

## **The complaint**

Mrs F complains through her representative, P, that Mitsubishi HC Capital UK Plc ("Mitsubishi") didn't fairly or reasonably deal with her claims under s. 75 and s. 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a holiday product in June 2015. The purchase was in Mr and Mrs F's name but, as it was funded by a loan taken out by Mrs F, she is the eligible complainant. For simplicity, in this decision I will refer to her as the sole purchaser.

## **What happened**

Mrs F held a fractional ownership holiday product with a company I will call D. In June 2015 she purchased a non-fractional product at a cost of £2,310 from D funded by a loan from Mitsubishi.

In June 2019 P claimed a refund from Mitsubishi due to misrepresentation and breach of contract. It also argued there had been an unfair relationship as set out in s.140A CCA. Both parties are aware of the details of the claim so in this decision for brevity I will simply set out the key points.

Firstly I should say that P has on occasion conflated various purchases and some of its arguments are not relevant to the subject of this complaint. I am only considering the 2015 purchase funded by Mitsubishi.

P says Mrs F was told that the new product would allow them to end their other membership earlier, but this wasn't true. It says that the fractional product could only be terminated if sold. P also said that Mrs F believed she was buying an exclusive product, but D's accommodation was available to others on the open market. It said the cost was front loaded which fell foul of the Timeshare Regulations 2010.

P argued there was breach of contract because the fractional owners contract breached the Unfair Terms in Consumer Contracts Regulations ("UTCCR") 1999.

It went on to claim that there had been a breach of fiduciary duty by failing to inform Mrs F that it had paid commission to D and so she was unable to give informed consent.

Finally, it said there was an unfair relationship due to the failure to disclose the commission paid. It also made a number of points relating to the fractional product. P said that a proper assessment of affordability had not been made and the Finance and Leasing Association code of conduct had not been followed.

Mitsubishi responded and rebutted each claim and P brought a complaint to this service on behalf of Mrs F. It reiterated the points it had made in its letter of claim. Mitsubishi noted that many of the points raised by P related to the earlier product which it had not funded. It also said that Mrs F had owned other holiday products since 2000. It attached a list of the numerous holidays taken between January 2016 and November 2017.

The complaint was considered by one of our investigators who didn't recommend it be

upheld. She said that she was only able to consider the purchase in 2015 and she didn't believe that evidence of misrepresentation had been supplied. Nor did she think there had been evidence of a breach of contract.

She also considered if there had been an unfair relationship, but concluded there were any relevant considerations which allow her to uphold this element of the complaint. She also hadn't seen any evidence that the lending was unaffordable.

P didn't agree and said the contract (without specifying which one) referred to ownership of property and this had caused Mrs F to believe she was acquiring property. However P refers to American rules and it may have been referring to another contract unrelated to the one which is the subject of this claim.

It said that D had been required to supply the key information as set out in the Timeshare Regulations. However, it didn't say which ones it thought had not been provided. It also reiterated that the UTCCR had been breached by D failing to make it clear that Mrs F would have ongoing financial obligations and subjecting her to a high pressured sales pitch.

Subsequently it submitted a generic counsel's opinion on sales by D. More recently it made new points which had not been raised with Mitsubishi and asked that this service obtain more information about the contract. Our investigator explained that it would have to raise any new arguments with Mitsubishi first and on the second point this service would decide what was required and in any event much of what had been suggested had no relevance to this complaint.

I issued a provisional decision as follows:

*"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. I would add that much of the arguments put forward do not relate to the purchase made in 2015 and much is irrelevant to the facts of this complaint.*

S.75 CCA

*S. 75 of the CCA states that, when a debtor (Mrs F) 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 they 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*

*On Mrs F’s behalf P alleges that the holiday product was misrepresented to her, in particular that:*

- She could terminate her fractional ownership earlier.*
- The resorts were exclusive.*

*Not having been present at the sale it’s not possible for me to say exactly what was said, and in what circumstances. But the terms of the contract set out fairly clearly what was being purchased and Mrs F had considerable experience of D’s products having held one or more of them for many years.*

*I have not had any testimony from her or her husband as to what was said and other than the claim made by P. I have seen no supporting evidence to back up the claim that she was told the fractional product could be ended earlier.*

*Mitsubishi has explained that D’s resorts have never been exclusive and some properties are retained by the developer and other timeshare clubs also have access. It suggested Mrs F would have been fully aware of this given her long association with D.*

*As our investigator has said the sales representatives would have put the best gloss on the product and emphasised the benefits membership would offer, but that does not mean that this amounted to misrepresentation.*

*Overall it is difficult for me to conclude that any misrepresentations were made.*

### *Breach of Contract*

*As our investigator has explained under s.75 of the CCA, we can only consider whether the D failed to perform one or more of the contract’s terms – thereby breaching the contract. I have not seen evidence that this occurred which makes it difficult for me to conclude there has been one or more breaches.*

### *S.140A CCA*

*Only a court has the power to decide whether the relationships between Mrs F 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 Mrs F could be said to have a cause of action in negligence against Mitsubishi anyway.*

*Mrs F's 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.*

*P seems to suggest that Mitsubishi owed Mrs F a duty of care to ensure that D complied with the 2010 Regulations. And P says that Mitsubishi breached that duty by failing to carry out – before granting Mrs F credit and paying D – the due diligence necessary to ensure that the product purchased by Mrs F wasn't sold by D in breach of the 2010 Regulations. However, I can see nothing which show that Mitsubishi accepted such a responsibility.*

#### *Affordability*

*P says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Our investigator said that she could not see any evidence that Mrs F 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 Mrs F lost out as a result of its failings. Mrs F has provided no evidence whatsoever that she would have found, nor that she found it difficult to repay the loan, so I do not need to consider this point further.*

*I appreciate Mrs F is dissatisfied with her purchase and she has my sympathies for this, but, in summary I cannot see why any of her claims were likely to have succeeded. So overall I think that Mitsubishi acted reasonably in declining the claims under s.75 and s. 140A CCA."*

#### **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.

Neither party has responded to my provisional decision and so I have been given no reasons to alter it. As such my provisional decision stands.

#### **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 Mrs F to accept or reject my decision before 15 December 2023.

Ivor Graham  
**Ombudsman**