DRN-4545457

The complaint

Mr O, who is represented by a professional representative ("PR") complains that Hitachi Capital (UK) Plc ("Hitachi") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. The product was purchased by Mr O and his partner, but the loan was taken out by Mr O alone and so he is the eligible complainant. For the purposes of simplicity in this decision I will refer to him as the sole purchaser.

What happened

In November 2019 Mr O purchased a points based membership of a timeshare from a company I will call C at a cost of £16,388. This was funded by a loan from Hitachi. I gather he has not taken a holiday using his membership save for one break with a third party supplier. In June 2023 PR submitted a letter of claim to Hitachi. The claims are well known to both parties and so in the interest of brevity I will set out a short summary of the key points.

PR claimed that the product had been misrepresented and promises were made which C could not, or had not, been able to meet. It said C had breached the Consumer Rights Act 2015 ("CRA") by charging management fees. In addition Mr O had not been informed that these would increase. PR said the sales pitch had been aggressive with Mr O having to endure a lengthy presentation.

It claimed that C had breached the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT") by making untrue statements and telling Mr O the special price was only available that day and he couldn't leave until he signed a contract.

It also claimed that the rate of interest charged by Hitachi was higher than other lenders would provide.

PR said that the Office of Fair Trading ("OFT") Guide had not been adhered to due to the oppressive and misleading behaviour during the presentation. He had not been given information to allow him to make an informed choice.

Hitachi rejected the claims setting out in detail the reasons why it did so. C contributed and said Mr O had not attempted to book any holiday other than the break with a third party over which it had no control. It also provided what seem to be contemporaneous notes which show Mr O to have been a willing purchaser.

PR brought a complaint to this service where it was considered by one of our investigators who didn't recommend it be upheld. She said she was not persuaded that there had been misrepresentation under s.75. On the matter of the claim under s.140 she was not persuaded that there was misrepresentation or an unfair relationship. And even if there had been she had not seen evidence that that any of the terms were applied in practice in an unfair manner. She also concluded that she had not been given any persuasive evidence that the lending was unaffordable.

PR didn't agree and referenced what it said was C's general sales practices which it believed fell short of the required standards. It reiterated some of the claims made in the

original letter of claim and added that the resorts offered by C were not exclusive and Mr O had only agreed to make the purchase due to C's misrepresentations.

It later said that Mr O had not been given sufficient information to make an informed decision and had been placed in a highly pressured environment. It felt that the complaint had not been fully investigated. Mr O's partner provided her testimony outlining the presentation and explaining Mr O had only signed when he was exhausted and drained. It had been difficult to find a suitable holiday and the flight costs had been more expensive than other providers offered.

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.

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.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75 of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

I am satisfied that C acted as broker in this case and that the loan to Mr O was made under existing arrangements between it and Hitachi. It follows that, if he has a claim against C for breach of contract or misrepresentation, he can bring that claim against BPF in the same way.

Misrepresentation

A misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue and which induces the other party into the contract.

PR says that Mr O was told he could book a holiday in the UK or the rest of the world at any time in the same standard of accommodation he had been shown. C has said that it does offer access to its resorts on a first come, first served basis. As such I cannot conclude that this matter was misrepresented.

I note Mr O was disappointed with the accommodation provided by a third party, but I cannot see that C can be held responsible for that. The agreement allowed Mr O to make bookings with the third party and this is what he was able to do. I do not believe this amounts to misrepresentation. I am not persuaded that C's sales representatives would have guaranteed the quality of accommodations provided by a third party.

Pr says that C said that the club is an exclusive one, with benefits only available to members. However, it points out that Mr O was staying at one of its resorts prior to becoming a member. That suggests the club was sold as exclusive, but not the resorts. I appreciate this may be a fine distinction, but it difficult for me to conclude there was misrepresentation of this matter without knowing exactly what was said by C's representatives.

It is claimed that Mr O was not told that the annual fees could increase. However, I note the documentation contains the following:

'*Full details are contained in the Vacation Club Articles, Rules and Regulations and Management. Management Charges for 2020 are 990.00 Euros. Fees are subject to review and increase by the Vacation Club'*

I cannot say what was said by the sales representative, but it was made clear in writing that the fees could go up. I note that Hitachi has confirmed the fees did not increase between 2019 and 2022.

I appreciate the assertions made by PR, but in the absence of clear supporting evidence I do not currently believe that a court would uphold a claim for misrepresentation

S.140 A

Only a court has the power to decide whether the relationships between Mr O and Hitachi 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 Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 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 Mr O could be said to have a cause of action in negligence against Hitachi anyway.

His alleged loss isn't related to damage to property or to him 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 Hitachi assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that Hitachi owed Mr O a duty of care to ensure that C complied with the 2010 Regulations and it argues that the payment of commission created an unfair relationship. However, it is my understanding that Hitachi paid relatively small rates of commission and so I cannot conclude that payment of commission created an unfair relationship.

Even if Hitachi had accepted that responsibility I have not been given persuasive evidence that there was an unfair relationship.

In line with laws designed to protect timeshare buyers, however, Mr O had 14 days in which to cancel the purchase agreement and he had 14 days in which to cancel he loan agreement with Hitachi. If Mr O felt he had been unduly pressured into the purchase, I think it likely that he would have cancelled.

Under section 56 of the Consumer Credit Act, C acted as agent for Hitachi, not as Mr O's agent. I am not persuaded therefore that it owed any fiduciary duty towards him, or that Hitachi procured, or could have procured, a breach of any such duty. C sold the timeshare and introduced Mr O to Hitachi. It was not his financial adviser and was not recommending any particular financial product from a range of products.

I am not persuaded there was any breach of the Timeshare Regulations. Mr O was given 14 days in which to withdraw from the agreement and acknowledged receipt of the Standard Information Form for Timeshare Contracts. Even if there were a breach of the Timeshare Regulations, that would not necessarily give rise to a claim which an individual club member could bring against C. Nor would it necessarily mean that the loan agreement created an unfair relationship between Mr O and Hitachi.

PR says that some terms of the contract are "unfair" within the definition in UTCCR. That is not for me to say, although I must have regard to relevant law, including UTCCR. The remedy if a contractual provision is "unfair" is however that the provision is unenforceable against the consumer – not that the whole contract falls. Mr O has not said whether any of the provisions which he says is unfair has been relied on by C or what the effect has been on him. In the circumstances, I think it unlikely that a court would have said that the loan agreement created an unfair relationship between Mr O and Hitachi.

Affordability

PR 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 Mr O 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 Hitachi 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 Mr O lost out as a result of its failings. PR has not provided information showing Mr O lost out.

Conclusion

It is not for me to decide whether Mr O has a claim against C, or whether he might therefore have a "like claim" under s. 75 of the Consumer Credit Act. Nor can I make orders under s. 140A and s.140B of the same Act – by which a court can decide that a credit agreement

creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr O's complaint. In the circumstances, I think that Hitachi's response to Mr O's claims was fair and reasonable.

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 Mr O to accept or reject my decision before 29 March 2024.

Ivor Graham
Ombudsman