DRN-4302840

The complaint

Mr and Mrs W 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 provided to them to purchase a timeshare product.

What happened

Mr and Mrs W were existing holders of a timeshare product provided and sold by a company (who I'll refer to as "A") when they were holidaying at a popular destination outside of the UK in or around November 2016.

During that holiday, they were invited to a meeting with A that turned out to involve a sales presentation about timeshare products. During that meeting, Mr and Mrs W agreed to purchase a further timeshare product from A. The total cost of the purchase was £92,500 funded under a fixed sum loan agreement for £64,750 provided by VFL. The balance of £27,750 was paid by way of a transfer from Mr and Mrs W's bank account.

In or around November 2019, using a professional representative ("the PR"), Mr and Mrs W submitted claims to VFL under sections 75 and 140A of the CCA.

In the PR's letter of claim, they said A had misrepresented the features and benefits of the timeshare in November 2016. And under section 75 of the CCA ("S75"), VFL were jointly and severally liable for those misrepresentations. In particular, the PR said A represented the timeshare product as a financial investment which Mr and Mrs W could later sell for a profit. And in the interim, they could rent out their timeshare to derive a return to cover any finance costs.

The PR also said that various aspects of the sale had led to the debtor-creditor relationship being unfair under section 140A of the CCA ("S140A"). In particular:

- the terms of the timeshare agreement were so egregious as to be unfair themselves since the payment of commission by VFL to A was hidden from Mr and Mrs W;
- Mr and Mrs W weren't told the meeting was, in fact, a sales presentation lasting several hours, and were pressured and subjected to persistent sales tactics, contrary to the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs");
- Mr and Mrs W weren't given time to consider the agreements before entering into them;
- Mr and Mrs W were told the product was only available for a limited time, contrary to the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT"); and
- no affordability checks or credit assessment were completed in relation to the loan.

As no response was received to Mr and Mrs W's claims, the PR referred their complaint to this service.

While considering the circumstances surrounding Mr and Mrs W's complaint, VFL told our investigator they'd not received the letter of claim, or any other claim or complaint from Mr and Mrs W in relation to their timeshare purchase. It was established that the claim letter had

been addressed and sent to a different company whose name was very similar to VFL. Because of this, VFL asked for time to consider and investigate the claims made.

In the absence of a subsequent outcome from VFL, the investigator didn't think Mr and Mrs W had a valid claim under S75 as the purchase price of the timeshare product exceeded the limits permitted under that section of the CCA. However. the investigator thought Mr and Mrs W's recollections and allegations plausible based upon what they'd said and the information available. And because of that, they thought a court was likely to find that this had led to the existence of an unfair relationship under S140A.

To put things right, our investigator thought VFL should cancel the loan, refund all payments adding 8% simple interest from the date of payment to settlement. They also thought VFL should pay Mr and Mrs W an additional £27,750 representing their cash contribution, together with refunding any maintenance fees paid for the years they hadn't used the timeshare product, adding 8% simple interest to this figures.

VFL didn't agree with our investigator's findings. They didn't think there was any *"concrete evidence"* to support Mr and Mrs W's allegations and thought their subsequent actions in completing further timeshare purchases and upgrades with A, together with their ongoing usage of the products didn't support the allegations. VFL also pointed to various terms within the purchase documentation that specifically stated the purchase wasn't to be considered a financial investment.

As an informal resolution couldn't be achieved, Mr and Mrs W's complaint was passed to me to consider further and issue a final decision. In doing so, I reached a different outcome to that of our investigator. Because of that, I issued a provisional decision on 18 July 2023 giving both Mr and Mrs W and Vacation Finance Limited the opportunity to respond to my findings before I reached a final decision.

In my provisional decision I said:

> Relevant Considerations
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> 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 W paid for their timeshare membership, having financed it with a restricted use regulated loan from VFL, they are afforded the protection offered to borrowers like them under those provisions – subject to any restrictions and limitations. So, I've taken this section into account when deciding what's fair in the circumstances of this case.
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> S140A looks at the fairness of the relationship between Mr W, Mrs W and VFL arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under the 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.
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> 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 W'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

The FCA's DISP rules specifically relate to complaints about regulated financial products and services and provides rules and guidance about what this service is able to consider. 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 a consumer, we don't 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.

Mr and Mrs M's timeshare product experience

In their statement, Mr and Mrs W say they had attended a meeting with A in or around December 2015 when they agreed to purchase a timeshare product from them. At that time, they say they already held an existing timeshare product. So, it appears the purchase in November 2016 (being the subject of their claim here) was at least their second purchase with A, and third experience of a timeshare product.

So, based upon this information, I think it's reasonable to conclude that Mr and Mrs W had a reasonably strong awareness about the products they'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude that Mr and Mrs W were familiar with A (as a timeshare supplier) and the sales presentations given by them. Particularly as the presentation in November 2016 wasn't their first experience.

I'm also aware that Mr and Mrs W agreed to subsequent purchases of timeshare products from A on at least two further occasions in 2017 and 2018. Again, these were said to involve long sales presentations, as they say they experienced in 2016.

The claim for misrepresentation

Having considered the PR's original claim letter together with documentation from the time of the sale, I can see that the claim was submitted to a different business – rather than VFL. So, I can't say that VFL's failure to respond was unreasonable in these circumstances.

S75(3) says that *"Subsection (1)[3] does not apply to a claim – (so far as any claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000[…]".* The cash price shown within the loan agreement in November 2016 was £92,500. As a consequence, I don't believe a valid claim can be made under S75. But it is possible that any misrepresentation could be considered under S140A if it could be found to give cause to the creation of an unfair debtor-creditor-supplier relationship.

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 W) 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;

[3] In relation a misrepresentation or breach of contract.

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 must have regard for *"anything done (or not done) by or on behalf of the creditor".* So, I think the alleged misrepresentations were, therefore, relevant here. Even though I don't think they can be considered under S75 due to the restriction within S75(3).

Misrepresentation

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 holiday product to Mr and Mrs W in 2016. In other words, that they told them something that wasn't true in relation to one or more of any points raised. I would also need to be satisfied that any misrepresentation was material in inducing them to enter the contract. This means I would need to be persuaded that Mr and Mrs W reasonably relied upon any false statements when deciding to buy the timeshare product.

The difficulty I have is identifying what was actually said at the time of the sale in 2016. Mr and Mrs W have provided limited details and evidence to support the misrepresentations they say A made, although I acknowledge that they do say they were told these things. So, I've thought about this and whether there's any evidence available from the time of their purchase in 2016.

In the letter of claim, the PR said that Mr and Mrs W *"were advised that this investment would make a profit and would sell much quicker as these were weeks in the High Season which were more in demand".*

Although not determinative of the matter, I've seen limited specific evidence from the time of the sale in 2016, such as marketing material or any of the wider purchase or membership documentation. I've only seen pages one to four the Membership Application Agreement which appears to have been signed by both Mr and Mrs W. I haven't found anything within this document to corroborate Mr and Mrs W's allegations. In particular, that there was any reference to the product purchased being an investment or any guarantees as regards its future saleability. Further, I can find no refence to the product generating a profit (potential or otherwise) or its ability to generate any investment return or rental income.

Because of that, I can't reasonably reach the conclusion that Mr and Mrs W were told something by A that amounted to misrepresentation. Specifically, that A represented their purchase in 2016 as an investment.

The sales process

It's alleged that A used *"aggressive and persistent sales tactics"* and it was made clear they *"had to make the decision on the day and were given no time to think about it in any detail".*

I acknowledge what Mr and Mrs W say in their testimony about the length of the sales presentation they attended. So, I can understand why it's argued that the prolonged nature of the 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 W agreed to the purchase in 2016 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 usually 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 Mr and Mrs W 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 contrary to Regulation 7 of the Consumer Protection from Unfair Trading Regulations ("CPUT").

I've considered the Supreme Court decision in Plevin which makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purposes of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. As S140A (2) says, courts shall have regard to *"all matters it thinks relevant (including matters relating to the creditor* [VFL] *and matters relating to the debtor* [Mr and Mrs W]*)."*, it is wide enough to include the consumer's ongoing exposure and how a supplier has enforced any terms that are or might be unfair.

Mr and Mrs W already held an existing timeshare product they'd purchased previously from A. And they've confirmed they'd attended a previous meeting and presentation with A. So, importantly this wasn't their first purchase from A. And neither was it their last. Mr and Mrs M weren't new customers and I think it's likely they would've benefitted from their previous experience and what they might expect from the meeting and sales presentation in 2016.

Whilst there could be 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 S'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 a court might say this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

Time to consider the agreement(s)

As I've already said, I've seen limited documentation from the time of the sale. But having previously seen similar documents relating to A's product sales, I'm aware they do include a period of 14 days from the date of agreeing to the purchase within which to cancel the agreement without giving any reason – as required under the TRs.

So, even if I were to find that Mr and Mrs W weren't given adequate opportunity to read and consider the purchase documentation at the time of the sale - and I make no such finding - I would expect them to have had sufficient time in which to consider their decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before the loan was drawn and the purchase completed. There's no suggestion or evidence that Mr and Mrs W did raise any questions or concerns prior to the sale being completed. Or that they had any intention of cancelling the agreement. Furthermore, it's apparent they went on to make further purchases.

Disclosure of Commissions

Part of Mr and Mrs W's claim questions the status of A (as the introducer of the loan) and their resultant responsibilities towards them. In particular, it's argued that a

payment of commission by VFL to A wasn't declared to Mr and Mrs W. But I don't think the fact that VFL might have paid A commission was incompatible with their role in the transaction. A wasn't acting as an agent for Mr and Mrs W, but as the supplier of contractual rights obtained under a timeshare product agreement. And, in relation to any 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 and Mrs W advice or information on that basis. As far as I'm aware, Mr and Mrs W were always at liberty to choose how they wanted to fund any purchase and there was no requirement or duty upon A to provide funding recommendations or options.

What's more, I haven't found anything to suggest VFL were under any regulatory duty to disclose the amount of commission paid in these circumstances. As I understand it, the typical amounts of commission paid by lenders to suppliers (like A in this case) was unlikely to be much more than 10%. I haven't seen any evidence to suggest otherwise. 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 an 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 W's claim that could be considered outside of S75 and S140A. In particular, in relation to whether VFL undertook a proper credit assessment. Mr and Mrs W have made an allegation suggesting the loan was provided irresponsibly. In particular that no affordability checks were undertaken by A or VFL.

VFL haven't provided specific details of the checks they undertook. So, If I were to find that they hadn't completed all the required checks and tests – 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 W in order to uphold their complaint here.

Mr and Mrs W provided copies of their personal bank account statements for the three-month period up to the point of the purchase in November 2016. Our investigator attempted to construct an analysis of Mr and Mrs W's income and expenditure during that period to try to establish whether there were any existing indicators they might not be able to afford the loan provided by VFL.

I've considered that information carefully. Unfortunately, it's not entirely clear what Mr and Mrs W's complete financial situation was at the time. I've also not seen a copy of their personal credit files. That said, the personal bank account statements show that the accounts appear well managed. And although each account benefits from its own agreed overdraft limit, these are rarely (if ever) used.

Accepting that the amount borrowed wasn't insubstantial, I haven't seen any evidence to show that the loan was unaffordable or unsuitable for them. And I've not seen anything that supports any allegation of financial difficulty from that time. I accept that Mr and Mrs W say they subsequently re-mortgaged their property to restructure the loan (and subsequent loans). However, their testimony suggests this was done in order to benefit from lower UK interest rates at the time, rather than in an attempt to address any financial problems.

With no other specific information about Mr and Mrs W's actual position at the time and no supporting evidence that they struggled to maintain repayments, I can't reasonably conclude the loan was unaffordable for them or that they suffered loss as a consequence.

Summary

I would like to reassure Mr and Mrs W that I've carefully considered everything they've said together with all the information they (and the PR) provided and referred to. Their complaint relates specifically to their purchase in November 2016. So, while they've said a lot about other purchases – and the actions of A generally, I can only consider the specifics of what happened in November 2016. I appreciate they will be disappointed, but in the absence of specific corroborating evidence from the time of the sale in 2016, for the reasons I've said above, I can't reasonably say that VFL's failure to uphold their claim was unfair or unreasonable. Because of that, I currently don't intend to ask VFL to do anything more.

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.

VFL haven't responded to my provisional decision ("PD").

The PR acknowledged receipt and requested more time to consult with Mr and Mrs W before providing any further comment and evidence. So, I agreed to extend the time permitted in this case.

The PR have now responded providing further comments and information for me to consider. I will summarise these below together with my observations and responses. The PR have also referenced a points-based product that doesn't appear to be the one purchased by Mr and Mrs W in November 2016. So, I can't see this has relevance to their specific complaint here.

Mr and Mrs W have made various observations and comments they feel are relevant to the outcome of their complaint to VFL. This is supported with copies of email exchanges, social media posts and messaging service transcripts. I don't propose to detail everything that's been said although I'd like to reassure Mr and Mrs W that I have looked at everything they've provided.

<u>The purchase price</u>

It's suggested that while the documented purchase price I mentioned in my PD is correct (according to the documentation provided), A omitted to include details and value attributed to existing timeshare products which were traded against the purchase in November 2016. And as a consequence, Mr and Mrs W believe the real price paid was higher.

Ultimately, I don't think this has bearing upon my findings here. I explained in my PD that the documented purchase price exceeded the amount covered under both S75 and S75a. And that remains the case, whether or not any trade in value is factored in.

<u>Mr W's understanding during the sales presentation</u>

It's suggested that Mr W's personal circumstances impeded his ability to fully take in and understand what was presented at the time of the sales presentation.

The documentation shows the purchase was in joint names. And Mrs W was, as I understand it, present at all times. Furthermore, as I said in my PD, Mr and Mrs W benefited from the 14-day cooling off period permitted under the TR's. And with nothing to suggest they raised any questions or concerns during that period, I think it's unlikely a court would find this caused unfairness under S140A.

<u>Assurances of rental and resale potential</u>

Mr and Mrs W insist A made verbal assurances using the word *"investment".* But in the absence of anything to corroborate that assertion leading up to and at the time of the sale, it's still not possible for me to be certain about what was or wasn't actually said.

I also 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 the product Mr and Mrs W purchased here. And I've found nothing within the limited evidence provided from the time of the sale which suggests A provided any assurances or guarantees about the future value of that product.

It would need to be evidenced that A had presented the product in such a way that used its investment element to persuade Mr and Mrs W to contract. Only then is it possible it could 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 not been provided with anything from the time of the sale that supports that allegation.

Attempts to rent/sell the timeshare

Mr and Mrs W outline issues they experienced when trying to put their timeshare up for rental and/or resale. They've supported this by providing copies of email exchanges from 2018 and 2019 – some time after the purchase was completed.

Having considered the limited documentation available from the time of the sale, I haven't found anything to suggest A had any contractual obligation to provide such a service or gave any guarantee of success. Mr and Mrs W have provided a copy of a rental agreement from January 2019 – more than two years after the original sales presentation. It clearly states A *"cannot guarantee any amount of rental return".*

I've also seen email evidence that Mr and Mrs W tried to rent out and/or resell the timeshare weeks associated with the product they purchased. And while this might have formed part of their own personal strategy, I can't fairly say, with any certainty, that strategy resulted from anything A said to them at the time of the sale.

Subsequent redevelopment delays

Mr and Mrs W suggest A made certain assurances – after the purchase – regarding plans for redevelopment and expansion of their resort which were subsequently delayed. However, I've seen no evidence this either formed part of the original sales presentation or that those plans pre-existed the sale in question. And because of that, I don't see how this would have influenced Mr and Mrs W's decision to complete the purchase in November 2016.

If it was proven delays in any redevelopment resulted in losses for Mr and Mrs W – specifically relating to the product they purchased in November 2016 - it's possible this could've resulted in a breach of contract. Particularly if it meant Mr and Mrs W couldn't use the product they'd purchased. However, I make no such finding here. And as I can't see that such a claim has been made to VFL anyway, I don't think this helps the complaint being considered.

The relationship with employees of A

Mr and Mrs W have referred to A's salesperson and their partner (also an employee of A). They've provided evidence from social media and messaging services to illustrate the relationship that developed between them and how this influenced them.

It's not uncommon for personal relationships to be formed between consumers and individual employees of a business. Particular where there's ongoing and regular interaction as a consequence of the product purchased. The legislation, regulations and codes of practice that apply serve to ensure that consumers are treated fairly – regardless of any relationship that may or may not develop. While I acknowledge Mr and Mrs thoughts on this aspect, I've already considered the regulations that applied in my PD and how they relate specifically to the purchase in November 2016.

Mr and Mrs W's comments haven't persuaded me to vary from those findings. Importantly, it seems most of this evidence and activity post-dates the product sale being considered here.

So, I can't say this influenced Mr and Mrs W's original decision to proceed with the purchase.

Links between A, VFL and another entity

Mr and Mrs W have provided an overview of links they've identified between various entities they've dealt with during the period of their timeshare ownership. They also highlight common individuals associated with those various entities. However, their concerns appear to relate to events they say occurred after they purchased the product in November 2016. And as there hasn't been any specific claim or complaint made to VFL relating to those events, or the other related entities and individuals I don't see how they would be relevant to their decision to purchase in November 2016.

"Imputation & Vicarious Liability"

Mr and Mrs W believe the actions of various individuals and entities (after the sale in November 2016) ultimately resulted in unfairness which they believe should be considered by this service.

This service can only consider complaints against regulated financial businesses – in this case VFL. I'm unable to consider concerns about other entities as part of the specific complaint against VFL where there isn't a link to the original purchase and a resultant link via the CCA. This service also isn't afforded powers to consider complaints against other types of businesses or individuals which aren't regulated by the FCA – including A.

I explained in my PD that I can only consider the claims against VFL under S140A and whether VFL's response to Mr and Mrs W's claim was fair and reasonable. And that's what I've done here. Much of what has been said I've already addressed in my PD. And nothing new that's been provided here leads me to vary from those findings.

Summary

Most (if not all) of what Mr and Mrs W have said and provided in response to my PD relates to events and exchanges that happened after they'd already agreed to purchase the product in November 2016. So, while it's clear they believe these serve to illustrate the alleged misrepresentations and unfairness, I can't fairly say that anything they've shown was said or done after the sale contributed to their original decision to purchase.

I would like to reiterate that I fully appreciate Mr and Mrs W's frustrations and strength of feeling here. But having carefully considered everything, I'm not persuaded to vary from my provisional findings. And as a consequence, I won't be asking VFL to do anything more.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W and Mr W to accept or reject my decision before 16 October 2023.

Dave Morgan
Ombudsman