DRN-4544309

The complaint

Mr B complains that Mitsubishi HC Capital UK Plc trading as Hitachi Personal Finance ("Hitachi") unfairly declined his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a loan they provided to him to purchase a timeshare product.

What happened

In or around February 2020, Mr B (jointly with his wife) purchased a timeshare product from a supplier who I'll refer to as "C". The purchase price agreed was £17,950 and was funded with a loan from Hitachi for that amount in Mr B's sole name.

In or around November 2021, using a professional representative ("the PR"), Mr B submitted a claim to Hitachi under sections 75 and 140A of the CCA. Within the claim, the PR allege Mr B purchased the timeshare product in February 2020 having relied upon representations made by C which turned out not to be true. And under section 75 of the CCA ("S75"), Hitachi are jointly liable for those misrepresentations. In particular, the PR allege that C told Mr B:

- he and his wife had purchased an investment, being a share of a property and they were promised a considerable return on that investment;
- He could sell the timeshare back to the resort or easily sell it at a profit; and
- they *"would have access to the holiday's apartment at any time all around the year".*

The PR say that C illegally sold the product as an investment contrary to regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

The PR went on to allege that a clause within the purchase agreement which addressed default in the event of non-payment of amounts due under the agreement was unfair. And they believe this renders the relationship with Hitachi, under the agreements, unfair pursuant to section 140A of the CCA ("S140A).

In addition, the PR alleged that:

- Mr B was introduced to Hitachi by a third party who wasn't authorised by the Financial Conduct Authority ("FCA") to carry on regulated activities;
- Mr B *"does not remember any affordability assessment to have been carried out* [sic]*"*
- C's companies are currently in an insolvency process which means Mr B is unable to recover any amounts awarded by the Spanish Courts.

In responding to Mr B's claim, Hitachi pointed out that the product that Mr B purchased was different to the one the PR referred to in the claim and didn't agree it had been represented as an investment. They didn't agree that Spanish Law applied to the purchase agreement as it was governed by UK Law. They also didn't agree the default clause referred to was unfair believing this hadn't been interpreted correctly by the PR. Hitachi said Mr B had been introduced to them by an FCA authorised party. They also confirmed they'd undertaken an appropriate assessment of credit worthiness and affordability before agreeing to provide the loan Mr B had applied for. Hitachi didn't think there was any reason for Mr B's claim to be upheld.

The PR didn't agree with Hitachi's findings so referred Mr B's claim to this service as a complaint. One of this service's investigators considered all the information provided. Having done so, they didn't think Hitachi's failure to uphold Mr B's claim was unfair or unreasonable.

In response, the PR asked that the complaint be passed to an ombudsman to make a decision. In doing so, they explained further why they thought the loan was unaffordable for Mr B and provided information about his financial situation at the time the loan was agreed to support that conclusion. They also referenced a training document allegedly used by C when selling timeshare products in which there is alleged reference to the product being represented as an investment. The PR also referred to some case law to support the claim for an unfair relationship and explained further why they believed the introducer of the loan wasn't appropriately authorised.

Having considered this information, our investigator wasn't persuaded to vary from their original findings and didn't think there was any evidence the loan was provided irresponsibly or that it was unaffordable for Mr B.

As an informal agreement couldn't be reached, Mr B's complaint was passed to me to consider further. Having done that, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 7 December 2023 giving the parties to this complaint the chance to respond before I reach a final decision.

In my provisional decision I said:

> Relevant considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA 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.
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> S75 provides consumers with protection for goods or services bought using credit. Mr B paid for the timeshare product under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means Mr B is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> S140A looks at the fairness of the relationship between Mr B and Hitachi arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're deemed to be related agreements. 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.
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> It's important to distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe Hitachi's failure to uphold Mr B's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
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> It's also relevant to stress that 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 the consumer, we don't provide a legal service. And as I've already said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.

[1] Dispute Resolution: The Complaints sourcebook (DISP)

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.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by C in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that C made false statements of fact when selling the timeshare product. In other words, that they told Mr B something that wasn't true in relation to the allegations raised. I would also need to be satisfied that any misrepresentation was material in inducing Mr B to enter into the contract. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mr B was specifically told (or not told) about the benefits of the products he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the evidence that is available from the time.

The claim submitted by the PR makes specific reference to a fractional timeshare product. They've also provided, what is alleged to be, a script used by C when presenting the product to Mr B during the sales meeting. Again, the script appears to relate to the sale of a fractional timeshare product.

I've seen a copy of the agreement signed by Mr B at the time of the sale. It's clear from this that Mr B didn't purchase a fractional timeshare product. It was, in fact, membership of a timeshare product with points allocated to be redeemed against holiday accommodation and experiences from within a portfolio offered by C. So, I don't think the references made by the PR are relevant to the circumstances surrounding the timeshare product Mr B purchased here.

Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr B's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says he was told about the specific product he purchased. In particular relating to the product being represented as an investment in property that would provide a considerable return on investment. There's simply no reference to this within any of the documentation form the time of the sale.

In fact, note 5 of the agreement (which Mr B signed) clearly states *"We understand that the purchase of our membership* […] *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* [C] *makes no representation as to the future price or value of the* […] *product"*.

I don't think the product can have been marketed and sold as investment contrary to the TRs simply because there might have been some inherent value to it. And in any event, I've found nothing within the evidence provided to suggest C gave any assurances or guarantees about the future value of the product Mr B purchased. C would had to have presented the product in such a way that used any investment element to persuade him to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

Furthermore, I haven't seen anything within the documentation provided suggesting that Mr B was told he would be able to sell the product purchased back to the resort. Or that there was any guarantee given that Mr B would be able to successfully sell his timeshare product for a profit. In fact, the Member's Declaration, which was signed and initialled by Mr B, specifically states, *"*[C] *does not and will not run any resale or rental programme and will not repurchase* […] *points other than as a trade in against future property purchases".* The Standard Information Form – also signed by Mr B – says under point 4, *"There is no resale, rental or re-purchase of Points programme in place operated by the Founder or the Management Company, although members are entitled to sell their Points on the open market if they wish to do so".*

I've also considered the allegation that Mr B was told he *"would have access to the holiday's apartment at any time all around the year"*. The sale documentation is clear that it doesn't relate to a specific named and identifiable apartment. Rather, as I've already explained, it provides points to be used each year against bookings from a portfolio provided by C – or more accurately, the management company. The documentation is also clear that bookings are accepted on a first come, first served basis. And are, at all times, subject to availability.

Having considered everything available, I haven't seen anything to support any of the allegations here. And because of that, I can't reasonably say, with any certainty, that C did misrepresent the product Mr B purchased in the ways alleged.

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 B) 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).

I've considered the *"default"* clause that the PR has referred to. Having done so, it appears this relates to the consequences should Mr B not complete the purchase by making the payment due within 14 days of the date of the agreement. I can't see that this refers to any other or subsequent charges or payments that may be payable. So, I'm not persuaded that a court is likely to find that this particular clause causes unfairness pursuant to S140A.

The authorised status of C

This service's records show that C came under our compulsory jurisdiction at the time of the product (and loan) sale to Mr B. So, I'm satisfied that they held the necessary authority to arrange the loan. The PR have alleged that the individual who sold the timeshare (and consequently the loan) was self-employed and not an employee of C. They believe this means the individual didn't hold the necessary authority to arrange the loan. However, I've not seen any specific evidence to support that allegation. And Hitachi have confirmed that Mr B was appropriately introduced to them by C as an authorised credit broker.

In the absence of any other evidence to the contrary, I'm not persuaded that the loan was introduced to Mr B by a party that didn't hold the necessary regulatory authority to do so.

The impact of C entering an insolvency process

Mr B's claim is submitted pursuant to sections 75 and 140A of the CCA. These specifically relate to instances of misrepresentation, breach of contract or unfairness. I've not seen any evidence that Mr B has submitted a claim to either a Spanish or UK court. So, as far as I'm aware, there's been no ruling or award in his favour.

It's possible Hitachi could incur a liability under S75 in the event C fails to fulfil any such court award. But as there doesn't appear to be one here, I can't see that Mr B has suffered any loss such that Hitachi could be held liable for that under S75. So, I don't see the relevance of this particular aspect in Mr B's case.

Were the required lending checks undertaken?

There are certain aspects of Mr B's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Hitachi undertook a proper affordability assessment. The PR say that Mr B doesn't remember any affordability assessment being carried out.

Hitachi have explained, in some depth, the assessment they completed. This was based upon a number of factors and included information Mr B provided in his loan application and that available from various recognised sources, including the credit reference agencies.

If I were to find that the checks and tests Hitachi completed didn't comply with the regulatory requirements that applied – and I make no such finding – I would need to be satisfied that had those checks complied, they would've revealed that the loan repayments weren't sustainably affordable for Mr B in order to uphold his complaint here.

I've seen copies of some of Mr B's bank statements together with a copy of his credit report. Having considered these, I'm not persuaded there's any evidence to demonstrate that Mr B's financial position was such that it would reasonably lead Hitachi to believe the loan wasn't sustainably affordable for him. The bank account(s) appear to have been well managed and the credit report reveals nothing adverse and demonstrates that all existing and previous borrowings had also been well managed, and repayments maintained within the terms agreed. Because of that, I can't reasonably conclude the loan was unaffordable for him or that he suffered loss as a consequence.

Summary

I would like to reassure Mr B that I've carefully considered everything that's been said and provided in reviewing his complaint. Having done so, and for the reasons explained above, I haven't found anything that leads me to conclude that Hitachi's response to his claim was ultimately unfair or unreasonably. Because of that, I don't currently intend to ask Hitachi to do anything more here.

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.

It's been confirmed that Mr B doesn't agree with my provisional findings. However, no further explanation has been provided and the PR advises Mr B isn't in a position to provide any additional evidence for me to consider.

In these circumstances, I've no reason to vary from my provisional decision. And for the reasons already explained, I won't be asking Hitachi to do anything more here.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 7 February 2024.

Dave Morgan
Ombudsman