DRN-4537909

The complaint

Ms M and Mr P say that Vacation Finance Limited (who I'll call Vacation Finance") unfairly declined their claims under the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare product they were sold in June 2018. They also say the loan wasn't affordable for them and that Vacation Finance were, therefore, irresponsible to extend the credit.

Ms M and Mr P have been represented by a professional representative who I'll call "PR". To keep things simple, I'll usually refer to everything that's been said on their behalf as if they said it themselves.

What happened

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

In June 2018 Ms M and Mr P relinquished a pre-existing timeshare agreement with a supplier I'll call "Az" and exchanged it for points to be used towards a timeshare product with the same supplier. They paid a deposit of £10,200 and financed the balance through a loan with Vacation Finance.

In March 2021 Ms M and Mr P complained to Vacation Finance about problems they had encountered with the timeshare product. There were a number of allegations and it's not practical to reproduce them all here, but I have taken note of them. They said the nature of the timeshare had been misrepresented to them, so they were able to make a claim against the lender under section 75 of the CCA. They also said that there was an unfair debtor-creditor-supplier-relationship under section 140A of the CCA, that Az were unable to provide the service they'd been sold as they had now been liquidated, and that Vacation Finance had been irresponsible to provide them with credit without completing affordability checks.

Vacation Finance didn't agree with Ms M and Mr P's complaint, but our investigator did. She thought the price of the transaction was beyond the financial limits that could be considered under section 75 and that such a claim couldn't be made. But she did think there was sufficient evidence that Ms M and Mr P had been told the timeshare product was an investment when there was no reasonable prospect of a re-sale. She thought a court would find that misrepresentation had caused an extreme inequality of knowledge and that Ms M and Mr P had suffered a loss as a result. It was her opinion that Vacation Finance should put things right for Ms M and Mr P.

Vacation Finance didn't respond so the complaint has been referred to me, an ombudsman, to make 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.

I know it will disappoint Ms M and Mr P, but I don't think there is sufficient evidence to justify

upholding this complaint. I'll explain why.

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 section 75 of the CCA

When something goes wrong and the payment was made with a fixed sum loan, as appears to be 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.

One of those circumstances is that the cash price that the supplier has attached to the product being purchased must be at least £100 and not more than £30,000. The cash price was £34,000 here and that's too high.

It's not for me to decide the outcome of a claim Ms M and Mr P may have under section 75 but I am required to take the provisions into account when deciding whether Vacation Finance were reasonable to reject Ms M and Mr P's section 75 claim. As the claim was beyond the allowable financial limits I don't think Vacation Finance were unreasonable to reject that claim.

The claim under section 140A of the CCA

Section 56 of the CCA is relevant in the context of section 140A of the CCA that Ms M and Mr P 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 the consumers and Vacation Finance.

It's not for me to decide the outcome of a claim Ms M and Mr P may have under section 140A but I'm required to take the provisions into account when deciding whether Vacation Finance were reasonable to reject them.

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.

Ms M and Mr P 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 Ms M and Mr P's 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."

Ms M and Mr P had already attended a number of presentations with the same supplier: they'd first purchased a timeshare product in 2010, 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 Ms M and Mr P 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 Ms M and Mr P's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

Ms M and Mr P also claim that an unfair relationship existed because they weren't 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.

Ms M and Mr P also say that an unfair relationship existed because they weren't offered a choice of lenders. Az wasn't acting as an agent of Ms M and Mr P 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 Ms M and Mr P advice or information on that basis. However, even if it's right to suggest that Ms M and Mr P should have been presented with a range of lenders to choose from, there's little to nothing to demonstrate that they have 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.

Our investigator thought that there was sufficient evidence to find that the timeshare had been sold as an investment. She thought that was a misrepresentation, and that Ms M and Mr P had been induced to enter into the agreement on that basis. I'm not persuaded there is sufficient evidence to suggest that was the case.

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 materially influenced the other party to

enter into the contract.

Ms M and Mr P explained they had:

"… invested £161,609 in this time-share company over a period of 8 years, with the promise of fantastic returns. Each time we visited, the time-share resort, we had been advised to convert our investment into a more desirable product, at an expense, as it would make it more re-saleable, and more easily rent-able. Since January 2016, we have paid an annual amount".

I've not been provided with any contractual paperwork that would suggest Az had marketed the timeshare as an investment. I've not, for instance, seen a copy of the Standard Information form that would accompany such an agreement and, having seen other agreements Az formed with other consumers around this time, I think it's likely that would have explained that resale values or timeframes cannot be guaranteed and are subject to offer and demand.

Ms M and Mr P have demonstrated that they made payments to enter the resale scheme over several years, but I don't think that, in itself, demonstrates the timeshare had been misrepresented to them as an investment, or that they'd been given a false statement of fact in that regard. Indeed, an email from Az to Ms M and Mr P regarding a previous timeshare that they held in 2016, explained that the price they chose to advertise their timeshare at was at their discretion and could be less, the same, or more. In the absence of more substantial evidence to the contrary it would seem likely that the same message would have been conveyed ahead of Ms M and Mr P's 2018 entry into the resale scheme. So, I am not persuaded there is sufficient evidence the timeshare was sold as an investment or that it was misrepresented to Ms M and Mr P on that basis and created an unfair relationship contrary to s140A. I don't, therefore, think Vacation Finance were wrong to reject the claim under s140A.

Was the loan irresponsible?

Ms M and Mr P 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 Ms M and Mr P suffered a loss as a result. I've not been provided with sufficient evidence from Ms M or Mr P 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

Ms M and Mr P's representative provided a copy of a statement and a membership application summary but neither party provided any additional comments regarding my provisional 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.

I've not, therefore, been persuaded to change my provisional decision and that provisional decision now 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 Ms M and Mr P to accept or reject my decision before 1 February 2024.

Phillip McMahon
Ombudsman