DRN-3959499

The complaint

Mr D and Mrs D, who are represented by a professional representative ("PR") complain that Vacation Finance Limited trading as VFL Finance Solutions ("VFL") rejected their claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

Mr and Mrs D have made seven purchases of holiday products from a company I will call A between 2011 and 2019. This complaint concerns one purchased in September 2017 at a cost of £45,000 which was funded in part with a fixed sum loan from VFL.

In December 2021 PR submitted a letter of claim to VFL on behalf of Mr and Mrs D. In summary it said the product had been misrepresented and Mr and Mrs D had been pressurised to purchase it. The product was sold as an investment and they were told it was only available at a special price that day. PR said A had contravened the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Regulations") and The Consumer Protection from Unfair Trading Regulations ("CPUT").

PR said the product remained unsold. Mr and Mrs D had not been given time to read the documentation and no affordability checks had been carried out. It said the sale had come about as a result of an unfair relationship due in part to VFL paying commission to A.

VFL rejected the claim and set out why it disagreed with PR. It noted Mr and Mrs D had not taken advantage of the 14 day withdrawal period. VFL said the product had not been sold as an investment and it had carried out the appropriate affordability checks. It noted Mr and Mrs D had been able to repay the loan in July 2018. It said no commission had been paid to A and the liquidation of A had not resulted in the promised services being removed.

PR brought a complaint to this service on behalf of Mr and Mrs D. It was considered by one of our investigators who didn't recommend it be upheld. Our investigator concluded that there was insufficient evidence of any misrepresentation and PR had not established that there had been an unfair relationship or a breach of contract. PR didn't agree and repeated many of the claims it had made initially. It said it was likely that A had sold the product as an investment and it didn't believe there was a reasonable market to allow it to be sold. It also pointed out that Mr and Mrs D would be in their 90s when the agreement came to an end.

Mr D provided a four page statement covering the seven purchases including the one in 2017. He said they were told there was easy access to the rental programme. He said the sales representative had been evasive and the presentations seemed to be carried out such that it misrepresented what they were buying. He referenced a lack of clarity regarding rental income, but did not specify that this related to the 2017 purchase. He also provided a manuscript note from the sale which he believed showed the sales process was vague and misleading. He concluded by saying the misrepresentations played an important part in their decision to buy.

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. PR has made a number of claims, but has not submitted much documentary evidence in support of them. I have noted the five page agreement and Mr D's statement. It is regrettable that PR has not been able to submit the 100's of page of documentation it says were provided at the sale.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr and Mrs D) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (VFL) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should they choose to.

It's important to note that, as VFL was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

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.

PR has said that Mr and Mrs D were told that their purchase was an investment. While I was not present I do not consider that I am able to conclude the product was misrepresented. I have seen no explanation of how that could be the case. Mr and Mrs D have made numerous purchases over the years and I find it surprising that they would continue to make purchases and take regular holidays with A if they had cause for concern. I also note that if they had concerns about the sales process they could have used the 14 day period of grace and withdrawn from the agreement.

I have noted that they were looking at rental returns, presumably in addition to being able to take holidays which they did regularly. However, I have not seen any documentation that shows a rental return is guaranteed. Nor have I seen what rental income, if any, was received for the 2019 purchase.

PR has suggested that it is likely A sold the product as an investment, but I don't believe that is sufficiently persuasive to allow me to require VFL to refund the costs to Mr and Mrs D. PR is asking that VFL refund a significant sum of money, but I do not consider it has given sufficient evidence in support of its claims. I am aware that some sales representatives have referred to these products as investments in future holidays, but that does not mean they were sold as financial investments. However, the paperwork usually explains that the products are not financial investments, but I cannot say what was contained in the documentation signed by Mr and Mrs D as I have only seen five pages.

In short I do not believe I can say that there was misrepresentation such that I can uphold this complaint.

Breach of Contract

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

In July 2020 the trustee wrote to all the club members. Its letter said: "*The JLs are pleased to confirm that FNTC has taken over as the new manager of the Clubs and further confirm that, as a result, the Clubs will continue to operate for the benefit of members*." I presume Mr and Mrs D received a copy of this letter or something similar.

On the face of it, therefore, the services linked to the purchase of the points remain available to them and are unaffected by the liquidation. Indeed the agreements used by A usually allow for the liquidation of A and its replacement by another provider. That said, I cannot say if this was in Mr and Mrs D's contract since I have not seen a complete copy of it.

Given I have not been persuaded that the product was sold as a financial investment I cannot conclude that the removal of a sales service by A can been regarded as a breach of contract.

S. 140A claims

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

PR seems to suggest that VFL owed Mr and Mrs D a duty of care to ensure that A complied with the Regulations and it argues at length that the payment of commission created an unfair relationship. However VFL has confirmed it paid no commission. Nor can I see any clear evidence that shows A breached the Regulations or CPUT.

I note that in responding to our investigator's view PR has raised a new point which it did not put to VFL. This was the fact that Mr and Mrs D would be in their 90s when the agreement came to an end. It is not for me to decide whether Mr and Mrs D have a claim against A, or whether they might therefore have a "like claim" under s. 75 CCA. Nor can I make orders under s. 140A and s.140A CCA – 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 and Mrs D's complaint. In the circumstances, I think that VFL's response to Mr and Mrs D's claims which did not reference their age was fair and reasonable. I would add that I have no reason to think their age would have any bearing on VFL's response or on this decision, but I make no finding on that point.

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 D lost out as a result of its failings. I see they repaid it some months later. Mr and Mrs D 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

I appreciate Mr and Mrs D are dissatisfied with their purchase and they have my sympathies for this, but, in summary I cannot see why any of their claims were likely to have succeeded. So overall I think that VFL acted reasonably in declining the claims under s.75 and s.140A CCA.

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 D and Mr D to accept or reject my decision before 26 January 2024.

Ivor Graham
Ombudsman