

The complaint

Miss M complains that she was mis-sold a timeshare product and the loan used to pay for it. The loan was provided by Hitachi Capital (UK) Plc, which is now Mitsubishi HC Capital UK Plc and which I'll refer to as Mitsubishi.

Miss M has been represented in bringing this complaint by a claims management business, so any reference to her arguments and submissions include those made on her behalf.

What happened

I issued a provisional decision on this complaint earlier this year. An extract from that provisional decision is set out below.

In October 2018 Miss M purchased a trial membership of a timeshare with a company I will call "C". She funded that purchase through a fixed sum loan with Mitsubishi. In August 2019 she traded in that trial membership for a full Holiday Owners Club membership and financed the balance through a further fixed sum loan with Mitsubishi.

Miss M complained to Mitsubishi in June 2022. Her claim was detailed but in essence she said she had a claim under sections 75 and 140A of the Consumer Credit Act 1974 (CCA) as the agreement had been misrepresented to her and there had been an unfair relationship. She also said that Mitsubishi hadn't performed adequate checks to ensure that the agreement was affordable for her.

Mitsubishi didn't uphold Miss M's complaint, so she escalated it to this Service. Our investigator considered what had happened but wasn't persuaded there was sufficient evidence to support the complaint.

Miss M didn't agree. She provided a statement in which she explained, in her own words, what had happened during the sales meetings, and she asked for a decision by an ombudsman.

What I've provisionally 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'm issuing a provisional decision here as it's been some time since the investigator provided his view and I can see we didn't respond to all of the issues. I'm not currently expecting to uphold the complaint.

I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards; codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.

The Financial Ombudsman Service is designed to be a quick and informal alternative to the

courts under the Financial Services and Markets Act 2000 (FSMA). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my decision.

The claim under the CCA

When something goes wrong and the payment was made with a fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the CCA says that in certain circumstances, the borrower under a credit agreement has a right to make the same claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier.

From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

Section 56 of the CCA is relevant in the context of section 140A of the CCA that Miss M also relies on, as the pre-contractual acts or omissions of the credit broker or supplier will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair relationship exists between Miss M and the lender.

It's not for me to decide the outcome of a legal claim Miss M may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether the lender was reasonable to reject her claims.

The claim under section 75 of the CCA

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 materially influenced the other party to enter into the contract.

Miss M says the agreement was misrepresented because the trial membership suggested she could "enjoy a number of weeks in a choice of resorts for the introductory number of years specified enjoying many of the benefits and facilities in the full term Destinations". She says that was a false statement because it was a condition of the membership that her first week was a prelude week in which she would have to attend a presentation. I don't think that was a false statement as the need to attend the prelude week was set out in the Trial Membership Members Declaration that was signed by Miss M and I don't think that prevented her from enjoying a number of other weeks in a choice of resorts.

Miss M says she was promised she could holiday at any resort and at any time, but she found that she didn't have enough points to do so, and there wasn't availability. The Trial Membership Members Declaration that was signed by Miss M explains that allocation of accommodation will be subject to demand and availability. The Standard Information form explains that "the points entitlement each year may be used or saved ...to increase the flexibility of choice and destination", I think it's likely Miss M would have understood that the amount of points she'd purchased wouldn't secure accommodation in all resorts and at all times. So, I don't think a court would be likely to uphold a claim for misrepresentation in respect of those issues.

Miss M says the supplier didn't explain that maintenance costs would increase so much. I've not seen evidence of how these costs increased, but the Information Statement explains they may, and C have explained that they haven't since 2019. On that basis I don't think a

court would be likely to consider there was a misrepresentation.

Miss M says she was told that holidays were exclusive to timeshare club members. I've not seen documentation to support that assertion and, on balance, and don't think Miss M's testimony alone is sufficient to demonstrate that representation was likely to have been made.

The claim under section 140A of the CCA

Miss M's representatives suggested that there was an unfair relationship contrary to section 63 of the Consumer Rights Act (2015). That section of the 2015 Act and section 140A of the Consumer Credit Act (1974) both deal with unfairness in contractual terms, but section 140A deals specifically with unfairness in consumer credit agreements. I think it's, therefore, more appropriate for me to consider some aspects of Miss M's claim under those provisions.

Having done so, I do not consider it likely that a court would conclude that the lender's acts and/or omissions, or those of the supplier or credit broker as agents of the lender, generated an unfair debtor – creditor relationship.

Miss M says that she was offered a special one off, time limited, price to accept the agreement and that was an aggressive sales practice in contravention of Schedule 1, clause 5 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations). I've not seen any supportive evidence to suggest that was the case and I don't, therefore, think Mitsubishi were unreasonable to reject that complaint point. The Withdrawal Forms for both agreements gave Miss M 14 days to withdraw from the purchase agreements and the related finance agreements if she changed her mind. So, I think she was provided with sufficient time to reflect on the arrangement even if time was limited on the day.

Overall, I'm not persuaded that Miss M's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 5 of the CPUT Regulations.

Was the loan irresponsible?

Miss M says that Mitsubishi was in breach of its obligations to conduct an adequate credit assessment to determine whether she could afford to repay the loan.

However, when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So even if I was persuaded that the lender 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 the credit granted by them was likely to be unaffordable and that Miss M suffered a loss as a result.

Mitsubishi have explained that they validated Miss M's income statement, checked her credit commitments, and estimated her expenditure using statistical data before they approved the finance. Miss M hasn't provided any evidence to support her assertion that the lending was unaffordable for her, and I am not, therefore, persuaded on the evidence presented, that Mitsubishi were unreasonable to reject that element of Miss M's complaint.

My provisional decision

For the reasons I've given above, I'm not expecting to uphold this complaint.

Further comments and/or evidence

Mitsubishi didn't provide any further comments, but Miss M's representatives did. They said:

- We have already provided you with our client's Statement, dealing with how she ... was pressured into trading her Trial Membership for C's (my edit) Vacation Club "Topaz" Points Membership scheme, over a period of nine hours, in a very hot and busy sales suite.
- Our client, a Head Teacher, was assured that they would be able to take holidays during the school holidays. That was a lie.
- Our client ... was supplied with alcohol, during the sales process. This was likely to affect her judgment, in respect of the purchase of the product, and was therefore an aggressive commercial practice, contrary to Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (as amended).

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.

We know it is common that these sales presentations often lasted for a number of hours. I've therefore considered whether there is evidence that Miss M's ability to exercise choice was significantly impaired by the lengthy presentation, the pressure, and the heat that she says she experienced as that may have created an unfair relationship between her and the supplier.

Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) seems to expand on the everyday definition of pressure. At the time of sale, Regulation 7 stated that a commercial practice was aggressive if, in its factual context and taking account of all of its features and circumstances, it:

a. significantly impaired or was likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence; and b. caused or was likely to cause the consumer to take a transactional decision they would not have taken otherwise as a result.

Regulation 7(2) went on to say that consideration must be given to the timing, location, nature and persistence of the practice. And when thinking about whether "undue influence" was applied, Regulation 7(3) said that thought must be given as to whether the Supplier exploited "*a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly [limited] the consumer's ability to make an informed decision.*"

Miss M had already attended a presentation when she entered into the trial membership, so I think she would have been likely to have had an understanding of the approach that would be taken. I don't think I've been provided with sufficient information to suggest Miss M didn't understand she didn't have to say yes to the agreement or that she didn't understand she could walk away without entering into it. She was also provided with a 14 day cooling off period and I think, even if she wasn't allowed much time to think during the presentation, or if she was given alcohol during the presentation (and I have no evidence to corroborate that statement), the cooling off period allowed her to reflect and withdraw from the agreement and the loan if she wished.

I'm not persuaded that Miss M's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

I've not seen evidence to corroborate Miss M's assertion that she was told she could take holidays during the school holidays. I've already explained why I don't think there is sufficient evidence she was promised she could take holidays "*in all resorts and at all times*" so I won't comment any further.

Ultimately, I've not been provided with any additional information that has persuaded me to change my provisional decision. That provisional decision now becomes my final decision on this complaint.

My final decision

For the reasons I've given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 21 March 2024.

Phillip McMahon
Ombudsman