

The complaint

Mr A complains that Hitachi Capital UK Plc trading as Hitachi Personal Finance (“Hitachi”) didn’t fairly or reasonably deal with his claim under sections 75 and 140 of the Consumer Credit Act 1974 (“the CCA”) in relation to a timeshare product he purchased.

What happened

In or around July 2015, Mr A was on holiday having taken out a trial membership with a timeshare supplier who I’ll refer to as “P”. During that holiday, he was approached by a representative of P and subsequently attended a sales presentation on 23 July 2015.

During that presentation, Mr A agreed to upgrade his trial membership to purchase full membership of a timeshare product with P. The cost of the product purchased was £5,500 after trade in of the existing trial membership. The total purchase price was funded with a fixed sum loan from Hitachi over 36 months in Mr A’s sole name.

On 20 July 2021, using a claims management company (“the CMC”), Mr A submitted a claim to Hitachi under sections 75 and 140 of the CCA.

The CMC said that P had miss sold the product by making misrepresentations which Mr A had relied upon when entering into the purchase agreement and contract. In particular, the CMC alleged P had told Mr A that purchase of the full membership would:

- resolve any ongoing issues regarding Mr A’s preferred holidays;
- would give a far greater choice of holidays; and
- would enable Mr A to book his preferred holiday at any time he wanted.

The CMC also alleged that an unfair relationship existed under section 140A of the CCA (“S140A”) due to the misrepresentations. They also thought unfairness existed due to:

- the terms of the agreement being so egregious as to be unfair themselves since an aspect of the relationship had been hidden from view – that being a payment of commissions;
- Mr A being aggressively targeted and subjected to a high pressure sales presentation resulting in Mr A feeling pressured and under duress;
- being told the product was only available at a special price if purchased that day;
- the contract having no end date and appearing to be “in perpetuity”; and
- no time being given to read or consider the information provided.

The CMC also believed there’d been various regulatory breaches which added to the unfairness of the relationship between the various parties. In particular:

- there’d been breaches of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (“The TRs”);
- P (and in turn Hitachi) had failed to ascertain whether Mr A could afford the finance provided; and
- P didn’t review other financial products with Mr A or advise that he could consider

other creditors.

In response, Hitachi thought Mr A's claim for misrepresentation under sections 75 of the CCA ("S75") had been made too late under the provisions of the Limitation Act 1980 ("the LA"). They also didn't agree that a fiduciary relationship existed such that there was a requirement to disclose any commission payment. Hitachi said P had presented Mr A with various options to finance the purchase and he was under no obligation to take out credit to fund it. Hitachi went on to explain the affordability assessment they'd undertaken and didn't agree the loan wasn't affordable.

Neither the CMC nor Mr A agreed with Hitachi's findings. So, the CMC passed Mr A's complaint to a professional representative ("the PR") who referred the complaint to this service. One of our investigators considered all the information and evidence available. Having done so, they didn't think there was sufficient evidence to support the allegations and didn't think Mr A's complaint should be upheld.

The PR didn't agree with our investigator's findings and asked that Mr A's complaint be passed to an ombudsman for a final decision, in support of which they would provide detailed submissions to support Mr A's complaint. As a consequence, Mr A's complaint was passed to me to consider further. Having done so, while I was inclined to reach the same outcome as our investigator, I considered a number of aspects which I don't feel were previously fully addressed. So, I issued a provisional decision on 3 October 2023 asking each party to provide any new comments or evidence before I reach a final decision.

In my provisional decision I said:

Relevant Considerations

When considering what's fair and reasonable, DISP¹ 3.6.4R of the FCA² Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

S75 provides consumers with protection for goods or services bought using credit. Mr A paid for the timeshare membership, having financed it with a restricted use regulated loan from Hitachi. So, he is afforded the protection offered to borrowers like him under those provisions – subject to any restrictions and limitations. I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr A and Hitachi arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under the credit agreement, it's deemed to be a related agreement. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

It's important to distinguish between the complaint being considered here and the legal claim. The complaint referred to this service specifically relates to whether I believe Hitachi's treatment of Mr A's claim was fair and reasonable given all the evidence and information available to me. This service isn't afforded powers to determine any legal claim itself. That is the role of the courts.

This service's role as an Alternative Dispute Resolution Service (ADR) is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by a consumer, we don't provide a legal service. And as I've said above, this service isn't able to make legal findings – that is the role of the

¹ Dispute Resolution: The Complaints sourcebook (DISP)

² Financial Conduct Authority

courts. Where a consumer doesn't accept the findings of an ombudsman, it doesn't prejudice their right to pursue their claim in other ways.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made 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 evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

The claim for misrepresentation under S75

In their response, Hitachi suggest that Mr A's claim was made too late under the provisions of the LA.

A section 75 claim is "*an action* [that is, court action] *to recover any sum by virtue of any enactment*" under section 9 of the LA. And the limitation period under that provision is six years from the date on which the cause of action accrued. So here, Mr A had to make a claim within six years of when he entered into the purchase contract and credit agreement. That's because this is when the CMC say Mr A lost out having relied upon the alleged false statements of fact at that time. The evidence suggests this took place on 23 July 2015.

Details of the alleged misrepresentations were submitted by the CMC to Hitachi by email on 20 July 2021, which was within six years of the purchase and when Mr A first say he lost out. So, I believe a court is likely to find that his claim falls within the time limit permitted in the LA.

For me to conclude there was a misrepresentation by P in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that P made false statements of fact when selling the timeshare product. In other words, that they told Mr A something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr A to enter the contract. This means I would need to be persuaded that Mr A reasonably relied on those false statements when deciding to buy the timeshare product.

From the limited information provided, I can't be certain about what Mr A was specifically told (or not told) about the benefits of the product he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the limited evidence available. The only document I have seen from the time of the sale is a single page headed "Membership Application & Contract of Sale". This specifies that Mr A "*will have exclusive rights to occupy a Holiday Club apartment of the type and for the period(s) identified below:...*". It goes on to detail a particular apartment for week 26. The document makes no reference to availability or choice options.

Although not determinative of the matter, I haven't seen any other documentation which supports Mr A's assertions, like marketing material or other detailed documentation from the time of the sale that echoes what he says he was told. In particular that any guarantees were provided about holiday availability and choice. On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that P did in fact make the alleged misrepresentations.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (Hitachi) and the debtor (Mr A) is unfair to the debtor because of one or more of the following (from S140A):

- a) any of the terms of the agreement or of any related agreement;
- b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;
- c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

Fiduciary responsibilities and disclosure of commission paid

Part of Mr A's S140A claim is primarily based upon the status of P (as the introducer of the loan) and their resultant responsibilities towards him. In particular, it's argued that the payment of commission by Hitachi to P was kept from him. But I don't think the fact that Hitachi might have paid P commission was incompatible with its role in the transaction.

P wasn't acting as an agent of Mr A, but as the supplier of contractual rights he obtained under the timeshare product agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was P's role to make an impartial or disinterested recommendation, or to give Mr A advice or information on that basis. As far as I'm aware, Mr A was always at liberty to choose how he wanted to fund the transaction.

What's more, I haven't found anything to suggest Hitachi were under any regulatory duty to disclose the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr A requested those details from Hitachi. As I understand it, the typical amounts of commission paid by Hitachi to suppliers (like P in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that a court would find that the non-disclosure and payment of commission created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

The sales process

It's alleged that P aggressively targeted Mr A and, as a result, he felt pressured into entering the agreement. I acknowledge what the CMC say have said about the length of sales presentations Mr A attended. So, I can understand why it's argued that the prolonged nature of these presentations might have felt like a pressured sale – especially if, as he approached the closing stages, he was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr A agreed to the purchase in 2015 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to P, after the purchase, to suggest he'd agreed to it when he didn't want to. And I haven't been provided with a credible explanation for why he didn't subsequently seek to cancel the purchase within the normal 14-day cooling off period usually permitted here.

If Mr A only agreed to the purchase because he felt he was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr A was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate he made the decision to proceed because his ability to exercise choice was – or was

likely to have been – significantly impaired contrary to Regulation 7 of the Consumer Protection from Unfair Trading Regulations (“CPUT”).

Time to consider the agreement(s)

As I've already said, I've seen limited documentation from the time of the sale. However, I'm aware they normally include a period of 14 days from the date of agreeing to the purchase within which to cancel the agreement without giving any reason – as required under the TRs. But I have seen a copy of the loan agreement signed by Mr A which includes a section headed (in bold printed typeface) “Your Right To Withdraw From The Agreement”. It clearly explains that Mr A has 14 days in which to cancel the loan agreement without giving any reason.

So, even if I were to find that Mr A wasn't given adequate opportunity to read and consider the purchase or loan documentation at the time of the sale - and I make no such finding - I would expect him to have had sufficient time in which to consider his decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before the loan was drawn and the purchase completed. There's no suggestion or evidence that Mr A did raise any questions or concerns prior to the sale being completed. Or that he had any intention of cancelling the agreement.

Regulatory breaches

One of the main aims of the various regulations that applied here was to enable consumers to understand the financial implications of their purchase so that they are put in a position to make an informed decision. If P's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Mr A ultimately lost out or almost certainly stand to lose out from having entered into a contract, the financial implications of which he didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

However, given the limited documentation provided, I haven't seen any evidence to support the breaches alleged here. And as the Supreme Court decision in *Plevin*³ makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. In other words, if I were to find there'd been regulatory breaches – and I make no such finding - they are only likely to lead to unfairness where there's evidence Mr A suffered loss as a consequence. And as I haven't seen any evidence that was the case, I think it unlikely a court would find that any of the alleged regulatory breaches resulted in unfairness under S140A.

Were the required lending checks undertaken?

There are certain aspects of Mr A's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Hitachi undertook a proper credit assessment. The CMC and the PR allege P didn't undertake a proper affordability check.

It's relevant that Mr A hasn't provided any evidence to show that the loan was unaffordable or unsuitable for him. And I've not seen anything that supports any suggestion of financial difficulty from that time.

In their response to Mr A, Hitachi explained the affordability assessment they'd completed which they believe showed the loan was sustainably affordable for Mr A. If I were to find that Hitachi hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been

³ *Plevin vs Paragon Personal Finance Ltd* [2014] (‘*Plevin*’)

completed, they would've revealed that the loan repayments weren't sustainably affordable for Mr A in order to uphold his complaint here.

With no specific information about Mr A's actual position at the time and no supporting evidence that he struggled to maintain repayments, I can't reasonably conclude the loan was unaffordable for him or that he suffered any loss as a consequence.

Summary

As I've explained above, from the evidence available, I don't agree that Mr A's claim for misrepresentation was made too late. However, I haven't found anything to support the allegations made here. And because of that, I don't think Hitachi's response to Mr A's claim was ultimately unfair or unreasonable.

I'm conscious the PR indicated they would provide further submissions in support of Mr A's complaint. However, I can't see that anything further has been received. So, as things stand, I don't currently intend to ask Hitachi to do anything more here. But I will consider any further submissions specific to Mr A's circumstances and complaint before I issue my final decision.

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 to this complaint has responded to my provisional findings, despite this service's attempts to follow matters up with them. In the circumstances, and in the absence of anything new to consider here, I've no reason to vary from my provisional findings.

My final decision

For the reasons set out above, I don't uphold Mr A's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 29 November 2023.

Dave Morgan
Ombudsman