DRN-4557896

The complaint

Mr H, who is represented by a professional representative ("PR") complains that Vacation Finance Limited ("VFL") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

In October 2018 Mr H purchased a holiday product from a company I will call A. It cost £37,500 and was funded in part by a loan from VFL. I gather Mr H had purchased a product from A previously.

In February 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. VFL said that Mr H had been aggressively targeted while on holiday and:

- VFL had paid a commission to the timeshare owner which was not declared to Mr H.
- A failed to conduct a proper assessment of our client's ability to afford the loan.
- A unduly pressured our client into entering the contract and taking finance from VFL.
- The product was misrepresented and Mr H was told it could be easily sold at a profit.
- Mr H was subjected to aggressive commercial practices.
- A marketed and sold the timeshare as an investment in breach of Regulation 14(3) of the Timeshare Regulations. It was illegal for them to do so.
- A is in liquidation and this caused a breach of contract.

I have not seen a response from VFL. PR brought a complaint to this service on behalf of Mr H. It was considered by one of our investigators who didn't recommend it be upheld. PR asked that the matter be considered by an ombudsman, but didn't supply any further arguments or 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.

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. However, I should point out that I have been provided with very little documentary material and I have not heard from Mr H. I have seen a single page from A summarising the purchase and a statement from VFL dated 21 February 2019 showing he had borrowed £2,500. PR has said the documentation ran to over 100 pages.

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.

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.

I have not been given personal testimony from Mr H and I have to rely on PR's claims as to what was said in 2018. Also I have little documentation to rely on and I am not aware that VFL were given anything more than I have seen. PR is asking VFL to pay Mr H a considerable sum, but it does not appear to have provided evidence in support of its claims. That makes it difficult to reach a conclusion that the product was misrepresented.

Breach of Contract

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

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 [AR and AXP] and with the directors of [GSR] (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. From your perspective as a member, there is a lot to look forward to as soon as governmental travel restrictions are lifted. We are also pleased to report to you that [R Resort & Spa], [GS] in Malta has reopened and is available for member use after the resort has successfully established COVID-19 health and safety precautions."

I cannot say that Mr H received this, but on the face of it, therefore, the services linked to Mr H's purchase remains available to him and are unaffected by the liquidation of the A companies.

S.140 A

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

His alleged loss isn't related to damage to property or to him 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.

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.

As for the matter of commission I believe VFL did not as a matter course pay commission and I have no reason to suspect that it did in this case.

PR says that some terms of the contract are "unfair" and A 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 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 H lost out as a result of its failings. No evidence has been submitted to show the loan was unaffordable.

Conclusion

It is not for me to decide whether Mr H has a claim against A, or whether he might therefore have a “like claim” under 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 H’s complaint. In the circumstances, I think that it was fair and reasonable for VFL not to uphold Mr H’s claims.

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 Mr H to accept or reject my decision before 10 April 2024.

Ivor Graham
Ombudsman