

## The complaint

Miss P complains that Mitsubishi HC Capital UK plc, trading as Hitachi Capital, won't refund to her the money that she paid for some holiday club membership point rights. Her partner is also involved in her complaint and she's being represented by a claims management company.

## What happened

I understand that Miss P and her partner had bought a trial membership of a holiday club from a holiday company in May 2019. The holiday company says that they traded in that trial membership and bought 800 holiday club membership point rights in February 2020. They entered into an acquisition agreement with the holiday company which showed that the purchase price was £10,340. Miss P also entered into a fixed sum loan agreement with Hitachi Capital for a loan of £13,976, which included £3,636 to repay the outstanding amount of the loan that she and her partner had taken out in May 2019. Miss P agreed to make 120 monthly repayments of £194.84 to Hitachi Capital.

Miss P's representative made claims, on behalf of Miss P, to Hitachi Capital under sections 75 and 140A of the Consumer Credit Act 1974 in August 2021. It said that: the product was mis-sold and misrepresented to Miss P and her partner; the contract was breached; commission was paid between Hitachi Capital and the holiday company which wasn't disclosed to Miss P which created a breach of fiduciary duty and caused an unfair relationship; the loan was unaffordable; and Miss P and her partner's relationship with the holiday company was so one-sided as to substantially limit their ability to make an informed choice.

Hitachi Capital provided a detailed response in which it set out the reasons that it wasn't upholding Miss P's claims. Miss P wasn't satisfied with its response so a complaint was made to this service. Miss P's complaint form says that the holiday company and Hitachi Capital failed to conduct a proper assessment of her ability to afford the loan; Hitachi Capital paid a commission to the holiday company which wasn't declared to her and the holiday company unduly pressured her and her partner into entering into the acquisition agreement and her into entering into the loan agreement; all rendering the loan agreement unfair pursuant to section 140A.

Our investigator didn't recommend that Miss P's complaint should be upheld as she didn't think that Hitachi Capital's decision to turn down the claims was unfair or unreasonable. She wasn't persuaded that there was a misrepresentation at the time of sale. She said that she hadn't seen enough to suggest that the relationship between Miss P and Hitachi Capital was unfair and she wasn't persuaded that a court would reach the conclusion that the relationship was unfair. She later also said that she hadn't seen anything to persuade her that the lending was unaffordable for Miss P given her financial circumstances at the time of sale.

Miss P's representative, on behalf of Miss P, says that Miss P doesn't agree with our investigator's recommendation and would like her complaint to be referred to an ombudsman. It has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses. It has also raised concerns about the way that the

finance was sold to Miss P and says that the holiday company wasn't regulated to act as a credit intermediary, didn't broker proper credit and failed to meet the standard of a regulated firm. It has referred to a decision issued by this service on a complaint relating to a different type of holiday ownership product in which it says the voluminous documentation for the product was reviewed and the debtor-creditor relationship was considered to be unfair. It says that the same voluminous documents and the same unfair charges exist in the product that was sold to Miss P and her partner so Miss P's relationship with Hitachi Capital is unfair.

### **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.

Having done so, I agree with our investigator that Miss P's complaint shouldn't be upheld for these reasons:

- Miss P and her partner signed the acquisition agreement in February 2020 to buy 800 holiday club membership point rights – I understand that they traded-in a trial membership but there was no reference in the acquisition agreement to a trade-in of a trial membership;
- they also signed other documents including a member's declaration, a standard information form, and a separate standard form of the withdrawal notice that could be given to withdraw from the agreement, and Miss P signed a loan application and the loan agreement;
- Miss P's representative made claims to Hitachi Capital in August 2021 and Miss P then made a complaint to this service – the claim letter refers to claims under sections 75 and 140A, including that the point rights were misrepresented to Miss P and her partner, but her complaint form only refers to claims under section 140A and doesn't refer to misrepresentations made by the holiday company;
- section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier (provided that certain criteria set out in that section are met) and section 140A gives a court the power, amongst other things, to require a creditor to repay any sum paid by the debtor under a credit agreement if it determines that there's an unfair relationship between the debtor and the creditor;
- I'm not determining the outcome of Miss P's claims under sections 75 and 140A as only a court would be able to do that but I'm considering whether or not Hitachi Capital's response to her claims was fair and reasonable in the circumstances;
- the August 2021 letter says that the points were misrepresented to Miss P and her partner because:
  - they were advised that the purchase would enable them to make significant savings on their holidays, have access to exclusive accommodation and to make a profit;
  - they were advised that the product was of some substance but it's worthless and has no merit;
  - the product was designed to offer an investment return; and
  - they were advised that they were, in effect, purchasing property;
- neither Miss P nor her representative has provided a detailed account of the circumstances in which the alleged misrepresentations were made, the

conversations that took place or the information that was provided to Miss P and her partner before they bought the point rights;

- the member's declaration that was signed by Miss P and her partner says: *"We understand that any points we may purchase will be for a limited duration and expire on 31/12/2034 (Term) and that we have the flexibility to use such Points when we wish to reserve holidays during the Term. All reservations are made strictly on a first come basis and subject to availability";* and: *"We understand that [the holiday company] does not and will not run any resale or rental programmes and will not repurchase Vacation Club Points other than as a trade in against future property purchases";*
- it also said: *"We understand that the purchase of our membership in Vacation Club is for the primary purpose of holidays and is not for the purposes of a real estate interest or an investment in real estate, and that [the holiday company] makes no representation as to the future price or value of the Vacation Club Holiday product. We understand that if we consider trading in any of our Points and it is not possible because of circumstances or due to availability of suitable properties, we still hold our points to use on holiday reservations";*
- I've seen no evidence to support Miss P's claim that she and her partner were advised that the purchase would enable them to make significant savings on their holidays, have access to exclusive accommodation and to make a profit;
- the point rights could be used by Miss P and her partner to reserve holidays until December 2034 so I consider that they do have value and aren't worthless but I don't consider that Miss P and her partner were purchasing property or that the point rights could properly be considered to be an investment and I'm not persuaded that there's enough evidence to support Miss P's claim that she and her partner were advised that the point rights were an investment or that they were purchasing property;
- I'm not persuaded that there's enough evidence to show that the point rights were misrepresented to Miss P and her partner by the holiday company or that they were induced into entering into the acquisition agreement by any such misrepresentations;
- the August 2021 letter says that the contract between Miss P and her partner and the holiday company was breached but the letter provides no further information about the alleged breach of contract and I've seen no evidence to show that there's been a breach of contract by the holiday company for which Hitachi Capital would be liable under section 75;
- the August 2021 letter also says that commission was paid between Hitachi Capital and the holiday company which wasn't disclosed to Miss P which created a breach of fiduciary duty and caused an unfair relationship and Miss P's complaint form says that Hitachi Capital paid a commission to the holiday company which wasn't declared to her;
- the member's declaration says that the holiday company: *"... has a commercial arrangement with the lender who is providing the loan you have requested and as part of those commercial terms we may be entitled to a commission from the lender. Details of commission in respect of your loan are available on request by you quoting your contract number";* so I consider that Miss P and her partner ought to have been aware that Hitachi Capital might be paying a commission to the holiday company but I've seen no evidence to show that they asked either it or the holiday company for any information about the commission before the claim about the commission was made in August 2021;
- Hitachi Capital hasn't provided any evidence to show what commission, if any, it paid to the holiday company but, from what this service has seen across the industry, if

commission was ever paid it tended to be low and of less than 15% and I'm satisfied that Hitachi Capital wouldn't have breached any duty in making any such payment – nor was it under any regulatory duty to disclose the amount of any commission paid in these circumstances - and I don't consider that the level of any commission that was normally paid in this type of situation was sufficiently high to mean that Hitachi Capital should have appreciated that not disclosing any commission to Miss P risked the relationship being unfair under section 140A;

- the August 2021 letter says that the loan was unaffordable for Miss P and her complaint form says that the holiday company and Hitachi Capital failed to conduct a proper assessment of her ability to afford the loan – but the evidence provided by Miss P includes a copy of the loan agreement which contains property and employment information for Miss P;
- Miss P also signed a loan application and the loan application and the information on the loan agreement both show that she was an employed property owner with a gross income of £62,000;
- Hitachi Capital says that it searched Miss P's credit record to check information and it used the credit record along with other information provided on the application to calculate an overall score for Miss P which exceeded its minimum lending criteria – it says that it uses a third party affordability product to assist it with understanding the affordability of any new credit and there were no indications that Miss P would struggle to service the loan;
- it says that it estimated Miss P's net monthly income as £3,707 from which it deducted the monthly payments for her existing credit commitments, her mortgage and the loan repayment which would leave approximately £1,948 each month for other expenses so it considered the loan to be affordable for her;
- the member's declaration says: *"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"*;
- neither Miss P nor her representative has provided detailed evidence about Miss P's financial position in February 2020 or to show that the loan wasn't affordable for her at that time;
- I'm not persuaded that there's enough evidence to show a loan with a monthly payment of £194.84 wasn't affordable for Miss P in February 2020, that Hitachi Capital should have done more to assess the affordability of the loan for her, that the loan was mis-sold to her or that Hitachi Capital has acted incorrectly in connection with the loan;
- the August 2021 letter also says that Miss P and her partner's relationship with the holiday company was so one-sided as to substantially limit their ability to make an informed choice – but Miss P and her partner had bought a trial membership of the holiday club in May 2019 and the holiday company says that they then traded-in the trial membership for the point rights and I'm not persuaded that enough evidence has been provided to show that they weren't able to make an informed choice;
- Miss P's complaint form says that the holiday company unduly pressured her and her partner into entering into the acquisition agreement and her into entering into the loan agreement - but Miss P and her partner had signed the separate standard form of the withdrawal notice that could be given to withdraw from the acquisition agreement within 14 days without giving any reason and I've seen no evidence to show that they

contacted either the holiday company or Hitachi Capital to withdraw from the acquisition agreement within the withdrawal period;

- the loan agreement also set out Miss P's right to withdraw from it without giving any reason for a period of 14 days but I've seen no evidence to show that she contacted Hitachi Capital to withdraw from the loan agreement within the withdrawal period;
- the member's declaration says: *"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"*;
- if Miss P and her partner had been unduly pressured into signing the acquisition agreement and didn't want to buy the point rights, I consider that it would be reasonable to expect them to have contacted either the holiday company or Hitachi Capital within the applicable withdrawal periods;
- I'm not persuaded that there's enough evidence to show that Miss P and her partner were unduly pressurised into entering into the acquisition agreement or that Miss P was unduly pressurised into entering into the loan agreement or that the holiday company used unacceptable sales practices against them;
- Miss P's representative has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses – but it would be for a court to determine whether or not any of the terms in the agreements were unfair;
- I don't consider that the presence of an unfair (or potentially unfair) term alone is likely to mean that a court would conclude that it created an unfair relationship between a debtor and a creditor as the court would consider how the term operated in practice and whether the operation of that term caused the relationship to be unfair;
- I'm not persuaded that there's enough evidence to show that the terms of the documents have been applied or operated unfairly against Miss P and her partner and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Miss P and Hitachi Capital;
- Miss P's representative has referred to a decision issued by this service on a complaint relating to a different type of holiday ownership product in which it says the voluminous documentation for the product was reviewed and the debtor-creditor relationship was considered to be unfair – it says that the same voluminous documents and the same unfair charges exist in the product that was sold to Miss P and her partner so Miss P's relationship with Hitachi Capital is unfair;
- that decision related to a different type of holiday ownership product which was sold as an investment and related to a specified property – Miss P and her partner bought some point rights from the holiday company which don't relate to a specified property and which I don't consider were sold to them as an investment;
- both products were often sold in similar ways and may have had similar contractual documentation but the operation and effect of the contractual documentation would be significantly different between the products;
- Miss P's representative says that the holiday company wasn't regulated to act as a credit intermediary but that claim wasn't included in the claim that was made to Hitachi Capital in August 2021 and wasn't included by Miss P in her complaint form so I'm unable to consider it in this decision – but the credit intermediary was identified on the loan agreement and this service's records show that that credit intermediary is authorised by the Financial Conduct Authority;

- I'm not persuaded that there's enough evidence to show that Miss P's relationship with Hitachi Capital was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Miss P and Hitachi Capital in these circumstances;
- I sympathise with Miss P for the issues that she and her partner have had with their point rights but I consider that Hitachi Capital's response to the claims that had been made to it was fair and reasonable; and
- I find that it wouldn't be fair or reasonable in these circumstances for me to require Hitachi Capital to refund to Miss P any of the money that she's paid under the loan agreement, to cancel the loan agreement, to pay her any compensation or to take any other action in response to her complaint.

### **My final decision**

My decision is that I don't uphold Miss P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 29 November 2023.

Jarrold Hastings  
**Ombudsman**