DRN-4600752

The complaint

Mr and Mrs H, 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 H have made three purchases of holiday products from a company I will call A The first was in April 2014, the second in June 2017 and the third in May 2019. The last one which was funded in part by VFL is the subject of this complaint. They have explained that they bought the first one as an investment and the other two as they would be easier to sell. They have supplied copies of resales listings for the first two purchases.

In May 2019 while on holiday they were persuaded to buy a new points based product. In June 2021 PR submitted a letter of claim to VFL. 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. PR also claimed that the product had been sold as an investment. PR said Mr and Mrs H had been pressurised to make the purchase and to take finance with VFL. It said the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Regulations") had been breached by A. The sale had also fallen foul of the Consumer Protection from Unfair Trading Regulations (CPUT) 2008 in various ways including VFL not disclosing the commission it had paid to A. 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 H had 14 days to withdraw from the agreement if they felt they had been pressurised into taking it out. 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 said it had carried out appropriate affordability checks and Mr and Mrs H had maintained their regular payments.

PR brought a complaint to this service on behalf of Mr and Mrs H. It was considered by one of our investigators who recommended it be upheld. She asked for testimony from Mr and Mrs H. They wrote saying that they had been led to believe it would be difficult to sell their existing products and the points, being more flexible, would be more likely to sell. Our investigator concluded that Mr and Mrs H had been persuaded that they were buying an investment which amounted to misrepresentation.

I issued a provisional decision as follows:

"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 should point out first of all that Mr and Mrs H 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 H's purchase. If that (or any other assumption I have made) is incorrect, the parties can explain that and provide the necessary evidence in their response to this provisional decision.

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 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.

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. They say in their testimony that in 2019 they were told the points product would retain its value and they would "stand a higher likelihood of being able to sell them.." I note they do not say they were

told that the product was an investment. Nor were they given a guarantee that they could be sold.

I have noted the claims about misrepresentation are generic, lack detail, and are largely unsupported by any documentation.

The standard Application for Membership recorded 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. They included:

- *"The primary purpose of our Membership is to access holiday accommodation and is not a financial investment for a return. We also understand that the membership price paid does not necessarily reflect the market value of our membership." [para 6]*

- *"We have been informed of the various options we have to exit our Membership. We understand that the A Resale's facility will be available with effect from the year 2020. We have also been advised should we wish to initiate the process to exit our membership through the A resale's facility we would first need to enter into a listing agreement. We have not been given any resale's timeframe guarantees since finding a new buyer depends on market conditions and could potentially take one or more years. We are not reliant on any resale's proceeds to pay off any financial commitments relating to any Memberships we own. Furthermore we understand that the future value of the Club Membership cannot be guaranteed and past trends are not an indication of future value." [para 8]*

- *"We confirm that the Membership Application and all other documentation presented to us during our compliance Interview constitute the entire written contract between both parties. … In addition, we also confirm and acknowledge that we have relied on no representation made to us, whether oral or written, other than those contained in the documentation provided to us and that we have been advised by the Resorts Contract Manager that any representations made to us whether orally or in writing by a Club representative are not binding and that we cannot rely on any such representations as the basis for executing this contract. [para 9]"*

I think it likely that Mr and Mrs H signed and initialled a Compliance Statement in these terms.

The warning in paragraph 8 ("… past trends are not an indication of future value…") is of course associated with investments and may have encouraged them to think that was what they were buying. Taken alongside the very clear statement in paragraph 6 that the Membership is not an investment, however, I do not believe that it is a reason for me to conclude that the timeshare was sold as an investment.

In addition, clause 13 of the standard Membership Application said:

"This Agreement shall constitute the sole agreement between the parties and supersedes all prior agreements, representations, discussions and negotiations between the parties with respect to the subject matter hereof."

And clause 20 included:

"This Agreement is irrevocable and legally binding upon all parties and cannot be cancelled or rescinded at any time after the expiry of the statutory withdrawal period stated in this Agreement and will supersede any and all understandings and agreements between the parties hereto whether written or oral and it is mutually understood and agreed that this Agreement and the Standard Information Document and ancillary documents represent the entire agreement between the parties hereto and no representation or inducements made prior hereto which are not included in and embodied In this Agreement, or the documents referred to, will have any force or effect."

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.

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 when A companies went into liquidation. 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.

Finally, as 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 C can been regarded as a breach of contract.

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 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 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.

PR seems to suggest that VFL owed Mr and Mrs H 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. Even if it did in my experience payments of commission in this industry were relatively low.

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. I take the point that

Mr H is now retired and Mrs H will retire in the next few years, but that does not allow me to conclude the lending was unaffordable.

Conclusion

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

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.

Neither party has responded to my provisional decision despite being sent a reminder. As such I consider my provisional stands unaltered.

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 H and Mrs H to accept or reject my decision before 11 March 2024.

Ivor Graham
Ombudsman