DRN-4548872

The complaint

Mr and Mrs L, who are represented by a professional representative ("PR") complain that Vacation Finance Limited ("VFL") rejected their claim under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

In March 2017 Mr and Mrs L purchased a holiday product from a company I will call A at a cost of £12,100 which was funded in part by a loan from VFL.

In July 2022 PR submitted a letter of claim to VFL. Both parties are aware of the details of the claim so in this decision I will simply set out a short summary. 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. It said this made the contract null and void since it breached regulations. Mr and Mrs L had been told it was available at a special price on that day only.

PR said Mr and Mrs L had been pressurised and to make the purchase and to take finance with VFL and had not been permitted to arrange their 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. Furthermore, they had not been given time to check the extensive paperwork which ran to over 100 pages. PR said that there had been an unfair relationship under s.140A CAA. Finally, it said no affordability check had been undertaken.

VFL rejected the claim setting out in some detail the reasons why it reached this conclusion. It noted that Mr and Mrs L had not made use of the 14 day cooling off period. On the matter of affordability it said Mr and Mrs L had made regular monthly payments until May 2018 when the loan was repaid in full. Overall it concluded that the claims were unsubstantiated.

In April 2023 PR brought a complaint to this service on behalf of Mr and Mrs L. It was considered by one of our investigators who didn't recommend it be upheld. She didn't consider she had seen sufficient evidence to show there had been either misrepresentation or that there had been a breach of contract. Furthermore, she didn't consider the sale fell within s.140A. Finally, she had not seen evidence that the loan had been unaffordable.

PR didn't agree and said the product had been sold as an investment and Mr and Mrs L had been aggressively targeted. It said the product had been misrepresented and key information had been withheld about the market for the product. Mr and Mrs L would be elderly when the product reached its term and proper affordability checks had not been carried out.

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 would note that although the original documents were written in Mr and Mrs L's first language VFL have provided English versions. That said I have not seen the full set of documents provided to Mr and Mrs L.

Sections 56 and 75 of the Consumer Credit Act

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 section 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 were 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.

Misrepresentation

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.

In short, I am afraid however that I think it most unlikely that Mr and Mrs L were told they were buying a financial investment. PR has made this assertion, but I have not seen supporting evidence. There is no explanation of how that could be the case or why Mr and Mrs L believed that the purchase of points would be an investment. If they had been told that – or had otherwise believed that to be the case – I would have expected them to ask for

more information.

The agreement I have seen makes it clear they were purchasing membership and not acquiring real estate or an interest in real estate. It may have been that the sales representatives referred to the making an investment in future holidays, but I have not seen any evidence that they were sold this product as a financial investment.

Breach of Contract

I do not believe that the liquidation of A in 2020 led to a breach of contract. I gather new management companies were appointed, and Mr and Mrs L were able to use the timeshare as usual after that date.

In July 2020 the trustee wrote to all the club members. Its letter said: "*The JLs are pleased to confirm that FNTC has taken over as the new manager of the Clubs and further confirm that, as a result, the Clubs will continue to operate for the benefit of members*." I presume Mr and Mrs L received a copy of this letter or something similar.

On the face of it, therefore, the services linked to their purchase of the points remain available to them and are unaffected by the liquidation. Indeed the agreements used by A usually allow for the liquidation of A and its replacement by another provider. That said, I cannot say if this was in Mr and Mrs L's documentation since I have not seen all of it.

Given I have not been persuaded that the product was sold as a financial investment I cannot conclude that the removal of a sales service by A can been regarded as a breach of contract.

S.140 A

Only a court has the power to decide whether the relationships between Mr and Mrs L 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 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 and Mrs L could be said to have a cause of action in negligence against VFL anyway.

Their alleged loss isn't related to damage to property or to them 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 Mr and Mrs L 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.

Also Mr and Mrs L had a 14 day window in which to withdraw from the agreement if they felt they had been pressurised or were unhappy for any other reason. PR states they were not given sufficient information, but also says that they were not given key information, but doesn't identify what was missing. Nor can I safely conclude that they were aggressively targeted.

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 Mr and Mrs L lost out as a result of its failings. I have noted they maintained their monthly payments and repaid the loan early. No evidence has been submitted to show the loan was unaffordable.

Conclusion

It is not for me to decide whether Mr and Mrs L have a claim against A, or whether they might therefore have a "like claim" under s. 75 of the Consumer Credit Act. 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 Mr and Mrs L's complaint. In the circumstances, I think that VFL's response to Mr and Mrs L'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 L and Mr L to accept or reject my decision before 29 March 2024.

Ivor Graham
Ombudsman