DRN-3981068

The complaint

Mrs B, who is represented by a professional representative ("PR") complains that Vacation Finance Limited ("VFL") rejected her claim under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product purchased from a company I will call A.

What happened

In May 2018 Mrs B purchased a points based holiday product at a cost of £41,142 which was funded by a loan from VFL. This was purchased when she was on holiday at her existing holiday product. Mrs B had made four previous purchases, one in 2008, one in 2014 and another in 2016 which was upgraded in 2017.

In January 2022 PR submitted a letter of claim to VFS. Both parties are aware of the details of claim so I will give a short summary. In brief it said there had been both a breach of contract and misrepresentation. It said the company had gone into liquidation and could no longer provide the service promised. It also claimed that the product had been sold as an investment which could be easily sold despite there being no viable market. She had been persuaded the new product was necessary in order to be able to sell her existing timeshare. It remained unsold, but PR did not say if Mrs B had tried to sell it. PR also said Mrs B had been told it was available at a special price on that day only.

PR said Mrs B had been pressurised to make the purchase and to take finance with VFL and had not been permitted to arrange her own finance. It said the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Regulations") had been breached by A. It had also fallen foul of the Consumer Protection from Unfair Trading Regulations (CPUT) 2008 in various ways including not disclosing the commission it had paid to A. PR said that there had been an unfair relationship under s.140A CAA. Finally, it said no proper affordability check had been undertaken.

VFL rejected the claim and countered the arguments put forward by PR. It said the allegations were unsupported and noted Mrs B had 14 days to withdraw from the agreement if she felt she had been pressurised into taking it out. It noted the claim that Mrs B had been subjected to a lengthy meeting which would have given them time to consider her purchase, but at no point had she been forced to remain. It also said no commission had been paid. VF explained that the running of the club had been taken over by another company and so there had been no breach of contract. It added that none of the documentation referred to the product being an investment and that Mrs B had experience of what she was signing given her previous purchases. It said it had carried out appropriate affordability checks.

PR brought a complaint to this service on behalf of Mrs B. It was considered by one of our investigators who didn't recommend it be upheld. He asked a testimony from Mrs B which she provided. This covered all Mrs B's purchases and she said she had realised the contract was help in perpetuity after the purchase. She also said maintenance fees had increased and now she was retired her finances were affected.

Our investigator said he did not have sufficient evidence to show that there had been either a breach of contract or misrepresentation. He did not believe there had been an unfair

relationship and he had not been persuaded that the loan was unaffordable.

PR made further representations arguing that the various upgrades purchased by Mrs B were evidence of 'churning'. It said it was very likely that A had sold the product as more than a holiday product. It said A's resale programme had been discontinued and Mrs B had been misled and A had broken several regulations.

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.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld. I will explain why.

I should point out first of all that Mrs B has provided very limited documentation for the disputed purchase in support of her claim. I do not, for example, have complete copies of the 2018 purchase documents, but I do have those for the earlier purchase. However, this service has seen a number of complaints about A's sales from around the same time. As is to be expected, the sellers and VFL used largely standard contract wording. I have presumed that the same standard wording was used for Mrs B's purchase.

Sections 56 and 75 CCA

Under s. 56 of the Consumer Credit Act 1974 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 s. 75(1) 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 do not understand VFL to dispute that the loan was made under pre-existing arrangements between it and A, the seller of the membership and the points, or between it and a company closely linked to the A Group. I have therefore considered what has been said about the sale and subsequent events.

Breach of contract

Although I have not seen all the documentation I think it likely that Mrs B would have signed an Application Agreement and would have received copies of the Rules of Membership, the Reservation Rules, and a Deed of Trust. Whether there was a breach of contract depends to a very large degree on what was in those documents compared with what happened.

PR says that the contract was breached when A companies went into liquidation. I do not agree. Club properties were held under a trust arrangement. The trust deed included a provision allowing the trustee to appoint a replacement entity to administer the club, should the existing management company go out of business. That is what happened.

On 7 May 2020 the liquidators of A wrote to all club members to tell them that the company had been placed into liquidation. That letter noted as well that the club's resort continued to operate normally – albeit subject to Covid-19 restrictions in place at the time. The liquidators also made reference to the liquidation of other A companies.

On 8 July 2020 the trustee wrote to all the club members. Its letter said:

"We have good news for all members. Following discussions with the liquidators of both [A Limited and A XP Limited] and with the directors of [X] (the owner of the resort) it has been decided that in the best interest of all clubs' members, [FNTC] be requested to establish a new company to act as manager of the clubs on behalf of all clubs' members.

"This new management company will be a non-profit making entity and its only role will be to manage the clubs for, and on behalf of, its members.

"We'd like to reassure you that the future of the clubs is secure."

Subsequently, club members were informed that a new resort manager, VCMS, had been appointed. On the face of it, therefore, the services linked to Mrs B's purchase of the points and club membership remain available to her and are unaffected by the liquidation.

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 Mrs B was told she was making an investment. I have noted the claims about misrepresentation are generic, lack detail, and are largely unsupported by any documentation.

The standard Application for Membership usually records that buyers had received A's Standard Information Document, the Rules of Membership, the Reservation Rules, and the Deed of Trust. I believe Mrs B would have been provided with those documents. That is relevant to the question of whether she was misled about what she was buying.

The standard sale documents also included a Compliance Statement, comprising ten numbered statements, each one of which customers were required to initial. This makes it plain that the primary purpose of the purchase is to acquire access to holiday

accommodation and not the purchase of real estate. This documentation also covers the matter of potential resale and explains this is not guaranteed, nor is there a guarantee of it being sold at a profit. Mrs B has supplied her copy duly initialled for the 2017 purchase and I think it likely that she signed and initialled a Compliance Statement in these terms for the 2018 purchase.

On the presumption that Mrs B signed an identical or similar agreement I do not consider I can uphold a claim of misrepresentation. I am also aware that she made several previous purchases from A and I presume she took holidays with A. I do not consider it reasonable to conclude that she was wholly unaware of what she was buying or how A operated.

S.140 A

Only a court has the power to decide whether the relationships between Mrs B and VFL 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 s.140A is "an action to recover any sum recoverable by virtue of any enactment" under s. 9 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 Mrs B could be said to have a cause of action in negligence against VFL anyway.

Her alleged loss isn't related to damage to property or to her 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 VFL such responsibility – whether willingly or unwillingly.

PR seems to suggest that VFL owed Mrs B a duty of care to ensure that A complied with the 2010 Regulations and it argues that the payment of commission created an unfair relationship. However, I believe VFL did not as a matter of course pay any commission so I cannot say that payment of commission created an unfair relationship. Even if it did in my experience payments of commission in this industry were relatively low.

I can see no basis for concluding there was an unfair relationship.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. VFL has said that it carried out the appropriate credit checks before approval.

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 VFL 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 Mrs B lost out as a result of its failings. I have noted that in her testimony Mrs B only says that she found the costs difficult

to maintain when she retired and there has been no suggestion that she was unable to afford them at the time of sale. I gather she stopped making payments in August 2019, but no reason has been given for this.

Conclusion

It is not for me to decide whether Mrs B has a claim against A, or whether she might therefore have a "like claim" under s. 75 CCA. Nor can I make orders under s. 140A and s. 140A 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 Mrs B's complaint. In the circumstances, I think that VFL's response to Mrs B'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 Mrs B to accept or reject my decision before 22 March 2024.

Ivor Graham
Ombudsman