DRN-4573262

The complaint

Mr S and Mrs M complain that Vacation Finance Limited ("VFL"), unfairly turned down their claim under the Consumer Credit Act 1974 ("CCA") in respect a of a purchase made in April 2018. Mr S and Mrs M are represented by a professional representative ("PR").

What happened

In March 2018 while using their existing timeshare Mr S and Mrs M purchased a new points based one from a company I will call A at a cost of £24,500 funded in part by a loan from VFL. This loan was repaid in October 2018.

In April 2021 PR submitted a letter of claim to VFL. It said A was in liquidation and could not provide the service it had offered. It also claimed the agreement was unfair as the payment of commission was hidden from them.

It said that Mr S and Mrs M had been told this was the best way to sell their timeshare. It claimed that they had bought the previous one as an investment. PR also claimed that Mr S and Mrs M found it difficult to make use of their points. It added that the sale was made under duress and their clients were led to believe that they had to take out a loan. Furthermore it claimed no credit checks had been carried out.

VFL refuted the claims made by PR. It said they were generic and not based on fact. It also pointed out they had a 14 day cooling off period which they had not used. It said Mr S and Mrs M had signed the 'Declaration of Fair Sales Practice" which set out that the purchase being made was solely a "holiday-based membership" and was not one to be taken up "purely for financial gain".

It went on to say: "Furthermore, prior to the contract entered into by Mr S and Mrs M on the 10th of March 2018 a series of other contracts had been entered into by Mr S and Mrs M with [A] for other time share products.

In addition to this, after this contract was entered into, Mr S and Mrs M not only proceeded to enter into another contract with A in March of 2020, but they also cancelled the contract in question and entered into another contract with A in April of 2020 for XP points."

Finally it pointed out that the running of the scheme had been taken over by another company so Mr S and Mrs M were able to access the holiday properties etc.

PR brought a complaint to this service on behalf of Mr S and Mrs M for much the same grounds as they made in the claim to VFL. It was considered by one of our investigators who recommend it be upheld. She accepted the testimony made by Mr S that their intention had been to sell the product and as A had not facilitated this there had been misrepresentation.

I issued a provisional decision as follows:

"*Sections 56 and 75 of the Consumer Credit Act*

Under section 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.

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 S and Mrs M were 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 S and Mrs M received this, but on the face of it, therefore, the services linked to Mr S and Mrs M's purchase of XP points remain available to them and are unaffected by the liquidation of the A companies.

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.

I have noted Mr S's testimony and VFL's explanation of A's approach to sales. What I have not seen apart from a single page, is the sales agreement between Mr S and Mrs M and A.

Mr S says that they had bought their previous product as an investment and the points based product was sold on the basis it would be easier to sell. I appreciate Mrs M was diagnosed with an incurable disease in late 2014 and they wanted to sell their timeshare. She has my sympathies, but the various purchases made do not suggest that the product was bought as a financial investment. Nor do I think it was sold as one. VFL has explained that the documentation indicates it is not a financial investment.

In short, I am afraid however that I think it most unlikely that Mr S and Mrs M were told they were buying a financial investment. There is no explanation of how that could be the case or

why Mr S and Mrs M believed that the purchase of points would help with the sale of timeshares. 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.

As I have said I have not seen the agreement signed by Mr S and Mrs M, but I am aware that such agreements address the transfer of rights. I believe it would have allowed the transfer of membership, including by sale, subject to the written approval of A. I think however it is unlikely that Mr S and Mrs M were told that XP points were an investment.

Given that these points were covered in the Club Rules and that Mr S and Mrs M had a 14-day cooling off period in which to check any matters which were of particular importance to them, I do not believe it was unreasonable of VFL to decline their claim under s. 75.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments. In deciding whether to make an order, a court can have regard to any connected agreement; in this case, that could include the agreement for the sale of the timeshare product in 2018. PR seems to have based this element of the claim on

the payment of commission, but I believe VFL did not pay commission. As such I can see no basis for a successful claim under s.140A.

Lending Decision

PR says that Mr S and Mrs M were not given a choice of lenders and was required to take out a loan with VFL.

PR says too that the payment of commission should have been disclosed to Mr S and Mrs M. As I have explained none was paid, but even if it was, there is no suggestion that it was important to them, or that it would have made any difference to their decision to purchase.

In any event, A wasn't acting as an agent of Mr S and Mrs M, but as the supplier of XP points. It also introduced VFL as a lender, if Mr S and Mrs M wanted to take out a loan. But it does not appear to me that it was A's role to make an impartial or disinterested recommendation or to give Mr S and Mrs M advice or information on that basis.

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 S and Mrs M lost out as a result of

its failings. I see they repaid it some seven months later. Mr S and Mrs Have provided no evidence whatsoever that they would have found, or did find, it difficult to repay the loan, so I do not need to consider this point further.

Conclusion

It is not for me to decide whether Mr S and Mrs M 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 S and Mrs S's complaint. In the circumstances, I think that VFL's response to Mr S and Mrs M's claims was fair and reasonable."

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.

PR said it was taking instructions from its clients, but despite further reminders no further arguments have been submitted. VFL did not respond. As such I have no reason to alter my provisional decision.

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 M and Mr S to accept or reject my decision before 29 February 2024.

Ivor Graham
Ombudsman