DRN-4632271

The complaint

Mr M complains that Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance ("Hitachi") didn't uphold his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a loan they provided to him to purchase a timeshare product.

What happened

In or around June 2019, Mr M (jointly with another party) purchased a timeshare product from a supplier, who I'll refer to refer to as "C". The purchase price agreed was £15,223 and was funded with a fixed sum loan from Hitachi in Mr M's sole name.

In or around December 2020, using a Claims Management Company ("the CMC"), Mr M submitted a claim to Hitachi under sections 75 and 140A of the CCA. The claim included various allegations, including that of misrepresentation and unfairness in relation to the product purchased and the related loan with Hitachi. Hitachi didn't uphold Mr M's claim and issued a response to explain their findings.

A complaint about Hitachi's response to Mr M's claim was referred to this service by the CMC. However, this did not proceed to a conclusion following Mr M's decision to remove the CMC as his representative.

In or around March 2022, using a Professional Representative ("the PR"), Mr M submitted a further claim to Hitachi, also under sections 75 and 140A of the CCA. Within that claim, the PR allege Mr M had purchased the timeshare product in June 2019 having relied upon representations made by C which turned out not to be true. And under section 75 of the CCA ("S75"), Hitachi are jointly liable for those misrepresentations. In particular, the PR allege that C told Mr M:

- he had purchased an investment, being a share of a property that would increase in value and provide considerable return on that investment;
- he could sell the timeshare product back to the resort or easily sell it at a profit; and
- he *"would have access to the holiday's apartment at any time all around the year".*

The PR say that C illegally sold the product as an investment contrary to regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs"). To support this, the PR refer to a training manual allegedly used by C to highlight the benefits of *"Fractional Ownership".*

The PR went on to allege that a clause within the purchase agreement which addressed default in the event of non-payment of amounts due under the agreement was unfair. And they believe this renders the relationship with Hitachi, under the agreements, unfair pursuant to section 140A of the CCA ("S140A).

In addition, the PR allege that:

- Mr M was introduced to Hitachi by a third party who wasn't authorised by the Financial Conduct Authority ("FCA") to carry on regulated activities;
- Mr M *"does not remember any affordability assessment to have been carried out* [sic]*"*

- C's companies are currently in an insolvency process which means Mr M is unable to recover any amounts awarded by the Spanish Courts.

The PR said that a response to the newly submitted claim wasn't received from Hitachi. So, referred Mr M's complaint to this service as they considered Hitachi had failed to appropriately assess Mr M's claim.

During the course of this service's investigations, Hitachi did provide their response to Mr M's further claim. In doing so, they explained why they didn't uphold any of Mr M's claims of misrepresentation or unfairness. They also thought their decision to lend to Mr M was responsible and showed he could afford the loan repayments.

One of this service's investigators considered all the information provided. Having done so, they didn't think Hitachi's failure to uphold Mr M's claim was unfair or unreasonable, given the evidence available.

Neither the PR nor Mr M initially responded to or investigator's findings. However, Mr M later asked that his complaint be referred to an ombudsman for a final decision. In addition, this service was provided with written statements from Mr M in which he explained, in more detail, the circumstances and consequences of his timeshare purchase from C.

As it appears an informal resolution couldn't be achieved here, Mr M's complaint was passed to me to consider further. Having done that, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 30 January 2024, giving both sides the chance to respond before I reach a final decision.

In my provisional decision, I said:

> Relevant considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
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> S75 provides consumers with protection for goods or services bought using credit. Mr M paid for the timeshare product under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means Mr M is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> S140A looks at the fairness of the relationship between Mr M and Hitachi arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.
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> It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe Hitachi's failure to uphold Mr M's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
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> It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't

[1] Dispute Resolution: The Complaints sourcebook (DISP)

provide a legal service. And as I've already said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by C in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that C made false statements of fact when selling the timeshare product. In other words, that they told Mr M something that wasn't true in relation to the allegation raised. I would also need to be satisfied that the misrepresentation was material in inducing Mr M to enter into the contract. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mr M was specifically told (or not told) about the benefits of the products he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the evidence that is available from the time.

The claim submitted by the PR makes specific reference to a *"Fractional"* timeshare product. They've also provided, what is alleged to be, a script used by C when presenting the product to Mr M during the sales meeting. Again, the script appears to relate to the sale of a *"Fractional"* timeshare product.

I've seen a copy of the purchase agreement signed by Mr M at the time of the sale. I think it's clear from this that he didn't purchase a *"Fractional"* timeshare product as is alleged. It was, in fact, membership of a timeshare product with points allocated to be redeemed against holiday accommodation and experiences from within a portfolio offered by C. A *"Fractional"* timeshare product is usually one that provides a specified share in a designated property. And from the evidence provided, this wasn't what Mr M purchased here. So, I can't see how the alleged script has any relevance to the product Mr M actually purchased. And because of that, I can't say that it played any part in Mr M's experience.

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr M's claim, such as marketing material or documentation from the time of the sale that echoes what the PR alleges Mr M was told about the specific product he purchased. In particular relating to the product being represented as an investment in property that would provide a considerable return on investment. There's simply no reference to this within any of the purchase documentation I've seen.

In fact, note 5 of the purchase agreement (which Mr M signed) clearly states *"We understand that the purchase of our membership* […] *is a personal right for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as a real estate interest or an investment in real estate, and that* [C] *makes no representation as to the future price or value of the* […] *product"*.

I don't think the product can have been marketed and sold as investment contrary to the TRs simply because there might have been some inherent value to it. And in any event, I've found nothing within the evidence provided to suggest C gave any assurances or guarantees about the future value of the product Mr M purchased. C would had to have presented the product in such a way that used any investment element to persuade him to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

Hitachi have referenced page 6 of the Information Statement that was provided to Mr M at the time of the sale. They've said that under point 4 on that page it's stated:

"There is no resale, rental or re-purchase of Points programme in place by the Founder or the Management Company, although owners are entitled to sell their Points on the open market if the wish to do so".

I haven't been provided with a copy of this document albeit I have previously seen a copy of the document that Hitachi refer to. So, in the absence of any other evidence, I can't reasonably say C did tell Mr M he could sell his timeshare product back to the resort, as alleged.

As regards the allegation that Mr M was told he *"would have access to the holiday's apartment at any time all around the year",* I've also seen nothing to support this. Firstly, and as I've already stated, the product purchased provided points, not a defined property. Secondly, the documentation I've seen makes it clear that all bookings are subject to availability and on a first come first served basis. So, based upon the evidence available, I'm not persuaded the product was misrepresented in the manner alleged.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (Hitachi) and the debtor (Mr M) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

I've considered the *"default"* clause that the PR has referred to. Having done so, it appears this relates to the consequences should Mr M not complete the product purchase by making the payment due within 14 days of the date of the agreement. I don't believe this refers to any other or subsequent charges or payments that may be payable. So, I'm not persuaded that a court is likely to find that this particular clause causes unfairness pursuant to S140A.

The authorised status of C

This service's records show that C fell under our compulsory jurisdiction at the time of the product (and loan) sale to Mr M. So, I'm satisfied that they held the necessary authority to arrange the loan. The PR have alleged that the individual who sold the timeshare (and consequently the loan) was self-employed and not an employee of C. They believe this means the individual didn't hold the necessary authority to arrange the loan. However, I've not seen any specific evidence to support that allegation. And Hitachi have confirmed that Mr M was introduced to them through an authorised and fully trained employee of C.

In the absence of any other evidence to the contrary, I'm not persuaded that Mr M was introduced to Hitachi by a party that didn't hold the necessary regulatory authority to do so.

The impact of C entering an insolvency process

Mr M's claim is submitted pursuant to sections 75 and 140A of the CCA. These specifically relate to instances of misrepresentation, breach of contract or unfairness. I've not seen any evidence that Mr M has submitted any claim to either a Spanish or a UK court. So, as far as I'm aware, there's been no ruling or award in his favour. It's possible Hitachi could incur a liability under S75 in the event that C is unable to fulfil a court award – should one be made. But as there doesn't appear to have been one here, I can't see that Mr M has suffered any proven loss such that Hitachi could be held liable for it under S75. And given it isn't possible to successfully claim for any potential or future loss or claim outcome, I don't see the relevance of this particular aspect in Mr M's claim.

Were the required lending checks undertaken?

There are certain aspects of Mr M's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Hitachi undertook a proper credit assessment. The PR say that Mr M doesn't remember any affordability assessment being carried out. Although not remembering something happening is clearly not the same as something not actually happening.

Regulated lenders each use their own systems, methods and processes when assessing loan applications. These are normally in conjunction with their own lending policies, regulatory guidelines and appetite at the time. In responding to Mr M's claim, Hitachi have explained, in detail, the checks and tests they undertook when Mr M applied for his loan with them.

If I were to find that the checks and tests they completed didn't comply with the regulatory requirements that applied – and I make no such finding – I would need to be satisfied that had the checks complied, they would've revealed that the loan repayments weren't sustainably affordable for Mr M in order to uphold his complaint here. A simple failure to meet the regulatory requirements wouldn't, in my opinion, lead to the loan being unenforceable. There would need to be a clearly attributable loss.

I've not been provided with any evidence of Mr M's financial circumstances at the time the loan was agreed. Because of that, I'm not persuaded there's sufficient evidence to demonstrate that Mr M's financial position was such that it would've reasonably led Hitachi to believe the loan wasn't sustainably affordable for him. Or that he suffered any attributable loss as a consequence.

Summary

I would like to reassure Mr M that I've carefully considered everything that's been said and provided in reviewing his complaint. Having done so, and for the reasons explained above, I haven't found anything that leads me to conclude that Hitachi's failure to uphold his claim was ultimately unfair or unreasonably. Because of that, I don't currently intend to ask them to do anything more here.

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.

Hitachi don't appear to have responded to my provisional decision. The PR has confirmed that Mr M doesn't agree with my provisional findings. However, they haven't explained specifically why or provided any new information or evidence for me to consider.

In the circumstances, I've no reason to vary from my provisional findings. So, won't be asking Hitachi to do anything more here. The PR have confirmed that Mr M wishes to pursue matters through other means, which is his right should he choose not to accept my final decision.

My final decision

For the reasons set out above, I don't uphold Mr M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 27 March 2024.

Dave Morgan
Ombudsman