

The complaint

Ms D complains Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance (“Hitachi”), has not dealt fairly with a connected lender liability claim she brought against it relating to the purchase of a holiday club membership.

What happened

I issued a provisional decision on 1 March 2023 in which I set out the background to the complaint, so I will summarise only briefly what happened in this final decision:

- Ms D made a joint purchase of a holiday club membership from a company (“C”) in October 2019, after a series of meetings. The purchase entitled her to use a number of “points” each year to book holiday accommodation within C’s portfolio of resorts/properties, from 2020 for a period of 10 years. Ms D was expected to pay annual management/service charges for the upkeep of the portfolio.
- The total cost of the membership was £18,630, including a £699 admin fee. C threw in several incentives as part of the overall deal. These included membership of an exchange organisation for two years (which would have allowed Ms D to holiday at a wider selection of resorts); an iPad; additional “bonus” points to use in the first years of membership; a “bonus week” in Spain, Tenerife or Turkey; airport lounge passes and preferential car hire rates.
- The membership was paid for with a Hitachi point of sale loan arranged by C, with a repayment period of 60 months.
- Ms D’s membership beginning coincided with the coronavirus pandemic. Her pre-booked holidays were cancelled and she was refunded their points value. The only resorts and accommodations available were ones she wasn’t interested in, such as in the UK or on canalboats, or which were self-catering. Meanwhile, C continued to demand payment of its management fees while apparently receiving subsidies to help with staff costs.
- A complaint was made to C and Hitachi in June 2020. Ms D argued the contract had been frustrated by the pandemic preventing her from using the membership rights she’d purchased. It was unclear what C’s response was, but Hitachi rejected the complaint in October 2020. It said the points value of her pre-booked holidays had been credited back to her, and C was “fully operational” so she could make use of her membership.
- Ms D brought her complaint to the Financial Ombudsman Service. One of our investigators looked into it. She noted that section 75 of the Consumer Credit Act 1974 (“CCA”) didn’t cover frustration of contract or everything that could go wrong with a purchase. She concluded that ultimately the membership entitled Ms D to holiday within C’s portfolio, subject to availability. At all times there had been something available within the portfolio, albeit not places Ms D wanted to visit. This didn’t mean there had been a breach of contract. C had refunded the points for Ms

D's cancelled booking so there was no breach in respect of this either, while the management fees were not funded by the Hitachi loan and so section 75 coverage did not apply to a dispute over these.

- Ms D disagreed with our investigator. She argued that C hadn't been able to fulfil its contract with her for the first three years of her ten year membership. She had made it clear when purchasing the membership what kind of places she wanted to holiday in, and none of these were available to her. It was no good having her points refunded if she couldn't use them. Even the open resorts did not have the usual amenities available. Further, various incentives she's been promised had now expired or could no longer be provided.
- Our investigator considered Ms D's points but her view remained unchanged. She noted that some of Ms D's points were new ones, like the loss of the incentives and lack of amenities at resorts, and not ones we would consider as a result.

The complaint was then passed to me to decide. I thought it was appropriate to look into Ms D's points about the failure to provide the incentives and investigated this point further.

Ms D said certain incentives, such as preferential car hire, airport lounge access and membership of the exchange organisation, had expired. She also said the bonus week would no longer be provided as she had learned the company in C's group which had provided it had gone into liquidation.

C acknowledged that the bonus week was no longer available due to the insolvency of an associated company. I raised further enquiries of C relating to an internal document included in Hitachi's case file. This document appeared to show the cost or value of the various incentives, along with a "subsidy" which C had paid to Hitachi, had been included in the cost of Ms D's membership. C said that this was a misunderstanding and the document only showed what it had cost C to provide the incentives. It denied passing on these costs to Ms D.

I then issued my provisional decision. I firstly considered on what basis Hitachi could be held liable by Ms D for what had gone wrong with her purchase. I noted that section 75 of the CCA allowed consumers a degree of protection when they purchased goods or services using the type of loan Hitachi had granted in this case. I noted that it enabled a consumer to claim against the lender for any breach of contract or misrepresentation by the supplier of the goods or services, so long as certain technical conditions were met.

It was not in dispute whether Ms D's claim met the technical conditions, but I observed that some of the arguments she had made were not based on C breaching the contract or misrepresenting something to her. In particular, Ms D was arguing the contract had been *frustrated* due to the impact of the coronavirus pandemic on C's ability to provide the services contracted for. It may or may not have been the case that the contract was frustrated, but this was a separate kind of legal claim to a claim for breach of contract and so not covered by section 75 of the CCA. I also thought that a point Ms D had made about C failing to pass on savings from lower running costs in the form of reduced management fees, was not something covered by section 75. This was because it didn't appear to be an allegation of breach of contract, rather it was a complaint about how the holiday club was being run.

I noted the remainder of Ms D's complaints about the purchase did focus on breaches of contract by C and I went on to consider these in more detail. I noted Ms D had not complained of misrepresentation and so I made no findings on whether C had made any misrepresentations.

I considered it was important to analyse the documents which could be said to form the contract between Ms D and C, in order to determine whether it had been breached. I noted there were various documents, but two in particular appeared to contain more detail about the extent of C's obligations to Ms D – an "Acquisition Agreement" and an "Information Statement". Ms D had signed both of these documents.

The documents contained some important clauses which served to limit C's responsibility to Ms D. For example, on the availability of resorts it stated:

"...you will be entitled to exercise occupancy rights (subject to availability) in any of the Vacation Club Scheme Accommodation..."

and...

"...all reservation requests in Vacation Club are subject to availability and seasonal demands...No assurances can be given that a specific resort or facility will remain within Vacation Club for the lifetime of a members or for the entire duration of the Vacation Club or of any individual term of membership."

Similar wording appeared about the availability of specific *facilities* at resorts.

On the subject of management fees I noted the following wording appeared:

"[Members] pay Management Charges...per Points Right held...Each resort included within the Vacation Club is responsible for providing management, repair and maintenance of their own Accommodation, but [C] pays maintenance fees to those resorts on behalf of the Vacation Club. Members are required to contribute to those fees by means of an annual service charge (called "Management Charge") levied by or on behalf of the Management Company...in proportion to the number of Points Rights to which each member is entitled. The Charges also include an element for managing and administering the scheme."

and...

"Management Charges for 2019 are 1287.00 Euros. Fees are subject to review and increase by the Vacation Club".

I thought the information in the documents made it apparent that C didn't guarantee the availability of specific accommodation at any given time, or if and when certain facilities would be available at resorts. The information also showed the management fees were payable annually regardless of whether holidays were taken. There was no promise that fees would be reduced in circumstances such as those caused by the pandemic.

I recognised Ms D considered that what had happened was unfair, but I was unable to conclude that it represented a breach of contract by C. However, my further investigations into incentives not supplied led me to conclude Ms D should receive compensation to reflect the value of what had not been supplied.

Expanding on this point, I explained that my provisional findings flowed from the effect of section 50 of the Consumer Rights Act 2015 ("CRA") on the agreement between Ms D and C:

"The effect of section 50 CRA is to turn anything said or written by the trader, or on their behalf, about a service, into a contractual term if a consumer takes it into account when entering into a contract. The CRA goes on to explain that where such contractual terms have been breached a consumer is entitled to an appropriate price reduction."

Ms D was told by C that she would receive various incentives if she signed up for the membership. I'm satisfied these were things she took account of when deciding to sign up for the membership.

The "bonus week" will not be provided due to the insolvency of the relevant company, and in my view this represents a breach of contract bearing in mind the effect of section 50 of the CRA. Other benefits have expired, such as the bonus points, but these were available to use so it's difficult to say there's been a breach of contract in respect of these, for essentially the same reason I've been unable to find the lack of availability of resorts during the pandemic represented a breach of contract either."

I went on to consider whether the "free" nature of the incentives meant Ms D shouldn't receive any price reduction in respect of the failure to provide the bonus week, finding ultimately that the bonus week did have a value with reference to which a price reduction could be calculated:

"...I think the incentives did have a value which was not explicitly stated on the documents Ms D was shown at the point of sale. I say this because the internal document I referred to earlier in this decision, which was a type of calculator, used various inputs such as the cost to C of the incentives and the subsidy it needed to pay Hitachi, to calculate a minimum amount Ms D should be charged for the membership. In view of this I think there are appropriate grounds for Ms D to receive a price reduction in respect of the bonus week.

I take C's point that it needs to account for the cost of incentives, and naturally taking into account the cost of selling a product when deciding how to set a price is a normal part of doing business. It's not clear if the internal document was used to price the sale or if it was just used to check the margin C had made on the sale at a later date. I make no finding on that for the purposes of this complaint, not least because Ms D has not complained of being misled regarding the price of the incentives. But it does at least show that the incentives had a value with reference to which a price reduction can be calculated.

The cost of incentives were included under the category of "Extra Giveaways" on the internal document I've referenced. Next to this line was an explanation: "Please include ipad cost, B[onus]p[oin]ts etc. here". In Ms D's case the amount next to this line was £1,000. According to another document Ms D signed at the point of sale, the iPad (which she received) was assigned a value of £310. It's unclear what value was assigned to the other benefits, but presumably this is information C will have access to, or which it will be able to calculate based on the price of accommodation in Spain, Tenerife and Turkey."

Concluding, I said I was minded to find that C had breached its contract with Ms D by failing to provide the bonus week due to the insolvency of the company within its group which was responsible for providing it. I thought an appropriate remedy would be for Ms D to be compensated for the value of the week she would no longer receive and, by virtue of section 75 of the CCA, she could ask Hitachi to provide that same remedy.

I appreciated there were some difficulties with calculating the value of the bonus week. I said that Hitachi would need to do this, in consultation with C, and provide an explanation of how it had reached its figure. I said I would need to calculate the figure myself if Hitachi did not come up with one, and I set out how I intended to do that. I added that Hitachi would need to add compensatory interest to any refund, calculated from the date it had declined Ms D's claim.

I invited all parties to the complaint to respond to my provisional decision. Both Ms D and Hitachi made further submissions.

I could summarise Ms D's submissions as follows:

- She would not have proceeded with the purchase had any possibility been raised by C's salespeople that her preferred destinations might not be available to book (or compensation of some kind given in lieu of availability). C had not been "fully operational" as it had claimed to be, and still didn't seem to be as she had tried to make a booking in Turkey recently and C had not been able to honour it, instead transferring the booking to a different resort.
- Some of the terms of the contract with C may be unfair and she felt the company had been acting in bad faith.
- The membership of the exchange organisation may have been shorter than the two years promised. Online it said the membership started in June 2019, while her paper version started in October 2019.
- She hadn't wanted or needed an iPad. Its value had not been discussed but it was described as a "gift" in an accompanying letter. She hadn't been aware she'd been charged for it.
- C had advised her recently on the phone that all the incentives were now invalid. These incentives had been put forward as solutions to her queries during the sales process, and she wanted to know if they had been costed and included as part of the membership fee.
- She had begun to think that aspects of the sale may have been misrepresented. She hadn't known that she may have been misled about the cost of the incentives until she'd received my provisional decision. She also considered that some other of C's statements had been false, about her having exclusive occupancy rights and that C planned, designed and built its own resorts.
- C had stopped selling new ownerships and was now partnered with two other large holiday companies. Anyone could now book at resorts in C's portfolio either directly or via online platforms, so there was no exclusivity and there would be a negative impact on availability. She had also noticed that via online booking platforms it was cheaper to book at the same resorts on an all-inclusive basis than through her C membership.
- Ultimately, although she appreciated it wasn't necessarily C's fault that it hadn't been able to provide the product or service she'd paid for, it wasn't her fault either and yet she was the one being held to the contract. She felt C could have offered more to members like her, for example by extending memberships, offering free weeks or other possibilities.

Hitachi's further submissions were a mixture of their own comments and C's comments, which I would summarise in the following way:

- They didn't agree that they should be held responsible for the failure to provide the bonus week. This wasn't a conclusion which had been reached by the Financial Ombudsman Service in very similar cases. The bonus week hadn't been a part of the contract. It wanted to know what had changed.
- It was categorically not the case that the internal document I'd mentioned (which referred to the cost or value of the incentives) was used to price the sale to Ms D.

- It had calculated a value for the bonus week of £895.15. It explained how it had arrived at this figure, which had been based on Ms D having booked the bonus week for October 2020, and taking the average price for a week at all of the two bedroom apartments which could have been booked for that time.

Hitachi also said that although it didn't agree with the provisional decision, it would accept it.

The case has now been returned to me to review again.

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.

I thank both parties for providing their further submissions following my provisional decision. I've considered both new sets of submissions carefully alongside the evidence previously sent.

I will address Hitachi's points first. It has quoted from a number of assessments by the Financial Ombudsman Service in which C had been unable to provide a bonus week. While the extracts provided by Hitachi are incomplete and so the comments I can offer on this are limited, it appears the bonus weeks in question were linked to "trial" memberships to C's holiday club. To take advantage of the trial membership, consumers were required to first go on a bonus week, the purpose of which seems to have been to persuade them to upgrade their trial membership to a full membership. The bonus weeks could not be provided for the same reasons as in Ms D's case, and it looks like arguments may have been made that this invalidated the whole trial membership (as the pre-conditions for using the membership could never be met).

I think the situation in Ms D's case is different. Ms D already had a full membership and its use was not contingent, as far as I'm aware, on her first going on the bonus week. My main basis for finding in my provisional decision that C was contractually bound to provide the bonus week, was section 50 of the CRA, which caused anything C said or wrote about the services it was providing, and which Ms D took account of, to become a contractual term. It hasn't been disputed that C told Ms D she would receive this bonus week and that this was something she took account of. And it hasn't been suggested that C qualified this by explaining the bonus week wouldn't be provided in certain circumstances. So I see no reason to change my conclusions on this point.

It's not clear from the extracts Hitachi has provided whether section 50 of the CRA was considered in these other cases. Ultimately however, the situations do not appear to have been entirely the same and each case has to be considered on its individual merits.

Regarding the significance of the internal document – the "calculator" I referred to in my provisional decision – I acknowledge Hitachi's point of view on this but I made no findings on the purpose of this document in my provisional decision. I used the calculator in my provisional decision as evidence the bonus week and other incentives had a value or a cost with reference to which a potential price reduction for Ms D could be calculated.

Hitachi has now calculated a value for the bonus week, £895.15, and explained the method it used to work this out. The method appears to be a reasonable one and the value arrived at is comparable to prices I found through research on online booking platforms, so I am content to adopt it for the purposes of this final decision.

Turning to Ms D's submissions, I will begin by restating that Hitachi cannot be held liable for

everything that C may have done which is wrong or unfair. There are a lot of things which can go wrong with a purchase and which could cause disappointment. There is an overarching point which comes across in Ms D's letter, which is that the membership with C has represented poor value for money and the company has treated its members, like her, badly. The basis on which Ms D can hold Hitachi liable is section 75 of the CCA, which only covers breaches of contract and misrepresentation. Ms D's points about C failing to offer goodwill solutions or concessions to members, or C partnering with other holiday companies, would not in my view fall under either of these headings.

In her further submissions Ms D has begun to advance a claim for misrepresentation. She's referenced false statements being made about the exclusivity of the occupancy rights she'd enjoy, and the nature of C's portfolio. She's also now concerned she may have been misled about the cost of the incentives, due to the existence of the internal document referred to in my provisional decision.

I acknowledge that in my provisional decision I agreed to make findings on some points which Ms D had *not* made in her original claim or complaint to Hitachi. I felt it appropriate to do this as these points were essentially the same as those which had already been made – that C had failed to provide things it had agreed to under the contract.

Misrepresentation, on the other hand, has not been a point which has been argued until after my provisional decision. Throughout the history of this case, the focus of the complaint has been on C failing to provide things it had promised under the contract. At this late stage in the complaint, I don't think it would be appropriate for me to make findings on whether or not there's been a misrepresentation. Hitachi hasn't had an opportunity properly to investigate and address a section 75 claim based on misrepresentation, and I think it would be fair for it to be able to do so before the matter is referred to the Financial Ombudsman Service.

On the question of whether some of C's terms may have been unfair, I don't think Ms D's submissions on this are specific enough as to *which* terms she thinks are unfair, for me to be able to comment. I would also add that were it to be found that certain terms were unfair, it would not necessarily help Ms D's case against Hitachi. This is because the fairness of a contractual term is a different question to the one of whether a contract has been breached.

Regarding the membership of the exchange organisation, there is not enough information to be able to determine whether the membership was shorter than promised, so there is nothing I can add to that either.

Ultimately, while I have considered Ms D's further submissions carefully they do not change the conclusions I've reached on her complaint. For the same reasons given in my summarised provisional findings above, I've been unable to conclude that the limited availability of resorts or continued charging of management fees during the pandemic, represented a breach of contract by C for which Hitachi would be liable under section 75 of the CCA.

Similarly, where incentives were available but had simply expired, I am unable to conclude this was a breach of contract by C either. However, C cannot supply the promised bonus week due to the insolvency of another company in its group. Because Ms D took account of this incentive when deciding to purchase the membership, the failure to provide it is in my view a breach of contract by C. If Ms D wishes to take a such a holiday now, she will need to pay for the accommodation herself, and so an appropriate remedy for the breach of contract would be to compensate her the value of the bonus week. I think Hitachi's calculation of the value of the bonus week - £895.15 – appears to be reasonable. Due to the effect of section 75 of the CCA, Ms D is able to claim this amount from Hitachi.

My final decision

For the reasons explained above, including the summarised reasoning from my provisional decision, I uphold Ms D's complaint in part and direct Mitsubishi HC Capital Plc trading as Hitachi Finance to take the following actions:

- A) Pay Ms D £895.15, this being the cash value of the bonus week.
- B) To the amount in A), add 8% simple interest per year*, calculated from the date it wrote to Ms D originally declining her claim, to the date the payment is made.

*If Hitachi considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms D how much it's taken off. It should also give Ms D a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms D to accept or reject my decision before 27 April 2023.

Will Culley
Ombudsman