

The complaint

Mrs C complains that Mitsubishi HC Capital UK plc, trading as Hitachi Capital, won't refund to her the money that she paid for a vacation club membership. Her husband is also involved in her complaint and she's being represented by a claims management company.

What happened

Mrs C and her husband entered into a vacation membership agreement in October 2013 to buy a vacation club membership. The total amount to be paid by them for the membership was £10,300 and Mrs C entered into a fixed sum loan agreement with Hitachi Capital for a loan of that amount. She agreed to make 120 monthly repayments of £133.17 to Hitachi Capital.

Mrs C's representative made claims to Hitachi Capital in June 2021 under sections 75 and 140A of the Consumer Credit Act 1974. It said that the membership was mis-sold to Mrs C and her husband and, but for the misrepresentations made to them, they wouldn't have purchased it nor entered into the loan agreement. It also said that the terms of the agreement are so egregious as to be unfair, the payment of commission was hidden from view and the membership was marketed as an investment. It said that Mrs C was pressured into entering into the loan agreement, a proper affordability check wasn't undertaken and her relationship with Hitachi Capital was unfair.

Hitachi Capital provided a detailed response to those claims. It said that the limitation period in respect of the section 75 claim had expired and it set out the reasons that it wasn't upholding her other claims. Mrs C wasn't satisfied with its response so a complaint was made to this service. Her complaint form says that: Hitachi Capital paid a commission to the holiday company which wasn't declared to her; the holiday company failed to conduct a proper assessment of her ability to afford the loan, unduly pressured her and her husband into entering into the agreements and used aggressive commercial practices to pressure them; and the product was misrepresented to them; all rendering the agreement unfair pursuant to section 140A and it said that the claim should also be considered under section 75.

Our investigator didn't recommend that Mrs C's complaint should be upheld. She thought that Hitachi Capital was entitled to rely on the timing of the misrepresentation claim to turn it down. She said that she hadn't seen enough to suggest that the relationship between Mrs C and Hitachi Capital was unfair and she wasn't persuaded that a court would reach the conclusion that the relationship was unfair. She didn't consider that Hitachi Capital had acted incorrectly in connection with any commission paid to the holiday company and she said that she hadn't seen anything persuasive to suggest that the lending was unaffordable for Mrs C.

Mrs C didn't accept our investigator's recommendation and asked for her complaint to be considered by an ombudsman. She says that she and her husband were told that they would have access to 5 star accommodation that was exclusive to members only and was patrolled through the use of security but multiple tour companies offer accommodation at the resort, allowing non-members to access facilities, but she's got no physical proof of this. Her representative says that Mrs C and her husband were sold a product with little or no benefit

or value as evidenced by the fact that there is little or no secondary market for it. It says that the product was, in effect, in perpetuity with unlimited liability for management charges which was concealed at the point of purchase and which have increased.

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 C's complaint shouldn't be upheld for these reasons:

- we don't have a free hand to consider every complaint that's referred to us and our rules, which we are required by law to follow, say – amongst other things – that we can't normally deal with a complaint if it's referred to us more than six years after the event complained of; or (if later) more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint;
- Mrs C's complaint is that Hitachi Capital turned down the claims that she'd made to it and I accept that she referred her complaint to this service within six years of that happening - but I need to consider whether the Limitation Act 1980 applies to her claims;
- Mrs C's claims were made under sections 75 and 140A but I'm not determining the outcome of those claims in this decision as only a court would be able to do that - I'm considering whether or not Hitachi Capital's response to those claims was fair and reasonable in the circumstances;
- 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);
- Mrs C's claim under section 75 is that the membership was misrepresented to her and her husband and that they wouldn't have bought it if it hadn't been misrepresented to them;
- if the criteria for a claim under section 75 were met, Hitachi Capital would be expected to consider that claim unless the claim was brought outside of the time limits set out in the Limitation Act in which case it would be entitled to rely on the Limitation Act and to not consider the claim;
- the time limit for a misrepresentation claim (whether under section 2 or 9 of the Limitation Act) is six years from the date on which the cause of action accrued (which is when everything needed to make a claim had occurred);
- I consider that Mrs C could have made a claim to the holiday company or Hitachi Capital about the misrepresentations that she says induced her and her husband into buying the membership in October 2013 as that was the latest time that any misrepresentations would have been made and any loss would have been incurred as that was when she also entered into the loan agreement with Hitachi Capital;
- I consider that her cause of action accrued at that time, so she would have had six years from then to bring a misrepresentation claim against either the holiday company or Hitachi Capital – but a misrepresentation claim wasn't made to Hitachi Capital until June 2021, more than six years later so was outside of the time limits set out in the Limitation Act and I consider that Hitachi Capital has a defence to the claim and I find that it wasn't unreasonable for it to have rejected the claim;

- Mrs C's representative says that it was deliberately concealed from Mrs C and her husband that there had been a breach of the regulations because the product was sold to them as an investment so the limitation period is postponed under section 32 of the Limitation Act until they discovered the concealment or it could with reasonable diligence have been discovered and they couldn't have reasonably become aware of the concealment until they received advice from it in around March 2020;
- section 32(1)(b) says that, if any fact relevant to the debtor's right of action has been deliberately concealed from them, the period of limitation doesn't begin until the debtor has discovered the concealment or it could with reasonable diligence have been discovered by them – and section 32(2) says that deliberate commission of a breach of duty which is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in the breach;
- Mrs C and her husband had signed the vacation membership agreement in October 2013 which granted them the right to use a one bedroom suite for four people for a week each year at the resort;
- they also signed other documents including the terms and conditions, a form about their right to withdraw from the agreement and a customer compliance statement and Mrs C also signed a loan application and the loan agreement;
- the customer compliance statement said: *"I/We understand that the reason for the purchase here today is for the primary purpose of holidays and is not a property or financial investment"*;
- neither Mrs C nor her representative has provided a detailed account of the circumstances in which Mrs C and her husband were told that the membership was an investment, the conversations that took place or the information that was provided to them before their October 2013 purchase;
- I'm not persuaded that there's enough evidence to show that the holiday company represented to Mrs C and her husband that the membership would be an investment or that it sold the membership to them as an investment;
- I'm not persuaded that there's enough evidence to show that the holiday company deliberately concealed from Mrs C and her husband that there had been a breach of the regulations so I don't consider that section 32 is applicable in these circumstances;
- Mrs C's representative also says that there was an unfair relationship between Mrs C and Hitachi Capital - 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;
- the courts have said, when considering section 140A, that the time for limitation purposes runs from the date that the credit agreement ended (if it was not still running at the time the claim was made) and the limitation period for a claim under section 140A is six years;
- Hitachi Capital has provided a statement for Mrs C's loan account which shows that the account was still open in June 2021 when the claims were first made to it so I don't consider that Mrs C's claim under section 140A is time-barred;
- as well as claiming that it was represented to Mrs C and her husband that the purchase would be an investment, Mrs C's representative's June 2021 claim letter says that it was represented to them that the membership would allow them to access 5 star accommodation that was exclusive to members only and patrolled through the use of security, that it was being offered at a discounted price but only available that day and that the accommodation would be something that could be

passed onto their family but the annual maintenance fees have increased drastically every year which is grossly unfair;

- neither Mrs C 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 C and her husband before their October 2013 purchase;
- the membership granted Mrs C and her husband the right to use a one bedroom suite each year at the resort and they visited the resort before they entered into the vacation membership agreement – and it shows that Mrs C and her husband agreed to pay £10,300 for the membership;
- the terms and conditions that were signed by Mrs C and her husband say: *“The rights acquired are the Membership Agreement are indivisible, of a personal nature and for an unlimited period of time”* (and the words *“for an unlimited period of time”* were underlined to draw attention to them); and: *“The programme for the assignment of timeshare rights is not available for weeks owned under the floating week system”*; and they confirmed in the customer compliance statement that they fully understood their obligations under the purchase agreement;
- the holiday company says that Mrs C and her husband enjoyed the product acquired in 2014 but didn’t make a booking from 2015 to 2017 and then didn’t pay their yearly maintenance fees in 2018 and 2019 so weren’t allowed to use their accommodation and the agreement was then cancelled in 2019 due to unpaid maintenance fees – it also says that it hasn’t received any complaint from Mrs C and her husband;
- any misrepresentations would have been made to Mrs C and her husband by the holiday company before they entered into the vacation membership agreement in October 2013 – but I’ve seen no evidence to show that they complained to Hitachi Capital or the holiday company about the alleged misrepresentations until their representative’s letter to Hitachi Capital in June 2021 – more than seven years later and more than six years after they’d last used their membership – and, if it had been misrepresented to them, I consider that it would be reasonable to expect them to have complained about those misrepresentations sooner than that;
- the customer compliance statement also says: *“I/We confirm that I/we have not been given representations that are not contained in the documentation presented to us”*; so if Mrs C and her husband had been given information by the holiday company that wasn’t included in the documents that they were signing, I consider that it would be reasonable to expect them to have raised that issue with the holiday company before they signed the agreements;
- I’m not persuaded that there’s enough evidence to show that the holiday company misrepresented to Mrs C and her husband that the membership would allow them to access 5 star accommodation that was exclusive to members only and patrolled through the use of security, that it was being offered at a discounted price but only available that day and that the accommodation would be something that could be passed onto their family - and I’m not persuaded that the membership was misrepresented to them by the holiday company or that they were induced into entering into the vacation membership agreement by any such misrepresentations;
- Mrs C’s representative says that the payment of commission was hidden from view and Mrs C’s complaint form says that Hitachi Capital paid a commission to the holiday company which wasn’t declared to her;
- Hitachi Capital says that it can’t find evidence that the existence of a commission arrangement was disclosed to Mrs C but that the commission rates paid by it to the holiday company aren’t excessive and that it takes care to ensure that commission

rates are not set at a level which could potentially incentivise inappropriate behaviour by companies or individuals who introduce customers to it;

- I've not been provided with any evidence to show what commission, if any, was paid by Hitachi Capital to the holiday company, but from what this service has seen across the industry, if commission was ever paid it tended to be low and of less than 15% and I'm satisfied that Hitachi Capital wouldn't have breached any duty in making any such payment – nor was it under any regulatory duty to disclose the amount of any commission paid in these circumstances - and I don't consider that the level of any commission that was normally paid in this type of situation was sufficiently high to mean that Hitachi Capital should have appreciated that not disclosing any commission to Mrs C risked the relationship being unfair under section 140A;
- Mrs C entered into the loan agreement in October 2013 and I consider that it's reasonable to conclude that any commission would have been paid by Hitachi Capital to the holiday company at about the same time – but I've seen no evidence to show that she asked Hitachi Capital for any information about that commission until her representative's June 2021 letter to it, more than seven years later and I consider that it would be reasonable to expect her to have made any complaint about the commission sooner than that;
- the June 2021 claim letter says that a proper affordability check wasn't undertaken and Mrs C's complaint form says that the holiday company failed to conduct a proper assessment of her ability to afford the loan but the loan agreement included information showing that Mrs C was an employed homeowner with no mortgage and a gross income of £25,000 to £25,999 and she has also signed a loan application form which included that information and which showed that her husband was self-employed;
- Hitachi Capital says that it searched Mrs C's credit record and used it, with other information provided on the application to calculate an overall score for Mrs C which exceeded its minimum lending criteria and that it utilises a third party affordability product but there were no indications that she would struggle to service the loan;
- it says that Mrs C's income was validated using data obtained from credit reference agencies and it estimated her net monthly income as £1,852.96 from which her monthly payments of approximately £66 for her other credit commitments were deducted and that, after the monthly loan repayment of £133.17, she would be left with approximately £1,653.79 each month for other monthly expenses which is generally sufficient to meet the other expenses which are typical to someone with similar circumstances to Mrs C – so it had no concerns about lending her an additional £10,300;
- neither Mrs C nor her representative has provided any evidence to show that the loan wasn't affordable for Mrs C when the loan made to her and I've seen no evidence to show that Mrs C asked Hitachi Capital for any information about the affordability checks that it had conducted until her representative's June 2021 letter to it, more than seven years later, and I consider that it would be reasonable to expect her to have made any complaint about those checks sooner than that;
- the loan account statement that Hitachi Capital has provided shows that Mrs C made the monthly payment each month until November 2023 when the loan was repaid on schedule and the loan account was then closed;
- I'm not persuaded that there's enough evidence to show that the loan wasn't affordable for Mrs C in October 2013 when it was made to her, that Hitachi Capital should have done more to assess the affordability of the loan for her, that the loan

was mis-sold to her or that Hitachi Capital has acted incorrectly in connection with the loan;

- the June 2021 letter says that Mrs C was pressured into entering into the loan agreement and Mrs C's complaint form says that the holiday company unduly pressured her and her husband into entering into the agreements and used aggressive commercial practices to pressure them – but the customer compliance statement that they signed says: *"I/We confirm that both the Credit and Purchase agreement were fully explained and the whole presentation was conducted in a friendly and helpful manner. I/We confirm I/we are happy to proceed with both agreements"*;
- Mrs C and her husband had signed a form about their right to withdraw from the vacation membership agreement within fourteen days without giving any reason but I've seen no evidence to show that they contacted either the holiday company or Hitachi Capital to withdraw from that agreement within the withdrawal period;
- the loan agreement also said that Mrs C had the right to withdraw from the loan agreement without giving any reason for a period of fourteen days but I've seen no evidence to show that she contacted Hitachi Capital to withdraw from the loan agreement within the withdrawal period;
- if Mrs C and her husband had been pressured into entering into those agreements and didn't want to buy the membership I consider that it would be reasonable to expect them to have contacted either the holiday company or Hitachi Capital soon after they'd signed the agreements but I've seen no evidence that they contacted either of them until Mrs C's representative's June 2021 letter, more than seven years after the agreements had been signed;
- I'm not persuaded that there's enough evidence to show that Mrs C and her husband were unduly pressured into buying the membership in October 2013, that Mrs C was unduly pressured into entering into the loan agreement or that the holiday company used unacceptably aggressive commercial practices against them;
- the June 2021 letter says that the annual maintenance fees have increased drastically every year which is grossly unfair and Mrs C's representative says that Mrs C has been with unlimited liability for management charges which was concealed at the point of purchase;
- the maintenance fee for the first year of membership was set out in the vacation membership agreement and the terms and conditions say: *"The Member must pay a yearly Maintenance Fee for the upkeep and management of the Resort. The annual maintenance fee will be calculated in accordance with the Club Constitution and will include the cost of managing the Club for the year (amongst others, electricity, water, insurance, maintenance and refuse collection), a contribution to a replacement fund for major repairs, replacements due to wear and tear, and a contribution to maintenance of common areas and facilities located within [the resort]. Maintenance Fees will be invoiced at the end of each year for each following year, and will be stipulated in accordance with the Club Constitution. A schedule of annual maintenance costs is enclosed as Appendix D. The Maintenance Fee will be collected by the Management Company"*;
- I'm not persuaded that there's enough evidence to show that the charges that Mrs C and her husband were required to pay for their membership were concealed at the point of purchase or are unfair;
- the June 2021 letter says that the terms of the agreement are so egregious as to be unfair but it would be for a court to determine whether or not any of the terms in the agreements 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;
- although a term providing for termination of an agreement for a holiday ownership product if maintenance fees aren't paid could be an unfair term, the holiday company says that Mrs C and her husband didn't make a booking from 2015 to 2017 and then didn't pay their yearly maintenance fees in 2018 and 2019 so weren't allowed to use their accommodation and the agreement was then cancelled in 2019 due to unpaid maintenance fees - it also says that it hasn't received any complaint from Mrs C and her husband and I've seen no evidence to show that they complained to the holiday company about the termination of their membership;
- I'm not persuaded that there's enough evidence to show that the termination of the agreement in these circumstances was unfair or that the other terms of the documents have been applied or operated unfairly against Mrs C and her husband 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 C and Hitachi Capital;
- I'm not persuaded that there's enough evidence to show that Mrs C's relationship with Hitachi 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 C and Hitachi Capital in these circumstances;
- I sympathise with Mrs C for the issues that she and her husband have had with their membership but I consider that Hitachi Capital's response to the claims that had been made to it was fair and reasonable; and
- I find that it wouldn't be fair or reasonable in these circumstances for me to require Hitachi Capital to refund to Mrs C any of the money that she's paid under 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 C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 5 January 2024.

Jarrold Hastings
Ombudsman