DRN-4566399

The complaint

Mr and Mrs Z have complained that Vacation Finance Limited ("VFL") needed to pay compensation arising out of the sale of a holiday product bought using a VFL loan.

What happened

In May 2017, Mr and Mrs Z took out an agreement with a holiday product supplier ("the Supplier"). Under the agreement, they purchased the right to stay in a one bedroom flat overseas every year. The membership cost £25,012 and was paid for in part by Mr and Mrs Z borrowing £22,012 from VFL over ten years.

In February 2023, Mr and Mrs Z, with the help of a professional representative ("PR"), wrote to VFL setting out problems they said there were with the sale of the timeshare. PR set out a number of issues and concerns that it argued VFL was responsible for under the operation of ss.75 and 140A of the Consumer Credit Act 1974 ("CCA"). Those concerns included:

- The Supplier is now in liquidation, so it can't supply the services under the membership. This amounted to a breach of contract that VFL was jointly liable to answer a claim for under s.75 CCA.
- PR said that Mr and Mrs Z attended an update meeting with the Supplier. At the time they already held a membership that they thought could be easily sold in the future for a profit.
- The Supplier explained that Mr and Mrs Z should consider buying a more premium membership that would be easier to sell through the Supplier's resale scheme. This was a breach of Reg.14(3) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations") prohibition on selling timeshares as investments.
- It was also said that the price was only available on the day, which was an aggressive commercial practice under The Consumer Protection from Unfair Trading Regulations 2008 ("CPUTR").
- The following year, Mr and Mrs Z were told a more desirable product existed, so the Supplier's representations at the time of sale were false and so VFL was jointly liable to answer for those too as part of a misrepresentation claim under s.75 CCA.
- The payment of commission by VFL to the Supplier had been hidden from Mr and Mrs Z.
- No credit checks were carried out when deciding to lend to Mr and Mrs Z.
- All of this gave rise to an unfair debtor-creditor relationship as set out in s.140A CCA.

In July 2023 PR referred a complaint to our service on Mr and Mrs Z's behalf, noting that VFL hadn't responded to the earlier letter.

In November 2023, VFL sent its response to PR. In summary, VFL said it disputed that there was enough evidence to back up any of the allegations made about how the Supplier came to sell the timeshare.

With respect to the specific allegations made, VFL thought Mr and Mrs Z had the chance to read the contractual documents, but, in any event, there was a fourteen-day withdrawal

period in which the timeshare could have been cancelled had they changed their minds. VFL denied that Mr and Mrs Z were told they had to take finance with the timeshare and they were in fact free to pay for the membership in any way they wished. VFL also said that the timeshare was being run by a new operator, so members still had full use of the timeshare as set out in the agreement. VFL also said that it had not paid any commission to the Supplier and it had undertaken affordability checks to make sure Mr and Mrs Z could afford the loan.

One of our investigators considered the complaint, but didn't think VFL needed to do anything to answer the concerns raised. She thought that there didn't appear to be any actionable misrepresentation or breach of contract and that there wasn't enough to say there was an unfair debtor-creditor relationship. Finally, she said there was nothing to suggest that the lending was unaffordable for Mr and Mrs Z.

PR, on behalf of Mr and Mrs Z, disagreed. In summary, it argued that the membership had been sold to Mr and Mrs Z as an investment, as had their earlier purchases from the Supplier. PR said that they had bought four products from the Supplier before, and marketing and selling more memberships whilst earlier loans were running was 'churning'. PR said that the Supplier's resale programme had now closed, which meant Mr and Mrs Z weren't able to sell their membership for a profit (or at all). PR argued that the Supplier misrepresented membership as something that could be easily resold in the future when that was not the case. It also said that the Supplier didn't provide the information it needed to under the Timeshare Regulations. As Mr and Mrs Z disagreed with our investigator, the complaint was passed to me for a decision.

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 deciding complaints, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

> *"(1) relevant:*
>
> > *(a) law and regulations;*
> > *(b) regulators' rules, guidance and standards;*
> > *(c) codes of practice; and*
>
> *(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."*

Where I need to make a finding of fact based on the evidence, I make my decision on the balance of probabilities. In other words, when I make a finding that something happened, that's because I think it's more likely than not that that thing did happen.

Having considered everything, I don't think that this complaint should be upheld.

Is VFL jointly liable for the Supplier's misrepresentations?

Under s.75 CCA, VFL could be liable to answer a claim about the Supplier's misrepresentations and Mr and Mrs Z have complained that VFL didn't properly deal with their claim. Mr and Mrs Z gave their evidence about their memories of the sale in a witness statement of January 2021. In summary, they said:

- In 2014, they bought a voucher from the Supplier so they could take a holiday the following year.
- At a purchase in 2015, they were misled that they would be able to book holidays to the Caribbean for under £200 if they took out a membership. They also weren't told about the need to pay annual maintenance fees.
- In 2016, they say they were pestered by the Supplier to buy another membership. They bought one that they were told was being sold cheaply by another customer who no longer wanted it.
- They said their final purchase was in or around 2018 and they were offered an apartment that normally cost £35,000 for £17,000. They had been told that they could have sold the first timeshare they had after five years, which was coming up soon, so they bought the timeshare in question thinking they could sell an earlier membership later. To pay for the timeshare they bought in 2018, they traded in their 2015 purchase and paid an extra £3,000.
- They had hoped to sell their timeshares in the future and make a financial return on them, but they're concerned this isn't possible. They were also unhappy that the annual maintenance bills had increased.

The sale that has been complained about was for a purchase in May 2017 for £25,012, funded with a VFL loan for £22,012. But the witness statement provided doesn't mention this purchase at all. Nor do I think that Mr and Mrs Z might have been mistaken with their dates, as there is no mention of a purchase for £25,000 nor have they described ever taking a loan from VFL. So the evidence provided directly from Mr and Mrs Z bears no relation to the claim PR advanced on their behalf. And there is no allegation of misrepresentation in their statement that I need to deal with in respect to the relevant sale at the centre of this complaint.

I have thought about whether there is anything in what PR alleged that could amount to a misrepresentation that VFL needed to answer. I've looked at PR's letter of claim, a response to our investigator's view and some of the documents available from the time of sale. The amount of evidence is, therefore, limited in its scope.

PR hasn't set out much detail about what Mr and Mrs Z were told when they came to buy a membership from the Supplier in 2017. So it's not clear to me what the alleged misrepresentations were, especially when no such representations were set out in Mr and Mrs Z's actual statement. So, it follows that, I can't say VFL should have accepted liability for any of the alleged misrepresentations of the Supplier.

Is VFL jointly liable for the Supplier's breach of contract?

The Supplier is now insolvent and Mr and Mrs Z have argued that this means there was a breach of contract. But I understand that the holiday club is now being run by a different business and Mr and Mrs Z haven't pointed to anything they were entitled to under their membership that they're no longer able to get. So, it also follows that, I can't see that there was any breach of the membership agreement by the Supplier's insolvency or for any other reason.

Was commission paid to the Supplier by VFL?

This was an allegation made by PR on Mr and Mrs Z's behalf. PR hasn't set out why it believes any commission was paid and VFL has said it didn't pay any commission. Based on what I've seen, I can't say that any such commission was paid.

Did VFL carry out the right checks before lending to Mr and Mrs Z?

PR said that VFL didn't undertake the right checks of Mr and Mrs Z's ability to repay the loan. However, in any complaint about lending there are a number of matters to consider. First, a lender had to undertake reasonable and proportionate checks to make sure a prospective borrower was able to repay any credit in a sustainable way. Secondly, if such checks were not carried out, it is necessary to determine what the right sort of checks would have shown. Finally, if the checks showed that the repayment of the borrowing was not sustainable, did the borrower lose out?

Here, even if the right checks weren't carried out, I haven't seen enough to persuade me that the lending was not affordable for Mr and Mrs Z. So I'm not persuaded that the complaint should be upheld on this basis.

Was VFL party to an unfair debtor-creditor relationship?

PR say that the problems with the Supplier's sale gave rise to an unfair debtor-creditor relationship as defined by s.140A CCA. When considering a complaint about this, I'm able to look at both the actions and agreements between Mr and Mrs Z and VFL, but also the agreement with the Supplier funded by the loan and what VFL said at the time it was entered into.

Many of the matters I've set out above could, if with merit, have given rise to an unfair debtor- creditor relationship. For example, the Supplier's alleged misrepresentations or granting an unaffordable loan. But as I wasn't persuaded by to uphold this complaint on the basis of these, I also don't think they could give rise to an unfair debtor-creditor relationship.

PR has pointed to regulations it says were breached during the sale (CPUTRs and the Timeshare Regulations). But again, based on the actual statement provided by Mr and Mrs Z, I can't say there were any breaches of those regulations at the time of the 2017 sale, or, if there were, why that might have caused an unfairness in this case. So I can't see any reason why there was an unfair debtor-creditor relationship between VFL and Mr and Mrs Z.

My final decision

I don't uphold Mr and Mrs Z's complaint against Vacation Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs Z to accept or reject my decision before 15 March 2024.

Mark Hutchings
Ombudsman