DRN-3661209

The complaint

Mr J complains that he and his wife were mis-sold a timeshare product and the loan used to finance the purchase. The loan was provided by Hitachi Capital (UK) Plc (now Mitsubishi HC Capital UK Plc), which I'll refer to as Hitachi Capital.

Mr J has been represented by a claims management business, which I'll refer to as "F". Where I refer to Mr J's submissions and arguments, I include those made on his behalf.

What happened

Mr and Mrs J were existing members of the Diamond Resorts European Collection ("DREC"), having originally bought a timeshare product from its predecessors in 2004. DREC is a timeshare and holiday club.

Mr and Mrs J made a further purchase in 2011, increasing their membership points and improving their options for using those membership points to book holiday accommodation and other benefits.

In March 2016 they bought another 7,000 points, funded in part with a loan from Hitachi Capital in Mr J's name. The purchase agreement recorded that the seller was Diamond Resorts (Europe) Limited ("DRL").

In April 2019 Mr and Mrs J wrote to DRL, expressing dissatisfaction with their timeshare and purporting to give notice of rescission of their membership of DREC.

In or about September 2019 they referred the matter to Hitachi Capital. In doing that and in subsequent submissions, they said, in summary:

- Hitachi Capital did not properly assess whether the loan was affordable.
- DRL misrepresented the club membership. Mr J therefore has a claim against DRL and, under section 75(1) of the Consumer Credit Act 1974, a like claim against Hitachi Capital.
- The sales process was pressured, and they did not have a proper opportunity to consider the sale and finance documents.
- They had difficulty booking accommodation. They were told that buying more points would guarantee availability, but that had not been the case.
- Some of the terms of the timeshare agreement were unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR").
- DRL had failed to disclose the commission it received from Hitachi Capital.
- The loan agreements created an unfair relationship within the meaning of section 140A of the Consumer Credit Act.
- Membership of DREC was of little or no value, as it was possible to book the same holiday accommodation more cheaply online.

Hitachi Capital sought comments from DRL. It said, in summary:

- The sales process was lengthy, but that was necessary to ensure full explanations were given and to comply with The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.
- It denied the sales tactics were pressured or unfair. Contrary to what they had said, Mr and Mrs J were not taking advantage of a free holiday in March 2016 and were not obliged to attend the presentation.
- Customers have a 14-day cooling-off period in which to withdraw from any agreement, should they wish to do so.
- Mr and Mrs J had been timeshare owners since 2004, so would have been familiar with the way the club operated.
- Mr and Mrs J had made regular bookings and had never raised any concerns about availability.
- They also knew that a commission might be paid and could have asked how much it would be.

When the case was referred to this service, one of our investigators considered what had happened but did not recommend that it be upheld. Mr J did not accept the investigator's assessment and asked that an ombudsman review the case.

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.

Affordability

Mr J says that proper assessments were not made to ensure he could afford the loan.

If a borrower complains that affordability checks were inadequate, I would generally expect them to provide evidence of any difficulty they may have had in making payments – especially where they have professional representation.

Mr J has not suggested however that he has had any difficulty in making repayments. The fact that he has been able to meet the loan repayments does not, of itself, mean that the loan was in fact affordable, still less that Hitachi Capital properly assessed it. It is however an indication that it was, and that more detailed assessments are unlikely to have made any real difference overall.

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 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.

The 2016 purchase agreement was made between Mr and Mrs J jointly as buyer and DRL as seller. It was an agreement for the sale and purchase of Points Rights in DREC. DRL is also named as the supplier in Hitachi Capital's documentation.

I am satisfied therefore that the loans were arranged by DRL under existing arrangements with Hitachi Capital. Indeed, that does not appear to be in dispute. I must therefore consider what Mr J has said about the actions of DRL.

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 do what it has agreed to under the contract. There can be a breach if it is clear that one party will not do what it has agreed to do.

In order to establish whether a party has a valid claim for breach of contract or misrepresentation, it is necessary therefore to consider the contract terms.

Contractual documents

F has not provided a full set of the contractual terms that Mr and Mrs J signed. However, like F, I am familiar with the standard terms which DRL used at the time, and I think it is reasonable to assume that the terms to which Mr and Mrs J agreed were not materially different.

I note that Mr J says the Points Rights were poor value for money, because he and Mrs J could have secured the same accommodation more cheaply. I make no comment on that, save to say that poor value is not, of itself, a ground for a claim.

As I have indicated, I believe the sale and purchase contract was based on a standard form produced by DRL. The standard contract included a 3-page purchase agreement, a Key Information document, and a Customer Compliance Statement.

By clause 4 of the Terms and Conditions Mr and Mrs J acknowledged receipt of the Key Information Document, Inventory Schedule, Withdrawal Form, Annual Global Reservations Directory, Resort Disclosure Booklet, the Governing Documents Booklet and the Rules and Regulations of the Club.

Clause 6 was an entire agreement clause, telling buyers that if they were relying on verbal promises, they should be put it in writing.

Clause 7 said that, if any part of the contract was invalid, illegal or unenforceable, the rest of the contract would remain valid and enforceable.

Part 1, section 4 of the Key Information document said that the club would be dissolved on 31 December 2054. Part 3, section 4 provided information about termination of the contract. It explained that membership could be transferred in some circumstances. In exceptional circumstances it might be possible to relinquish membership.

Part 1, section 8 outlined the Management Charge and explained how it would be calculated. It said expressly that the charge was not linked to inflation.

The Customer Compliance Statement comprised 22 statements about the sale and loan. The statements included:

- a statement that, having looked at the Points tables, the member was aware of the possibilities available with the number of Points allocated to them (1);
- a statement that the points system offered flexibility, *subject to availability* (my emphasis) (4);
- confirmation that they were able to meet the financial commitments under any finance agreement (17);
- a statement that the member understood that DRL worked with credit providers and that it was entitled to receive a commission in respect of credit brokered (18);
- confirmation that they had been treated courteously, had been given time to consider whether the product was right for them, and had not been put under pressure (20);
- confirmation they had read the purchase agreement, key information and any finance document and were happy to proceed (21);
- confirmation that they understood that the documents constituted the entire agreement and that no oral or written representations had been made on which they had relied (22).

A signature on these statements does not of course mean that they were true. But if they were not true, I would have expected Mr J, in bringing this complaint and addressing Hitachi Capital's response to it, to explain why he signed the documents and why, having done so, he did not exercise his right of withdrawal if he was unhappy.

I note that some of the contractual provisions – for example, that Management Charges were not linked to inflation – were completely at odds with what Mr J says he was told. And, as an existing member since 2004, he would have known how they were calculated.

It is relevant too that the purchase contract was clear that Mr and Mrs J would not be able to rely on any oral representations and that they confirmed they had been given plenty of time to consider the purchases. If Mr and Mrs J felt they had been rushed into the agreements, they had 14 days in which to review things and withdraw if they weren't happy.

In the circumstances, I think it unlikely that a misrepresentation claim against DRL would succeed in this case.

Mr J says that the accommodation was of poor quality, and that this amounts to a breach of contract. There is however nothing to support that assertion – such as photographs of the accommodation or evidence that he expressed dissatisfaction with any stay at DRL resorts.

Mr J says too that it was difficult to book accommodation, even though he was told availability would be guaranteed. Mr and Mrs J's booking history shows however that they booked 11 holidays between December 2016 and September 2019 at a range of resorts, both in the UK and abroad. Mr J has provided no evidence of any occasion on which he has not been able to book accommodation. DRL says that, since 2004, the only year when Mr and Mrs J have had unused points was 2009.

Finally, Mr J says that he was told that DRL's resorts were exclusive to members, but that was not the case. I am not persuaded he was told that, and neither has he explained why that was so important to him. I note too that, having been a member since 2004 and having used his membership almost every year since then, Mr J would almost certainly have known by 2016 that non-members had some access to the same resorts.

It follows that Hitachi Capital's decision not to uphold Mr and Mr J's claim under section 75(1) of the Consumer Credit Act was reasonable.

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 and refunding payments.

In deciding whether to make orders under these provisions, a court can consider any linked agreement – which in this case would include the contract with DRL. For the reasons I have explained, I think it unlikely that a court would make an order under section 140B on the basis of misrepresentation or breach of contract.

F says that the commission paid to DRL for introducing the loans was not disclosed. DRL told Mr J that commission might be paid, but it was under no duty to say how much it would be unless asked. Contrary to F's submissions, this was not a case where DRL was acting on behalf of Mr J in introducing or recommending a financial product from a range of products. It was selling Points Rights on its own account and providing Mr J with payment options. In doing so, it was acting as Hitachi Capital's agent, not Mr J's.

In any event, I have no reason to think that, if Mr J had asked about the level of commission, he would not have been told what it was.

I do not accept that Mr J was given no time to consider what he was buying. He had a two-week cooling-off period in respect of both the purchase agreement and the loan.

F says that some of the terms of the contract with DRL are unfair within the meaning of UTCCR. The relevant statute by the time of this sale was the Consumer Rights Act 2015, although the provisions about unfair terms are broadly similar to those in UTCCR. If a term is "unfair", the usual remedy is that it is unenforceable as against a consumer, not that the entire contract falls or that any connected finance agreement creates an unfair relationship.

In any event, there is no evidence here that DRL has sought to enforce any terms in an unfair manner.

Finally, I note that, in its submissions in response to the investigator's preliminary assessment, F referred to a different timeshare provider and to a subsequent purchase of fractional points. There was no purchase of a fractional timeshare product in this case.

For these reasons, I think it unlikely that a court would make orders under section 140B of the Consumer Credit Act. It follows again that Hitachi Capital's response to this part of the complaint was reasonable.

Conclusion

I stress that it is not for me to decide whether Mr J has a claim against DRL or, therefore, whether he has a claim under section 75(1) of the Consumer Credit Act against Hitachi Capital. Nor do I have any power to make orders under section 140A and section 140B; only a court can do that. They are however matters which I must take into account in deciding what I consider is fair and reasonable in all the circumstances. I have done that and concluded that Hitachi Capital's response to Mr J's claims was reasonable.

My final decision

For these reasons, my final decision is that I do not uphold Mr J's complaint and do not require Mitsubishi HC Capital UK Plc to take any further steps to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 24 August 2023.
Mike Ingram
Ombudsman