

The complaint

Mr M complains that Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer Finance ('Hitachi') acted unfairly and unreasonably by (1) deciding against paying his claim under Section 75 of the Consumer Credit Act 1974 (the 'CCA'), and (2) being party to an unfair credit relationship with him under Section 140A of the CCA

The credit agreement to which these complaints concern is in Mr M's sole name, so he is the only eligible complainant here. However, as the timeshare in question was in both Mr and Mrs M's names, I will refer to both of them throughout much of this decision.

What happened

Mr and Mrs M purchased membership of an asset-backed timeshare called the Fractional Property Owners Club ('FPOC') from a timeshare provider ('the Supplier') on 14 April 2014 (the 'Time of Sale'). They bought 900 Fractional Points at a cost of £10,563.

Mr and Mrs M paid for their FPOC Membership and the first year's '*Membership/Dues*' of £786 by taking finance from Hitachi in Mr M's name. He entered into a 10-year restricted use Fixed Sum Credit Agreement (the 'Credit Agreement') for £11,349 with the total amount repayable after interest being £24,046.80.

The purchase agreement (the 'FPOC Purchase Agreement') dated 14 April 2014, was made between one of the timeshare provider's sales companies and Mr and Mrs M. The sales company, who had the right to promote and sell Fractional Rights in the FPOC, was the Supplier for the purposes of the CCA. Under the FPOC Purchase Agreement, Mr and Mrs M agreed to be bound by the club Rules and Project Regulations.

Under the terms of the FPOC, Mr and Mrs M could exchange their Fractional Points for holidays. And at the end of their projected membership term, they also had a share in the net sales proceeds of a property tied to their membership (the 'Allocated Property'). As their interest in the Allocated Property was limited to a share in its net proceeds, they didn't have any preferential rights to stay in the Allocated Property or use it in any other way.

Mr M, using a professional representative, wrote to Hitachi on 14 August 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim under Section 75 of the CCA.
2. Hitachi being party to an unfair credit relationship under the Credit Agreement and related FPOC Purchase Agreement for the purposes of Section 140A of the CCA.

Mr M's Section 75 Complaint

Mr M says that the Supplier made a number of misrepresentations at the Time of Sale – namely:

- The maintenance fees associated with FPOC membership had increased

dramatically and did not stay minimal as was promised.

- They contacted the resort in 2016 in an attempt to sell their timeshare and was told by the Supplier that this was not possible, contrary to what was promised.

Mr M's Section 140A Complaint

The Letter of Complaint set out that there had been '*unfair negotiations*' in the initial process leading Mr and Mrs M to enter into the FPOC Purchase Agreement. It was said, in essence, that:

- The Supplier's sales representative acted recklessly.
- The Supplier's sales representative did not apply due care towards Mr and Mrs M's needs and financial circumstances.
- There had been misrepresentations, negligence, failures and unfair initial contract negotiations and sales tactics used by the Supplier.
- The discrepancies within the agreement, and the promises made along with the failures of the Supplier in miss-selling and not disclosing potential risks of the product resulted in Mr and Mrs M bearing a loss.

In conclusion, Mr and Mrs M's representative said that the Supplier had misrepresented its contract to Mr and Mrs M by providing false and untrue statements of fact to induce them into the contract to their detriment. They claimed £11,349 plus interest from Hitachi under Section 75 of the CCA.

Hitachi, other than acknowledging the letter and sending an interim 'holding' response did not provide Mr C with any substantive answers to his points, so on 29 November 2019 Mr M's representative referred his complaint to our Service.

Mr M then became represented by a different firm, who said that the credit relationship between Mr M and Hitachi was unfair, but in addition to the reasons already given, stated this was also due to there having been undisclosed commission paid by Hitachi to the Supplier, and a breach of Regulation 14(3) of the 2010 Timeshare Regulations by the Supplier because the FPOC membership had been sold to Mr M and Mrs M as an investment.

Mr M's complaint was assessed separately by two Investigators. But having considered everything that had been submitted, both Investigators thought Mr M's complaint shouldn't be upheld. Mr M, in response to the second Investigator's view asked for his complaint to be reviewed by an Ombudsman. He also said that the sales process was "*a hard sell for more than 6 hours, I was suffering from depression and making bad decisions, [Mrs M] just wanted to please me, it has cost me a lot of money.*"

As no agreement could be reached the complaint has come to me for a 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.

Where I have found evidence is incomplete, inconclusive, incongruent or contradictory, I have made my decision on the balance of probabilities – what I think is more likely than not to have happened – given the available evidence and wider circumstances.

Mr M's Complaint about the Supplier's Misrepresentations

Mr M says that there were two elements to FPOC membership that were misrepresented by the Supplier, leading him and Mrs M into their purchase of the FPOC membership. Those were:

- The maintenance fees. Mr M says he and Mrs M were told by the Supplier at the Time of Sale that they wouldn't increase significantly when that wasn't true because they did so dramatically afterwards.
- The ability to sell the FPOC membership mid-contract. Mr M says that he and Mrs M were told by the Supplier at the Time of Sale that they could sell their membership part way through their membership term. But that wasn't true either.

But, other than the initial year's fee of £786 which was included in the amount paid for by the Credit Agreement, Mr M has not provided any evidence to show what, if any, maintenance fees he has subsequently had to pay to the Supplier. And Mr M has also not provided any evidence, either orally or in writing, of what he says they were told during the sales process which led to them believing they would be able to sell their FPOC membership during the membership term.

In short, therefore, I have not seen enough evidence to say, on balance, that any alleged false statements of existing fact were made to Mr and Mrs M by the Supplier.

So having considered everything, and without a more detailed description of the conversation(s) surrounding the alleged misrepresentation, or any supporting evidence, Mr M's claim of misrepresentation doesn't have sufficient weight to succeed. And for this reason, I do not think Hitachi acted unfairly or unreasonably when it dealt with Mr M's Section 75 CCA claim.

Mr M's Complaint about his Credit Relationship with Hitachi being Unfair to Him

I've already explained why I'm not currently persuaded that the contract entered into by Mr and Mrs M was misrepresented by the Supplier. But there are other aspects of the sales process in question that, being the subject of Mr M's dissatisfaction, I need to explore in more detail. These include the alleged undisclosed commission paid to the Supplier, and that the FPOC membership was sold to Mr and Mrs M as an investment.

When looking at the Supplier's sales process, I've considered:

- The Supplier's sales and marketing practices at the Time of Sale; and
- The provision of information by the Supplier at the Time of Sale.

And in considering these aspects of the sale, I've considered the impact that one or both had on Mr M and his credit relationship with Hitachi.

The Supplier's sales and marketing practices at the Time of Sale

Mr M has told our Service that the sales process lasted six hours, and that he was suffering from a mental health condition and making bad decisions. And in the Letter of Complaint to Hitachi it was said that Mr M told the Supplier at the Time of Sale that he was suffering from that condition.

I'm required to take into account, when appropriate, what I consider was good industry practice at the time – which, in this complaint, is the Resort Development Organisation's

Code of Conduct dated 1 January 2010 (the 'RDO Code'). The RDO Code sets out, amongst other things, the Sales and Marketing Principles.

It states that selling Members will ensure:

- 2.2.1 Appropriate marketing techniques that make it clear what the object of the approach to the consumer is;
- 2.2.2 Appropriate selling methods that treat the consumer with respect and allow the consumer choice between purchasing and reflection; and
- 2.2.3 The provision of any necessary assistance to consumers to enable them to make an informed decision.

I don't doubt the honesty of Mr M's recollection that he told the Supplier at the Time of Sale that he had a mental health condition. But it is important to note that he was accompanied by Mrs M who was a co-signatory to the purchase of the FPOC membership, so he wasn't alone when making the decision to purchase. Mr and Mrs M were also given a 14-day 'cooling off' period following the sale, during which time they could cancel the purchase and the associated Credit Agreement without penalty. And as I haven't seen enough evidence to persuade me that it was wrong of the Supplier to sell Mr and Mrs M the FPOC membership in light of his mental health condition, even if Mr M had disclosed it at that time, I don't think his credit relationship with Hitachi was rendered unfair to him for this reason.

Mr M, in the Letter of Complaint, said that the Supplier did not apply due care towards Mr and Mrs M's needs and *financial circumstances*. But that was not, and has not been expanded on, and Mr M has not provided any explanation of what the Supplier did, or what it failed to do at the Time of Sale, or even that the Credit Agreement was actually unaffordable to him.

So when considering whether the Supplier applied due care here, even if I were to find that Hitachi failed to do everything it should have when it agreed to lend to Mr M (and I make no such finding), I'd have to be satisfied that the money lent to Mr M was unaffordable before also concluding that he lost out as a result. As I haven't seen anything to persuade me that was the case, I don't think this is a reason to uphold this complaint given its circumstances.

Regulation 14(3) of the Timeshare Regulations prohibit the Supplier from marketing or selling membership of the FPOC as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But the complaint form submitted by Mr M's most recent former representative said that the Supplier did exactly that at the time. So, I have gone on to consider whether, on the balance of probabilities, that was the case.

However, Mr M hasn't described what was said to him, by whom and in what circumstances to justify the assertion from the representative in question. And he was only concerned with other aspects of his FPOC purchase when he asked for an Ombudsman's decision. So, given the facts and circumstances of this complaint, I'm not persuaded that the Supplier is likely to have breached the prohibition on selling timeshares as investments and, even if I'm wrong about that, I don't think the investment element of FPOC membership was important enough to Mr M's purchasing decision to render his relationship with Hitachi unfair to him had membership, in fact, been sold as an investment.

The provision of information by the Supplier at the Time of Sale

Mr M says that he and Mrs M were not given accurate information regarding the annual maintenance fees and their ability to sell the FPOC membership.

But it seems likely to me that Mr and Mrs M were told by the Supplier at the Time of Sale that the annual maintenance fees could go up each year. And while it's possible the Supplier didn't give them sufficient information, in good time, on the various charges they could have been subject to as FPOC members in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't seen enough to persuade me that this, alone, rendered Mr M's credit relationship with Hitachi unfair to him.

As for what Mr M says about not being given sufficient information by the Supplier in relation to when and how they could sell his FPOC membership, he has not provided any detail on what was said, by whom and in what circumstances at the Time of Sale other than saying, in the Letter of Complaint, that he and Mrs M contacted the Supplier in 2016 in an attempt to sell their timeshare but were told by the Supplier that this was not possible. But this doesn't persuade me that they were told something different at the Time of Sale that can be said to have rendered Mr M's relationship with Hitachi unfair to him.

Commission

It was said on behalf of Mr M by one of his former representatives that the Supplier was paid commission by Hitachi, and as this wasn't disclosed to Mr M, that non-disclosure made his relationship with Hitachi unfair to him. But I don't think the fact that Hitachi might have paid the Supplier commission was incompatible with its role in the transaction. The Supplier wasn't acting as an agent of Mr and Mrs M but as the supplier of contractual rights they obtained under the FPOC Purchase Agreement. And, in relation to the loan, it doesn't look like it was the Supplier's role to make an impartial or disinterested recommendation or to give Mr M advice or information on that basis. What's more, as I understand it, the typical amounts of commission paid by Hitachi to suppliers (like the Supplier) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that a court would find that the non-disclosure and payment of commission created an unfair debtor-creditor relationship under Section 140A given the circumstances of this complaint.

Conclusion

Taking everything into account, I am satisfied that Hitachi did not act unfairly or unreasonably when it dealt with Mr M's Section 75 claim, and I am not persuaded that Hitachi was party to a credit relationship with Mr M that was unfair to him for the purposes of Section 140A.

My final decision

I do not uphold Mr M's complaint against Mitsubishi HC Capital UK Plc trading as Hitachi Capital Consumer Finance.

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

Chris Riggs
Ombudsman