DRN-4632123

The complaint

Mr B and Ms K complain that Vacation Finance Limited ("VFL") didn't provide a fair and reasonable response to their claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a timeshare product financed by a loan they provided.

What happened

In or around October 2018, whilst on holiday utilising their existing timeshare product, Mr B and Ms K met with a representative of their timeshare supplier who I'll refer to as "A". During that meeting, Mr B and Ms K agreed to purchase a new points-based product from A. The purchase price agreed was £15,125 which, after payment of a deposit, was funded under a fixed sum loan agreement with VFL for £12,125 over 120 months.

In October 2022, using a professional representative ("the PR"), Mr B and Ms K submitted a claim to VFL under sections 75 and 140A of the CCA. The PR alleged that the timeshare product was purchased 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.

In particular, the PR allege A had previously sold timeshare products to Mr B and Ms K as being highly desirable and easily saleable for a profit. The PR allege A told Mr B and Ms K:

- they should now purchase another timeshare product which would be easier to sell as part of A's re-sale scheme allowing them to make a profit and exit their timeshare; and
- the product was available at a special price, but only if purchased that day.

But despite completing the purchase, Mr B and Ms K have been unable to sell the timeshare points they purchased. The PR said that selling timeshare products as an investment falls contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

The PR also allege that the misrepresentations, together with other things done (or not done) by A render the relationship with VFL, under the agreements, unfair pursuant to section 140A of the CCA ("S140A). In particular, the PR allege that A:

- pressured Mr B and Ms K into entering the purchase and loan agreements using aggressive commercial practices;
- gave the impression the loan was part of the timeshare product purchase agreement;
- allowed them no time to read or consider the extensive paperwork provided;
- failed to advise of any commission they received from VFL;
- made no comparisons to other loan companies and didn't inform Mr B and Ms K they were free to arrange their own finance; and
- failed to undertake appropriate affordability checks for the loan or seek proof of their income or outgoings.

The PR also allege that A are in liquidation and can't provide the service sold. They suggest this constitutes a breach of contract which VFL are jointly liable for under S75.

VFL didn't uphold the claim. They didn't agree there was any evidence to support the allegations of misrepresentation. Or that there was any evidence to support the allegations of unfairness under S140A. They also didn't think there was any evidence of loss to support the alleged breach of contract. VFL said they followed their usual process and conducted an appropriate affordability assessment. They didn't think there was any evidence the loan was unaffordable for Mr B and Ms K.

The PR didn't agree with VFL's findings, so referred Mr B and Ms K's claim to this service as a complaint. One of this service's investigators considered all the information and evidence provided. Having done so, they didn't think VFL's failure to uphold Mr B and Ms K's claim was unfair or unreasonable. In particular, our investigator said they also weren't able to find evidence to support any of the various allegations. Or that there was any evidence to suggest the loan was unaffordable for Mr B and Ms K.

The PR didn't agree with our investigator's findings suggesting they'd failed to properly assess the claim under S 75 and S140A. They asked that Mr B and Ms K's complaint be referred to an ombudsman to consider further. To support their rejection, they reiterated much of what had already been included in Mr B and Ms K's claim, and included:

- that the product had been represented as an investment, consistent with previous purchases Mr B and Ms K had made from A;
- details of the other timeshare product purchases Mr B and Ms K had made through A;
- reference to the testimonies and experiences of other consumers who'd purchased timeshare products from A;
- further reference to the alleged breaches of the TRs; and
- comments regarding the viability of the secondary market for timeshares;

As an informal resolution couldn't be achieved, Mr B and Ms K's complaint has been passed to me to consider further. Having done that, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 18 January 2024 giving both sides the chance to respond before I reach a final decision.

In my provisional decision I said:

> Relevant considerations
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> 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.
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> S75 provides consumers with protection for goods or services bought using credit. Mr B and Ms K 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 B and Ms K are afforded the protection offered to borrowers like them under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> S140A looks at the fairness of the relationship between Mr B, Ms K 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

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

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 the legal claim. I acknowledge the PR's assertion that our investigator failed to assess the claims properly. However, the complaint this service is able to consider specifically relates to whether I believe VFL's failure to uphold Mr B and Ms K's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.

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 what I believe are the most salient points having considered everything that's been said and 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 B and Ms K something that wasn't true in relation to the allegations raised. I would also need to be satisfied that the misrepresentation was material in inducing Mr B and Ms K to enter into the purchase contract. This means I would need to be persuaded that they reasonably relied upon false statements when deciding to buy the timeshare points.

From the information available, I can't be certain about what Mr B and Ms K were specifically told (or not told) about the benefits of the product they purchased. It was, however, indicated that they were told these things. So, I've thought about that alongside the evidence that is available from the time. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr B and Ms K's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says they were told. In particular that the product was represented as an investment that could easily be sold for a profit. There's simply no reference to this within any of the limited documentation I've seen.

The PR have referenced prior purchases made by Mr B and Ms K from A. But these don't form part of their claim and subsequent complaint here. The claim specifically relates to the product purchase in October 2018. And, in any event, I can't see that VFL were involved in financing the first of those purchases from A. So, I don't think I can fairly hold VFL responsible for anything allegedly said or done in relation to that earlier purchase. And I also don't think any allegations specifically relating to the circumstances of any of the previous purchases help me in establishing the facts of what happened in October 2018.

I think it unlikely the product can have been marketed and sold as an investment contrary to the TRs simply because there might have been some inherent value to it. And in any event, despite Mr B and Ms K's assertions, I've found nothing within the evidence provided to suggest A gave any assurances or guarantees about the future

value of the product they purchased. A would had to have presented the product in such a way that used any investment element to persuade them to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

Furthermore, I haven't seen any evidence to suggest that A were contractually bound to provide a timeshare resale service. And even if they were, I've seen nothing that suggests they gave any guarantee of a successful sale or that a profit could be achieved. So, based upon the specific evidence available relating to Mr B and Ms K's claim here, I can't say, with any certainty, that A did misrepresent the product in the ways alleged.

The breach of contract claim under S75

As far as I understand, whilst A may have entered an insolvency process, the current management company have confirmed that timeshare owners remain able to fully utilise their timeshare products subject to the associated agreements. So, in the absence of any specific explanation or evidence to support why Mr B and Ms K believe there's been a breach of contract which resulted in a loss for them, I haven't seen anything that would lead me to conclude there was such a breach.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (VFL) and the debtor (Mr B and Ms K) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor). And I think it's relevant to acknowledge Mr B and Ms K's existing membership and relationship with A. They'd previously purchased products from them in 2010 and 2012. So, I think it's reasonable to conclude that at the time of the purchase in October 2018, they had a reasonably strong awareness about the products they'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude Mr B and Ms K were familiar with A (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the purchase in October 2018 certainly wasn't their first.

- The pressured sale and process

The claim suggests Mr B and Ms K were pressured into purchasing the product and entering into the finance agreement with VFL through the use of aggressive commercial practices. I acknowledge what the PR have said about this. So, I can understand why it might be argued that any prolonged presentation might have felt like a pressured sale – especially if, as Mr B and Ms K approached the closing stages, they were going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr B and Ms K agreed to the purchase and the finance agreement in 2018 when they simply didn't want to. I haven't seen any evidence to demonstrate that they went on to say something to A, after the purchase, suggesting

they'd agreed to it when they didn't want to. And neither the PR, nor Mr B and Ms K have provided a credible explanation for why they didn't subsequently seek to cancel the transaction within the 14-day cooling off period permitted here – both under the purchase and loan agreements.

If they only agreed to the purchase because they felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr B and Ms K were obviously harassed or coerced into the agreements. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that they made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired contrary to the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").

- Time to read and consider the information provided

I've thought about the information that I believe should have been provided to Mr B and Ms K as required under the TRs. I've seen very little from the time of the sale here, although there's no suggestion that A didn't provide all the required documentation. And in response to Mr B and Ms K's claim VFL have referred to the *"Separate Standard Withdrawal Form"* which Mr B and Ms K signed. Further, the PR refer to *"The written paperwork* (which) *runs to over 100 pages".* So, I think it's fair to conclude that Mr B and Ms K did receive this.

It's possible Mr B and Ms K weren't given sufficient time to read and consider the contents of the documentation at the time of the sale. But even if I were to find that was the case – and I make no such finding – It's clear they still had 14 days to consider their purchase and raise any questions or concerns they might've had. And ultimately, if they were unhappy or uncertain, they could've cancelled the agreement without incurring any costs.

Furthermore, I understand the finance agreement also included a withdrawal/cancellation period of 14 days. But I haven't seen any evidence that Mr B and Ms K did raise any questions or concerns about either agreement.

- A's responsibilities and disclosure of any commission paid

Part of Mr B and Ms K's S140A claim is based upon the status of A (as the introducer of the loan) and their (and VFL's) resultant responsibilities towards them. In particular, it's argued that the payment of commission by VFL to A was kept from them. In response to the claim, VFL confirm that no commission was paid here.

That said, I don't think any payment of commission by VFL to A would've been incompatible with their role in the transaction. A weren't acting as an agent of Mr B and Ms K, but as the supplier of contractual rights they obtained under the timeshare product agreement. And, in relation to the loan, based upon what I've seen so far, it doesn't appear it was A's role to make an impartial or disinterested recommendation, or to give Mr B and Ms K advice or information on that basis. As far as I'm aware, they were always at liberty to choose how they wanted to fund the transaction.

What's more, I haven't found anything to suggest VFL were under any regulatory duty to disclose any amount of commission paid in these circumstances. Nor is there any suggestion or evidence that Mr B and Ms K requested those details from VFL (or A) at any point. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure or payment of commission would've created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

Were the required lending checks undertaken?

There are certain aspects of Mr B and Ms K's complaint that could be considered outside of S75 and S140A. In particular, in relation to whether VFL undertook a

proper credit assessment. The PR allege that a proper affordability check wasn't completed by A. They also suggest that information about their income and outgoings wasn't requested or verified.

Ordinarily, responsibility falls with the lender (VFL in this case) to conduct affordability checks as set out within the Consumer Credit Sourcebook ("CONC") - part of the FCA handbook. In Mr B and Ms K's case, VFL have confirmed they followed their usual process and conducted an appropriate affordability assessment.

It's relevant that the PR haven't provided any evidence to show that the loan was unaffordable for Mr B and Ms K. And I've not seen anything that supports any suggestion of financial difficulty from that time, or since. If I were to find that VFL hadn't complied with the regulatory guidelines and requirements that applied here – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that the loan repayments weren't sustainably affordable for Mr B and Ms K in order to uphold their complaint here. Furthermore, I don't believe any regulatory failure would automatically mean that the loan agreement is null and void. It would need to be proven that any such failures directly resulted in an attributable loss for Mr B and Ms K as a consequence.

I've seen no specific information about Mr B and Ms K's actual position at the time of the purchase and no supporting evidence that they struggled to maintain repayments. In fact, VFL have pointed out that the loan repayments have always been maintained. Because of that, I can't reasonably conclude the loan was unaffordable for them. Or that they've suffered any attributable loss as a consequence.

Other considerations

In response to our investigator's findings, the PR have included details of Mr B and Ms K's recollections of their purchase experiences in 2010 and 2012. But as I've already said above, I don't see how the recollections assist in establishing what actually happened in 2018.

Furthermore, the PR have referenced the experiences of other consumers who purchased timeshare products from A. However, I don't think this helps in establishing the facts of what actually happened in Mr B and Ms K's specific circumstances in 2018.

Finally, the PR have raised additional allegations relating to Mr B and Ms K's experience of booking availability when using their timeshare product points, together with the term of the product they purchased. I can't see that these allegations were included within the claim submitted to VFL. So, it wouldn't be appropriate for me to comment further on those aspects. And in any event, I've seen no evidence to support those allegations.

Summary

I want to reassure Mr B and Ms K that I've carefully considered everything that's been said and provided. Having done so, I haven't found any evidence from the time of the sale to support the allegations included within their claim. So, while I do appreciate they will be very disappointed, I can't say that VFL's failure to uphold the claim they submitted was ultimately unfair or unreasonable. And because of that, I don't currently intend to ask them to do anything more.

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.

VFL haven't responded to my provisional decision.

Mr B and Ms K have provided extensive responses to my provisional decision. And in doing so, they've confirmed they don't agree with my findings. In particular, they've annotated comments and observations throughout my provisional decision highlighting aspects they feel haven't been fully considered or understood. I don't propose to repeat everything they've said but want to further assure them that everything has been carefully considered.

To summarise, Mr B and Ms K:

- said the product they purchased was never sold as a timeshare product; only ever as an investment. And the term 'timeshare' was never used, including in the brochures they were shown;
- said they didn't agree to purchase a points-based timeshare product, rsather further weeks to their *"holiday investment"*;
- claim the product was purchased as *"investment points"* and *"effectively a stock"* and offered to swear affidavits to this effect;
- provided more detail of the sales presentation and tactics they say they experienced as they felt this hadn't been understood or appreciated;
- suggest documentation and information wasn't provided to them;
- believe I've ignored substantive facts;
- question whether accommodation assets were frozen as a consequence of the insolvency process A entered in to; and
- said their affordability to fund the product was reliant upon the ability to secure a subsequent product sale and profit.

Mr B and Ms K also point out that on one occasion, I used their incorrect initials in my provisional decision. I would like to apologise for that oversight and assure them that this was a genuine typing mistake and had no impact upon the completeness of my investigation and findings in their particular complaint. I've corrected that mistake within the wording of my provisional decision included above.

The complaint being considered

Having thought carefully about Mr B and Ms K's comments, I think it would help to provide further clarity about what this service is actually able to consider here.

This service's powers are extended under the Financial Services and Marketing Act 2000 ("FSMA"). They allow us to consider complaints specifically relating to regulated products and services provided by financial business regulated by the FCA.

Mr B and Ms K's complaint specifically relates to VFL's response to their claim under S75 and S140A, being part of the CCA. And as such, these provisions are features of the regulated financial product they entered in to – the loan.

As the provider of the loan, VFL are the respondent to their complaint, and it is they who are regulated by the FCA here. And the complaint specifically relates to the regulated loan they provided. A is a supplier of timeshare and holiday products, neither of which are regulated by the FCA. So, I can only consider the actions of A (where supported evidentially) where there is a direct link to the complaint in question.

Mr B and Ms K's legal claims include:

- Misrepresentation – under the Misrepresentation Act 1967
- Breach of Contract;
- Unfairness – as a consequence of alleged breaches of various legislation including

(where appropriate and non-exhaustive):

- The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010;
- The Consumer Protection from Unfair Trading Regulations 2008; and
- The Unfair Terms in Consumer Contract Regulations 1999.

As explained in my provisional decision. S75 makes provision for Mr B and Ms K to make a 'like' claim against VFL - specifically for claims of misrepresentation and breach of contract. Simply put, the CCA allows Mr B and Ms K to mirror their claim against A to VFL under the loan agreement.

However, as I've already said, this service isn't afforded powers to decide legal claims. Only to consider whether VFL's response to the claim appears fair and reasonable given the information available. And that's what I've done here.

How was the product purchased represented by A?

In response to my provisional decision, Mr B and Ms K insist A didn't describe the points-based product as a timeshare. But rather as an investment which Mr B and Ms K suggest was *"effectively a stock".*

As I've already explained in my provisional decision, it's not possible for me to establish, with any certainty, what A told (or didn't tell) Mr B and Ms K at the time they purchased the product from them. Often, the recollections and accounts of one party (the respondent) can differ from those of another (the complainant). So, my decision needs to be based upon the extent to which such claims and recollections can be corroborated from evidence available from the time. Again, that's what I've done here.

To reiterate, I've not seen any supporting evidence from the time of the sale that the product was represented in the ways alleged by Mr B and Ms K. I want to reassure them that I certainly haven't ignored or misunderstood anything they've said. But where the evidence available doesn't support those recollections, it would neither be fair nor reasonable to accept one parties (unsupported) recollections and explanations over those of another. Particularly where the available evidence suggests different.

Documentation and information

Mr B and Ms K say they weren't given certain information or documentation, either at the time of the sale or subsequently. Although this appears to contradict the PR's assertion that the written paperwork - at the time of the sale – *"runs to over 100 pages".*

Despite this, I've seen no evidence to demonstrate that Mr B and Ms K subsequently asked A to provide information and/or documentation they were allegedly not given at the time of the sale. And given the PR's suggestion that the paperwork was extensive, this raises the question of why they wouldn't have requested copies of this information prior to expiry of the 14-day withdrawal period. Particularly given the alleged important nature of the purchase they believe they'd agreed to.

Impact of the insolvency process

Mr B and Ms K have questioned whether *"accommodation assets"* had become frozen as part of the insolvency process, thus preventing the possibility of a profitable sale. There are several points to address here.

- The various companies impacted by the insolvency process appear to include those responsible for A's product sales function and the management of product memberships and points. The Management company was replaced under the membership club's rules. And, as I said in my provisional decision, it appears members remain able to fully utilise their products and points subject to the membership conditions.
- It's my understanding with such schemes, accommodation assets or properties are held by a 'Trust' company separate from the sales and management companies. I've seen no evidence that the trust company was impacted by any insolvency proceedings. So, I'm not aware that any assets or properties would've been frozen.
- The evidence shows Mr B and Ms K purchased membership of a points based timeshare product with allocated points. They didn't purchase a share in any specific or nominated properties. So, even if the assets of the trust company had been frozen, I've not seen any evidence to suggest this would've impacted on Mr B and Ms K's ability to sell the points they held.

Affordability

Mr B and Ms K suggest they were relying upon the alleged investment to repay the associated loan from VFL. In particular, their ability to sell the product at a profit. However, for the reasons I've already said, I've not seen any evidence that persuades me the product was sold by A as an investment.

VFL's loan agreement clearly sets out the repayments associated with the loan they provided. There is no reference to the loan being repaid from investment proceeds. So, VFL would've been required to assess affordability based upon Mr B and Ms K's financial circumstances at the time.

Even if it were Mr B and Ms K's intention to repay the loan from any future sale proceeds relating to the product they purchased, I can't see that VFL agreed to lend the funds on that basis. And because of that, it doesn't appear affordability was assessed on that basis.

The comments in my provisional decision do, therefore, remain pertinent here.

Summary

I fully appreciate Mr B and Ms K's strength of feeling here. They've been very clear about what they believe they were told and the way they believe the product they purchased was represented to them.

Having thought very carefully about their responses to my provisional decision, I'm not persuaded to vary from those findings. And for that reason, I will not be asking VFL to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr B and Ms K's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Ms K to accept or reject my decision before 19 March 2024.

Dave Morgan
Ombudsman