DRN-4527237

The complaint

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

What happened

Mr and Mrs H made two purchases of holiday products from a company I will call A The first was in August 2017 and the second in March 2018. It is the latter purchase which is the subject of this complaint. It cost £14,500 and was funded by a loan from VFL. This was purchased when they were on holiday at their existing holiday product.

In October 2022 PR submitted a letter of claim to VFS. Both parties are aware of the details of claim so in the interest of brevity I will give a short summary of the key points. The claims were made under s.75 and s.140A CCA. In brief it said there had been both a breach of contract and misrepresentation.

Misrepresentation

- Mr and Mrs H were told they would benefit from cheaper holidays.
- The upgrade would be more easily sold.
- The points they purchased would allow them to take holidays all over the world.
- They would get access to exclusive discounts.
- Their existing product would be bought back by A giving the impression the new one had a resale value.

PR says these claims were false and set out why it took this view.

Breach of Contract

- PR said that the false statements became incorporated in the contract and this resulted in a breach of contract.
- A went into liquidation in April 2020 and a replacement was not appointed until July 2020
- A's resale programme had since ceased.

S.140A Unfair Relationship Claims

- The documentation was not made available until after the above misrepresentations had been made.

- Mr and Mrs H were allowed to purchase the product as an investment.
- Failure to pay the ongoing maintenance fees will lead to the loss of their investment.
- Other clauses in the rules create an imbalance.

Irresponsible Lending

- No meaningful affordability checks were carried out.
- Mr and Mrs H were elderly.
- A cash back was given which allowed them to fund the fees and repayments until the product could be sold.
- Mrs H now has limited income to repay the loan.

PR provided testimony from Mrs H in which she set out the circumstances of the purchases in some detail and her belief that the product had been sold as an investment. She believed the purchase was connected with some new lodges which were being built in England. She also said they were told they would receive 4.5% interest each year, but this had not been paid.

VFL rejected the claim. It stated that no promise of cheaper holidays had been made and the new points based product did offer greater flexibility. It said this was to the benefit of Mr and Mrs H in that it allowed them to take holidays in the UK. It said on the matter of affordability regular monthly payments had been made until recently when the product was relinquished. VFL also said that a choice of lenders had been offered and they had in fact used a different lender for the earlier purchase.

It explained that the closed resale programme had been replaced by another. It challenged the claim that commission had been paid. VFL added that Mr and Mrs H had the opportunity to take advantage of the 14 day cooling off period, but had not done so. It noted that no concrete evidence had been provided in support of the claim..

PR brought a complaint to this service and 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 and referenced another complaint to this service which it said had been upheld. I should point out that the proposed uphold by one of our investigators was overturned when it was considered by an ombudsman. PR said that the ages of Mr and Mrs H indicated that they would not have been interested in using the product for holidays. It said Mrs H's testimony was detailed and consistent and taken in conjunction with the facts should lead to her complaint being upheld. VFL had not produced witness statements and the onus was on it to show there was no unfair relationship.

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 I have not seen all the documentation. 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 H’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 section 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 H 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 the liquidation led to a breach of contract. 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 H's purchase of the points and club membership remain available to them and are unaffected by the liquidation.

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 H were told they were making an investment. I have noted Mrs H's testimony but I do not consider it is sufficient to allow me to ignore the 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 H 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 H signed and initialled a Compliance Statement in these terms.

On the presumption that Mr and Mrs H 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 a previous purchase from A and VFL says they took several 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.

There is nothing in the documentation I have seen which suggests any link with a specific property. The papers show they were purchasing 8,000 points which could be used to access accommodation and 'experiences'.

S.140 A

Only a court has the power to decide whether the relationships between Mr and Mrs H 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 H 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.

In any event I am not persuaded that there was an unfair relationship. PR seems to suggest 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. Even if it did in my experience payments of commission in this industry were relatively low.

I also note that Mr and Mrs H had a 14 day cooling off period so if they felt they had been taken advantage of or unduly pressured they could walk away from the agreement. I note that the product has been relinquished and I cannot say that Mr and Mrs H were affected by the allegedly onerous terms in the contract. Nor can I see that it has been established that any statements made by the sales representative(s) were factually incorrect and so I do not consider those can have resulted in 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 H lost out as a result of its failings. I have noted they were able to maintain the monthly payments, despite the passing of Mr H, up to the time it was relinquished.

Conclusion

It is not for me to decide whether Mrs H and the estate of Mr H 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 the complaint. In the circumstances, I think that VFL’s response to the 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 H and the estate of Mr H to accept or reject my decision before 1 April 2024.

Ivor Graham
Ombudsman