DRN-4375418

The complaint

Mr and Mrs R, 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

In May 2018 Mr and Mrs R purchased a holiday product from a company I will call A at a cost of £55,251 which was funded by a loan from VFL. They already owned an existing holiday product sold to them by A.

In March 2021 PR submitted a letter of claim to VFL. Both parties are aware of the details of claim so 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. They had been told that this was a premium product which would make it easier to sell. Mr and Mrs R had been told it was available at a special price on that day only.

PR said Mr and Mrs R had been pressurised 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 fallen foul of the Consumer Protection from Unfair Trading Regulations (CPUT) 2008 in various ways including not disclosing the commission it had paid to A. Furthermore, they had not been given time to check the extensive paperwork which ran to over 100 pages. PR said that there had been an unfair relationship under s.140A CAA. Finally, it said no affordability check had been undertaken.

I gather VFL rejected the claim, though I have not seen its letter of rejection and in May 2023 PR brought a complaint to this service on behalf of Mr and Mrs R. It was considered by one of our investigators who didn't recommend it be upheld. She noted the sum paid fell outside the limits for s.75 CAA and she didn't consider the sale fell within s.140A. Finally, she had not seen evidence that the loan had been unaffordable.

PR didn't agree and said the product had been sold as an investment. It said further representations would be made when this service issued a deadline. Our investigator notified both parties the matter would be reviewed by an ombudsman, but no further evidence or arguments were submitted.

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 R have provided no documentation in support of their claim. I do not have a copy of the contract. 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 R'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.

However, s.75 does have monetary limits as follows. S.75 subsection (3) states that:

(1) does not apply to a claim – (b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000.

The purchase price of the product exceeded £30,000 and so I consider VFL was entitled to reject the claim made under s.75. I have also considered if s.75A has effect, but I do not consider it does.

S.140 A

Only a court has the power to decide whether the relationships between Mr and Mrs R 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 Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 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 R 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.

PR seems to suggest that VFL owed Mr and Mrs R 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 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 R lost out as a result of its failings. No evidence has been submitted to show the loan was unaffordable.

Conclusion

It is not for me to decide whether Mr and Mrs R 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 R's complaint. In the circumstances, I think that VFL's response to Mr and Mrs R'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 Mr R and Mrs R to accept or reject my decision before 26 March 2024.

Ivor Graham
Ombudsman