DRN-4489239

The complaint

Mr and Mrs B complain that Vacation Finance Limited trading as VFL Finance Solutions ("VFL") unfairly dealt with their claims under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") relating to loans they provided to fund timeshare product purchases.

What happened

Since 2014, Mr and Mrs B have purchased various timeshare products provided and sold by a company (who I'll refer to as "A"). Over that time, they purchased various timeshare products and upgrades from A, which were funded in different ways, including the use of loan(s) provided by different financial business(es).

In or around January 2018, while on a promotional holiday, Mr and Mrs B attended a meeting with A in which they agreed to exchange their existing timeshare product holding for a points-based timeshare product offered by A. The purchase required payment of an agreed sum of £19,000, £13,300 of which was funded under a fixed-sum loan agreement over 120 months with VFL. £5,700 was funded by bank transfer from Mr and Mrs B's bank account.

In or around April 2018, while on holiday using their timeshare product, Mr and Mrs B attended a further meeting with A in which they agreed to purchase additional points to increase their existing timeshare points holding. The total purchase price, including what was already owed in respect of the January 2018 purchase, was £23,180. This was funded, in part, with a new loan from VFL of £19,880 over 120 months. Under the agreement, Mr and Mrs B's existing loan was repaid. £3,300 was funded by bank transfer from Mr and Mrs B's bank account.

In or around May 2020, using a claims management company ("the CMC"), Mr and Mrs B submitted claims to VFL under sections 75 and 140A of the CCA. The CMC said that during the sales meetings in January and April 2018, A made a number of representations about the product(s) purchased which turned out not to be true. And it was these misrepresentations that had induced Mr and Mrs B to enter into the purchase contracts with A. They believe that under section 75 of the CCA ("S75"), VFL are jointly liable for any misrepresentation. In particular, the CMC allege that A told Mr and Mrs B:

- the product was of some substance; and
- the purchase would be an investment that would increase in value and could be sold at a considerable profit after a few years.

They also said that the relationship between VFL and Mr and Mrs B arising out of the loan agreement, taken with the related purchase agreement with A, is unfair pursuant to section 140A of the CCA ("S140A"). In particular, they said:

- Mr and Mrs B were subjected to a high-pressure sales presentation;
- A were acting as an agent of Mr and Mrs B and VFL paid commission to A without their consent breaching their fiduciary duties;
- commission paid wasn't disclosed to Mr and Mrs B;
- Mr and Mrs B weren't presented with a choice of finance options;

- VFL failed to carry out a sound and proper credit assessment; and
- the finance agreements were unaffordable.

Furthermore, the CMC said that A had gone into liquidation and ceased to trade, so were in breach of the contract. They believe that under section 75 of the CCA ("S75"), VFL are jointly liable for any breach of contract.

Having not received a substantive response to Mr and Mrs B's claim, the CMC referred matters to this service as a complaint. During the course of this service's investigations, VFL provided their response to the claims. Having considered the various allegations together with evidence from the time of the sale and their own records, VFL didn't think there was any evidence to support the allegation that the product had been misrepresented to Mr and Mrs B. Or that there was any evidence there'd been a breach of contract. VFL didn't agree with the CMC's allegations of unfairness, or that the loan was unaffordable for Mr and Mrs B at the time of the purchases.

One of this service's investigators considered all the evidence and information provided. In doing so, they didn't think Mr and Mrs B's complaint should be upheld. In particular, the investigator didn't think there was any evidence to show the product had been misrepresented in the ways alleged. Or that there'd been a breach of contract. Our investigator also wasn't persuaded there was sufficient cause likely to lead a court to conclude the relationship was unfair pursuant to S140A. Or that there was anything to suggest the loan was unaffordable for Mr and Mrs B.

The CMC didn't agree with our investigator's findings. They insisted the loans were unaffordable for Mr and Mrs B given the existence of previous finance that remained outstanding. Furthermore, they insisted the product(s) had been sold as investments but provided no further explanation or evidence to support this allegation.

The CMC subsequently provided copies of Mr and Mrs B's bank statements covering an extended period from just prior to the purchase in January 2018 which they believe supported the allegation of unaffordability. They also provided their own in-depth explanation of the rules and guidance that applied to the assessment of loan affordability and how (they believe) that wasn't complied with.

As an informal resolution couldn't be achieved, Mr and Mrs B's complaint was passed to me to consider further and reach a final decision. Having done so, while I reached a similar outcome to that of our investigator, I addressed various aspects that I feel weren't fully considered and explained previously. Because of that, I issued a provisional decision on 7 November 2023, giving Mr B, Mrs B and VFL the opportunity to respond to my findings below, before I reach a final decision.

In my provisional decision I said:

> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.
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> S75 provides consumers with protection for goods or services bought using credit. Where Mr and Mrs B paid for their timeshare products having financed them with restricted use regulated loans from VFL, they are afforded the protection offered to borrowers like them under those provisions. So, I've taken this section into account when deciding what's fair in the circumstances of this complaint.
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> S140A looks at the fairness of the relationship between Mr B, Mrs B and VFL arising out of any credit agreement (taken together with any related agreements). And where

[1] Dispute Resolution: The Complaints sourcebook (DISP)
[2] Financial Conduct Authority

the products purchased were funded under credit agreements, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

It's important to distinguish between the complaint being considered here and the legal claim. The complaint referred to this service specifically relates to whether I believe VFL's treatment of Mr and Mrs B's claim was fair and reasonable given all the evidence and information available to me. This service isn't afforded powers to determine any legal claim itself. That is the role of the courts.

It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service (ADR) is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service. And as I've already said, this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, it doesn't prejudice their right to pursue their claim in other ways.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made 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 evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Mr and Mrs B's timeshare experience

Based upon the information available, it appears Mr and Mrs B maintained an ongoing association with A and their products. In particular relating to a holiday destination they've regularly attended and holidayed at. They first purchased a timeshare product from A in 2014, with subsequent exchanges and upgrades in 2015, 2016 and 2017 before the purchases in 2018.

Over that time, Mr and Mrs B's timeshare holding varied in terms of the type of accommodation, the season and flexibility according to the product held. And I understand many, if not all, of the purchases were completed utilising finance provided by different businesses (including VFL).

So, based upon this information, I think it's reasonable to conclude that Mr and Mrs B had a reasonably strong awareness about the products they purchased, how they operated and any associated costs. I also think it's reasonable to conclude that Mr and Mrs B were familiar with A (as a timeshare supplier) and the sales presentations given by them. Particularly as the meetings in 2018 (the subject of their claim) weren't their first experience.

The claim for misrepresentation under S75

For me to conclude there was a misrepresentation by A in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that A made false statements of fact when selling the timeshare products. In other words, that they told Mr and Mrs B something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr and Mrs B to enter the contracts. This means I would need to be persuaded that Mr and Mrs B reasonably relied upon the alleged false statements when deciding to buy the timeshare products and additional points rights.

From the information available, I can't be certain about what Mr and Mrs B were specifically told (or not told) about the benefits of the products they purchased. It is,

however, indicated that they were told these things. So, I've thought about that alongside the other evidence available. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr and Mrs B's claim, such as marketing material or documentation from the time of the sale that echoes what they say they were told. In particular that the products purchased were represented as a financial investment.

I don't think the contracts can have been marketed and sold as an investment contrary to The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs") simply because there might have been some inherent value to Mr and Mrs B's membership. And in any event, I've found nothing within the evidence provided to suggest A gave any assurances or guarantees about the future value of the product or the additional points purchased.

A would had to have presented the products in such a way that used their investment element to persuade Mr and Mrs B to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs. I've also found nothing within the documentation provided that appears to provide any guarantees or assurances about the subsequent resale of the points they purchased.

On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that A did in fact make the alleged misrepresentations.

The breach of contract claim under S75

VFL have said that whilst A may have entered an insolvency process, the current management company confirm that timeshare owners remain able to fully utilise their timeshare products subject to the associated agreements. So, in the absence of any specific explanation or evidence to support why Mr and Mrs B believe there's been a breach of contract which resulted in a loss for them, I haven't seen anything that would lead me to conclude there was such a breach.

The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (VFL) and the debtor (Mr and Mrs B) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

As I've said previously, it's important to acknowledge that only a court can make a determination under S140A. But as this is relevant law, I need to take it into account in reaching my decision – where appropriate.

- The pressured sale and process

The claim and subsequent submissions set out an allegation that Mr and Mrs B were subjected to a pressurised sale. I acknowledge what has been said about the length of the sales presentations they attended – albeit I'm aware they'd previously attended such meetings with A. I can, therefore, understand why it's argued that the prolonged nature of any presentation might have felt like a pressured sale – especially if, as they approached the closing stages, they were going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr and Mrs B agreed to the purchases in 2018 when they simply didn't want to. I haven't seen any evidence to demonstrate that they went on to say something to A, after the purchases, to suggest they'd agreed to them when they didn't want to. And Mr and Mrs B haven't provided a credible explanation for why they didn't subsequently seek to cancel the purchases within the 14-day cooling off period permitted here.

If Mr and Mrs B only agreed to the purchases (and the associated finance agreements) because they felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr and Mrs B were obviously harassed or coerced into either. And because of that, I'm not persuaded there's sufficient evidence to demonstrate they made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired.

In deciding whether to make a determination under S140A, *"the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor* [A] *and matters relating to the debtor* [Mr and Mrs B]*)"*.

As I've said, Mr and Mrs B already held an existing timeshare product they'd purchased previously from A. And had previously agreed to entering finance agreements to fund these. Importantly, the points purchases in 2018 appear to relate to the upgrade and/or change from their existing timeshare product holding. It doesn't appear it was their first product purchase from A and Mr and Mrs B weren't new customers. So, it's likely they would've benefitted from their previous experiences and what might be expected from the meetings and sales presentations in 2018.

If there was potential for a court to decide that some of the allegations might have led to an unfair debtor-creditor relationship here, I think any decision is likely to be taken within the context of Mr and Mrs B's overall experience. And even if I was to find that some of the information could've been clearer during the sale – and I make no such finding – I think it's unlikely this would lead to a court finding this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

- A's responsibilities and disclosure of commission paid

Part of Mr and Mrs B's S140A claim is based upon the status of A (as the introducer of the loan) and their resultant responsibilities towards them. In particular, it's argued that the payment of commission by VFL to A was kept from them and was paid without their consent

VFL have confirmed that no commission was paid here. And in any event, even if it had been, I don't think this was incompatible with A's role in the transactions. They weren't acting as an agent of Mr and Mrs B, but as the supplier of contractual rights they obtained under the timeshare product agreements. And, in relation to the loans, based upon what I've seen so far, it doesn't appear it was A's role to make an

impartial or disinterested recommendation, or to give Mr and Mrs B advice or information on that basis. As far as I'm aware, Mr and Mrs B were always at liberty to choose how they wanted to fund the transactions.

What's more, I haven't found anything to suggest VFL were under any regulatory duty to disclose the amount of any commission paid in these circumstances – had it been paid. Nor is there any suggestion or evidence that Mr and Mrs B requested those details from VFL. As I understand it, the typical amounts of commission paid by VFL to suppliers (like A in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure and payment of commission created and unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

Were the required lending checks undertaken?

There are certain aspects of Mr and Mrs B's claim that could be considered outside of S75 and S140A. In particular, in relation to whether VFL undertook a proper credit assessment. The CMC allege a sound and proper affordability check wasn't completed.

Having received our investigator's initial findings, the CMC provided copies of Mr and Mrs B's bank statements covering an extended period from October 2017 through the period of the purchases and beyond. I've also seen information relating to Mr and Mrs B's income and outgoings from that time which our investigator has considered in depth. Our investigator also asked for copies of Mr and Mrs B's credit files. But I can't see that these have been received.

I've carefully considered the information provided together with the work done by our investigator. Having done so, I've not seen anything that I believe supports any suggestion of financial difficulty from that time. The bank account appears to have been well managed and it appears Mr and Mrs B had a surplus of income over the outgoings having taken into account the loans agreed.

In their response to Mr and Mrs B's claim, VFL explained to this service the affordability assessment they'd completed which they believe was regulatorily compliant and showed the loan was sustainably affordable for them. If I were to find that the checks and tests completed by VFL didn't comply with the regulatory guidelines and requirements that applied – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that the loan repayments weren't sustainably affordable for Mr and Mrs B in order to uphold their complaint here.

It's important to stress that I don't believe any compliance failure (if proven) would automatically mean that Mr and Mrs B's loan agreements were null and void in any event. It would need to be shown that any such failure resulted in a loss to Mr and Mrs B as a consequence.

I understand that Mr and Mrs B later experienced financial pressures. That said, it appears this coincided with the impact global pandemic of 2020. But I don't think that's something that would've been reasonably foreseeable for VFL at the time the loans were assessed and agreed. So, I can't reasonably conclude that at the time they were agreed, the loans were likely to be unaffordable for Mr and Mrs B, or that they suffered a foreseeable loss as a consequence.

Summary

To reiterate – My role in deciding Mr and Mrs B's complaint is to establish whether, based upon all the evidence available, VFL's handling of their claim was unfair or unreasonable. Given my findings above, I can't say that it was. And on that basis, I don't currently intend to ask VFL to do anything more here.

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.

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Despite follow up by this service, neither VFL nor the CMC have provided any further comment or evidence for me to consider. In the circumstances, I've no reason to vary from my provisional findings.

My final decision

For the reasons set out above, I don't uphold Mr and Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 4 January 2024.

Dave Morgan
Ombudsman