DRN-4554989

The complaint

Mr and Mrs H, who are represented by a professional representative ('PR') complain that Vacation Finance Limited ('VFL') rejected their claims under s.75 and s.140A Consumer Credit Act ('CCA') in respect of a holiday product.

What happened

Mr and Mrs H have made a number of timeshare purchases beginning in 2010. In October 2017 when on a free holiday PR says they attended a sales presentation at which they were pressurised to buy a new points based product from the supplier. This cost £110,750 which was funded in part by a loan from VFL.

In July 2020 PR made a claim on behalf of Mr and Mrs H to VFL. It said that they had been misled by the claims made by the sales representative at the event which took place in their apartment. He had claimed they were being given a privileged opportunity to purchase this new product. They were told that this was a great investment opportunity and they believed they would get their money back. They have not been able to recoup their investment. They had not been given the opportunity to consider the purchase or the funding and no affordability checks were undertaken.

PR said Mr and Mrs H had not been made aware of any commission paid and overall they said a claim under ss. 75 and 140A could be made. I have seen nothing to show VFL responded to this claim.

In November 2022 PR brought a complaint to this service where it was considered by one of our investigators who didn't recommend it be upheld. He noted that the cash price of the product fell outside the financial limits of s.75 and he considered that the s.75 claim failed. With regard to the s.140A claim he noted that this was to be considered in the round and not in a narrow technical manner. Having done so he was not persuaded that there had been an unfair relationship. Nor did he think he had been given any persuasive evidence to show that the lending had been unaffordable.

PR didn't agree and said Mr and Mrs H had been told they were purchasing an investment. Indeed, they believed their earlier purchases were investments and the 2017 purchase was only made because they thought it was the only way to recover their money. It said there was no realistic chance of this happening. I asked for further information relating to the affordability and PR supplied a brief statement from Mr H.

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.

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 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.

It also operates within financial limits and only applies where the cash price of the goods or service is more than £100 but no more than £30,000. For completeness I would note that s.75a allows claims on purchases up to £60,260, but this does not apply to payments made by credit card and it also only covers certain specific situations.

That means that s.75 is not available to Mr and Mrs H as the cash price of the product was in excess of £30,000.

S.140 A

Only a court has the power to decide whether the relationships between Mr and Mrs H 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 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 H 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 accepted such responsibility – whether willingly or unwillingly.

As I was not present at the sales meeting I cannot say what was actually said by the sales representative. It is known for these products to be sold as investments in future holidays which is not the same as financial investments. I have read Mr H's testimony which was taken on 24 October 2020. I have noted the wording is, in parts, identical to the claim made by PR on 31 July 2020. That gives me cause to wonder about the personal nature of the statement.

I note from what he says that it seems he and his wife made use of their earlier purchases, but were persuaded to upgrade to a new points system. They did so as a means of getting their money back, but it appears they had a good knowledge of the Supplier and what it offered and I am not convinced that there is sufficient evidence to support the claim that the main reason for making the purchase was as an investment.

PR says that some terms of the contract are "unfair" and the supplier breached the Consumer Protection from Unfair Trading Regulations (CPUT) 2008"). That is not for me to say, although I must have regard to relevant law, including CPUT. The remedy if a contractual provision is "unfair" is however that the provision is unenforceable against the consumer – not that the whole contract falls.

In the circumstances, I think it unlikely that a court would have said that the loan agreement created an unfair relationship between Mr and Mrs H and VFL.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. 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 H lost out as a result of its failings.

I asked PR about this matter and it provided a comment from Mr H. He said that the loan had been repaid some 12 months later from the sales proceeds of his business. However, subsequently they had to take out a mortgage for £50,000 which they wouldn't have done had they not taken the loan with VFL. That of itself does not indicate that the loan was unaffordable at the time it was taken out and I do not consider there are grounds to ask VFL to take any further action.

Conclusion

It is not for me to decide whether Mr and Mrs H have a claim against the supplier, or whether they might therefore have a "like claim" 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.

However, for the reasons I've already given, I don't think VFL lent irresponsibly to Mr and Mrs H or otherwise treated them unfairly in relation to this matter. I haven't seen anything to

suggest that s. 140A would, given the facts of this complaint, lead to a different outcome here.

My final decision

My final decision is that I do not uphold this claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 26 July 2024.

Ivor Graham
Ombudsman