

The complaint

Mrs G complains that it was unfair of Mitsubishi HC Capital UK Plc (trading as Hitachi Capital Consumer Finance) (HCCF) to reject claims she made under the Consumer Credit Act 1974 (CCA) in relation to the purchase of a holiday product.

I have referred to Mrs G alone in this decision because the finance used to (part) fund the purchase is in her sole name - meaning she's the only complainant eligible to bring this complaint to our service.

Mrs G is represented by a firm of solicitors (that I'll call N) but I'll refer generally to anything that's been said on her behalf as if Mrs G had said it herself, to keep things simple.

What happened

On 2 January 2020 Mrs G and Mr V purchased a points based membership of a holiday club (from a supplier that I'll call CLC). The membership cost around £18,000 and they funded the purchase by trading in an existing trial membership (that they bought in June 2019 at a sales presentation in the UK) and taking out a fixed sum loan with HCCF, in Mrs G's sole name, for the balance.

In June 2021, N sent a letter of claim to HCCF stating that Mrs G was unhappy with the sale process, there were breaches of contract and timeshare legislation and CLC made misrepresentations that induced Mrs G to make the purchase (and take out the loan) when she wouldn't have done so otherwise.

N considers HCCF is liable for anything said during pre-contract negotiations under section 56 CCA and HCCF is equally liable with CLC for any misrepresentations made and/or breach of contract under section 75 CCA. In summary, N said:-

- the membership was purchased at a meeting abroad (during a bonus week included with the trial membership) and Mrs G was told attendance was a condition of the trial membership but the event would only last 90 minutes, when it actually lasted several hours and, using high pressure sales techniques, they were bombarded with the purported benefits of membership, including the investment potential;
- Mrs G was reassured by the promise of a "locked in" future holiday price and the investment potential when she agreed to make the purchase - they were told that points purchased could be used as a down payment towards full property ownership, that was purely for investment purposes and came with a rental guarantee – which amounts to an Unregulated Collective Investment Scheme (UCIS) that's prohibited from promotion;
- Mrs G was concerned at the interest rate (of 11.9%), because she knew other loans were available at lower rates, but she was told this was the only way to fund the membership and she could re-finance on her return to the UK;
- the holiday club didn't exist - the vacation club named in the membership agreement (that I'll refer to as CLCVC) has been dormant since incorporation;
- CLC went into administration in November 2020 and the Administrator's Proposal says it is a sales arm and doesn't own the properties or have rights to weeks in the

timeshares - so the sale contract and membership agreement are mere “puffery”, CLC purported to sell rights in property it had no right to and (given the Administrator’s Proposal notes numerous judgments and claims lodged in the administration far outweigh the assets available) there’s no realistic prospect it will continue trading;

- membership conferred no benefits - the same was on offer at a lower price elsewhere and, while Mrs G did make bookings using the membership through a third party marketed alongside as a way to book holidays worldwide with points, the two bookings she made required payment of additional fees and the third party failed to refund these when the trips couldn’t be taken due to travel restrictions;
- CLC breached the Timeshare Holiday Products Resale and Exchange Contracts Regulations 2010 (“the 2010 regulations”) as payment was taken within the “cooling off” period; and
- Mrs G wasn’t given certain key information or told that the resort meeting was a sales event and the product was marketed as a long term holiday product (LTHP) but there was a failure to provide for the price to be paid in instalments.

N considers the relationship between Mrs G and HCCF is unfair under section 140A CCA due to misrepresentations made and other issues referred to above. Mrs G seeks repayment of all monies paid under the timeshare agreement and the loan plus cancellation of future loan payments, recovery of the trade in value of the trial membership (£4,395), legal costs and interest. She also wants the terms of the timeshare agreement altered so that the end date is amended to 21 days after the claim was made to HCCF - or HCCF should take over the timeshare contract and any future liabilities. And she would like any reference to the loan removed from her credit file.

HCCF forwarded the claims to CLC and responded taking issue with various allegations and denying any breach of contract and/or misrepresentation as follows (in summary):-

- Mrs G was told that they’d have to attend a presentation in the resort during phone calls, in the bonus week voucher and in the reservation confirmation, they were also informed that the presentation would last for some time and the multimedia presentation was not high pressured - they could have left when it ended but chose to stay and make a purchase;
- Mrs G had 14 days to cancel both the membership and the loan and she could have used alternative finance to fund the purchase;
- the holiday club exists, this product is not a UCIS – it’s a points based membership – and it wasn’t marketed as a LTHP and the contract documents make clear it’s a timeshare;
- membership is not an investment and it was not sold as such - membership can be traded in towards a property purchase and there are options to accept a leaseback providing rental returns through CLC, but members can also simply rent out privately or stay themselves;
- there’s no requirement for CLC to own what it was selling - Mrs G and Mr V did not purchase rights in a property, they purchased points;
- CLC’s administration is irrelevant, it’s not responsible for the day to day management – this is handled by a different entity (that I’ll call CW) which continues to trade and the membership purchased can be provided in line with the agreement; and
- there was no advance payment, payment (in full) was received from HCCF after the 14-day withdrawal period ended.

One of our investigators considered the matter and she didn’t recommend the complaint should be upheld. She wasn’t persuaded there’s enough evidence to reasonably find there was a breach of contract or misrepresentations were made at the point of sale and she didn’t

think the contract terms - or the relationship between Mrs G and HCCF - were unfair.

Mrs G disagreed and N said (in summary):-

- Mrs G had no interest in purchasing a membership before the resort sales meeting so the sole reason for her purchase must have been representations made then;
- Mrs G wasn't told that this was a sales event and this misrepresentation induced her attend when she wouldn't otherwise have done so;
- Mrs G was told that the only way to fund the membership was a loan from HCCF which was untrue and, despite her concern at the interest rate, she was compelled to sign up for the membership and take out the loan;
- the only logical inference is that there was an undisclosed commission which was both a misrepresentation and is unfair under section 140A;
- CLCVC is dormant and has never traded so it was misrepresented as being a viable vacation club;
- Mrs G was told she would save money on holidays which was untrue and she would not have made the purchase otherwise – she's done her own research and found identical holidays at the same resorts for lower cost (than the annual maintenance fees);
- CLC is in administration and cannot fulfil its contractual obligations so Mrs G is entitled to a refund CLC and she has a like claim against HCCF;
- the Administrator's report confirms that CLC did not own the properties it sold rights in which, in addition to being a breach of contract, is another misrepresentation; and
- Mrs G is entitled to rescind the agreement and the relationship between her and HCCF is unfair under s140A.

The investigator wasn't persuaded to change her mind. She acknowledged CLC is in administration but she didn't think this means relevant contractual obligations can't be fulfilled and she remained of the view there isn't enough evidence that misrepresentations were made. She's satisfied that Mrs G signed paperwork, which included the relevant terms and conditions as well as a description of what was on offer, and she had a 14 day cooling off period to voice any concerns and/or withdraw from the purchase and the finance.

Mrs G didn't think that was fair and she asked for an ombudsman to review the matter so it was passed to me for a decision. Having considered the available evidence, I wasn't minded to uphold this complaint. My reasons weren't quite the same as the investigator's however and I thought it was fair to give the parties the chance to see my provisional findings and respond (if they wanted to) before I made my final decision. I issued a provisional decision on 14 august 2023 and I've set out what I decided provisionally (and why) below (in italics). This forms part of my final decision.

My provisional decision

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Where evidence is incomplete, inconclusive or contradictory, I reach my decision about the merits of this complaint on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Mrs G's representatives have made very detailed submissions which include references to various regulations, legislation and caselaw (amongst other things). I have to take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and (where appropriate) good industry practice at the relevant time, when I make my decision. And I want to assure the parties, if I don't address every single point that's been raised, it's

not because I haven't thought about it. I have considered everything that's been said and sent to us. But I'm going to concentrate in this decision on what I think is relevant and material to reaching a fair and reasonable outcome.

I should make it clear at the outset that I'm not deciding the outcome of any claim that Mrs G may have under the CCA - that's a matter for the courts. In this decision, I'm considering whether HCCF should reasonably have accepted her claims.

Claims made under sections 56 and 75 CCA

There's no suggestion that the debtor-creditor-supplier relationship required under the CCA is not present here and I haven't considered this further because I'm not minded to uphold the complaint for other reasons – as I'll explain below.

Broadly speaking, section 56 provides that any pre-sale negotiations conducted by the supplier in relation to the product purchase financed by the loan that HCCF provided were conducted by the supplier as HCCF's agent. And, under section 75, a borrower has an equal right to claim against a credit provider and a supplier if there's been a breach of contract or misrepresentation by the supplier, in certain circumstances.

For me to find misrepresentations were made here, I'd need to be satisfied not only that CLC told Mrs G something untrue during the course of pre-sale negotiations but, in addition, she reasonably relied on this when she made the decision to purchase the timeshare and take out the loan.

I can't be certain what was said exactly when Mrs G made this purchase and I make my decision based on the evidence available. I've got somewhat limited information about the misrepresentations said to have been made - I haven't seen a statement from Mrs G setting out her memory of what happened in any detail, for example. I've thought carefully about the evidence that has been provided - including the paperwork completed at the point of sale. I can see the membership acquisition agreement signed by Mrs G says (at paragraph 5 of the first page) "the purchase of our membership in vacation club is a personal right for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as a real estate interest or an investment in real estate, and that CLC makes no representation as to the future price or value of the Vacation Club Holiday product".

I've also seen a member's declaration, consisting of a single page where each paragraph seems to be initialled, and Mrs G has signed at the end to confirm that she read and understood everything. This says (among other things) "all reservations are made strictly on a first come basis and subject to availability", "we understand that CLC World Travel aims to provide personal service to our members and its prices will be comparable to but not necessarily cheaper than other providers of the same services" and, at paragraph 6, CLC "has a commercial arrangement with the lender who is providing the loan you have requested and as part of those commercial terms...may be entitled to a commission from the lender. Details of commission in respect of your loan are available on request".

I think this was probably a fairly significant financial commitment for Mrs G – she was taking out a loan repayable over 15 years at a cost of nearly £40,000 (including interest). And I find it reasonable to expect a borrower to consider the documents fairly carefully in this situation. So, if Mrs G was told something different (to what's set out in the sale paperwork) by the salesperson at the point of sale - that induced her to enter the relevant agreements - I'd reasonably expect her to question this. Even if she felt unable to do so at the point of sale, I'm satisfied Mrs G had the opportunity to raise queries later - and she could have withdrawn from both agreements, if she wanted to. The membership acquisition paperwork contained a form specifically for this purpose and the loan agreement explains how this option could be exercised fairly clearly on the first page.

I've seen nothing to show that Mrs G sought to withdraw from either agreement within the relevant 14 day period. I'm satisfied she seems to have received and considered the relevant paperwork in some detail during this time. I've seen an email exchange between her and one of the supplier's representatives dated 13 January 2020 when Mrs G asked about ten fairly detailed questions. I note Mrs G didn't raise any concerns about the sales process in this correspondence. On the contrary, she said she had a "lovely time" at the resort during the bonus week. I find it difficult to reconcile this with various allegations made on her behalf.

N suggests that the payment of commission was concealed but (in light of paragraph 6 of the member's declaration in particular) I think Mrs G was made reasonably aware that commission was paid. And I haven't been supplied with any evidence to suggest that she enquired further about this at the time - or she was told something untrue regarding the payment of commission.

N also makes various claims about the status of CLC and CLCVC. It states that CLC is in administration, it didn't own the relevant properties and CLCVC is dormant - which means there was no holiday club, so this was misrepresented - and the contract can't be fulfilled. Like the investigator, I'm satisfied that being in administration doesn't mean a company is unable to meet its contractual obligations. I note Mrs G said she tried to book holidays via a third party but these didn't go ahead due to restrictions (presumably Covid related) and the third party hasn't provided a refund of additional fees paid - but I can't fairly find this amounts to a breach of contract by CLC.

Having considered everything available so far, I'm not persuaded that I can safely find there's been a breach of contract or misrepresentations were made here. And I can't reasonably conclude that it's unreasonable for HCCF to decline the relevant claims.

Was the product a UCIS?

If I understand N correctly, it says if the membership Mrs G acquired was a UCIS that could mean the loan agreement (taken alongside the product it was used to finance) led to an unfair debtor/creditor relationship between Mrs G and HCCF. So, before I go on to deal with Mrs G's claim under section 140A CCA, I think it's useful explain why I don't think the product could amount to a UCIS.

In order to be a UCIS, this product would have to not only fall within the definition of a collective investment scheme (CIS) under FSMA (section 235) but outside of the definition of arrangements which do not amount to a collective investment scheme set out in the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 ("the CIS order"). And, if the purchase agreement qualified as a 'timeshare contract', it can't have given rise to a CIS because the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (the '2001 CIS Order') provides in Schedule 1 (Paragraph 13) that arrangements don't amount to a CIS if "...the rights or interests of the participants are rights under a timeshare contract..."

Regulation 7 of the 2010 Regulations defines a timeshare contract "as a contract between a trader and a consumer under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation and which has a duration of more than one year ...". I think an important phrase in this definition, in the context of this complaint, is "the consumer...acquires" (...the relevant rights to use accommodation). I think 'acquire' given its normal meaning relates to gaining something or coming into possession of it. So, if the purchase agreement was a timeshare contract, it must have caused Mrs G to have gained or come into possession of rights to use overnight accommodation.

Looking at the relevant agreement, I'm satisfied that Mrs G paid for the right to use overnight accommodation for more than one period of occupation (including accommodation from a pool of accommodation) under an agreement that had a duration of more than one year. I see no reason why the purchase agreement wasn't a timeshare contract and I'm minded to find it is therefore excluded from being a CIS and can't (by definition) be a UCIS.

Claims made under section 140A CCA

This provision looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement). And a court can make an order under section 140B CCA in connection with a credit agreement if it decides that the relationship between the lender and creditor arising out of the agreement is unfair. Only a court has the power to decide whether the relationship between Mrs G and HCCF is unfair but I think this is relevant law and I've taken it into account.

A court will take account of all matters it thinks relevant in relation to both the creditor and debtor in any section 140A claim. I've considered the evidence provided about Mrs R's individual circumstances when this sale took place. I've also thought about CLC's actions and I've looked at the regulations applicable CLC (as a timeshare provider) at the point of sale. It's not my role to decide CLC's legal liability in regard to these regulations. But I think they're relevant in determining a standard of commercial conduct expected and, whilst any potential breach of the rules isn't determinative of the question posed by s140A, it may have a legitimate influence on whether an unfair relationship between Mrs G and HCCF existed.

N argues that the membership was misrepresented to such an extent that this gives rise to an unfair relationship but I'm not persuaded that's right. For the reasons given earlier in this decision, I don't think there's sufficient evidence to reasonably conclude that there's an actionable misrepresentation here. I consider the paperwork provided at the point of sale sets out the key facts - such as the cost, the length of the contract and annual management fees - and it said the membership should not be viewed as a financial investment and booking was subject to availability. Looking at the email exchange on 13 January 2020 especially, I consider Mrs G had a good grasp of what she was buying and the associated finance.

N states that Mrs G wasn't given advance notice required of the resort sales event and she was pressurised into making this purchase and taking out the loan. CLC denies that – it says Mrs G was made aware of the nature and length of the presentation beforehand and she could have left once a multimedia presentation was finished but chose to stay. Mrs G hasn't provided a detailed statement about what happened but I accept these sales meetings could sometimes be lengthy and salespeople would highlight the benefits of the holiday product. I'm satisfied that Mrs G had already attended one sales presentation in the UK – having been referred by a friend. And I note the letter of claim says she was reluctant to attend the resort meeting as "she had recently attended a sales event and been told all about the club".

I think it's likely Mrs G was made aware that she'd need to attend a sales presentation during her time at the resort and she probably had a good idea of what to expect when she attended that meeting. If Mrs G had concerns about the sale process at the time, I'd expect her to have raised that her email dated 13 January 2020 but she didn't – instead she said she had a lovely time at the resort. I find it difficult to see why Mrs G would say this if she felt misled about the nature of the sales meeting and/or she was pressured to make her purchase. Based on the information I've seen so far, I'm not persuaded there's enough evidence to reasonably find she was pressured into buying the product. And, in any event (for the reasons set out earlier in this decision) I'm satisfied she had the option to withdraw later if she wanted to - which would likely mitigate any potential unfairness.

For the reasons I've given above, I'm satisfied that Mrs G was made reasonably aware of

commission paid here. I think it was open to her to make further enquiries about this if she wanted to and I've seen nothing to show that she did so at the relevant time. In any event, taking into account typical rates of commission paid, I think it's unlikely a court would find this meant the relationship between Mrs G and HCCF was unfair.

I'm satisfied that Mrs G was aware of the loan interest rate - the APR of over 11% is set out fairly prominently in the loan paperwork. If a lower interest rate was particularly important to Mrs G at the time it's difficult to see why she agreed to the loan. I realise she may say this was due to pressure to sign on the day but this seems to be contradicted by the letter of claim which says Mrs G was also told that she could re-finance when she got back to the UK. I've seen nothing to indicate that Mrs G tried to re-finance. I appreciate she might have been able to get a cheaper loan elsewhere - but this wouldn't have come with the added benefit of protection under section 75. And I think Mrs G probably accepted the HCCF loan as part of the package offered.

Overall, thinking about Mrs G's circumstances, CLC's actions at the time of the sale and how the sales process took place, I consider it is unlikely a court would find there was an unfair relationship between Mrs G and HCCF. And, for the reasons set out, I'm not presently persuaded that there are sufficient fair and reasonable grounds to uphold this complaint.

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 invited the parties to consider what I'd said and let me have any new comments or evidence by 28 August 2023 and I'd look at everything available after that and make my final decision.

Mrs G provided some video evidence initially which I was unable to access unfortunately so she sent us a written statement/transcript and some additional paperwork. I've considered this carefully. I am sorry to hear about Mrs G's poor health. If she is having difficulty meeting her financial obligations it's open to her to raise this with the lender and, if she's unhappy with the response, she may be able to bring another complaint about that to our service.

I realise this is likely to come as a disappointment to Mrs G but I'm satisfied that I've dealt with any material issues that she has raised in my provisional decision already - and nothing that's been said or sent to us has persuaded me to change my mind. For the reasons I've given above, I remain of the view there aren't sufficient fair and reasonable grounds to uphold this complaint.

I appreciate this isn't the outcome that Mrs G wanted and I'm sorry if she feels let down. Mrs G isn't obliged to accept what I've said - in which case it remains open to her to pursue the matter by any other means available.

My final decision

For the reasons I've set out above, my decision is I am unable to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 25 October 2023.

Claire Jackson
Ombudsman