DRN-3985998

The complaint

Mrs B, who is represented by a professional representative ("PR") complains that Vacation Finance Limited ("VFL") rejected her claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. I gather the purchase was made by Mrs B and her husband, but as the finance agreement was in Mrs B's name she is the eligible complainant. In this decision for simplicity I will refer to Mrs B as the sole purchaser.

What happened

In August 2019 Mrs B purchased a holiday product from a company I will call A at a cost of £11,700. This was funded in part by a loan from VFL and the balance came from trading in an existing product.

In April 2022 PR submitted a letter of claim to VFL. The details of this are well known to both parties so in the interests of brevity I will simply summarise the key points.

It said Mrs B had been approached while on holiday using her existing product and had been aggressively targeted. She had agreed to upgrade to a new points based product. She had been trying to sell her old product and was persuaded the new one was more sellable. PR said it remains unsold. Mrs B was led to believe she was purchasing an investment which was contrary to the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Regulations").

She had also been misled by A when it told her the product was only available at a special price that day. PR also alleged that Mrs B was encouraged to take out a loan with VFL and no affordability checks had been carried out. It also said she was not given time to consider the documentation which was over 100 pages in length. PR claimed there was an unfair relationship due A acting on behalf of VFL which had paid commission to A.

VFL rejected the claim and disputed the allegations. It noted that Mrs B had a 14 day withdrawal period which she had not used. It pointed out the contradiction in PR's claims which said she had been forced to spend hours at the presentation, but didn't have time to read the documentation. VFL also said it had carried out appropriate affordability checks and Mrs B had been able to maintain her monthly payments.

It said there was no evidence the product had been sold as an investment and Mrs B had made a number of purchases from A and so would have understood what she was buying. As to the alleged breach of contract VFL said the management of the timeshare clubs had been taken over by a new entity and Mrs B had access to the accommodation as she had before. Finally, it explained that it had not paid commission to A.

PR brought a complaint to this service where 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 made general points about A saying that it churned sales and Mrs B

thought she was buying an investment. It said that it was very likely that A sold the product as an investment and that Mrs B was led to believe it could be easily resold. It said this breached the Regulations and A had also failed to provide key information, but didn't specify what information had not been given.

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 evidence in support of them. I have noted the claims made by PR, but I have not seen a copy of the agreement signed by Mrs B (apart from a single page) nor any other paperwork supplied by A at the time of sale. PR has simply made several assertions which are not supported by the documentary evidence.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mrs B) 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 she 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 Mrs B was told that her 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 or why Mrs B believed that the purchase of points would be an investment. If she had been told that – or had otherwise believed that to be the case – I would have expected her to ask for more information.

Although I am aware of the types of agreement used by A I cannot be certain what Mrs B signed. 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 Mrs B. In short, PR is asking that VFL refund a significant sum of money, but has not 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 agreement signed by Mrs B as a copy has not been supplied.

Quite simply, 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 Mrs B was 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 Mrs B received a copy of this letter or something similar.

On the face of it, therefore, the services linked to Mrs B's purchase of the points remain available to her 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 Mrs B's contract since I have not seen a 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 Mrs B 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 Mrs B could be said to have a cause of action in negligence against VFL anyway.

Mrs B's alleged loss isn't related to damage to property or to her 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 Mrs B 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 Timeshare Regulations.

I appreciate Mrs B is dissatisfied with her purchase and she has my sympathies for this, but, in summary I cannot see why any of her 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 B to accept or reject my decision before 26 January 2024.

Ivor Graham
Ombudsman