

## **The complaint**

Mrs L and Mr L complain about the sale of a timeshare. They say that Vacation Finance Limited (who I'll call Vacation Finance) financed the purchase and that they, therefore, have claims against it. Mrs L and Mr L have brought their complaint through a representative, so references to their submissions and arguments include those made on their behalf.

## **What happened**

I issued my provisional decision on this complaint in December 2023. An extract from that provisional decision is set out below.

*In November 2016 Mrs L and Mr L entered into a timeshare membership with a company I will call "Az". The purchase was funded through a fixed sum loan with Vacation Finance.*

*Mrs L and Mr L complained to Vacation Finance in June 2021. Their claim was detailed but in essence they said they had a claim under sections 75 and 140A of the Consumer Credit Act 1974 (CCA) as the agreement had been misrepresented to them and there had been an unfair relationship. They also said Vacation Finance hadn't performed adequate checks to ensure the loan was affordable for them.*

*Vacation Finance responded to the complaint later that year and as they didn't uphold it Mrs L and Mr L escalated the complaint to this Service.*

*Our investigator considered what had happened but didn't think that Vacation Finance had been unreasonable to reject Mrs L and Mr L's claims.*

*Mrs L and Mr L didn't agree so the complaint has been referred to me, an ombudsman, to provide a decision.*

## **What I've provisionally 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.*

*Mrs L and Mr L have provided very limited documentation in support of their claim. However, this service has seen a number of complaints about Az timeshare sales from around the same time. Az and the lender used largely standard contract wording. I have, therefore, approached this case on the assumption that the same standard wording was used in this case. 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.*

*Since our Service provided an initial view on this complaint Mrs L and Mr L's representatives have raised further issues that weren't included in their original complaint to Vacation Finance. This Service will usually only review complaints that have already been considered by the lender and here, I can't see that Vacation Finance have yet considered those additional issues or engaged with them. I'll, therefore, only be considering the points Mrs L and Mr L raised in their June 2021 letter of complaint to Vacation Finance.*

*I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards; codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.*

*The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under the Financial Services and Markets Act 2000 (FSMA). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my decision.*

### **The claim under the CCA**

*When something goes wrong and the payment was made with a fixed sum loan, as was the case here, it might be possible to make a section 75 claim. This section of the CCA says that in certain circumstances, the borrower under a credit agreement has a right to make the same claim against the credit provider as against the supplier if there's either a breach of contract or misrepresentation by the supplier.*

*From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.*

*Section 56 of the CCA is relevant in the context of section 140A of the CCA that Mrs L and Mr L also rely on, as the pre-contractual acts or omissions of the credit broker or supplier will be deemed to be the responsibility of the lender, and this may be taken into account by a court in deciding whether an unfair relationship exists between Mrs L and Mr L and the lender.*

*It's not for me to decide the outcome of a claim Mrs L and Mr L may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether the lender was reasonable to reject their claims.*

### **The claim under section 75 of the CCA**

*Mrs L and Mr L say that as Az has now been liquidated there has been a breach of contract. I'm not persuaded that's the case as Vacation Finance have confirmed there is a new management company in charge, and it appears Mrs L and Mr L's use of their timeshare would, therefore, have been unfettered.*

*Mrs L and Mr L also say the agreement was misrepresented to them as an investment but other than their testimony, I've not seen evidence to corroborate that or to corroborate Mrs L and Mr L's suggestion that they wanted to sell the timeshare and were promised they'd be able to. I don't, therefore, think Vacation Finance were unreasonable to reject those complaints.*

### **The claim under section 140A of the CCA**

*Section 140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).*

*I do not consider it likely that a court would conclude that the lender's acts and/or omissions, or those of the supplier or credit broker as agents of the lender, generated an unfair debtor – creditor relationship.*

*Mrs L and Mr L rely upon a number of clauses in the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) that their representatives suggest created an unfair relationship between them and Az. We know it is common that these sales presentations often lasted for a number of hours. I've therefore considered whether there is evidence that their ability to exercise choice was significantly impaired by the pressure and aggressive sales tactics they say they experienced.*

*Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) seems to expand on the everyday definition of pressure. At the time of sale, Regulation 7 stated that a commercial practice was aggressive if, in its factual context and taking account of all of its features and circumstances, it:*

- a. significantly impaired or was likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence; and*
- b. caused or was likely to cause the consumer to take a transactional decision they would not have taken otherwise as a result.*

*Regulation 7(2) went on to say that consideration must be given to the timing, location, nature, and persistence of the practice. And when thinking about whether "undue influence" was applied, Regulation 7(3) said that thought must be given as to whether the Supplier exploited "a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly [limited] the consumer's ability to make an informed decision."*

*Mrs L and Mr L had already attended presentations by Az, so I think they would have been likely to have had an understanding of the approach that would be taken. I don't think I've been provided with sufficient information to suggest Mrs L and Mr L didn't understand they didn't have to say yes to the agreement or that they didn't understand they could walk away without entering into it. They were also provided with a 14 day cooling off period and I think that allowed them to reflect and withdraw from the agreement and the loan if they wished.*

*Overall, I'm not persuaded that Mrs L and Mr L's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.*

*Mrs L and Mr L say that they were offered a special one off, time limited, price to accept the agreement and that was an aggressive sales practice in contravention of Schedule 1, clause 5 of CPUT. I've not seen any supportive evidence to suggest that was the case and I don't, therefore, think Vacation Finance were unreasonable to reject that complaint point.*

*Mrs L and Mr L also claim that an unfair relationship existed because they were not told about the commission Az received from Vacation Finance. But Vacation Finance have confirmed that no commission was paid in this case, so I think it's unlikely a court would find there was an unfair relationship for that reason.*

*Mrs L and Mr L say that an unfair relationship also existed because they were not offered a choice of lenders. Az wasn't acting as an agent of Mrs L and Mr L but as the supplier of contractual rights they obtained under the Purchase Agreement. And, in relation to the loan, it still doesn't look like it was the Supplier's role to make an impartial or disinterested recommendation or to give Mrs L and Mr L advice or information on that basis. However, even if it's right to suggest that they should have been presented with a range of lenders to choose from, there's little to nothing to demonstrate that they suffered a financial loss because they entered into a credit agreement with Vacation Finance rather than another*

*lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship on this occasion given the facts and circumstances of this complaint.*

*I don't, therefore, think Vacation Finance were wrong to reject the claim under s140A.*

### **Was the loan irresponsible?**

*Mrs L and Mr L say that Vacation Finance was in breach of its obligations to carry out an adequate credit assessment to determine whether they could afford to repay the loan. However, when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So even if I was persuaded that the lender 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 the credit granted by them was likely to be unaffordable and that Mrs L and Mr L suffered a loss as a result. I've not been provided with sufficient evidence from Mrs L and Mr L to suggest they didn't have enough disposable income to sustainably afford repayments against this loan, and I don't therefore think it would be reasonable to suggest the lender was irresponsible when providing the credit.*

### **My provisional decision**

*For the reasons I've given above, I'm not expecting to uphold this complaint.*

### **Additional comments and/or evidence**

Vacation Finance didn't provide any further comments, but Mrs L and Mr L's representatives did. They repeated the response they had provided to our investigator's View of the complaint. They added that even if there hadn't been a misrepresentation:

*"Az's actions against the prohibition of unfair commercial practices in CPUTR. A commercial practice is a misleading action: (a) If it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and (b) It causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise Paragraph (4) provides, amongst other matters: (a) The existence or nature of the product (b) The main characteristics of the product (d) The motives for the commercial practice."*

### **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.

Mrs L and Mr L's letter of claim to Vacation Finance explained that they believed the purchase agreement had been misrepresented to them as an investment. In my provisional decision I explained that other than their testimony, I had not seen evidence to corroborate that or to corroborate Mrs L and Mr L's suggestion that they wanted to sell the timeshare and were promised they'd be able to. Having considered Mrs L and Mr L's recent submissions I don't think I've seen evidence of any *"unfair commercial practice"*, that I didn't think amounted to misrepresentation when I formed my provisional decision, but that may have been in breach of the CPUT Regulations.

I also explained in my provisional decision that I didn't think it would be fair for me to

consider further issues that weren't included in Mrs L and Mr L's original complaint to Vacation Finance. I explained that this Service will usually only review complaints that have already been considered by the lender and that I couldn't see that Vacation Finance had considered those additional issues or engaged with them.

It's for those reasons that I have not been persuaded to change my provisional decision. That provisional decision, therefore, becomes my final decision on this complaint.

### **My final decision**

For the reasons I've given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L and Mr L to accept or reject my decision before 13 February 2024.

Phillip McMahon  
**Ombudsman**