DRN-4455728

The complaint

Mr L and Miss P complain that Vacation Finance Limited ("VFL") unfairly turned down their claims under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") relating to a loan they provided to them to purchase a timeshare product.

What happened

In or around June 2018, while overseas on holiday, Mr L and Miss P accepted an invitation to visit and view a holiday resort. As part of that visit, they attended a sales presentation from a timeshare supplier who I'll refer to as "A". During the course of the presentation, Mr L and Miss P agreed to purchase a timeshare product from A. The purchase price agreed was £18,600 of which £15,810 was funded under a fixed sum loan agreement with VFL.

In or around December 2020, using a claims management company (the "CMC"), Mr L and Miss P submitted claims to VFL under sections 75 and 140A of the CCA. In particular, the CMC alleged that A had misrepresented the product purchased by Mr L and Miss P by advising:

- the product was of some substance, but it is now clear it is worthless; and
- the purchase would be an investment that would increase in value and could be sold later at a considerable profit.

The CMC said that as A have now ceased to trade, they have committed a repudiatory breach of contract. They believe that both the misrepresentations and the breach satisfy the criteria for a claim under section 75 of the CCA ("S75").

They also said that the relationship between VFL, Mr L and Miss P 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 L and Miss P were subjected to a high-pressure sales presentation;
- there's been a breach of fiduciary duty
- VFL deliberately chose not to disclose the fact that commission was paid to A, or the amount paid;
- Mr L and Miss P weren't presented with a choice of finance options; and
- VFL failed to carry out a sound and proper credit assessment.

Shortly after submitting the claim and in the absence of a substantive response from VFL, the CMC referred Mr L and Miss P's claims to this service as a complaint.

During the course of this service's investigations, VFL provided their response to the claims. They didn't think there was any evidence the product had been misrepresented to Mr L and Miss P. Or that there was any evidence there'd been a breach of contract. VFL didn't find anything else that would lead them to uphold any other part of Mr L and Miss P's claim.

One of this service's investigators considered all the evidence and information provided. Having done so, they didn't think there was any evidence to support the allegation that the product had been represented to Mr L and Miss P as an investment. There were also unable to find any evidence to suggest there'd been a breach of contract.

Our investigator's considered the various allegations of unfairness. But again, they weren't persuaded the evidence available was likely to lead to a court finding that the relationship was unfair under S140A. Or that there was anything persuasive to suggest the loan was unaffordable to Mr L and Miss P.

The CMC didn't accept our investigator's findings and various exchanges followed in which they:

- insisted all products sold by A were represented as an investment;
- suggested all points-based timeshare products sold by A were presented with the ability to rent out and receive an income regularly highlighted as part of the sales process;
- referenced previous complaint outcomes relating to the financing of sales by A;
- raised questions about the fairness of the contract terms where annual maintenance fees hadn't been paid;
- provided a 36 page document containing *"Generic submissions on behalf of complainants"* specific to the points-based timeshare products sold by A; and
- asked this service to obtain information and provide responses to questions about the procedures and policies that applied to the sale of loans with VFL for the purchase of timeshare products.

As an informal resolution couldn't be achieved, Mr L and Miss P's complaint was passed to me to consider and reach a final decision. In doing so, while I reached a similar outcome to that of our investigator, I'd considered various aspects that I feel weren't fully addressed previously. Because of that, I issued a provisional decision on 17 October 2023, giving all parties to this complaint the opportunity to respond to my findings 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.
>
> S75 provides consumers with protection for goods or services bought using credit. Where Mr L and Miss P paid for their timeshare product having financed it with a restricted use regulated loan from VFL, it's accepted S75 applies. Because of that, I've taken this section into account when deciding what's fair in the circumstances of this case.
>
> S140A looks at the fairness of the relationship between Mr L, Miss P and VFL arising out of any credit agreement (taken together with any related agreements). And where the product purchased was funded under a credit agreement, it's deemed to be a related agreement. 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 L and Miss P'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.

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

It isn't the role of this service to supervise, regulate or impose fines on any business. It's also not our role to ask a business to alter their policies or procedures or impose improvements on the level of service offered to their customers. These aspects fall firmly within the remit of the regulator – in this case, the FCA. But it is our role to examine and decide whether a business has been fair and reasonable in the manner in which those policies and procedures are applied in the individual circumstances of Mr L and Miss P's experience with them.

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 said above, 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.

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 product. In other words, that they told Mr L and Miss P 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 L and Miss P to enter the contract. This means I would need to be persuaded that they reasonably relied on those false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what they were specifically told (or not told) about the benefits of the product they purchased. It was, 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 L and Miss P 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 product purchased was represented as a financial investment.

I don't think the contract 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 their 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 purchased. A would had to have presented the membership in such a way that used its investment element to persuade Mr L and Miss P to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

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 L and Miss P) 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).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

- The pressured sale and process

The claim makes an allegation that Mr L and Miss P were subjected to a high-pressure sales presentation. As part of his own testimony, Mr L says they *"were put through a very stressful period of hard selling".* In describing what happened as the presentation continued he says, *"we were now tired and rather nervously signed the papers and documents agreeing to the loan and completing the timeshare application".*

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr L and Miss P agreed to the purchase 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 purchase, to suggest they'd agreed to it when they didn't want to. And they haven't provided a credible explanation for why they didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If they only agreed to the purchase because they felt they were pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest they were obviously harassed or coerced into the purchase. 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.

- A's responsibilities and disclosure of commission paid

Part of Mr L and Miss P'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. VFL have confirmed that no commission was paid here. But, even if it had been, I don't think this was incompatible with A's role in the transaction.

A weren't acting as an agent of Mr L and Miss P, but as the supplier of contractual rights they obtained under the timeshare product agreement. And, in relation to the loan, 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 L and Miss P advice or information on that basis. As far as I'm aware, they were always at liberty to choose how they wanted to fund the transaction.

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. Nor is there any suggestion or evidence that Mr L and Miss P requested those details from VFL at any point. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure or payment of commission would've created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

- The terms and conditions of the purchase agreement

In subsequent submissions to this service, the CMC have suggested that some of the terms of the purchase agreement are unfair. In particular where Mr L and Miss P have stopped paying annual maintenance fees under their contract. The presence of an unfair, or potentially unfair term alone won't, in my view, mean a court would automatically deem the relationship unfair. Any finding on that is more about whether such terms have been applied in such a way as to create unfairness. In any event, I can't see that this aspect formed part of the claim that was made. And because of that, I don't think this is something I can fairly consider here, as I can only look at whether VFL's response to the claim(s) made was fair and reasonable.

In any event, I think it's relevant to acknowledge the circumstances that appear to have led to any non-payment. I've seen evidence that Mr L wrote to A in April 2019 asking that they consider a request to cancel their membership. The reasons given specifically related to a change in his and Miss P's personal circumstances together with a new medical problem that meant Mr L was no longer able to fly. As a consequence, it appears it was Mr L's request to cancel the agreement that ultimately led to any non-payment of maintenance fees rather than anything instigated by A.

Were the required lending checks undertaken?

There are certain aspects of Mr L and Miss P'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.

It's relevant that the CMC haven't provided any evidence to show that the loan was unaffordable or unsuitable for Mr L and Miss P. And I've not seen anything that supports any suggestion of financial difficulty from that time.

In their response to the claim, VFL explained the affordability assessment they'd completed which they believe satisfies their regulatory obligations and showed the loan was sustainably affordable. 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 L and Miss P in order to uphold their complaint here.

I've seen no specific information about their actual position at the time and no supporting evidence that they struggled to maintain repayments. VFL have confirmed that Mr L and Miss P maintained all repayments as they fell due without any suggestion of financial difficulty. While I acknowledge the suggestion that their personal and financial circumstances have now changed, I don't think those changes were reasonably foreseeable as part of any assessment undertaken by VFL. And in any event, I don't believe any compliance failure would automatically mean that their loan agreement was null and void. It would need to be shown that any such failure resulted in a loss to Mr L and Miss P as a consequence.

Based upon these findings, I can't reasonably conclude the loan was unaffordable for them or that they've suffered any loss as a consequence.

Other considerations

Following our investigator's view, the CMC asked that this service consider the contents of a document headed *"Generic submissions on behalf of complainants".* However, given the generic nature of its contents, I don't think it's helpful in establishing the facts of what actually happened in Mr L and Miss P's specific case.

The CMC have also referenced other complaint decisions issued by this service in relation to timeshare products funded under regulated agreements. However, my role

is to consider Mr L and Miss P's complaint on its own merits given its own particular set of circumstances.

Furthermore, the CMC also requested that this service obtain extensive details of VFL's processes and procedures together with evidence that A (and in turn VFL) complied with the relevant rules, regulations and codes of practice that applied in the circumstances of the loan that was provided to Mrs M.

As I've already explained, this service's role as an ADR does not extend to regulating financial businesses or their policies and procedures – that's the role of the FCA. Our powers are confined to deciding whether, on balance, their processes and procedures were applied in a fair and reasonable way in Mr L and Miss P's individual circumstances. And that's what I've done here

Summary

Having carefully considered everything that's been said and provided, I haven't found anything that persuades me that A did misrepresent the timeshare product to Mr L and Miss P in the ways alleged. Or that a court is likely to find any of the specific allegations within their claim resulted in an unfair relationship under S140A. And because of that, I can't reasonably conclude that VFL's treatment of their claim was unfair or unreasonable. Given my findings, I don't currently intend to uphold Mr L and Miss P's complaint.

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 VFL nor the CMC have responded to my provisional findings, despite follow up from this service. In these circumstances and having seen nothing new which persuades me to vary from my provisional findings, I've no reason to change the proposed outcome here.

My final decision

For the reasons set out above, I don't uphold Mr L and Miss P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L and Miss P to accept or reject my decision before 13 December 2023.

Dave Morgan
Ombudsman