

The complaint

Mr and Mrs M's complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance, (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA. As part of their complaint Mr and Mrs M have said the loan wasn't affordable.

What happened

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 20 October 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1200 fractional points at a cost of £12,494 (the 'Purchase Agreement').

Mr and Mrs M paid for their Fractional Club membership by taking out a loan of £12,494 from the Lender in Mr M's sole name (the 'Credit Agreement').

Mr and Mrs M wrote to the Lender on 7 April 2020, (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above. The Lender dealt with their concerns as a complaint and issued its final response letter on 19 August 2020, rejecting it on every ground.

Mr and Mrs M then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits. In essence, the Investigator thought that the Supplier had misrepresented the accommodation which wasn't appropriate for Mrs M, considering her disabilities.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I asked the business for information about the affordability checks it carried out before it provided Mr M with the loan. And I asked Mr M to provide evidence of his income and bank statements prior to taking out the loan.

Both parties provided the information I requested. I subsequently wrote to the Lender informally explaining why I thought it might want to consider making an offer of settlement to Mr M. And I provided it with copies of the information Mr M had sent me. In response, it explained why it remained of the opinion that the loan was affordable for Mr M.

I then issued a provisional decision (PD), explaining why I thought the complaint should be upheld. In response, Mr and Mrs M agreed with my decision but asked for some clarification on the redress methodology I had set out in the PD.

The Lender said in response, that whilst it disagreed with the decision reached, it would agree to uphold the complaint.

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.

And having done that, I remain of the opinion that this complaint should be upheld. As neither party has provided any further submissions or arguments for me to consider, I see no reason to depart from the findings I set out in my PD. I'll set out my reasoning again below. Although the Purchase Agreement was taken out in Mr and Mrs M's joint names, the loan as I've already said, was taken out in Mr M's sole name. So, I will refer to Mr M throughout the rest of this decision.

However, before I explain why I've reached my decision, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them, because even if one or more of those aspects ought to succeed, the redress I am currently proposing, puts Mr M in the same or a better position than he would otherwise be in.

We've set out our approach to considering unaffordable and irresponsible lending complaints on our website - including the key relevant rules, guidance, good industry practice and law. And I've considered this approach when deciding Mr M's complaint.

There are several questions that I've thought about when deciding if the Lender treated Mr M fairly and reasonably when it provided him with the loan.

- 1) Did the Lender complete reasonable and proportionate checks to satisfy itself that Mr M would be able to repay his loan in a sustainable way?
- 2) If not, what would reasonable and proportionate checks have shown at the time?
- 3) Ultimately, did the Lender make a fair lending decision?
- 4) Did the Lender act unfairly or unreasonably in some other way?

Did the Lender complete reasonable and proportionate checks to satisfy itself that Mr M would be able to repay his loan in a sustainable way?

The rules that the Lender had to follow, required it to carry out checks that would enable it to reasonably assess, whether Mr M could afford to repay the loan he was wanting to take out. This is often referred to as an "affordability assessment".

The rules don't set out what specific checks it needed to carry out, but they do set out that those checks needed to be proportionate to the circumstances of the application. The checks the Lender needed to carry out as part of its affordability assessment, had to be "*borrower focussed*". What I mean by this, is that the checks needed to consider whether paying the loan back would cause Mr M any difficulties or have any adverse consequences for him.

I think what this meant in practice, was that the scope and extent of the Lender's checks needed to reflect the nature of the loan, bearing in mind things such as the amount of credit, the interest rate, the duration of the loan, the monthly and total amounts repayable, and any indications of customer vulnerability. This isn't an exhaustive list.

And because of the above, I think reasonable and proportionate checks needed to be more thorough if Mr M had a low income. This would reflect that it could be more difficult for him to make the loan repayments with a low income.

The Lender's checks would also need to be more thorough the higher the amounts Mr M had to repay, as it would be more difficult to make higher loan repayments on a given income. The length of the loan term would also be relevant, partly because where the loan duration is longer, the total cost of credit was likely to be higher. It would also be relevant because there is greater risk of a negative change in circumstances affecting Mr M's ability to repay, where repayments need to be sustained over a longer period.

With these principles in mind, I've thought about whether the Lender completed reasonable and proportionate checks to satisfy itself that Mr M would be able to repay his loan in a sustainable way.

In summary then, the circumstances of the loan application are as follows:

- Mr M was applying for a loan for £12,494 repayable over 120 months, which had an APR of 18.9%. The loan repayments were £220.61 a month.
- Mr M was recorded by the Lender as having an annual income of approximately £28,000 when the loan was taken out.
- The checks the Lender says it carried out, showed that Mr M had existing credit commitments totalling £43. It also said he had no outstanding mortgage or evidence of financial stress. It had checked his income using a validation tool which returned a value of "High." It explained this meant Mr M's declared income was overstated. As a result, it said it had stressed his income down by 30% to a minimum of £19,600.

The Lender has said it did carry out verification checks to validate the income and financial information Mr M gave it in his application, before it agreed to provide him with the loan. This seems to have been based on his completed application form, credit file, and verification of the information he provided using automated tools and Office of National Statistics (ONS) data. And it has said that based on the checks it carried out, it thought the loan was affordable for Mr M. So, I've gone on to consider if the checks it carried out were reasonable and proportionate, and whether it made a fair lending decision in respect of that loan.

The Lender has said that the income verification check it carried out, indicated that the income figure Mr M had provided in his application might not have been accurate. The Financial Conduct Authority (FCA) Consumer Credit Sourcebook (CONC) rules, under which the Lender operated at this time, do anticipate that borrowers may not always provide accurate information. These rules require lenders to take proportionate steps to establish whether a loan applicant can afford the loan – including, in most circumstances – taking steps to verify customer declarations about income and expenditure.

So, I think it was important for the Lender to have conducted checks which gave it a thorough understanding of Mr M's financial position, and to scrutinise the information it gathered carefully, asking follow up questions where necessary, before agreeing to lend.

Whilst I accept that validation tools and general statistical data can in some circumstances be useful, I think the information the Lender had about Mr M's income, should have led it, in this particular case, to interrogate his financial circumstances (and in particular his income declaration) in a borrower focussed fashion rather than just making an assumption to reduce his income by 30%. I can't see any objective reason why it just made an assumption in

respect of his income, considering the “red flag” that had been raised by its initial income verification check. This in my opinion should have alerted the Lender to carry out further checks, considering the information it obtained when it carried out its affordability checks. I think the information contained in the credit report it obtained, and the discrepancy raised by its income validation check, should have been considered in a wider context, rather than just as to whether or not its checks showed any obvious adverse information, such as missed or late payments.

So, taken together, I think the information the Lender had about Mr M, should have prompted it to look more closely at his financial circumstances and carry out further borrower focussed checks; to ensure that the lending it was proposing to provide him with was sustainably affordable for him.

What would reasonable and proportionate checks have shown at the time?

I think the Lender should have ensured that the scope and extent of its checks were adapted to the circumstances of Mr M's application and took account of the information it had obtained from its initial checks. This was a sizeable loan with a total amount payable (including interest) of £26,743 over the 10-year term, which Mr M would continue to pay for nearly four years after he had reached state retirement age.

Given this and the information the Lender had about Mr M's income, further checks would in my opinion, need to verify his income and expenditure, in addition to the checks the Lender had already carried out. And this was in my opinion, needed to establish that he was able to afford the loan.

Mr M has provided copies of his joint account bank statements for the three months prior to this loan being taken out. He was self-employed and provided his income tax self-assessment tax calculation for the tax year prior to taking out the loan, which was 2013/2014. These documents have been provided to the Lender, and I think they provide insight into what reasonable and proportionate checks might have shown.

The documents show discrepancies with the information recorded on Mr M's application in respect of his income, and the information the Lender said it verified and subsequently stressed down. The self-assessment tax calculation shows that Mr M had taxable income of £14,290 on a turnover of just over £20,000. This is significantly different from the figure provided by Mr M and the stressed down figure assumed by the Lender.

In respect of the expenditure assessment, the Lender appears to have used ONS data to calculate Mr M's expenditure. As I've already said there is nothing wrong with that in principle, but as I've explained, I don't think that was reasonable or proportionate in this particular case.

I don't consider the checks the business carried out to have been proportionate because it estimated income and expenditure, and in my opinion it ought to have got actual figures. It could have obtained actual figures in a variety of different ways and didn't necessarily need to look at bank statements. The joint account statements show that in the months leading up to the lending being provided, the joint account shows minimal discretionary expenditure and a lack of disposable income due to the income and expenditure. Also, the account was either overdrawn or had a low credit balance. Mrs M was in receipt of disability benefit. And even if her income was to be taken into account when making the assessment (which I do not think it should be, taking into account she was in receipt of benefits to assist with her disability and the borrowing was taken out by Mr M in his sole name), the account had a very low credit balance in the months leading up to the finance being provided.

The Lender queried whether Mr M had another bank account. The information provided by Mrs M on his behalf, states that he doesn't, and explains that the large payments that had been made from the account, which the Lender questioned; had been made to Mr and Mrs M's son, who had a very similar name to Mr M. Also, the other answers she has given, don't seem implausible to me. And I've not seen sufficient evidence that persuades me that Mr M had another bank account with funds that he could draw upon to support him repaying the loan.

Did the Lender make a fair lending decision?

As I've said, the statements indicate to me that in the months preceding the loan being provided to him, there was minimal discretionary expenditure and a lack of disposable income due to the income and expenditure going in and out of the account. Also, the account was either overdrawn or had a low credit balance. And by providing the loan to him, I think the Lender exacerbated what was a difficult financial situation for Mr M. And I think that if the Lender had carried out reasonable and proportionate borrower focussed checks; it would have identified that Mr M was struggling financially

I think the information the Lender already had about Mr and Mrs M, together with the information it would have seen if it had carried out reasonable and proportionate checks, by understanding more about his actual income and expenditure rather than essentially relying on estimates, should all have led it to conclude that it was unlikely Mr M would be able to sustainably afford to make the monthly payments for this loan. And it doesn't appear to have taken into account as part of its affordability assessment, that for approximately 40% of the loan term, Mr M would be making loan repayments on a retirement income, which I think given what was known about his financial circumstances, was unlikely to have been more than his income from employment.

The Lender disagrees the loan was unaffordable because Mr M managed to make the repayments with no missed payments or arrears. It also says that it doesn't think the bank accounts accurately reflected the full picture of Mr M's financial circumstances and the income he may have received from contracting.

I've thought carefully about this, but I don't agree. Just because with hindsight Mr M did make the payments, that doesn't mean that it was correct for the Lender to have provided the loan if the reasonable and proportionate checks it should have carried out, would have shown the loan was unaffordable. And as I've explained, I think the checks the Lender should have carried out would have shown that the loan wasn't sustainably affordable for Mr M. Ultimately, the lender needed to make sure Mr M was able to repay the loan sustainably. Simply making the repayments doesn't indicate they were being made through sustainable means, nor does it take away that proportionate checks at the outset would have revealed the lending was likely to be unaffordable.

In respect of the bank statements not accurately reflecting Mr M's financial circumstances and his income, the Lender hasn't provided any evidence in support of that allegation. It appears to be supposition on its part. And the corroborative evidence that is available, in the form of Mr M's income tax self-assessment tax calculation, and the information contained in it, doesn't support that allegation. So, I'm not persuaded by the argument it's made which in my opinion is unsubstantiated and based on the fact that Mr M was self-employed.

For the reasons I've set out, I think in the particular circumstances of Mr M's case, the Lender should have concluded that it wasn't appropriate to provide him with the loan.

Fair Compensation

Having found that Mr M shouldn't have been provided with the loan as it wasn't affordable for him, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs M agree to assign / hand over to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved. Here's what I think needs to be done to compensate Mr M with that being the case – whether or not a court would award such compensation:

- (1) The Lender should refund Mr M's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
- (2) In addition to (1), the Lender should also refund the annual management charges Mr M paid as a result of Fractional Club membership. So, if Mr M hasn't paid any management charges, there will be no management charges to be refunded.
- (3) The Lender can deduct:
 - i. The value of any promotional giveaways (if any) that Mr and Mrs M used or took advantage of; and
 - ii. The market value of the holidays* (if any) Mr and Mrs M took using their Fractional Points.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

- (4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mr M's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr and Mrs M's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs M took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr M a certificate showing how much tax it's taken off if he asks for one.

My final decision

For the reasons set out above, my decision is to uphold this complaint about Mitsubishi HC

Capital UK PLC trading as Hitachi Personal Finance. It needs to calculate and pay Mr M compensation using the methodology set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs M to accept or reject my decision before 7 November 2025.

Simon Dibble
Ombudsman