DRN-3794173

The complaint

Mr H, who is represented by a professional representative ("PR") complains that Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance ("Mitsubishi") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. I gather the purchase was made by Mr H and his partner, but as the finance agreement was in Mr H's name he is the eligible complainant. In this decision for simplicity I will refer to Mr H as the sole purchaser.

What happened

In February 2012 Mr H was offered a free holiday in exchange for attending a presentation. At that meeting he decided to purchase a holiday product from a company I will call P at a cost of £10,314 funded by a loan from Mitsubishi. He says he was told that he could pass it on to his children. He also says that his partner was asked to sign the forms even though she did not want to, but he assumed she was simply acting as a witness. It turned out she also became a member of P. He also had an issue with the request that he take out a loan with Mitsubishi as he wanted to pay cash. Mr H says his children didn't want any part of it. Mr H says he was not pressurised into buying the product, but he had been feeling unwell at the time.

In May 2017 PR submitted a letter of claim to Mitsubishi on behalf of Mr H. It claimed a full refund under s.75 CCA and s.140A CCA. It said that:

- A proper assessment of Mr H's financial position and ability to repay the loan had not been done.
- P applied considerable pressure to Mr H to take out the finance;
- The product was not a fixed week timeshare and therefore the prospects of resale were nil and therefore the product purchased was not legal.
- The product was in an excess of 50 years and gave no fixed accommodation or time.
- There was an unfair relationship as set out under s.140 A CCA.
- P was under a duty to Mr H to not make a secret profit (commissions).

Mitsubishi responded to the claim and said it had carried out an affordability assessment. It also noted Mr H's testimony that he had not been pressurised and explained that he had purchased a fixed week timeshare. Mitsubishi said the contract was governed by English law and various references to Spanish law were irrelevant. It added that no commission was paid and there was no evidence of an unfair relationship.

In October 2017 PR made a complaint to this service broadly in line with the letter of claim. This was considered by one of our investigators who didn't recommend it be upheld. She said that there was insufficient evidence to show there had been either misrepresentation or a breach of contract. Nor was there evidence of an unfair relationship or undue amounts of

commission paid. Finally she noted there was nothing to show the loan was unaffordable.

PR didn't agree and said delays had made it more difficult to obtain evidence on the matter of affordability. It set out in some detail its views on the process to be followed by lenders when considering affordability. It also said the onus was on Mitsubishi to demonstrate the relationship was fair. It asked that Mitsubishi be required to supply all the documentation covering the lending 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.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision 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 available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr H) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (Mitsubishi) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should he choose to.

It's important to note that, as Mitsubishi was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

Misrepresentation

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 materially influenced the other party to enter into the contract.

PR has claimed that misrepresentation arose when Mr H was led to believe he would have some certainty as to the accommodation he could use. It says that Mr H thought it he had acquired a fixed week timeshare. I also note that Mr H has said he was misled regarding the

signature of his partner. It is clear from the agreement that Mr H had purchased a specific week and property and I cannot see how that was misrepresented. Certainly it was not an issue Mr H raised in his testimony. As for the request that his partner sign the agreement I note it was clearly marked “PURCHASERS SIGNATURE”. I am not persuaded that P’s representative misrepresented this matter.

Breach of Contract

PR has said the product was illegal pursuant to Spanish law and it lasted for a period in excess of 50 years which also illegal. However, as Mitsubishi points out in its response the contract was governed by English law and I cannot see why these matters amount to a breach of contract. I have not been told that Mr H was unable to access the property and I can only assume he has made use of the product.

S.140 A

Only a court has the power to decide whether the relationships between Mr H and Mitsubishi were unfair for the purpose of s.140A. But, as it’s relevant law, I do have to consider it if it applies to the credit agreement – which it does.

However, as a claim under s.140A is “an action to recover any sum recoverable by virtue of any enactment” under s. 9 of the LA, I’ve considered that provision here.

It was held in Patel v Patel [2009] EWHC 3264 (QB) (‘Patel v Patel’) that the time for limitation purposes ran from the date the credit agreement ended if it wasn’t in place at the time the claim was made. The limitation period is six years and the claim was made within this period.

However, I’m not persuaded that Mr H could be said to have a cause of action in negligence against Mitsubishi anyway.

Their alleged loss isn’t related to damage to property or to her personally, which must mean it’s purely financial. And that type of loss isn’t usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a claimant against that type of harm.

Yet I’ve seen little or nothing to persuade me that Mitsubishi assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that Mitsubishi owed Mr H a duty of care to ensure that C complied with the 2010 Regulations and it argues at length that the payment of commission created an unfair relationship. However, Mitsubishi has said it didn’t pay any commission so I cannot say that payment of commission created an unfair relationship. Even if it did, in my experience payments of commission in this industry were relatively low.

It also suggested the terms were onerous in that if maintenance payments were not made the contract would be terminated. Mitsubishi has explained that this is incorrect and membership is only suspended until the arrears are paid. Again I can see no basis for concluding there was an unfair relationship.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Mitsubishi has said that it carried out credit checks and Mr H’s application was referred to its underwriters for further checks before approval. PR has set

out in some detail what it considers to be the regulatory position and has claimed that unless followed the correct procedure the lending decision should be deemed to be wrong and the loan voided.

Our investigator said that she could not see any evidence that Mr H found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if Mitsubishi did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr H lost out as a result of its failings. Mr H has provided no evidence whatsoever that he found the loan difficult to repay. Indeed I note that he would have preferred to pay with cash which indicates his liquidity was such that he could meet the cost without a loan.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 11 December 2023.

Ivor Graham
Ombudsman