DRN-4648976

The complaint

Mr C complains that he was mis-sold a timeshare product and the loan used to pay for it. The loan was provided by Hitachi Capital (UK) Plc, which is now Mitsubishi HC Capital UK Plc; for simplicity I'll refer to the lender as "Hitachi". Mr C has been represented in bringing this complaint by a claims management business, so any reference to his arguments and submissions include those made on his behalf.

What happened

In November 2018 Mr C and his partner took out a trial membership of Club La Costa Vacation Club ("the Club"), a holiday and timeshare club. In June 2019 they bought full membership, and in November 2019 they "upgraded" that membership with the help of a loan from Hitachi. This complaint concerns the November 2019 upgrade. Mr C has expressed similar dissatisfaction with the June 2019 purchase, but that was financed by a different provider (not Hitachi), so I make no further comment on it.

In November 2019 Mr C and his partner bought from Club La Costa (UK) Sucursal en Espaňa (a UK company with registration in Spain) a 15-year membership of the Club and 1,700 holiday points (of which 200 were described as bonus points). Mr C and his partner could trade the holiday points annually for holiday accommodation and other benefits over the membership period.

To pay for the membership and points, Mr C took out a loan for £25,205. That covered the full purchase price and refinanced the loan he had taken out in June 2019 with a different lender. It also took into account the trade in value of the points bought in June 2019. The loan was brokered by Club La Costa (UK) Plc.

In December 2022 Mr C complained to Hitachi. He said that he and his partner had been misled about the sale of the holiday club membership and the holiday points they had bought. They had, he said, been led to believe that they were buying a share in a property, that it would be an investment, and that they would be able to access club property at any time of the year.

Mr C also said: Hitachi had not properly assessed whether the loan was affordable for him; the individuals working for the credit intermediary had not been properly authorised; Club La Costa was going through liquidation proceedings in Spain and so was in breach of contract; and the loan created an unfair relationship.

Mr C said too that the effect of the Consumer Credit Act 1974 (and in particular sections 75 and 140(A) was that Hitachi was responsible for the actions of Club La Costa.

After referring the matter to Club La Costa for comment, Hitachi wrote to Mr C's representative to say it did not accept his claims. Mr C then referred the matter to this service. One of our investigators considered what had happened, but did not recommend that the complaint be upheld. Mr C did not accept the investigator's recommendation and asked that an ombudsman review the case. I did that and issued a provisional decision in which I said:

Affordability

Mr C has said that Hitachi did not properly assess whether the loan was affordable for him; he did not recall being asked any questions about affordability. Hitachi says that it carried out appropriate checks, including by asking Mr C about his income and other debts at the time. Having done that, it was satisfied that Mr C's disposable income was sufficient to meet his commitments under the loan agreement.

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case. I am satisfied that Hitachi did ask Mr C about his income and expenditure in this case, even though he may not recall it. Hitachi has produced its notes on the loan application; they include details of Mr C's income and employment status, so it is clear that some questions were asked of him.

In assessing whether a loan is affordable, lenders should consider not just whether it is affordable when it is taken out, but whether it is likely to remain affordable. They should, for example, consider whether there are any future events which might have an impact on a borrower's ability to pay – such as retirement, for example.

As part of the sales process, Mr C signed a one-page declaration which included, at paragraph 9:

"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."

Hitachi did therefore address the possibility of future events affecting Mr C's ability to repay the loan – albeit partly by seeking a reassurance from him. Mr C has explained that a combination of factors now mean that he is having difficulty making repayments; he has cited in particular the Covid-19 pandemic and its consequences, which have led to a continuing downturn in work for him.

I note however that Mr C has been able to meet the loan payments and other financial commitments (or at least was able to until this complaint was referred to this service). That does not necessarily mean that Hitachi carried out appropriate checks, but it is an indication that the loan was affordable.

That said, I would expect a lender to engage with a borrower who is having difficulty making payments, with a view to reaching a mutually satisfactory solution, if possible. That may be appropriate here.

Authorisation of the credit intermediary

Consumer credit broking is, and was in 2019, a regulated activity under the Financial Services and Markets Act 2000. That is, entities carrying out consumer credit broking must be properly authorised by the regulator, the Financial Conduct Authority ("FCA"). A consumer credit loan which is brokered by an unauthorised party is not enforceable (although the lender can apply to the FCA if it wishes to enforce it).

Mr C's representative acknowledges that the broker, Club La Costa (UK) Plc, was properly authorised at the time, but says that its sales force were self-employed. Club La Costa, on the other hand, says its staff (including the individual who dealt with Mr C) were employed. I think it more likely that the regulated entity is aware of its staff's employment status than Mr C's representative is, but in any event his representative has not explained why self-

employed individuals representing a regulated business cannot carry out regulated activities on its behalf.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- *that the lending financed the contract giving rise to the claim; and*
- *that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

I am satisfied that the necessary conditions were met in this case, and so will discuss what has been said about misrepresentation and breach of contract.

Misrepresentation and breach of contract

A misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

A breach of contract occurs when one party to a contract does not fulfil its obligations to the other. That is, it does not do what it has agreed to do or does not provide what it has agreed to provide.

Mr C says that the membership and points were sold to him as an investment. In support of that contention, those representing her have provided a copy of some of the seller's presentation materials. They relate however to the sale of fractional timeshare interests (where timeshare properties are sold after a set number of years and the proceeds shared amongst those who have bought timeshare weeks in those properties). That is not however what Mr C purchased, and I find that material of very limited assistance; it was not used in the sales presentation which Mr C and his partner attended.

In addition, the Acquisition Agreement included, at paragraph 5 on page 1:

"We understand that the purchase of our membership in vacation club 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 CLC makes no representation as to the future price or value of the Vacation Club Holiday product…"

Further, the one-page declaration (referred to under the Affordability heading above) included a near-identical statement, which Mr C signed and initialled.

In the circumstances, I think it most unlikely that the club membership was sold as an investment, or that Mr C thought that was what he was buying. I note as well that there is no evidence of any attempt on the part of Mr C to sell the membership and points.

Mr C says he was told he could book holidays at any time of the year. But that was true – albeit subject to availability of accommodation and Mr C having sufficient points. I note that I have been provided with no information about any holidays Mr C and his partner may have taken or – perhaps more importantly in the light of this particular allegation – any holidays they tried to book but were unable to secure.

In general, the allegations of misrepresentation are generic and unsupported by evidence. I do not find them particularly convincing. I also note that the Member's Declaration included, at paragraph 10:

"We understand that this Member's Declaration, together with the Agreement, is the entire written contract between the parties, anything additional shall only be valid if signed and stamped on behalf of the Company."

In my view, the inclusion of an "entire agreement" provision was an attempt to ensure that anything on which Mr C sought to rely was included in the contract itself. Such provisions are not uncommon, even in consumer contracts, as they can help to provide clarity about the parties' rights and obligations. I am not persuaded in this case that Mr C was misled, but, if I were to take a different view on that, I would need to consider the effect of that declaration.

Mr C says that Club La Costa is in liquidation and he therefore has a claim for breach of contract. It is correct that liquidation proceedings were started in Spain in or around December 2020. But those concerned sales companies. I understand however that the Club is still operating and that its facilities remain available. The liquidation of the sales companies does not constitute a breach of contract.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties, refunding payments and re-opening an agreement which has come to an end. In considering whether a credit agreement creates and unfair relationship, a court can have regard to any connected agreement, which in this case could include the sale contract.

An ombudsman does not have the power to make an order under section 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable. And I have the power to make a wide range of awards – including, for example, requiring a borrower to refund interest or charges, and to write off or reduce the balance of a loan. I am not persuaded however that I should do so here.

Much of Mr C's case that the loan agreement created an unfair relationship is based on fundamental misunderstandings – that the broker was unauthorised; that Mr C was buying a fractional timeshare, which was sold as an investment; that there was a breach of contract when companies within the Club La Costa group were placed into liquidation.

Mr C says that the timeshare sale was pressured. But it was very clear from the sales documents that he could cancel both the sale and the loan agreement for 14 days after he signed them. Paragraph 12 of the Member's Declaration said:

"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."

The Directive referred to was incorporate into UK law by The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, which requires customers to be given 14 days in which to cancel a timeshare contract. Mr C was told that he could cancel and was provided with a form by which he could do so. If, as he says, he was genuinely pressured into buying something he did not understand, I might have expected him to explain when he brought this complaint why he didn't exercise his right to cancel.

Mr C's representative has also referred to clause D of the Acquisition Agreement, by which the seller can rescind the Agreement if any sum due under it remains unpaid for 14 days. His representative says that similar clauses have been found unfair and has referred to a case in which the court, as a result, made an order under section 140B. I note however that the only sum payable under the Acquisition Agreement was the sale price for the Club membership and holiday points. Mr C's case appears to be, therefore, that, had he not paid, it would have been unfair for his membership and points to have been withdrawn. That is a rather different position from the case law on which he seeks to rely. Be that as it may, Mr C did pay (through the loan) and the sale contract was not rescinded by Club La Costa.

Mr C says too that he was not told about the management charges, which have risen to more than £1,000 a year. I note however that the Acquisition Agreement referred to them on page 1; it said they were (at the time) €1,485 a year.

As I have noted, Mr C has indicated that he may have difficulty making loan repayments. If that is so, it may be appropriate for him to contact Hitachi to discuss possible arrangements.

It is not for me to decide whether Mr C has a claim against Club La Costa, or whether he might therefore have a "like claim" under section 75 of the Consumer Credit Act. Nor can I make orders under sections 140A and 140B of the same Act.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr C's complaint. In the circumstances of this case, however, I do not believe that it would be fair to require Hitachi to do any more to resolve things.

I indicated that I would consider any further evidence or arguments from the parties before issuing a final decision, and I gave them until 27 February 2024 to respond.

Mr C said that he strongly disagreed with my provisional decision, but he did not explain why, or provide any further evidence for me to consider. Hitachi did not reply 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 neither party has provided me with any additional evidence or arguments to consider, I see no reason to reach a different conclusion from that which I set out in my provisional decision. I stress nevertheless – especially in the light of Mr C's reaction to my provisional findings – that I have considered the entire complaint afresh before issuing this final decision.

My final decision

For these reasons, my final decision is that I do not uphold Mr C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 1 April 2024.

Mike Ingram
Ombudsman