DRN-4267523

The complaint

Mr T complains that Vacation Finance Limited ("VFL"), unfairly turned down his claim under the Consumer Credit Act 1974 ("CCA") in respect a of a purchase made in April 2018. Mr T is represented by a professional representative ("PR").

What happened

Mr T made a number of purchases from a timeshare company I will call A on the following dates:

- 14 March 2010
- 31 March 2012
- 3 April 2013
- 9 April 2014

They were funded by loans from different providers. In April 2018 he traded these in for a points based membership at a cost of £26,500. This was funded in part by a loan from VFL.

In April 2021 PR submitted a letter of claim to VFL. In summary it said that:

- As A was in liquidation there had been a breach of contract.
- Mr T had been pressurised into making the purchase.
- He had been trying to sell his existing timeshare products but without success and had been advised to replace them with the new one which would be easier to sell.
- He was told it would also allow him to access more holidays in more destinations.
- He was told it was a special price on the day.
- He tried to sell it but there is no market for it and A offered no help.
- He was not told that VFL had paid commission to A.
- No other options were made available to fund the purchase and no affordability checks were carried out.
- A had broken the Timeshare Regulations in a number of ways.
- There had been an unfair relationship as set out in s.140A CCA.

VFL rejected the claim and said that no evidence had been supplied in support of the claim of misrepresentation. It also pointed out that Mr T had not made use of the 14 day

withdrawal period within the agreement.

VFL pointed out that Mr T was not obliged to take a loan out with it and it noted he had paid for the timeshare in part using other means. It also said that proper affordability checks had been carried out and it noted that Mr T had paid off the loan in April 2020. It pointed out that this was not the first purchase Mr T had made from A and he would have understood what he was acquiring. It said he had made use of the product on a number of occasions as he had with his previous purchases.

It said that whilst A had ceased trading the club was subsequently managed by another entity and customers were able to make use of its accommodation.

It confirmed no commission had been paid to A and noted that Mr T was still able to use his membership despite PR's claims to the contrary.

PR brought a complaint to this service on Mr T's behalf reiterating the points it had made in the letter of claim. It also supplied a statement from Mr T. In this he said he had been sold the points as a means of realising his investment as well as maintaining the ability to have a holiday. He had been told the new product would be valuable and would offer a range of top level experiences.

The complaint was considered by one of our investigators who recommended it be upheld. She said that A's products could only be sold through its own marketplace and this had since been closed. She felt it was unlikely that the points could be sold and she considered Mr T's testimony supported his complaint. She considered he had only purchased the new product as a means of selling it and he had done so due to misrepresentation by A.

I issued a provisional decision as follows:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- *that the lending financed the contract giving rise to the claim; and*
- *that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.*

Breach of Contract

I do not believe that the liquidation of A in 2020 led to a breach of contract. New management companies were appointed, and Mr T was able to use the timeshare as usual after that date.

On 8 July 2020 the trustee wrote to all the club members. Its letter said:

"We have good news for all members. Following discussions with the liquidators of both [AR

and AXP] and with the directors of [GSR] (the owner of the resort) it has been decided that in the best interest of all clubs' members, [FNTC] be requested to establish a new company to act as manager of the clubs on behalf of all clubs' members.

"This new management company will be a non-profit making entity and its only role will be to manage the clubs for, and on behalf of, its members.

"We'd like to reassure you that the future of the clubs is secure. From your perspective as a member, there is a lot to look forward to as soon as governmental travel restrictions are lifted. We are also pleased to report to you that [R Resort & Spa], [GS] in Malta has reopened and is available for member use after the resort has successfully established COVID-19 health and safety precautions."

On the face of it, therefore, the services linked to Mr T's purchase of XP points remain available to him and are unaffected by the liquidation of the A companies.

Misrepresentation

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.

I have noted Mr T's testimony and VFL's explanation of A's approach to sales. What I have not seen is the sales agreement between Mr T and A.

As I have said, much of what Mr T says he was told here concerns the possibility of selling his timeshares. But he also says that he was told the purchase of XP points would make that easier. I am afraid however that I think it most unlikely that he was told that. There is no explanation of how that could be the case or why Mr T believed that the purchase of points would help with the sale of timeshares. If he had been told that – or had otherwise believed that to be the case – I would have expected him to ask for more information.

As I have said I have not seen the agreement signed by Mr T, but I am aware that such agreements address the transfer of rights. I believe it would have allowed the transfer of membership, including by sale, subject to the written approval of A. I think however it is unlikely that Mr T was told that XP points were an investment. Given the difficulty he has described in selling timeshares, it is in my view unlikely that he believed XP points would be easier to sell than an interest in an identifiable property. Given that these points were covered in the Club Rules and that Mr T had a 14-day cooling off period in which to check any matters which were of particular importance to him, I do not believe it was unreasonable of VFL to decline his claim under section 75.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments. In deciding whether to make an order, a court can have regard to any connected agreement; in this case, that could include the agreement for the sale of the timeshare product in 2018. PR seems to have based this element of the claim on the payment of commission, but VFL has told it and this service that it did not pay commission. As such I can see no basis for a successful claim under s.140A.

Lending Decision

PR says that Mr T was not given a choice of lenders. I note he paid part by bank transfer and so it seems likely that Mr T was not required to rely on VFL.

PR says too that the payment of commission should have been disclosed to Mr T. As I have explained none was paid, but even if it was there is no suggestion that it was important to him, or that it would have made any difference to his decision to purchase.

In any event, A wasn't acting as an agent of Mr T, but as the supplier of XP points. It also introduced VFL as a lender, if Mr T wanted to take out a loan. But it does not appear to me that it was A's role to make an impartial or disinterested recommendation or to give Mr T advice or information on that basis.

Conclusion

It is not for me to decide whether Mr T has a claim against A, or whether he might therefore have a "like claim" under section 75 of the Consumer Credit Act. Nor can I make orders under sections 140A and 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr T's complaint. In the circumstances, I think that VFL's response to Mr T's claims was fair and reasonable."

PR responded stating that:

- A had consistently marketed this product as an investment to a number of PR's clients. More broadly it suggested that more weight be given to other claims by consumers.

- The 2018 purchase was a different type of product, but I had wrongly dismissed the earlier purchases as having no relevance. It argued that the representations of A's agents in the earlier purchases had contributed to Mr T believing he had purchased an investment. It also suggested that under s.56 and dealings he had with A prior to the purchase in 2018 are deemed to be the responsibility of the lender.

- My provisional decision was based on a misunderstanding regarding the sale of points. It said that Mr T had traded in his existing timeshare product which had been represented as an investment as a means of realising this investment.

- My provisional decision had not taken into account numerous other complaints about A. And it was accepted that there was no genuine market for re-selling timeshare points.

- A's actions contravened the Consumer Protection from Unfair Trading Regulations 2008 ("CPUTR") in that it misled Mr T.

- The closure of A's resale scheme amounted to a breach of contract.

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 have considered the points raised by PR, but they do not lead me to a different conclusion. I will explain why.

This service considers each complaint on its merits and on the evidence submitted in support of any claims made by the consumer or their representative. In this case the only material I have seen from PR is the letter of claim and the testimony of Mr T. I have not been given a copy of the agreement with A save for a single page which confirms the purchase.

The claim hinges on Mr T's assertion that he bought all the timeshare products as investments. However, I note that he says that subsequent purchases were made when he was on holiday. So it would appear that even if I accept the claim that the products were bought as investments they were not solely bought as such. He clearly was making use of them for holidays.

In my experience the documentation used by A does not promote the products as investments. However, as PR has not submitted the agreement signed by Mr T and accompanying paperwork I cannot say for certain what he agreed to. Nor can I say what was said by A's representatives. It is quite possible that they referred to the products as investments in future holidays, but I cannot safely conclude they were promoted as financial investments. PR is seeking a significant payment from VFL, but without clear evidence in support of the claim.

I take the point about Mr T believing the 2018 purchase would unlock his earlier purchases. His testimony is not so clear cut on that matter. For example he says: "*The points were represented as an upsale on the understanding that they were better than the units in order to resell and therefore realise the profits in our investment.*" It is possible he was referring to his preceding purchases as investments. I appreciate he makes repeated reference to the products being investments, but as I have explained above, other than his assertion I have no evidence that they were sold as such.

It also applies to the claim that CPUTR was contravened. Quite simply I cannot say it was, based on the claims made by Mr T or by PR.

As for the claim that the closure of the resale programme was a breach of contract I consider that would only be material if it was central to the purchase. PR has however provided no further evidence of the marketing of the timeshare, or even of the payment of a fee for the use of the re-sale scheme. I note R says Mr T was unable to sell his points, but I have seen no evidence that he tried to do so.

In the circumstances, I am not persuaded that VFL (whether directly or through its agents) misled Mr T at the time of the sale about what he was buying or about the terms on which he was doing so.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 15 September 2023.

Ivor Graham
Ombudsman