

The complaint

Mrs H complains about the sale of a timeshare. She says that Mitsubishi HC Capital UK Plc (who I'll call Mitsubishi) financed the purchase and that she therefore has claims against it.

Mrs H has brought her complaint through a representative, so references to her submissions and arguments include those made on her behalf.

What happened

I issued my provisional decision on this complaint last month. An extract from that provisional decision is set out below.

In February 2020 Mrs H bought a timeshare with a company I will call "C". The purchase was funded through a fixed sum loan with Hitachi (UK) PLC who are now Mitsubishi HC Capital UK Plc.

Mrs H complained to Mitsubishi in February 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, and that the self-employed agents of the credit broker were not licensed to broker the finance agreement. She was also concerned that the supplier was in liquidation and that Mrs H would, therefore, be unable to make use of the timeshare product.

Mitsubishi didn't uphold Mrs H'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.

Mrs H didn't agree and, in particular, she provided financial information from around the time of sale that she said demonstrated she didn't have sufficient funds available to her to be able to sustainably afford the finance that was provided. Mrs H 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 Mrs H 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 Mrs H and the lender.

It's not for me to decide the outcome of a legal claim Mrs H 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 Mrs H's 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.

Mrs H says the agreement was misrepresented to her as an investment and that she was promised her share of the property would increase in value. She also says she was promised she could sell it back, and that she would have availability anytime of the year. I've been provided with a copy of the Standard Information Statement that was issued alongside the purchase agreement. That explains that:

"The purchase of membership in Vacation Club is for the primary purpose of holidays and is neither specifically for direct purpose of a trade nor as an investment in real estate. C (my edit) makes no representation as to the future value of the Vacation Club holiday product" and that there is "no resale, rental or re-purchase programme in place..."

I don't, therefore, think I have evidence the timeshare product was misrepresented as an investment or that Mrs H was likely to have been told she could sell it back at any time.

Mrs H has provided a copy of a training manual to support her claim that the agreement was misrepresented to her. I'm not sure of the provenance of that manual (and I make no finding about that) but, regardless, the manual doesn't relate to the type of timeshare Mrs H purchased and is, therefore, not relevant to her claim.

Mrs H also says the purchase agreement was misrepresented to her as she was told she would have all year round availability and that has proven to be untrue. C have confirmed that Mrs H is able to make use of the pool of accommodation at any time as long as maintenance payments are up to date. I'm not persuaded there is, therefore, evidence of misrepresentation.

Mrs H says that C is in liquidation. That may mean she has a claim for breach of contract. It seems that liquidation proceedings were started in Spain in or around December 2020. But those concerned sales companies, which are no longer operating. I understand, however, that the holiday club is still operating and that, subject to members fulfilling their obligations in respect of management fees, for example, facilities remain available. The liquidation of the sales companies does not constitute a breach of contract.

I don't, therefore, think Mitsubishi were unreasonable to reject Mrs H's section 75 claim.

Broker authorisation

Mrs H argues that C wasn't authorised by the Financial Conduct Authority to arrange the credit agreement on Mitsubishi's behalf, and that their agents were self-employed and not qualified to do so. She says this breached the General Prohibition (section 19 of the Financial Services and Markets Act (2000)).

However, our records indicate that C was authorised at the time of sale. C have previously explained to us that their agents were fully trained to broker finance agreements, and I don't think I have evidence that there had, therefore, been a breach of the relevant regulations. So, I don't uphold this part of Mrs H's complaint.

The claim under section 140A of the CCA

Section 140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

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.

Mrs H's representatives say that a termination provision in Mrs H's timeshare agreement meant she would forfeit the entire purchase price if she missed payments. I've not seen that Mrs H experienced any loss as a result of that clause and I am not persuaded that the mere existence of a potentially unfair foreclosure term in Mrs H's agreement, when it wasn't operated unfairly, would likely lead a court to find the debtor-creditor relationship was unfair on this occasion.

Overall, I don't think Mitsubishi were wrong to reject the claim under s140A.

Was the loan irresponsible?

Mrs H says that Mitsubishi was in breach of its obligations to carry out 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 Mrs H suffered a loss as a result.

Mitsubishi have explained that they validated Mrs H's income statement, checked her credit commitments, and estimated her expenditure using statistical data before they approved the finance. The credit file Mrs H has supplied shows a search on it was carried out by them and, therefore, supports their statement.

Mrs H has provided a copy of bank statements from around the time of sale, her credit file, and an income and expenditure form. I've not seen anything in those documents that suggests the credit wouldn't have been sustainably affordable for her. It appears that Mrs H would also have been likely to have been able to rely on her partner's income to contribute towards the household bills listed on her income and expenditure calculations and I've seen a statement of tax and income that suggests that was in excess of £40,000 gross per year. I am not, therefore, persuaded that Mitsubishi were unreasonable to reject that element of Mrs H'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

Neither party provided any further information.

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.

As I have not been provided with any further comments or evidence to consider, I have not been persuaded to change my provisional decision. That provisional decision, therefore, 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 Mrs H to accept or reject my decision before 21 March 2024.

Phillip McMahon
Ombudsman