

## **The complaint**

Mr F 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. His wife is also involved in his complaint and he's being represented by a claims management company.

## **What happened**

Mr F and his wife had bought 7,000 holiday club membership points rights from a holiday company in November 2013 and they entered into a purchase agreement in February 2016 to buy 8,000 more membership points rights from the holiday company. The total price payable for the additional points rights was £8,000 and Mr F also entered into a fixed sum loan agreement with Hitachi Capital for a loan of that amount. He agreed to make 120 monthly repayments of £124.06 to Hitachi Capital. The loan was repaid in January 2021.

Mr F's representative made claims, on behalf of Mr F, to Hitachi Capital under sections 75 and 140A of the Consumer Credit Act 1974 in December 2021. It said that the holiday company was in breach of contract, Hitachi Capital was liable for procuring a breach of fiduciary duty and the purchase agreement and the loan agreement are unfair. It also said that the points rights were misrepresented to Mr F and his wife, the holiday company was in breach of the EU timeshare directive and Hitachi Capital failed to carry out a sound and proper credit assessment.

Hitachi Capital didn't provide a substantive response to those claims so a complaint was made to this service. Mr F'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 purchase agreement and him into entering into the loan agreement; all rendering the loan agreement unfair pursuant to section 140A. Hitachi Capital then provided a detailed response to Mr F's claims in which it set out the reasons that it was unable to uphold them. It also says that Mr F and his wife bought another 7,500 membership points rights from the holiday company in April 2016.

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

Mr F says that he's not in agreement with our investigator's recommendation. He says, in summary and amongst other things, that:

- he and his wife were told that it was an investment, kept paying for it but weren't benefiting from the investment and were unable to book holidays;
- they were told that if they were unable to use their points they could offer them to others but that never materialised;
- there was a lot of high pressure from the holiday company to purchase more points; and
- there was no fairness and he ended up paying interest which could have been avoided.

Mr F's representative says that it doesn't accept our investigator's recommendation and it requested that the complaint be reviewed by an ombudsman. It has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses. It has also raised concerns about the way that the finance was sold to Mr F and says that the holiday company didn't broker proper credit and failed to meet the standard of a regulated firm.

Mr F has also made complaints to this service about the finance providers' responses to the claims that he'd made to them about his and his wife's November 2013 and April 2016 purchases of membership points rights from the holiday company. Those complaints are being dealt with separately.

### **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.

Having done so, I agree with our investigator that Mr F's complaint shouldn't be upheld for these reasons:

- Mr F and his wife signed the purchase agreement in February 2016 to buy 8,000 more holiday club membership points rights from the holiday company which increased their number of points rights to 15,000;
- they also signed other documents at that time, including the terms and conditions, a key information document, a separate standard form of the withdrawal notice that could be given to withdraw from the purchase agreement and a customer compliance statement, and Mr F signed the loan agreement;
- Mr F's representative made claims to Hitachi Capital in December 2021 and Mr F then made a complaint to this service – the claim letter refers to claims under sections 75 and 140A, including that the 8,000 points rights were misrepresented to Mr F 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;
- 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) 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;
- I'm not determining the outcome of Mr F's claims under sections 75 and 140A as only a court would be able to do that but I'm considering whether or not Hitachi Capital's response to his claims was fair and reasonable in the circumstances;

- the December 2021 letter says the points were misrepresented to Mr F and his wife because they were advised that they would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit but they've never made any profit on the product and they believed that they would be buying into an exclusive membership but almost all of the properties can be accessed and booked by non-members;
- neither Mr F nor his representative has provided a detailed account of the circumstances in which the alleged misrepresentations were made, the conversations that took place or the information that was provided to Mr F and his wife before their February 2016 purchase;
- the customer compliance statement that they both signed in February 2016 says: *"We understand that [the holiday company] operates a Rental Programme and that to participate, we must ask the Travel Club to convert our Points into a week which will then be placed in the Programme. Whilst there is no guarantee that the week will be rented out, if it is we can currently expect to be paid up to £100 / €130 per 1000 Points (less 15% commission plus vat). It is our responsibility to contact the Travel Club to ascertain if the week has been rented out ..."*;
- it also says: *"We understand that there is currently no resale or buyback programme for our Points and that you therefore cannot assist us in selling our Points"*; and: *"We understand that the purchase of our Points is an investment in our future holidays, but that it should not be regarded as a property or financial investment and that any subsequent resale will depend on market conditions"*;
- I've seen no evidence to support Mr F's claim that he and his wife were advised that they would receive a guaranteed yearly rental income which would cover the maintenance fees and provide a profit or that the points rights were an investment so I'm not persuaded that there's enough evidence to show that the holiday company represented to them that they would receive such an income or make a profit or that the points rights were an investment;
- the holiday company says that Mr F hasn't made any enquiries to it about offering any membership points rights that he and his wife were unable to use for sale and I've seen no evidence to show the holiday company misrepresented to them that they'd been able to sell any points rights that they were unable to use;
- I've seen no reference in the purchase agreement, the terms and conditions, the key information document or the customer compliance statement to the membership points rights giving them an exclusive membership or exclusive access to holiday properties and I'm not persuaded that there's enough evidence to show that the holiday company told them that they were buying into an exclusive membership or that it was reasonable for them to believe that the membership was exclusive;
- I'm not persuaded that there's enough evidence to show that the points rights were misrepresented to Mr F and his wife by the holiday company or that they were induced into entering into the purchase agreement by any such misrepresentations;
- the December 2021 letter also says that Mr F and his wife's membership would continue for another 37 years (and potentially in perpetuity) and that they had no control of the sums incurred by and/or charged under the contract and those terms are unfair terms pursuant to the Unfair Terms in Consumer Contracts Regulations 1999 and the contract in its entirety is unenforceable;
- it also says that Mr F and his wife weren't provided with notice of the holiday company's general meeting for any year after 2010, so they were not given the opportunity of attending and speaking at the meeting, and that is a breach of the

holiday company's articles of association and is a breach of contract by the holiday company for the purposes of section 75;

- the key information document that was signed by both Mr F and his wife in February 2016 says: "... *your membership of the ... Collection will last until 31<sup>st</sup> December 2054. On that date, the ... Collection will be dissolved and your membership will terminate*"; so I'm not persuaded that the membership would last in perpetuity;
- the terms and conditions that were signed by Mr F and his wife in February 2016 say: "*You agree to pay annual Management Charges, which are described at Article 13 of the Articles of Association of the ... Collection and in the Management Agreement. These documents are contained in the ... Collection Legal/Governing Documents. The charges will be calculated for future years as described in these documents*"; and information about the management charges was also included in the customer compliance statement;
- I'm not persuaded that those terms would properly be considered to be unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999, that the purchase agreement is unenforceable or that those terms are enough to constitute a breach of contract for which Hitachi Capital would be liable under section 75;
- Mr F and his wife had been members of the holiday company since November 2013 but they bought the points rights which are the subject of this complaint in February 2016 so they would only have had a right to attend meetings of the holiday company arising from the points that they bought in February 2016 after that time and not from 2010;
- I've seen no evidence to show that Mr F and his wife have contacted the holiday company about the general meetings or to tell it that they haven't received the notices of its meetings and the holiday company says that notices for the 2015, 2016, 2017, 2018 and 2020 were sent to Mr F and his wife by e-mail and that they were received and opened;
- I'm not persuaded that there's enough evidence to show that there's been a breach of the holiday company's articles of association, but even if there had been such a breach, I don't consider that it would be a breach of contract for which Hitachi Capital would be liable under section 75;
- I'm not persuaded that there's enough evidence to show that there's been any breach of contract, or a breach of the EU timeshare directive, by the holiday company for which Hitachi Capital would be liable under section 75;
- the December 2021 letter says that Hitachi Capital paid a commission to the holiday company but the level of commission wasn't disclosed to Mr F and his wife and they didn't consent to it and Mr F's complaint form says that Hitachi Capital paid a commission to the holiday company which wasn't declared to him;
- the customer compliance statement says: "*We are aware that [the holiday company] is able to recommend credit facilities to its customers to fund their purchase, but understand that [the holiday company] is not independent. We have been advised that [the holiday company] works with a number of selected credit providers and ... is entitled to receive a commission in respect of credit brokered*"; so I consider that it was disclosed to Mr F and his wife that the holiday company might receive a commission from Hitachi Capital but I've seen no evidence to show that they asked Hitachi Capital for any information about the commission until their representative's letter to it in December 2021;
- 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 F risked the relationship being unfair under section 140A;

- Mr F entered into the loan agreement in February 2016 and he repaid the loan in January 2021 but no complaint about the commission was made to Hitachi Capital until December 2021 and, if he 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 2021 letter says that Hitachi Capital failed to carry out a sound and proper credit assessment and Mr F'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 F in February 2016 included information about his income and expenditure, including that he was an employed home-owner with an annual gross income of more than £60,000 – and I consider that it also clearly set out the interest rate and the interest that would be payable;
- Hitachi Capital says that it searched Mr F's credit record and used it with other information provided to calculate an overall score for him which exceeded its minimum lending criteria – it says that it utilises a third party affordability product to assist it with understanding affordability and there were no indications that Mr F would struggle to service the loan;
- it says that Mr F told it that his gross annual income was more than £50,000 which was validated using data obtained from credit reference agencies and it estimated his net monthly income as at least £3,128 and, taking account of his existing credit commitments and mortgage, there were no concerns about lending him an additional £8,000;
- the customer compliance statement says: *"Having carefully considered our financial commitments, we confirm that we are able to meet the financial obligations being undertaken by us in respect of our Points purchase including any financial commitments and repayments under a finance agreement"*;
- the loan was made to Mr F in February 2016 and was repaid in January 2021 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 2021 letter and I consider that it would be reasonable to expect him to have raised any concerns about the affordability assessment before then;
- I consider that it was reasonable for Hitachi Capital to have concluded on the basis of the information that Mr F had provided that he could afford a loan with a monthly repayment of £124.06 and I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mr F, that Hitachi Capital should have done more to assess the affordability of the loan for him, that the loan was mis-sold to him or that Hitachi Capital has acted incorrectly in connection with the loan;
- Mr F's complaint form says that the holiday company unduly pressured him and his wife into entering into the purchase agreement and him into entering into the loan agreement and Mr F says that there was a lot of high pressure from the holiday company to purchase more points;

- Mr F and his wife had signed the separate standard form of the withdrawal notice that could be given to withdraw from the purchase agreement which set out their right to withdraw from the 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 purchase agreement within the withdrawal period;
- the loan agreement also said that Mr F 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 F and his wife signed the purchase agreement in February 2016 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 2021 letter – if they had been unduly pressured into signing the purchase agreement and didn't want to buy the additional 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;
- Mr F and his wife had bought 7,000 points rights in November 2013 and his complaint form about the finance provider's response to the claims that he'd made to it about that purchase says that the holiday company unduly pressured him and his wife into entering into the purchase agreement in November 2013 and him into entering into the loan agreement at the same time – but if they'd been unduly pressured into entering into those agreements in November 2013, I don't consider it to be likely that they'd then have allowed themselves to be unduly pressured into buying more points rights in February 2016;
- Mr F and his wife then bought 7,500 more membership points rights from the holiday company in April 2016 - if they'd been unduly pressured into entering into the purchase agreement and the loan agreement in February 2016, I don't consider it to be likely that they'd then have then bought more membership points rights from the holiday company two months later;
- I'm not persuaded that there's enough evidence to show that Mr F and his wife were unduly pressured into entering into the purchase agreement in February 2016 or that Mr F was unduly pressured into entering into the loan agreement at that time or that the holiday company used unacceptable sales practices against them;
- Mr F's representative has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses – but it would be for a court to determine whether or not any of the terms in the agreements were 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 F and his wife and I consider it to be unlikely that a court would conclude in these circumstances that the terms of the documents created an unfair relationship between Mr F and Hitachi Capital;
- I'm not persuaded that there's enough evidence to show that Mr F'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 F and Hitachi Capital in these circumstances;

- I sympathise with Mr F for the issues that he and his wife have had with their membership points rights but I consider that Hitachi Capital's response to the claims that had been made to it was fair and reasonable; and
- I find that it wouldn't be fair or reasonable in these circumstances for me to require Hitachi Capital to refund to Mr F any of the money that he paid under the loan agreement, to pay him any compensation or to take any other action in response to his complaint.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 6 December 2023.

Jarrold Hastings  
**Ombudsman**