DRN-4293034

The complaint

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

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

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

What happened

I issued my provisional decision on this complaint last month. An extract from that provisional decision is set out below.

What happened

On 1 March 2019 Mrs V purchased a Trial Membership of a timeshare and funded it through a different finance provider. In October of that year during a promotional holiday in Tenerife, Mrs V attended a presentation and purchased a Holiday Owners Club Membership with a company who I'll call "C", trading in her trial membership. Mrs V funded this new purchase through a loan with Mitsubishi.

The timeshare agreement she entered into allowed her to use the points purchased to secure accommodation at resorts worldwide.

In December 2020 PA complained to Mitsubishi on Mrs V's behalf. Their claim was quite lengthy and it's not practical to list all of the matters they mentioned here. In summary they said that Mrs V had a claim against Mitsubishi as there had been an unfair relationship pursuant to section 140A (s.140A) of the CCA. They explained there hadn't been a proper assessment of whether Mrs V could afford the agreement; Mitsubishi should have declared the commission it had paid to the timeshare provider, and that the timeshare company had unduly pressured Mrs V to take out the timeshare and the finance agreement that funded it.

Our investigator didn't think there was sufficient evidence to support Mrs V's claim.

PR disagreed. They didn't think the investigator had reviewed all of the submissions they'd made, and they referred us to the recent case of Shawbrook Bank Ltd, R v Financial Ombudsman Service Ltd [2023] in which they said the same voluminous evidence had been considered by the ombudsman and found to be unfair. They noted that the judge had found the ombudsman in that case "did not err in law" in their application of Regulation 7(1) Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) that gave rise to a successful claim under section 140A CCA 1974. They said the same voluminous evidence and unfair charges existed in this case and that the interpretation should be the same. They also provided a copy of generic submissions on behalf of complainants against C that had been produced by Counsel.

The complaint has therefore been referred to me, an ombudsman, for a decision.

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 her view and I can't see we've responded to all of the issues in the case.

PR provided some generic comments from Counsel that shared some general concerns about consumer contracts with the timeshare provider Mrs V entered into an agreement with. PR didn't elaborate on which of Counsel's comments they thought were pertinent to Mrs V's complaint. This service can't usually consider the merits of new complaints if they haven't been made to the business first. So, I've only considered the complaint points raised with Mitsubishi in PR's claim to them of 1 December 2020, along with any generic submissions made on those issues by Counsel.

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). 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 (CCA)

Section 56 of the CCA is relevant to the claim under s.140A of the CCA as the pre-contractual acts or omissions of the 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 Mrs V and Mitsubishi.

It's not for me to decide the outcome of a claim Mrs V may have under s.140A but I'm required to take it into account when deciding whether Mitsubishi would be reasonable to reject Mrs V's claims.

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).

Unfair pressure

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 Mrs V'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 she says she experienced as that may have created an unfair relationship between her and the supplier.

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 can't see that Mrs V has provided much of an account of why the presentation was pressured. She'd attended a presentation in March of that year when she signed up for a trial timeshare, so I think she would have been likely to have had an understanding of the approach that would be taken. I don't think I've been provided with sufficient information to suggest Mrs V didn't understand she didn't have to say yes to the agreement or that she didn't understand she could walk away without entering into it. She was also provided with a 14 day cooling off period and I think, even if she wasn't allowed much time to think during the presentation, the cooling off period allowed her to reflect and withdraw from the agreement and the loan if she wished.

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

Commission

One of the main aims of both the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 and the Consumer Rights Act 2015 was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. If a supplier's disclosure and/or the terms of a bargain didn't recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may amount to unfairness under S.140A.

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 Mrs V but as the supplier of contractual rights she 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 Mrs V 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.

Was the loan irresponsible?

Mrs V says that Mitsubishi were in breach of its obligations to carry out an adequate credit assessment to determine whether she could afford to repay the loan.

However, even if Mitsubishi didn't complete adequate affordability checks (and I make no finding about that) 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, for me to say Mitsubishi needed to do something to put things right, I would need to see that the credit granted by Mitsubishi was likely to be unaffordable and that Mrs V suffered a loss as a result. As there's little evidence that she would have found, nor found, it difficult to repay what she was lent by Mitsubishi, I'm not persuaded the agreement was unaffordable for her or that there was any unfair relationship created by any potential failure to assess the credit application more thoroughly.

Ultimately, I don't think a court would find evidence to suggest there was an unfair relationship and I'm not therefore persuaded it would be reasonable to expect Mitsubishi to uphold Mrs V's s.140A claim.

Shawbrook Bank Ltd, R v Financial Ombudsman Service Ltd [2023]

The complaints at the centre of this judicial review were concerned with a particular type of asset backed timeshare, known in the industry as "fractional ownership timeshare". Such timeshares offered prospective members the same sort of holiday rights commonly associated with timeshares more generally. But they also offered prospective members a "share" in the ownership of a specific property. They didn't usually confer any rights to stay in that property. But under the terms of the purchase agreement, the property is usually set to be sold at the end of the membership period and the net proceeds distributed (on a pro-rata basis) among the fractional owners.

But that isn't the type of timeshare purchased by Mrs V. While fractional and non-fractional timeshares may have been sold in a similar way, the fact that the non-fractional timeshares weren't designed with an investment element front and centre is an important distinction when determining what a fair and reasonable outcome to a complaint involving a non-fractional timeshare might look like. After all, those parts of the judicial review and subsequent judgment concerned with the prohibition in Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 and the provision of information in relation to any investment element aren't relevant to non-fractional timeshares – including the one purchased by Mrs V.

I acknowledge that some non-fractional timeshares might share a number of contractual terms that were the subject of the judicial review (and may fall foul of the relevant law on unfair contract terms). However, an assessment of unfairness under s.140A doesn't necessarily stop at a regulator breach. It's often necessary to then assess the impact of that breach on the consumer. That much is clear from case law – including the recent timeshare review.

In other words, complaints must be decided on their individual merits. And it is with that approach in mind that having considered the circumstances of this complaint, I'm not intending to uphold it.

My provisional decision

I'm not expecting to uphold this complaint.

Further comments and/or evidence

Mitsubishi didn't provide any further information, but Mrs V did, she said:

"My complaint was not about Mitsubishi (previously Hitachi), but "C".

In October 2019 I signed for a holiday plan membership with CLC World completely unaware that I am actually applying for a loan to pay for it. I believe this product was sold unlawfully to me, because me and my family were convinced that we are signing for a membership that can be terminated any time.

We did not want to become members initially, and the representative reassured us that we can try the membership only for a few months (like a gym membership) to see if we like it. No one ever mentioned a loan. We specifically asked if it's going to be a change for termination and we were told no.

It turned out that the information about cancelling any time was correct, they just left out the fact that we have to continue the payments, because we actually have a loan.

I did not read the documents properly after I signed which obviously was my biggest mistake, because I would noticed Hitachi on the form (which I first saw on my bank statement and became suspicious that something is not right), that was never mentioned in the conversation.

I have to also mention that when I signed, the documents were taken from us for approximately 10-15 minutes and we were invited in manager's office for a welcome gift and a coffee. The explanation was that they will put the documents in a nice folder with additional vouchers and will bring it to us. I believe the information about Hitachi was added on after my signature.

It is difficult even for me to accept that I was so obliviously unaware what was actually going on, but that is how good those guys are.

I was actually concerned that they are not offering wide variety of choices for holiday rather than suspecting any fraud.

If I had the information that we are actually applying for a loan I would never agree to sign and that was my initial commitment. I was sold a loan as a holiday club membership and was reassured that I can cancel any time."

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.

I can't consider complaints about C directly, but I've explained that section 56 of the CCA allows me to consider Mitsubishi responsible for C's pre-contractual acts or omissions, to decide whether an unfair relationship existed between Mrs V and Mitsubishi.

I can't agree that there is sufficient evidence to suggest Mrs V wouldn't have been aware she was financing the deal through a loan. Mitsubishi (Hitachi then) wrote to her in late October 2019 to thank her for choosing them *"to fund your purchase through "C*" and she signed the finance documents. Whilst I understand she suggests the documents were taken away and adapted, I don't have sufficient evidence to corroborate that, and I think she would have complained as soon as she received the letter confirming the funding, if she wasn't

aware the deal was being financed through a loan.

I don't think there's sufficient evidence Mrs V was told she could try the membership for a few months either. While the March agreement was for a trial, 12 month, arrangement, the second agreement was for 15 years and that term was clearly set out, in bold, on the first page of the Acquisition Agreement.

I don't think I've been provided with additional information that would lead me to change my provisional decision. 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 Mrs V to accept or reject my decision before 7 September 2023.

Phillip McMahon
Ombudsman