DRN-4650124

The complaint

Mr and Mrs H 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 February 2020, Mr and Mrs S agreed to purchase a timeshare product from a supplier who I'll refer to as 'A'. The purchase price agreed €7,150 which, after payment of a deposit, was funded under a fixed sum loan agreement with VFL for €6,074.99 over 120 months.

In November 2022, using a professional representative ("the PR"), Mr and Mrs H 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 alleged that A told Mr and Mrs H:

- the timeshare product was an investment that would appreciate in value and provide a considerable return on that investment;
- the timeshare product would be listed for resale and the proceeds would repay the loan and provide a profit; and
- the loan would only last until the timeshare product was sold.

The PR allege the timeshare product was *"definitely sold as an investment"* contrary to an EU directive implemented into the local legislations of the European countries.

The PR also included various other allegations which, in some cases, they believe renders the relationship with VFL (under the purchase and loan agreements) unfair pursuant to section 140A of the CCA ("S140A"). in particular, the PR alleged:

- the terms and conditions of the loan weren't explained in detail;
- Mr and Mrs H were rushed through the signing process without reading the documents;
- A were offering loans without the required regulatory authorisation between 2006 and 2016;
- the canvassing of the loan breached a Financial Conduct Authority ("FCA") restriction placed upon VFL;
- terms within the timeshare agreement relating to the non-payment of the annual membership renewal are unfair;
- Mr and Mrs H weren't advised of any commission received by A from VFL; and
- no affordability assessment was completed which amounts to irresponsible lending.

Finally, the PR allege that as A are in liquidation, the members club won't continue to operate and there's no resale department available to sell Mr and Mrs H's timeshare.

Further, they allege that yachts are no longer available for members to book. They believe that all of these aspects constitute a breach of contract which VFL are jointly liable for under S75.

VFL didn't uphold Mr and Mrs H's 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. They said they'd undertaken an appropriate credit assessment which showed Mr and Mrs H could afford to repay the loan agreed.

The PR didn't agree with VFL's findings, so referred Mrs G's claim to this service as a complaint. In doing so, they provided their response to VFL's findings. In particular, the PR:

- referred to a decision issued by the Upper Tribunal in London (UK) in 2018, together with a further decision in 2022 relating to loans provided by VFL and brokered by A;
- referred to the lending assessment requirements of CONC[1]; and
- alleged Mr and Mrs H weren't advised about the cost of maintenance fees.

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 and Mrs H's claim was unfair or unreasonable. In particular, our investigator said they 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 and Mrs H.

The PR didn't agree with our investigator's findings. In response, they repeated a number of the points already raised. The PR also:

- explained why they thought the loan was lent irresponsibly, providing details of Mr and Mrs H's financial circumstances and income/expenditure at the time of the sale, supported with copies of bank statements;
- referred to previous loans arranged by A for Mr and Mrs H for the purchase of timeshare products; and
- referred to loan refunds agreed by another financial business.

Having reviewed this information, our investigator wasn't persuaded to change their view. So, as an informal resolution couldn't be achieved, Mr and Mrs H's complaint was 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 31 January 2024 giving both sides the chance to respond before I reach a final decision.

In my provisional decision, I said:

> Relevant considerations
>
> When considering what's fair and reasonable, DISP[2] 3.6.4R of the FCA 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.
>
> S75 provides consumers with protection for goods or services bought using credit. Mr and Mrs H 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 and Mrs H are afforded the protection offered to borrowers like them under those provisions. And as

[1]The Consumer Credit Sourcebook – Part of the FCA Handbook
[2] Dispute Resolution: The Complaints sourcebook (DISP)

a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr H, Mrs H 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 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. The complaint this service is able to consider specifically relates to whether I believe VFL's failure to uphold Mr and Mrs H'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 and Mrs H something that wasn't true in relation to the allegations raised. I would also need to be satisfied that any misrepresentation was material in inducing Mr and Mrs H 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 product.

From the information available, I can't be certain about what Mr and Mrs H 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 and Mrs H'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 be sold at a profit. There's simply no reference to this within any of the documentation provided.

The PR have pointed to prior purchases made by Mr and Mrs H from A. But these don't form part of their claim and subsequent complaint here. And, in any event, I can't see that VFL were involved in financing any previous purchases from A. So, I don't think I can fairly hold VFL responsible for anything allegedly said or done in relation to the earlier purchases. And I also don't think any allegations specifically relating to the circumstances of those purchases help me in establishing the facts of what happened in February 2020.

It's generally understood that the selling of timeshare products as an investment falls contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs"). But 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 the PR'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 Mr and Mrs H 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, while A may have previously offered a timeshare resale service, I haven't seen any evidence to suggest that A were contractually bound to do so. 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.

I also haven't found any evidence that A told Mr and Mrs H that the loan would operate for a term shorter than that detailed in the loan agreement. The agreement does make provision for Mr and Mrs H to repay it early – should they desire. And I think it's reasonable to conclude they may have done that had they subsequently sold their timeshare product. However, based upon the specific evidence available relating to Mr and Mrs H's claim here, I can't say, with any certainty, that A did misrepresent the product in the manner alleged.

The breach of contract claim under S75

As far as I understand, whilst A may have entered an insolvency process, the current (replacement) 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 and Mrs H 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.

Furthermore, I haven't seen any evidence to support the assertion that A are no longer able to provide access to yachts as part of Mr and Mrs H's membership. More importantly, I've also seen no evidence that Mr and Mrs H intended or even attempted to book a yacht during the course of their membership. And because of that, I can't reasonably conclude they suffered loss as a consequence, such that VFL would be liable for that under S75.

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 and Mrs H) 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 and Mrs H's existing membership and relationship with A. They'd previously purchased products from A. So, I think it's reasonable to conclude that at the time of the

purchase in February 2020, they had a reasonably strong awareness about the products they'd purchased, how they operated and any associated costs. And accepting that the new product differed from those previously purchased, I also think it's reasonable to conclude Mr and Mrs H were familiar with A (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation, given the purchase in February 2020 certainly wasn't their first.

- Time to read and consider the information provided

I've thought about the information that I believe should have been provided to Mr and Mrs H as required under the TRs. I've seen several documents from the time of the sale here. And there doesn't appear to be any suggestion that A didn't provide all the required documentation.

It is possible Mr and Mrs H 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, it appears the finance agreement also included a withdrawal/cancellation period of 14 days. But I haven't seen any evidence that Mr and Mrs H did raise any questions or concerns about either agreement.

- A's responsibilities and disclosure of commission paid

Part of Mr and Mrs H'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 and Mrs H, 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 and Mrs H 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 and Mrs H 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.

- Unfair terms and annual charges

One of the main aims of the various regulations that applied here was to enable consumers to understand the financial implications of their purchase so that they are put in a position to make an informed decision. If A's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Mr and Mrs H ultimately lost out or almost certainly stand to lose out from having entered into a contract, the financial implications of which they didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

However, having considered the documentation provided, I haven't seen any evidence to suggest the terms have operated unfairly against Mr and Mrs H here.

And as the Supreme Court decision in Plevin[3] makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. In other words, if I were to find there'd been regulatory breaches – and I make no such finding - they are only likely to lead to unfairness where there's evidence Mr and Mrs H suffered loss as a consequence.

The product agreement confirms that annual membership renewal fees are included through until 2025. And given Mr and Mrs H's existing membership and product holdings, I think it's reasonable to conclude they would've been familiar with the concept and calculation of any annual charges that may be payable under their agreements. Ultimately, I haven't seen any evidence that A enforced any of the terms within the product agreement to such an extent that they caused loss for Mr and Mrs H or resulted in unfairness.

Is the loan agreement unenforceable?

Various arguments have been made to support a belief that the lending agreement here is essentially unenforceable as a result of various alleged regulatory breaches.

Specifically:

- The authorised status of A – This service's records show that A were registered as a representative of VFL from 25 April 2016. And VFL were authorised under this service's compulsory jurisdiction from 31 March 2016 which means they held the required authorisation from the FCA. And as VFL's representative, A was able to introduce credit business to them. So, I don't agree that A didn't hold the required authorisation to introduce business to VFL under section 19 of the Financial Services and Markets Act 2000 ("FSMA)".
- Canvassing off trade premises - Section 154 of the CCA says, *"It is an offence to canvass off trade premises the services of a person carrying on a business of credit-brokerage […]".* The Financial Conduct Authority ("FCA") Handbook defines *"canvassing off trade premises"* as:

  (a) an activity by an individual ("the canvasser") of soliciting the entry of another individual ("B") into an agreement by making oral representations to B during a visit by the canvasser to any place (other than a place in (b)) where B is, being a visit made by the canvasser for the purpose of making such oral representations.

  (b) a place where a business is carried on (whether on a permanent or temporary basis) by:

  (i) the lender or owner; or

  (ii) a supplier; or

  (iii) the canvasser; or

  (iv) a person who employs the canvasser or has appointed the canvasser as an agent; or

  (v) B;

  is excluded from (a).

It's my understanding that the sale, and resultant credit application, were completed at A's offices/premises at the hotel/resort Mr and Mrs H were visiting. And given I've established that A was a registered representative of VFL at the time of the sale, I

[3] *Plevin vs Paragon Personal Finance Ltd [2014] ('Plevin')*

think they were entitled to do that. So, I can't reasonably say there was a regulatory breach in doing so.

Having considered the arguments put forward by the PR, I don't think there appears to be any circumstances, based upon the evidence available, that would likely lead me to conclude the agreement(s) could be determined as unenforceable.

Were the required lending checks undertaken?

There are certain aspects of Mr and Mrs H's claim that could be considered outside of S75 and S140A. In particular, in relation to whether VFL undertook a proper credit assessment. The PR's allegation suggests the loan was provided irresponsibly. In particular that no affordability checks were undertaken by A or VFL.

Regulated lenders each use their own systems, methods and processes when assessing loan applications. These are normally in conjunction with their own lending policies, regulatory guidelines and appetite at the time. In responding to Mr and Mrs H's claim, VFL have confirmed they followed their usual process and conducted an appropriate affordability assessment. But they haven't provided specific details of the checks they undertook. So, If I were to find that they hadn't completed all the required checks and tests – 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 and Mrs H in order to uphold their complaint here. A simple failure to meet the regulatory requirements wouldn't, in my opinion, lead to the loan being unenforceable. There would need to be a clearly attributable loss.

The PR have provided copies of personal bank account statements covering a period before the product sale. They've also provided a summary of Mr and Mrs H's income and expenditure from that time. I've considered that information carefully. Unfortunately, it's not entirely clear what Mr and Mrs H's complete financial situation was at the time. The bank statements suggest transfers received from other accounts which I haven't had sight of. That said, the personal bank account statements I've seen appear to show that the account was well managed with no obvious signs of financial difficulty or distress.

Accepting that the amount borrowed wasn't insubstantial, I haven't seen any evidence to show that the loan was unaffordable or unsuitable for Mr and Mrs H. And I've not seen anything that supports any suggestion of financial difficulty from that time, or since. There's certainly nothing to suggest that Mr and Mrs H previously raised affordability concerns with VFL. And as far as I'm aware, repayments have always been maintained in a timely manner. So, with no other specific information about Mr and Mrs H's actual financial situation at the time and no supporting evidence that suggests they struggled to maintain loan repayments, I can't reasonably conclude the loan was unaffordable for them. Or that they've suffered any loss as a consequence.

Other considerations

The PR has repeatedly referenced various decisions and findings relating to finance brokered by A in relation to timeshare product they sold. It appears most of these observations actually relate to loans provided by another financial business. Some of which pre-date the sale in question here. The later findings appear to relate to affordability assessments undertaken by that other financial business – not VFL. So, I don't see how those decisions and findings particular help in establishing the facts of what happened in Mr and Mrs H's own circumstances.

Summary

I would like to reassure Mr and Mrs H that I've carefully considered everything that's been said and provided in reviewing their complaint. Having done so, and for the reasons explained above, I haven't found anything that leads me to conclude that VFL's failure to uphold their claim was ultimately unfair or unreasonably. And whilst I realise they will be very disappointed; I don't currently intend to ask them to do anything more here.

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.

Despite follow up by this service, no response, further comment or new evidence and information has been received from any of the parties involved in this complaint.

In the circumstances, I've no reason to vary from my provisional findings. And for the reasons included in my provisional decision, I won't be asking VFL to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mr and Mrs H's complaint.

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 28 March 2024.

Dave Morgan
Ombudsman