

The complaint

Mrs S complains that Mitsubishi HC Capital UK plc won't refund to her the money that she paid for some holiday club membership points. Her relative is also involved in her complaint and she's being represented by a claims management company.

What happened

I understand that Mrs S and her relative had bought a trial membership of a holiday club in October 2013 which had a price of £3,000. They entered into an upgrade agreement to upgrade their trial membership and bought 10,000 holiday club membership points in May 2016. The total amount payable by them was £11,000, they made an advance payment of £4,000 and Mrs S entered into a fixed sum loan agreement with a lender that has since changed its name to Mitsubishi Capital for a loan of £7,000. She agreed to make 120 monthly repayments of £108.56 to Mitsubishi Capital. I understand that Mrs S and her relative entered into an agreement to buy 5,000 more holiday club membership points in July 2016.

Mrs S's representative made claims, on behalf of Mrs S, to Mitsubishi Capital in November 2020 under sections 75 and 140A of the Consumer Credit Act 1974. It said that: the product and the loan were mis-sold; the product was misrepresented to Mrs S and her relative; the contract was breached; commission was paid between Mitsubishi Capital and the holiday company which wasn't disclosed to Mrs S which created a breach of fiduciary duty and caused an unfair relationship; the loan was unaffordable; and the relationship between Mrs S and Mitsubishi Capital was unfair. The letter referred to a purchase in July 2016 for a price of £7,000 and said that a comprehensive witness statement that Mrs S and her relative had provided was enclosed.

Mitsubishi Capital responded to those claims in detail and set out the reasons that it wasn't upholding Mrs S's complaint. Mrs S wasn't satisfied with its response so a complaint was made to this service. Mrs S's complaint form says that the holiday company and Mitsubishi Capital failed to conduct a proper assessment of her ability to afford the loan; Mitsubishi Capital paid a commission to the holiday company which wasn't declared to her and the holiday company unduly pressured her and her relative into entering into the upgrade agreement and her into entering into the loan agreement; all rendering the loan agreement unfair pursuant to section 140A.

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

Mrs S's representative, on behalf of Mrs S, has asked for this complaint to be considered by an ombudsman. It says that our investigator's recommendation is manifestly wrong and none of the relevant clauses have been reviewed. It says that the holiday company contravened the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 and the Unfair Terms in Consumer Contracts Regulations 1999, and it has provided a list of terms, including those relating to the management charges, which it says may be regarded as unfair. It has raised concerns about the way that the finance was sold to Mrs S and says that the holiday company didn't broker proper credit and failed to meet the standard of a regulated firm. It has also provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses and a further document in which it sets out its analysis of some of the contractual terms.

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 Mrs S's complaint shouldn't be upheld for these reasons:

- Mrs S and her relative signed the upgrade agreement in May 2016 to upgrade their trial membership of the holiday club and to buy 10,000 holiday club membership points – the total amount payable by them was £11,000, they made an advance payment of £4,000 and Mrs S entered into a fixed sum loan agreement with Mitsubishi Capital for a loan of £7,000;
- I understand that Mrs S and her relative then entered into an agreement to buy 5,000 more holiday club membership points in July 2016 but I've not been provided with copies of the documents relating to that purchase (nor have I been provided with a copy of the trial membership agreement that Mitsubishi Capital says that Mrs S and her relative entered into in October 2013);
- Mrs S and her relative signed other documents in May 2016 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 upgrade agreement and a customer compliance statement;
- Mrs S's representative, on Mrs S's behalf, made claims to Mitsubishi Capital in November 2020 and it referred to a purchase in July 2016 for a price of £7,000 – Mrs S then made a complaint to this service and said that she was complaining about a transaction that took place in July 2016;
- the loan agreement that Mrs S entered into with Mitsubishi Capital was signed in May 2016 and was for a loan of £7,000 – although I understand that Mrs S and her relative bought more points from the holiday company in July 2016, I've seen no evidence to show that they used a loan from Mitsubishi Capital to pay for those points or that the purchase price of those points was £7,000 so I'm satisfied that Mrs S's complaint to Mitsubishi Capital is about the upgrade agreement and the loan agreement that were entered into in May 2016;
- Mrs S's representative's November 2020 claim letter refers to claims under sections 75 and 140A, including that the membership points were misrepresented to Mrs S and her relative, but Mrs S's complaint form only refers to claims under section 140A and doesn't refer to a misrepresentation made by the holiday company;
- the November 2020 letter also says that Mrs S and her relative had provided a comprehensive witness statement which was enclosed – but a witness statement

wasn't included with the documents that have been provided by Mrs S's representative;

- 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 Mrs S's claims under sections 75 and 140A as only a court would be able to do that but I'm considering whether or not Mitsubishi Capital's response to her claims was fair and reasonable in the circumstances;
- the November 2020 letter says that the membership points were misrepresented to Mrs S and her relative because: they were advised that the package would enable them to have exclusive accommodation and cheaper holidays, so over the length of the contract they would save an amount in excess of the sum paid; they were advised that the product was of some substance but it's now clear that the product is worthless and has no merit; and it was represented to them that the purchase would be an investment as the product would increase in value and, after a few years, they would be able to sell it at a considerable profit;
- Mrs S and her relative bought 10,000 holiday club membership points in May 2016 and the upgrade agreement says: "... *your existing timeshare will be upgraded and enhanced and you will receive the Points Rights described above, plus membership (if you are not already a member) of [a specified collection of the holiday company]*";
- the key information document says: "... *you are acquiring a contractual right (on redemption of your Points) to use the accommodations detailed in the ... Resorts Disclosure Booklet*"; and it, and the customer compliance statement, included further information about the membership points;
- the customer compliance statement also says: "*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*";
- neither Mrs S nor her 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 Mrs S and her relative before their May 2016 purchase;
- the holiday company has provided an extract from the verification notes that were made in May 2016 which say that Mrs S and her relative had: "... *really enjoyed [their] stay ... [and] want to be full members*"; and a list of the 33 reservation bookings that were made by Mrs S, her relative and others using their membership between June 2013 and May 2020;
- the membership points can be redeemed to use holiday accommodation so I'm not persuaded that they're worthless and have no merit or that there's enough evidence to show that Mrs S and her relative were advised that the membership points would enable them to have exclusive accommodation and cheaper holidays or that the purchase would be an investment;
- I'm not persuaded that there's enough evidence to show that the membership points were mis-sold or misrepresented to Mrs S and her relative by the holiday company or that they were induced into entering into the upgrade agreement by any such misrepresentations;

- the November 2020 letter also says that the seller has ceased to trade and has committed a repudiatory breach of contract but I've seen no evidence to show that the holiday company has stopped trading and I'm not persuaded that there's been a breach of contract by the holiday company for which Mitsubishi Capital would be liable under section 75;
- the November 2020 letter says that commission was paid between Mitsubishi Capital and the holiday company which wasn't disclosed to Mrs S which created a breach of fiduciary duty and caused an unfair relationship and Mrs S's complaint form says that Mitsubishi Capital paid a commission to the holiday company which wasn't declared to her;
- the customer compliance statement that was signed by Mrs S and her relative says: *"We are aware that [the holiday company] is able to recommend credit facilities to its customers to fund their purchase, but understand that [it] 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";*
- I consider that Mrs S knew, or ought reasonably to have known, that Mitsubishi Capital might be paying a commission to the holiday company but I've not seen any evidence to show that she asked either the holiday company or Mitsubishi Capital for any details about any commission that was paid;
- the holiday company says that it received commission of £420 in respect of the loan that Mitsubishi Capital made to Mrs S which was 6% of the loan amount and I'm satisfied that Mitsubishi Capital didn't breach any duty in making that payment – nor was it under any regulatory duty to disclose the amount of the commission paid in these circumstances - and I don't consider that the level of commission that was paid was sufficiently high to mean that Mitsubishi Capital should have appreciated that not disclosing it to Mrs S risked the relationship being unfair under section 140A;
- the November 2020 letter also says that the loan was unaffordable for Mrs S and her complaint form says that the holiday company and Mitsubishi Capital failed to conduct a proper assessment of her ability to afford the loan but neither Mrs S nor her representative has provided detailed evidence about Mrs S's financial position in May 2016 or to show that the loan wasn't affordable for her at that time;
- the loan agreement that Mrs S signed in May 2016 shows that she was employed with a gross income of between £25,000 and £29,999 and Mitsubishi Capital says that it searched Mrs S's credit record and used it, with other information provided on her application, to calculate a credit score which exceeded its minimum lending criteria and that it utilises a third party affordability product and there were no indications that Mrs S would struggle to service the loan;
- it says that it calculated Mrs S's net monthly income as £1,852 and that, after the loan repayment of £108.56 and the payment for her other credit commitments, she would be left with approximately £1,520 each month for other monthly expenses which, based on national averages, it says is generally sufficient to meet typical other expenses and given that there were no indications of financial stress on her credit file, there were no concerns about lending her an additional £7,000;
- Mrs S and her relative had signed the customer compliance statement which said: *"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 Mrs S in May 2016 but I've seen no evidence to show that she asked Mitsubishi Capital for any information about the affordability assessment that it conducted before her representative's November 2020 letter;
- I consider that the evidence that Mitsubishi Capital has provided shows that it made reasonable and proportionate checks to assess whether the loan was affordable for Mrs S before it was made to her and that it was reasonable for it to have concluded on the basis of the information that it had gathered that Mrs S could afford a loan with a monthly repayment of £108.58;
- I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mrs S, that Mitsubishi Capital should have done more to assess the affordability of the loan for her, that the loan was mis-sold to her or that Mitsubishi Capital has acted incorrectly in connection with the loan;
- Mrs S's complaint form says that the holiday company unduly pressured her and her relative into entering into the upgrade agreement and her into entering into the loan agreement – but Mitsubishi Capital says that Mrs S and her relative bought 5,000 more membership points from the holiday company in July 2016 - if they'd been unduly pressured into entering into the upgrade agreement I don't consider it to be likely that they would have agreed to buy more membership points from the holiday company two months later;
- Mrs S and her relative had signed the separate standard form of the withdrawal notice that could be given to withdraw from the upgrade agreement within 14 days without giving any reason and the loan agreement said : *"You will have the right to withdraw from the agreement, without giving any reason, for a period of 14 days"*; but I've seen no evidence to show that Mrs S contacted either the holiday company or Mitsubishi Capital to withdraw from either the upgrade agreement or the loan agreement within the applicable withdrawal periods;
- the customer compliance statement also said: *"We confirm that we have been treated courteously during the sales presentation, that we have been given plenty of time to consider if the product is right for us and we have not been put under any pressure to purchase our Points"*;
- Mrs S and her relative signed those agreements in May 2016 but I've seen no evidence to show that they complained to either the holiday company or Mitsubishi Capital about the undue pressure that Mrs S claims was applied to them until her representative's November 2020 letter – if they'd been unduly pressured into signing the upgrade agreement and didn't want to buy the membership points, I consider that it would be reasonable to expect them to have contacted either the holiday company or Mitsubishi Capital about that issue sooner than they did;
- I'm not persuaded that there's enough evidence to show that Mrs S and her relative were unduly pressurised into entering into the upgrade agreement or that Mrs S was unduly pressurised into entering into the loan agreement or that the holiday company used unacceptable sales practices against them;
- Mrs S's representative has says that the holiday company contravened the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 and the Unfair Terms in Consumer Contracts Regulations 1999, it has provided a list of terms, including those relating to the management charges, which it says may be regarded as unfair, and it has provided a generic submission from a legal counsel about the holiday company and the unfair terms that it uses and a further document in which it sets out its analysis of some of the contractual terms;
- I'm not persuaded that enough evidence to show that there's been there's been a breach of any applicable law or regulation for which Mitsubishi Capital would be liable

in these circumstances and it would be for a court to determine whether or not any of the terms in the agreements that Mrs S signed 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 Mrs S and her relative 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 Mrs S and Mitsubishi Capital;
- there was no reference in the November 2020 letter or the complaint form to the management charges or the terms relating to the management charges being unfair and I'm not persuaded that there's enough evidence to show that the management charges are unfair or that Mrs S and her relative have been required to pay any other unfair charges for their membership points;
- I'm not persuaded that there's enough evidence to show that Mrs S's relationship with Mitsubishi Capital was unfair and I don't consider it to be likely that a court would conclude that there was an unfair relationship between Mrs S and Mitsubishi Capital in these circumstances;
- I sympathise with Mrs S for the issues that she and her relative have had with their membership points but I consider that Mitsubishi Capital's response to the claims that had been made to it was fair and reasonable in these circumstances; and
- I find that it wouldn't be fair or reasonable for me to require Mitsubishi Capital to refund to Mrs S any of the money that she's paid under the loan agreement, to cancel the loan agreement, to pay her any compensation or to take any other action in response to her complaint.

My final decision

My decision is that I don't uphold Mrs S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 15 November 2023.

Jarrold Hastings
Ombudsman