DRN-4076904

The complaint

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

What happened

Mr and Mrs W have made nine purchases of holiday products from a company I will call A The first was in October 2012 and the last in August 2020. In September 2019 they purchased a points based product at a cost of £18,950 which was funded by a deposit and the balance with a loan from VFL and is the subject of this complaint. This was purchased when they were on holiday at their existing holiday product.

In July 2022 PR submitted a letter of claim to VFS. Both parties are aware of the details of the claim so in this decision I will give a short summary. In brief it said there had been both a breach of contract and misrepresentation. It said the company had gone into liquidation and could no longer provide the service promised. It also claimed that the product had been sold as an investment which could be easily sold despite there being no viable market. Mr and Mrs W had been told it was available at a special price on that day only.

PR said Mr and Mrs W had been pressurised and to make the purchase and to take finance with VFL and had not been permitted to arrange their own finance. It said the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Regulations") had been breached by A. It had also fell foul of the Consumer Protection from Unfair Trading Regulations (CPUT) 2008 in various ways including not disclosing the commission it had paid to A. PR said that there had been an unfair relationship under s.140A CAA. Finally, it said no affordability check had been undertaken.

VFL rejected the claim and countered the arguments put forward by PR. It noted Mr and Mrs W had 14 days to withdraw from the agreement if they felt they had been pressurised into taking it out. It noted the claim that Mr and Mrs W had been subjected to a lengthy meeting which would have given them time to consider their purchase. It also said no commission had been paid. VFL explained that the running of the club had been taken over by another company and so there had been no breach of contract. It added that none of the documentation referred to the product being an investment. It said it had carried out appropriate affordability checks and Mr and Mrs W had maintained their regular payments.

PR brought a complaint to this service on behalf of Mr and Mrs W. It was considered by one of our investigators who didn't recommend it be upheld. She said she did not have sufficient evidence to show that there had been either a breach of contract or misrepresentation. She did not believe there had been an unfair relationship and she had not been persuaded that the loan was unaffordable. PR made further representations arguing that the various upgrades purchased by Mr and Mrs W were evidence of 'churning'. It said was very likely that A had sold the product as more than a holiday product. PR said A's resale programme had been discontinued. It said that Mr W had been misled on many occasions by A and set out some of these apparent misrepresentations. It also pointed out that Mr W would be over 100 when the agreement came to an end.

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. I will explain why.

I should point out first of all that Mr and Mrs W have provided very limited documentation in support of their claim. I do not, for example, have complete copies of the 2019 purchase documents. However, this service has seen a number of complaints about A's sales from around the same time. As is to be expected, the sellers and VFL used largely standard contract wording. I have presumed that the same standard wording was used for Mr and Mrs W's purchase.

Sections 56 and 75 of the Consumer Credit Act

Under s. 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 s. 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.

I do not understand VFL to dispute that the loan was were made under pre-existing arrangements between it and A, the seller of the membership and the points, or between it and a company closely linked to the A Group. I have therefore considered what has been said about the sale and subsequent events.

Breach of contract

Although I have not seen all the documentation I think it likely that Mr and Mrs W would have signed an Application Agreement and would have received copies of the Rules of Membership, the Reservation Rules, and a Deed of Trust. Whether there was a breach of contract depends to a very large degree on what was in those documents compared with what happened.

PR says that when A companies went into liquidation the contract was breached. I do not agree. Club properties were held under a trust arrangement. The trust deed included a provision allowing the trustee to appoint a replacement entity to administer the club, should the existing management company go out of business. That is what happened.

On 7 May 2020 the liquidators of A wrote to all club members to tell them that the company had been placed into liquidation. That letter noted as well that the club's resort continued to operate normally – albeit subject to Covid-19 restrictions in place at the time. The liquidators also made reference to the liquidation of other A companies.

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 [A Limited and A XP Limited] and with the directors of [X] (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."

Subsequently, club members were informed that a new resort manager, VCMS, had been appointed. On the face of it, therefore, the services linked to Mr and Mrs W's purchase of the points and club membership remain available to them and are unaffected by the liquidation.

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.

Misrepresentation

A 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 induces the other party into the contract.

PR says Mr and Mrs W were told they were making an investment. I have noted the claims about misrepresentation are generic, lack detail, and are largely unsupported by any documentation.

The standard Application for Membership usually records that buyers had received A's Standard Information Document, the Rules of Membership, the Reservation Rules, and the Deed of Trust. I believe Mr and Mrs W would have been provided with those documents. That is relevant to the question of whether they were misled about what they were buying.

The standard sale documents also included a Compliance Statement, comprising ten numbered statements, each one of which customers were required to initial. This makes it plain that the primary purpose of the purchase is to acquire access to holiday accommodation and not the purchase of real estate. This documentation also covers the matter of potential resale and explains this is not guaranteed, nor is there a guarantee of it

being sold at a profit. I think it likely that Mr and Mrs W signed and initialled a Compliance Statement in these terms.

On the presumption that Mr and Mrs W signed an identical or similar agreement I do not consider I can uphold a claim of misrepresentation. I am also aware that they had made seven previous purchases from A and VFL says they took numerous holidays with A. I do not consider it reasonable to conclude that they were wholly unaware of what they were buying or how A operated.

S.140 A

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

If that were not the case I remain unpersuaded that there was an unfair relationship. PR seems to suggest that VFL owed Mr and Mrs W a duty of care to ensure that A complied with the 2010 Regulations and it argues that the payment of commission created an unfair relationship. However, I believe VFL did not as a matter of course pay any commission so I cannot say that payment of commission created an unfair relationship.

I also note that they had 14 days in which they could withdraw from the agreement. If they had been unduly pressurised or had not had time to read the documentation they could have withdrawn. I would add that I have seen no evidence that either the 2010 Regulations of CPUT were breached by A. I have seen no evidence of the product being sold as an investment.

PR has, in broad terms, made a series of allegations but has not provided supporting evidence. Overall I can see no basis for concluding there was an unfair relationship.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. VFL has said that it carried out the appropriate credit checks before approval.

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 W lost out as a result of its failings. I have noted they were able to maintain the monthly payments.

Conclusion

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

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 W and Mr W to accept or reject my decision before 23 February 2024.

Ivor Graham
Ombudsman