DRN-4161105

The complaint

Mr P says that Mitsubishi HC Capital UK Plc (who were Hitachi Capital (UK) Plc), who I'll refer to as Mitsubishi, unfairly declined his claims under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare he was sold.

Mr P has been represented by a professional representative who I'll refer to as "PR". Where I refer to Mr P's submissions I include those made on his behalf.

Mr P entered into the timeshare agreement with his partner, but as the finance agreement was in his sole name, I will refer only to Mr P or his representatives in this decision.

What happened

I issued my provisional decision on this complaint in May of this year. An extract from that provisional decision is set out below.

What happened

Mr P purchased a timeshare from a company I'll call "A", in April 2012 (the Time of Sale). He financed the deal through a fixed sum loan with Mitsubishi.

The timeshare membership agreement gave him the right to occupy an apartment at a resort in Greece, for a prescribed week of every year until the expiry of the membership in December 2036.

Mr P complained to Mitsubishi in December 2018. He said that the timeshare had been misrepresented to him and that he had a like claim against the credit provider (Mitsubishi) as he did against the supplier under section 75 of the CCA. He said that the agreement was illegal under Spanish law and that the timeshare agreement, and the finance agreement that funded it, were therefore null and void. He also suggested that the timeshare agreement was in breach of a European directive and that commission paid to the broker should have been disclosed. It was Mr P's assertion that he wouldn't have proceeded with the timeshare deal had it not been for the unfair relationship and the misrepresentations.

Our investigator didn't think Mr D's complaint should be upheld. He didn't think they'd been able to demonstrate a breach of contract or that there was sufficient evidence of misrepresentation. He noted that PR had expanded on their original complaint and had raised questions about whether Mitsubishi had performed adequate affordability checks and he explained that if PR wished to raise those new issues PR would need to be given an opportunity to consider them before this Service could. He noted that PR had provided new generic submissions, but he didn't take those into account as he explained they were related to points based timeshares and to a timeshare provider, who I'll call "D", who were not the provider of Mr P's timeshare agreement.

Mr P and his representatives didn't agree with the investigator's view, and they asked for a decision by an ombudsman.

What I've provisionally 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.

I'm issuing a provisional decision here as it's been some time since the investigator provided his view and I can't see we've responded to all of the issues in the case.

This service can't usually consider the merits of new complaints if they haven't been made to the business first. On this occasion, I can see that Mitsubishi have considered the merits of issues Mr P has raised since his initial complaint, and that they haven't objected to this Service considering the complaint as a whole. And given its age, it seems to me to be in everyone's interest if I now deal with everything. I am, however, issuing a provisional decision to allow both parties the opportunity to respond to the decision I'm currently inclined to make.

I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations, regulators rules, guidance, and standards, codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.

The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under the Financial Services and Markets Act 2000 (FSMA). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my final decision.

The Consumer Credit Act 1974

When something goes wrong and the payment was made with a fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the Consumer Credit Act (1974) says that in certain circumstances, the borrower under a credit agreement has a right to make the same claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier.

From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

Section 56 of the CCA is relevant in the context of section 140A of the CCA that Mr P also relies on, as the pre-contractual acts or omissions of the credit broker or supplier will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair relationship exists between Mr P and the lender.

It's not for me to decide the outcome of a claim Mr P may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether the lender was reasonable to reject Mr P's claims.

The claim under section 75 of the CCA

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.

Mr P says that he was told that accommodation would be of a luxury standard and that wasn't the case. I think the standard of accommodation is a subjective matter and I've not been provided with sufficient information to persuade me that a false statement was made about the quality of the accommodation.

Mr P says he was told the resort was exclusive and could only be used by members. I'm not persuaded I have been provided with evidence that other members of the public were allowed to use the resort. That's because the information provided by Mr P relates exclusively to availability at resorts in Spain and doesn't demonstrate availability at the Greek resort he was a member of. But, even if was to accept that the resort wasn't exclusive, I think that would have been clear to Mr P from the outset as he'd signed up for an international exchange scheme with a company I'll call "R" as part of the agreement, and it would have therefore been clear that other members of R, who were not necessarily members of the Resort, would have been able to use their membership to book accommodation at the Resort.

Mr P has explained that he was promised cheaper flights would be available through R, but I've not been provided with any further evidence to support that assertion, or to demonstrate that cheaper flights weren't available, so I don't think there's evidence of misrepresentation.

It's also suggested that Mr P was told he could gain access to the resort at any time and could use several weeks together. It's unclear how Mr P thinks he could gain access at any time as his membership agreement explained he only had access for week 46. I can't see that the timeshare agreement allowed for movement of weeks so that several weeks could be used together either. So, I don't think there's evidence the timeshare agreement was misrepresented to him, and I don't think Mitsubishi were unreasonable to reject that claim.

Breach of contract

PR have suggested that the timeshare agreement is null and void under Spanish law, but the timeshare agreement explains:

"15. governing LAW

The construction, validity and performance of this Agreement shall in all aspects be governed by the laws of the Republic of Cyprus".

So, I can't see how Spanish law a consideration is here and overall, I don't think Mitsubishi have been unreasonable not to uphold a section 75 claim.

The claim under section 140A of the CCA

S.140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

We know it is common that these sales presentations often lasted for a number of hours. I've therefore considered whether there is evidence that Mr P's ability to exercise choice was significantly impaired by the lengthy presentation, the pressure, lack of breaks, and the lack of time alone to think, that he says he experienced.

Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) seems to expand on the everyday definition of pressure. At the time of sale, Regulation 7 stated that a commercial practice was aggressive if, in its factual context and

taking account of all of its features and circumstances, it:

a. significantly impaired or was likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence; and
b. caused or was likely to cause the consumer to take a transactional decision they would not have taken otherwise as a result.

Regulation 7(2) went on to say that consideration must be given to the timing, location, nature and persistence of the practice. And when thinking about whether "undue influence" was applied, Regulation 7(3) said that thought must be given as to whether the Supplier exploited "a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly [limited] the consumer's ability to make an informed decision."

I don't think I've been provided with sufficient information to suggest Mr P didn't understand he didn't have to say yes to the agreement or that he didn't understand he could walk away without entering into it. He had, after all, been to what I think was likely to be a similar presentation, when he signed up for the trial. He was also provided with a 14 day cooling off period and I think, even if he wasn't allowed much time to think during the presentation, the cooling off period allowed him to reflect and withdraw from the agreement and the loan if he wished.

Overall, I'm not persuaded that Mr P's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

PR suggest that Mr P's rights to a week's accommodation at the Resort amount to a "long-term holiday product" as defined in the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "2010 Regulations"). They say that Regulation 26 of those Regulations, stipulates that payments towards the agreement should have been in instalments. But this wasn't a long-term holiday product as defined by Regulation 8 of the 2010 Regulations, it was a Timeshare Contract as defined under Regulation 7, and in those circumstances, Regulation 26 ("Payment schedule – long term holiday products") didn't, and doesn't, apply.

PR say that the timeshare company accepted a deposit from Mr P in advance of the agreement and that, as the deposit was taken in contravention of Article 9 of Directive 2008/122/EC of the European Parliament, the contract should be rescinded. That Directive says:

"Member States shall ensure that in relation to timeshare, long-term holiday product and exchange contracts any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration to the trader or to any third party by the consumer before the end of the withdrawal period according to Article 6, is prohibited".

I can't see that the finance agreement included any advance payment, and the agreement explained that the first payment was due on 27 May 2012, which was after the 14 day withdrawal period had expired. So, I'm not persuaded there was a contravention of the Directive.

I have also considered the matter of commission in relation to this transaction. I don't think the fact that Mitsubishi may have paid the Supplier commission was incompatible with its role in the transaction. The Supplier wasn't acting as an agent of Mr P but as the supplier of contractual rights he obtained under the purchase agreement. And, in relation to the loan,

based on what I've seen, I don't think it was the Supplier's role to make an impartial or disinterested recommendation or to give Mr P advice or information on that basis. What's more, I haven't seen any persuasive evidence that the typical amounts of commission paid by Mitsubishi to suppliers (like the Supplier) when loans were interest bearing (as was the case on this occasion) was likely to be high enough to create an unfair debtor-creditor relationship given the circumstances of this particular complaint. I think it's unlikely a court would find that the failure to disclose commission in this case created an unfair relationship under s.140A.

Ultimately, I do not consider it likely that a court would conclude that the lender's acts and/or omissions, or those of the supplier or credit broker as agents of the lender, generated an unfair debtor – creditor relationship here.

Unaffordable lending

Mr P says that the lender didn't perform adequate credit checks or review his credit file when approving the loan, and that they didn't conform to guidance from the Office of Fair Trading on lending.

However, when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So even if I was persuaded that the lender 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 the credit granted by them was likely to be unaffordable and that Mr P suffered a loss as a result. I've not been provided with sufficient evidence from Mr P to suggest he didn't have enough disposable income to sustainably afford repayments against this loan, and I don't therefore think it would be reasonable to suggest the lender was irresponsible when providing the credit.

My provisional decision

I'm not currently expecting to uphold this complaint.

Further comments or evidence

Mitsubishi didn't provide any further comments, but Mr P's representatives did. They said:

"We do not agree with the decision.

We return in this matter to the submissions we have provided in each non-fractional matter. We are also of the view that these have not been considered at all and a decision has already been reached in each matter, as appears to be the case from the nature of your emails on this subject.

However, there does appear to be some confusion about our arguments in relation to non-fractional matters. We DO NOT assert that both were sold as an investment. That is not the reason as to why these matters are similar. The key issue is the fairness of what each consumer was (or not) advised of.

In the precedent CLC fractional decision, in paragraphs 136 – 227, the Ombudsman reviews the voluminous documentation supporting the fractional product. The Ombudsman found it was unfair and, in the recent decision by Mrs Justice Collins Rice, she found that the Ombudsman "did not err in law" in their application of Regulation 7(1) UTCCR. That gave rise to a successful claim under section 140A CCA 1974.

Regardless of the investment issue, the same voluminous documents exist, and the same unfair charges exist.

Why is this being interpreted differently?"

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.

PR haven't advised which of their submissions they feel I have not considered and having reviewed them again I think I have dealt with them in some detail.

I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations, regulators rules, guidance, and standards, codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time, and having done that, I may consider what is fair in the circumstances. Having done that I'm persuaded that it wouldn't be fair to uphold Mr P's complaint on the various issues I've set out above.

Regulation 7(1) of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) says:

"A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language."

I'm not persuaded that the issues raised in this complaint can be fairly compared to those considered by the judge in the 2023 judicial review PR refer to. The judge in that case was considering whether it was fair to market the investment aspect of a fractional timeshare agreement. In my opinion, and for the reasons I've already given, I'm not persuaded the aspects PR have raised on Mr P's behalf in this case suggest there has been a breach of Regulation 7(1) of the UTCCR.

Having considered PR's additional comments I'm not therefore persuaded to change my provisional decision and that provisional decision therefore becomes my final decision on this complaint.

My final decision

For the reasons I've given above I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 31 July 2023.

Phillip McMahon
Ombudsman