DRN-4138552

The complaint

Mr W complains that Vacation Finance Limited ("VFL") didn't uphold his complaint pursuant to sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in respect of a timeshare product he purchased and funded with a loan they provided.

What happened

Mr W held an existing timeshare product he'd purchased from a supplier (who I'll refer to as "A") in 2007. In or around June 2018, Mr W met with A to discuss his existing timeshare arrangements. During that meeting, Mr W agreed to trade in his existing timeshare product against the purchase of a new points-based product with A.

After trade-in of Mr W's existing timeshare product, the price agreed for the purchase was £12,500. Mr W paid a deposit of £3,750, and the balance was funded with a fixed-sum loan of £8,750 from VFL over 10 years.

In July 2022, using a professional representative ("the PR"), Mr W submitted a complaint to VFL pursuant to sections 75 and 140A of the CCA. The PR allege that Mr W purchased the timeshare product having relied upon representations made by A which turned out not to be true. And under section 75 of the CCA ("S75"), VFL are jointly liable for those misrepresentations.

I don't propose to provide a full list of the alleged misrepresentations included in Mr W's complaint as the parties are familiar with them. However, the main allegation appears to be based upon the meeting with A being driven by Mr W's desire to sell his existing timeshare in 2018. And during that meeting, it's alleged A told him that could take four or five years to achieve. It's further alleged A suggested Mr W upgrade his existing timeshare as this was *"a more valuable property with increased prospects of being sold".*

The complaint goes on to make various allegations suggesting there'd been breaches of the purchase contract. And under S75, Mr W has an equal claim for those breaches against VFL.

The PR further allege that that the misrepresentations, together with other things done (or not done) by A renders the relationship with VFL, under the agreements, unfair pursuant to section 140A of the CCA ("S140A). Again, I don't propose to list the full extent of those allegations for the purpose of my decision as the parties involved are also familiar with them.

Finally, it was suggested by the PR that the loan had been provided irresponsibly to Mr W. In particular, that no meaningful affordability checks or assessments were made to establish whether the loan was sustainably affordable for him.

VFL didn't uphold Mr W's complaint. In particular, they thought that information Mr W had provided to the PR contradicted and/or didn't support many of the allegations included within his complaint. They also didn't agree there was any evidence to support the misrepresentations alleged. And they didn't agree with the allegations underpinning the suggestion that an unfair relationship existed under section 140A of the CCA ("S140A"). VFL said that Mr W had maintained all his loan repayments until March 2019, whereupon he repaid the outstanding loan in full. So didn't agree there was any evidence the loan had been provided irresponsibly.

The PR didn't agree with VFL's findings. So, referred Mr W's complaint to this service. One of this service's investigators considered all the information and evidence provided. Having done so, they didn't think VFL had acted fairly in rejecting Mr W's complaint. In particular, our investigator thought Mr W's allegations of misrepresentation were plausible and supported by evidence he'd provided from around the time of the sale. Our investigator didn't think Mr W would've proceeded with the upgrade and associated loan, but for those misrepresentations.

Our investigator didn't think VFL's response to Mr W's complaint was fair and reasonable, and thought they should put thinks right by ensuring Mr W was put back into the position he would've been, had he not made the purchase.

The PR confirmed that Mr W was happy with our investigator's findings. But VFL didn't respond, despite follow up by our investigator. So, as an informal resolution couldn't be achieved, Mr W's complaint has been passed to me to consider further.

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.

Relevant considerations

When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] 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.

S75 provides consumers with protection for goods or services bought using credit. Mr W paid for the timeshare product under a restricted use fixed sum loan agreement. So, it isn't in dispute that S75 applies. This means Mr W 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 complaint.

S140A looks at the fairness of the relationship between Mr W and VFL 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.

It's important to distinguish between the complaint being considered here and any legal claim that may be made. In considering Mr W's complaint I need to decide whether I believe VFL's failure to uphold it was fair and reasonable given all the evidence and information available to me, rather than deciding any associated legal claim.

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 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.

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

[1] Dispute Resolution: The Complaints sourcebook (DISP)
[2] Financial Conduct Authority

what I believe are the most salient points having considered everything that's been said and provided.

Mr W's timeshare history

I can see that Mr W first purchased a timeshare product from A in May 2007. And I understand he continued to regularly use that timeshare product after purchasing it.

I believe the meeting in June 2018 occurred during a visit to use his timeshare. And Mr W says that it was at this point he expressed to A his desire to sell his existing timeshare product. The evidence from the time of the sale shows that Mr W subsequently purchased the upgraded points-based timeshare product, having traded in the product purchased in 2007. So, in order to fully consider the allegations included within Mr W's complaint, I've tried to establish and understand what prompted Mr W to upgrade his existing timeshare holding, based upon the evidence provided.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by A in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that A made false statements of fact when selling the timeshare product. In other words, that they told Mr W 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 W to enter into the purchase contract. This means I would need to be persuaded that he reasonably relied upon false statements when deciding to upgrade to the timeshare product in June 2018.

- The purchase documentation

The purchase documentation shows that Mr W purchased the upgraded points-based membership from A in June 2018. It shows an agreed price of £12,500 after trade in of an existing timeshare product. It also documents the payment of a deposit of £3,750 with the balance of £8,750 financed over 120 months - funded by a loan from VFL.

Looking in isolation at these documents, I can't be certain about what Mr W was specifically told (or not told) about the benefits of the product he purchased. It was, however, indicated that he was told these things. So, I've thought about that alongside the other evidence provided by Mr W, which he believe supports his recollections and serves to explain his decision to purchase at that time.

- Subsequent correspondence

Mr W's emails and correspondence evidence, from around the time of the sale, supports his assertion that he wanted to sell his existing timeshare (purchased in 2007). I've seen an email Mr W sent to A, shortly after the meeting in June 2018, confirming he'd intended to sell his timeshare.

The email goes on to confirm Mr W's understanding of what he says he was told by A. In particular, that his existing timeshare product had been valued at £29,700, but that *"it might take 4-5 years to sell".*

The email further recounts that Mr W believes he was told, *"the earliest I could leave the new system, would be 2020, at which time the Company would pay the present value (£29,700.00, or any increase at that time), and also repay the fees paid to join the the new system, in three payments-Jan.,June, and Dec.2020.,less any fees outstanding* [sic]*".* Mr W asked for confirmation of his understanding.

A responded a few days later confirming *"A resale facility for* [the points-based product] *will be available from 2020. At this point you will be able to list your* [points] *for sale up to a maximum of 4,000* [points] *per-transaction. The* [points] *price is subject to demand."*

Mr W has also provided a copy of a letter he sent to A after these exchanges in which he points out that he wasn't told that *"price will be subject to demand"* at the time of the sale.

The letter also states, *The only reason I signed up to the new scheme, was because of what he told me* [sic]. *He rang on 21st June, I again went over the information , he promised someone would Email. Me back- They did not* [sic]*".*

The letter goes on to say, *"Given that you did not contact me prior to the payment date of 27th June, I had to make the Bank Transfer of £ 3,750* [the deposit], *and sign the direct debit.*

A further letter sent by Mr W to A shortly afterwards says, *"I today received an email from* [A's representative]*, he still will not confirm what I was told by* [A's salesperson]*, but now, having had the opportunity, to read all the many papers I had to sign at that time, I assume clause 20 – "Legally Binding", covers your unwillingness to do so".*

Having considered and thought about this evidence, I'm persuaded that Mr W went to the sales meeting in June 2018 with the intention of selling his existing timeshare. On balance, I think it more likely than not that A encouraged Mr W to purchase the timeshare upgrade as a means to realise his timeshare holding more easily and quickly, rather than as a long-term holiday product.

Mr W has provided a copy of A's handwritten notes retained from the time of the sale. These suggest A attributed a trade in value of £27,000 for his original timeshare. Further, the notes appear to suggest the new (upgrade) timeshare value as £42,200 and goes on to illustrate three instalments of £14,000 every six months. I think this supports Mr W's recollection that he could sell the upgrade product back to A in three tranches. And further supports his summary email to A shortly after the sales presentation.

Subsequent email exchanges focus on Mr W's ability to sell the new upgraded timeshare. So, I think this supports my view that Mr W agreed to the upgrade fully intending to sell it as quickly as possible. And I think this intention was based upon the representations made by A about the value of his timeshare both at the time of the sale and in the future. I think the suggested enhanced ability to sell back his timeshare holding is ultimately what persuaded Mr W to contract.

It seems clear to me that there was a distinct lack of clarity about Mr W's ability to sell the upgraded timeshare. And despite Mr W proactively seeking clarity about his understanding of what he'd been told, I can't see that A clearly addressed any misunderstanding or apparent misrepresentation before the sale was completed. Despite having opportunity to do so. So, I'm persuaded that this aspect was misrepresented to Mr W. And it was this misrepresentation that persuaded him to contract.

Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs") says *"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be regulated".* I'm persuaded A told Mr W that upgrading his timeshare would enhance his ability to sell it more quickly. And I also think they provided illustrations to suggest what he could receive back, and the timescales associated with that. But I've seen no evidence that the product Mr W purchased was likely to either increase in value or be easier to sell. So, based upon my findings above, I think A misrepresented the upgrade product as an investment that he could easily re-sell in the future.

Based upon my findings, I will be upholding Mr W's complaint. And in doing so, I believe it would be fair and reasonable for VFL to take the actions described below to Put Mr W back in the position he would have been had the upgrade product not been misrepresented to him.

<u>The other allegations under section 75 and 140A, and irresponsible lending</u>

As I've already mentioned above, Mr W's complaint includes various additional allegations of misrepresentation, breach of contract and unfairness, together with a suggestion that VFL leant to him irresponsibly. Given my findings above, I will be upholding Mr W's complaint.

So, I make no findings on the other issues and alegations because I don't believe this will have any further bearing upon the actions I require VFL to take.

Putting things right

Our investigator recommended that VFL cancel Mr W's loan with them and refund all loan repayments he'd made together with any maintenance/management fees paid to A for any years when the upgraded timeshare product wasn't used.. Also, that they pay Mr W a further £3,750 to represent the deposit he paid to A. Our investigator thought VFL should add 8% simple interest to all the amounts refunded from when each payment was made to the point of refund. Finally, that they arrange for the upgraded product to be cancelled together with Mr W's membership with A.

As I understand it, Mr W repaid his loan with VFL in full in March 2019. So, it appears there is no outstanding balance to be refunded. So, I propose to reflect this below.

I find it would fair and reasonable for Vacation Finance Limited to:

1. refund to Mr W all of the payments he made under the fixed sum loan agreement that he signed in June 2018, including any full and final repayment amount he made in March 2019;
2. refund £3,750 representing the deposit Mr W paid for the product purchased in June 2018 - subject to Mr W providing evidence of payment;
3. refund to Mr W any management/maintenance charges he has paid to A relating to the upgrade product purchased in 2018, less any charges paid for years that Mr W used that product - subject to Mr W providing evidence of payment;
4. remove any adverse information about the loan agreement that may have been recorded on Mr W's credit file;
5. ensure the purchase agreement and membership that Mr W bought in June 2018 is cancelled (including releasing him from any further obligations) or agree to take over his contract/membership or indemnify him for any and all future liabilities (including maintenance/management charges) that he incurs as a result of the timeshare product; and
6. pay interest[3] at 8% simple on all amounts refunded from the point they were paid to the point of settlement.

My final decision

For the reasons set out above, I uphold Mr W's complaint. I require Vacation Finance Limited to provide a resolution as I've detailed above under points 1 – 6 of "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 10 April 2024.

Dave Morgan
Ombudsman

[3] HM Revenue & Customs requires Vacation Finance Limited to deduct tax from the interest payments to be made to Mr W and must provide him with a certificate showing how much tax is deducted, should he ask for one.