DRN-4600453

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

In November 2018 Mr and Mrs W purchased a membership of a timeshare holiday product from a company I will call A at a cost of £40,000 which was funded in part by a loan from VFL.

In July 2022 PR submitted a letter of claim to VFL. Both parties are aware of the details of claim so in this decision I will simply set out a short summary. The claims were made under s.75 and s.140A CAA. It said there had been both a breach of contract and misrepresentation.

Misrepresentation

- Mr and Mrs W were told they would benefit from cheaper holidays.
- The upgrade would be more easily sold and this was reinforced by the fact A had opened a resale department.
- The product was only available at reduced rate for a limited period.
- The resorts were exclusive.

PR says these claims were false and set out why it took this view. It noted that A had not denied liability and Mr and Mrs W had provided detailed testimony.

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

- Mr and Mrs W were allowed to purchase the product as an investment without an explanation of the risks.
- 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 W were not given a choice of lenders.
- Mr and Mrs W now have depleted savings.

PR provided testimony from Mr W in which he set out the circumstances of the purchases in some detail and his belief that the product had been sold as an investment.

VFL had previously rejected a claim made by a previous PR setting out in some detail the reasons why it reached this conclusion. I would add that the issue of whether this complaint was made in time has been decided by one of my colleagues and I am able to consider the merits of this complaint.

VFL noted that Mr and Mrs W had not made use of the 14 day cooling off period. On the matter of affordability it said Mr and Mrs W had made regular monthly payments. Overall it concluded that the claims were unsubstantiated.

In September 2022 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. He believed the claim fell outside the ambit of s.75 due to the price paid. Furthermore, he didn't consider the sale fell within s.140A. Finally, he 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 that the product purchased was not points, but timeshare membership which came with points. It said that another lender had accepted claims from consumers regarding loans to make purchases from A and this service had upheld some claims. It argued that Mr and Mrs W had spent some £53,650 on timeshares and this could not have been for holidays alone. They already had access to holiday accommodation and had no need to upgrade.

It provided testimony from Mr W setting out his recollections of the purchase along with some notes from the sales representative at the time of sale. PR said the evidence suggested that the sale was made as an investment.

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.

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.

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 would add that I do not consider s.75A applies either.

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 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 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.

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 did not sell the product as an investment. I have read the testimony provided by Mr W and I have also read the documentation he and his wife signed. The latter makes no reference that I have found of the product being an investment. It makes it clear that what is being purchased is a floating week timeshare interest and not real estate. Quite simply, it provided access to accommodation and other services.

As I was not present at the sale which took place over two days I cannot say what was actually said by the sales representative. It is known for these products to be sold as investments in future holidays which is not the same as financial investments.

I am not persuaded there was any breach of the Timeshare Regulations. Mr and Mrs W were given 14 days in which to withdraw from the agreement and acknowledged receipt of the Standard Information Form for Timeshare Contracts.

Even if there were a breach of the Timeshare Regulations, that would not necessarily give rise to a claim which an individual club member could bring against A. Nor would it necessarily mean that the loan agreement created an unfair relationship between Mr and Mrs W and VFL.

PR says that some terms of the contract are "unfair", I presume within the definition in the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR"). That is not for me to say, although I must have regard to relevant law, including UTCCR. The remedy if a contractual provision is "unfair" is however that the provision is unenforceable against the consumer – not that the whole contract falls. PR has not said whether any of the provisions which it says is unfair has been relied on by Mr and MRs W or what the effect has been on them.

In the circumstances, I think it unlikely that a court would have said that the loan agreement created an unfair relationship between Mr and Mrs W and VFL.

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 maintained their monthly payments and repaid the loan early. No evidence has been submitted to show the loan was unaffordable.

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 1 April 2024.

Ivor Graham
Ombudsman