

## The complaint

Mr S complains that Mitsubishi HC Capital UK plc, trading as Hitachi Capital, won't refund to him the money that he paid for some holiday club membership points rights. His wife is also involved in his complaint and he's being represented by a claims management company.

## What happened

I issued a provisional decision on this complaint in November 2023 in which I described what had happened as follows:

*"Mr S and his wife entered into an acquisition agreement in July 2011 to buy 1,500 holiday club membership points rights from a holiday company. The total amount due from them was £20,273, they paid £1,500 by a card payment and Mr S entered into a fixed sum loan agreement with Hitachi Capital for a loan of £18,773. He agreed to make 180 monthly repayments of £294.74 to Hitachi Capital.*

*Mr S's representative made claims, on behalf of Mr S, to Hitachi Capital under sections 75 and 140A of the Consumer Credit Act 1974 in December 2018. It said that the product purchased is illegal so the holiday company is in breach of contract, Hitachi Capital was liable for procuring a breach of fiduciary duty and the acquisition agreement and the loan agreement are unfair. It also said that the points rights were misrepresented to Mr S and his wife, the holiday company has breached the EU timeshare directive and the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 and Hitachi Capital failed to carry out a sound and proper credit assessment.*

*Hitachi Capital provided a detailed response to those claims in which it set out the reasons that it didn't believe that the evidential threshold for these types of claims had been met. Mr S wasn't satisfied with its response so a complaint was made to this service. Mr S's complaint form says that: the holiday company and Hitachi Capital failed to conduct a proper assessment of his ability to afford the loan; Hitachi Capital paid a commission to the holiday company which wasn't declared to him; and the holiday company unduly pressured him and his wife into entering into the acquisition agreement and him into entering into the loan agreement; all rendering the loan agreement unfair pursuant to section 140A. Mr S's representative also raised concerns about the way that the finance was sold to Mr S.*

*Our investigator didn't recommend that Mr S's complaint should be upheld as he didn't think that Hitachi Capital's decision to turn down Mr S's claims was unfair or unreasonable. He wasn't persuaded that there was a misrepresentation at the time of sale and he didn't think that the holiday company had breached the contract. He said that he hadn't seen enough to suggest that the relationship between Mr S and Hitachi Capital was unfair and he wasn't persuaded that a court would reach the conclusion that the relationship was unfair. He didn't consider that Hitachi Capital had acted incorrectly in connection with any commission paid to the holiday company and he said that he hadn't seen anything persuasive to suggest that the lending was unaffordable for Mr S.*

*Mr S's representative says that it doesn't agree with our investigator's recommendation and would like the matter referred to an ombudsman for further investigation. It has also raised concerns about the contractual arrangements for the holiday club".*

I said in my provisional decision: *"I agree with our investigator that Mr S's complaint shouldn't be upheld but for these reasons:*

- we don't have a free hand to consider every complaint that's referred to us and our rules, which we are required by law to follow, say – amongst other things – that we can't normally deal with a complaint if it's referred to us more than six years after the event complained of; or (if later) more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint;*
- Mr S's complaint is that Hitachi Capital turned down the claims that he'd made to it and I accept that he referred his complaint to this service within six years of that happening - but I need to consider whether the Limitation Act 1980 applies to his claims;*
- Mr S's representative made claims to Hitachi Capital in December 2018 and Mr S then made a complaint to this service – the claim letter refers to claims under sections 75 and 140A, including that the points rights were misrepresented to Mr S and his wife, but his complaint form only refers to claims under section 140A and doesn't refer to misrepresentations made by the holiday company;*
- I'm not determining the outcome of those claims in this decision as only a court would be able to do that - I'm considering whether or not Hitachi Capital's response to them was fair and reasonable in the circumstances;*
- 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);*
- Mr S's claim under section 75 is that there's been a breach of contract by the holiday company and that the points rights were misrepresented to him and his wife and that they wouldn't have bought them if they hadn't been misrepresented to them;*
- if the criteria for a claim under section 75 were met, Hitachi Capital would be expected to consider that claim unless the claim was brought outside of the time limits set out in the Limitation Act in which case it would be entitled to rely on the Limitation Act and to not consider the claim;*
- the time limit for a misrepresentation claim (whether under section 2 or 9 of the Limitation Act) is six years from the date on which the cause of action accrued (which is when everything needed to make a claim had occurred);*
- I consider that Mr S could have made a claim to the holiday company or Hitachi Capital about the misrepresentations that he says induced him and his wife into buying the points rights in July 2011 as that was the latest time that any misrepresentations would have been made and any loss would have been incurred as that was when he also entered into the loan agreement with Hitachi Capital;*
- I consider that his cause of action accrued at that time, so he would have had six years from then to bring a misrepresentation claim against either the holiday company or Hitachi Capital – but a misrepresentation claim wasn't made to Hitachi Capital until December 2018, more than six years later so was outside of the time*

*limits set out in the Limitation Act and I consider that Hitachi Capital has a defence to the claim and that it wouldn't have been unreasonable for it to have rejected the claim for this reason;*

- *Mr S's representative has also referred to breaches of contract by the holiday company and the time limit for a breach of contract claim in these circumstances is also six years from the date on which the cause of action accrued;*
- *the alleged breaches of contract relate to the terms of the contracts and events that took place in July 2011 so I consider that Mr S could have made a claim to the holiday company or Hitachi Capital about those breaches in July 2011 and that his cause of action accrued at that time;*
- *I consider that he would have had six years from then to bring a breach of contract claim against either the holiday company or Hitachi Capital – but a breach of contract claim wasn't made to Hitachi Capital until December 2018, more than six years later so was outside of the time limits set out in the Limitation Act and I consider that Hitachi Capital has a defence to the claim and that it wouldn't have been unreasonable for it to have rejected the claim for this reason;*
- *even if I'm wrong about that, I'm not persuaded that there's enough 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;*
- *Mr S's representative says that it's of the view that Spanish law has jurisdiction in this matter and that the product purchased by Mr S and his wife is null and void pursuant to Spanish law because it's in perpetuity so they're entitled to rescind the contract - but Hitachi Capital says that none of the holiday company's memberships are sold in perpetuity and all have exit strategies should Mr S and his wife wish to exit their membership;*
- *I'm not persuaded that there's enough evidence to show that the points rights are null and void and I've seen no evidence to show that any steps have been taken by Mr S and his wife in Spain to void their acquisition agreement with the holiday company;*
- *Mr S's representative says that the holiday company demanded and accepted a deposit payment from Mr S and his wife on the date that they signed the acquisition agreement in breach of the EU timeshare directive so they're entitled to rescind the contract;*
- *Mr S and his wife entered into the acquisition agreement in July 2011 and the agreement says that the balance of £20,273 was due from them in August 2011, more than fourteen days later – and they were also provided with a statement which showed that they were paying £1,500 by a card payment with a due date more than fourteen days later and they were paying £18,773 by finance with a due date also more than fourteen days later;*
- *I've not been provided with any evidence to show that Mr S and his wife made a payment to the holiday company within fourteen days of entering into the acquisition agreement, but even if they did make such a payment, I've seen no evidence to show that they would have suffered a loss as a result of the payment being made within that period and I don't consider that such a breach of the EU timeshare directive would be a breach of contract for which Hitachi Capital would be liable under section 75;*
- *Mr S's representative says that Mr S and his wife weren't provided with any information as to the nature of the meeting and had no idea that they would be subject to an overly long, arduous and aggressive sales pitch so the holiday*

*company is in breach of the EU timeshare directive and they're entitled to rescind the contract;*

- Hitachi Capital says that the holiday company has confirmed that Mr S and his wife have been members of the holiday club since 2006, have made 39 bookings since then but haven't raised any concerns about their membership or usage with it, they've attended eleven presentations and have made purchases from it seven times and I'm not persuaded that the holiday company has breached the EU timeshare directive in the way claimed by Mr S's representative;*
- Mr S's representative says that the holiday company contravened the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations by accepting payment in one deposit and one lump sum, rather than by dividing it into yearly instalments of equal value – but if Spanish law has jurisdiction in this matter as claimed by Mr S's representative, those regulations wouldn't be applicable and I don't consider that the regulation to which Mr S's representative has referred would apply to a points rights membership of the type bought by Mr S and his wife;*
- I'm not persuaded that there's enough evidence to show that there's been any breach of contract, directive or regulation by the holiday company for which Hitachi Capital would be liable under section 75;*
- Mr S's representative says that there was also an unfair relationship between Mr S and Hitachi Capital 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;*
- the courts have said, when considering section 140A, that the time for limitation purposes runs from the date that the credit agreement ended (if it was not still running at the time the claim was made) and the limitation period for a claim under section 140A is six years;*
- Hitachi Capital has confirmed that Mr S's loan account was still open in December 2018 when the claims were first made to it so I don't consider that Mr S's claim under section 140A is time-barred;*
- the December 2018 letter says that it's clear that Hitachi Capital paid a commission to the holiday company but didn't obtain Mr S and his wife's informed consent to it so is in breach of its fiduciary duties and Mr S's complaint form says that Hitachi Capital paid a commission to the holiday company which wasn't declared to him;*
- I've not been provided with any evidence to show what commission, if any, was paid by Hitachi Capital 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 Mr S risked the relationship being unfair under section 140A;*
- Mr S entered into the loan agreement in July 2011 but I've seen no evidence to show that he and his wife asked Hitachi Capital for any information about the commission until Mr S's representative's letter to it in December 2018 and no complaint about the commission was made to Hitachi Capital until December 2018 - if Mr S was concerned about the commission that had been paid, I consider that it would be reasonable to expect him to have complained about it sooner than he did;*

- *the December 2018 letter says that Hitachi Capital failed to carry out a sound and proper credit assessment and Mr S's complaint form says that the holiday company and Hitachi Capital failed to conduct a proper assessment of his ability to afford the loan;*
- *the loan agreement that was signed by Mr S in July 2011 included information to show that he was an employed home-owner with an annual income of £22,200 and the May 2019 loan account statement shows that Mr S made the payment due under the loan agreement each month from August 2011 to May 2019;*
- *Mr S and his wife signed a member's declaration in July 2011 which said: "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 able to meet the monthly re-payments";*
- *Hitachi Capital hasn't provided any information about the affordability assessment that it conducted but neither Mr S nor his representative has provided any evidence to show that the loan wasn't affordable for Mr S when it was made to him in July 2011;*
- *the loan was made to Mr S in July 2011 but I've seen no evidence to show that he asked Hitachi Capital for any information about the affordability assessment that it conducted before his representative's December 2018 letter and I consider that it would be reasonable to expect him to have raised any concerns about the affordability assessment before then;*
- *I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mr S when it was made to him, that it was mis-sold to him or that Hitachi Capital has acted incorrectly in connection with the loan;*
- *Mr S's complaint form says that the holiday company unduly pressured him and his wife into entering into the acquisition agreement and him into entering into the loan agreement but Hitachi Capital says that the holiday company has confirmed that Mr S and his wife have been members of the holiday club since 2006, have made 39 bookings since then but haven't raised any concerns about their membership or usage with it, they've attended eleven presentations and have made purchases from it seven times;*
- *Mr S and his wife had the right to withdraw from the acquisition agreement within fourteen days without giving any reason but 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 said that Mr S had the right to withdraw from the loan agreement without giving any reason for a period of fourteen days - but I've seen no evidence to show that he contacted Hitachi Capital to withdraw from the loan agreement within the withdrawal period;*
- *Mr S and his wife signed the acquisition agreement in July 2011 but I've seen no evidence to show that they complained to either the holiday company or Hitachi Capital about the undue pressure that they claim was applied to them until the December 2018 letter – if they had been unduly pressured into signing the acquisition agreement and didn't want to buy the points rights, I consider that it would be reasonable to expect them to have contacted either the holiday company or Hitachi Capital about that issue sooner than they did;*
- *I'm not persuaded that there's enough evidence to show that Mr S and his wife were unduly pressured into entering into the acquisition agreement in July 2011 or that Mr*

*S was unduly pressured into entering into the loan agreement at that time or that the holiday company used unacceptable sales practices against them;*

- Mr S's representative has raised concerns about the contractual arrangements for the holiday club – but it would be for a court to determine whether or not the contractual arrangements are 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 Mr S and his wife and I consider it to be unlikely that a court would conclude in these circumstances that the contractual arrangements for the holiday club created an unfair relationship between Mr S and Hitachi Capital;*
- having considered all of the information and evidence that's been provided by Mr S and his representative, I'm not persuaded that there's enough evidence to show that Mr S'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 Mr S and Hitachi Capital in these circumstances;*
- although I consider that it wouldn't have been unreasonable for Hitachi Capital to have rejected Mr S's section 75 claim under the Limitation Act, I consider that its response to the claims that had been made to it was fair and reasonable; and*
- I sympathise with Mr S for the issues that he and his wife have had with their membership points rights, but I find that it wouldn't be fair or reasonable in these circumstances for me to require Hitachi Capital to refund to Mr S any of the money that he's paid under the loan agreement, to end the loan agreement, to pay him any compensation or to take any other action in response to his complaint".*

Subject to any further comments or evidence that I received from any of Mr S, his representative and Hitachi Capital, my provisional decision was that I didn't intend to uphold this complaint. None of Mr S, his representative and Hitachi Capital has responded to my provisional 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.

As none of Mr S, his representative and Hitachi Capital has responded to my provisional decision, I see no reason to change my provisional decision.

### **My final decision**

My decision is that I don't uphold Mr S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 5 February 2024.

Jarrold Hastings  
**Ombudsman**