudsman Service's internal records, I can see that Paradise Trading SLU did hold, at the Time of Sale, a Consumer Credit Licence issued by the OFT. So, I don't think this makes any difference here.

Again, as I said in my provisional decision, even if I am wrong about this, and an unlicenced entity brokered this particular Credit Agreement (and I still don't think I am) it is not something that would warrant compensation being paid to Mrs W in any event.

Section 27 of FSMA ("Agreements made through unauthorised persons") only applies to regulated activities, which in this case doesn't cover consumer credit lending prior to 1 April 2014.

In October 2019, the Regulator, the Financial Conduct Authority (the 'FCA') issued explanation and guidance relating to Validation Orders to allow an otherwise unenforceable credit agreement. This was last updated in October 2024. Insofar as it's relevant to Mrs W's complaint, the FCA explanation says,

> *"For agreements entered into before 1 April 2014, a modified regime applies. […] For agreements that were entered into before this date and which are unenforceable against the borrower, the borrower has no right to recover any money paid or other property transferred under the agreement or compensation for loss".*

Again, that aside, if Mrs W's Credit Agreement was found to be unenforceable – and I make no such finding in this decision – it would normally mean that whilst the obligations under the agreement remain in existence, one or both parties to the agreement can't enforce compliance in the courts. So, if the Lender took steps against Mrs W to enforce the agreement, she might have a defence. However, I don't think this is relevant in Mrs W's case because she repaid all amounts due under the Credit Agreement in full in July 2013. So, no such steps to enforce the agreement appear to have occurred.

In reality, Mrs W took the finance from the Lender and subsequently repaid it. Mrs W knew she had the finance, the amount borrowed and what it was for (the Fractional Club purchase). So, even if the loan was found to be improperly brokered, I still haven't seen anything that persuades me that it resulted in something that would require the payment of compensation.

My final decision

For these reasons, I do not uphold Mrs W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 7 January 2025.

Fiona Mallinson
Ombudsman