DRN-4514310

The complaint

Mr and Mrs R complain that Vacation Finance Limited trading as VFL Finance Solutions ("VFL") - didn't provide a fair and reasonable response to their claim under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") in relation to a timeshare product financed by a loan they provided.

What happened

Mr and Mrs R were on holiday in or around June 2018 using a timeshare product they'd previously purchased from a supplier who I'll refer to as "A". During that holiday, they met with A for a catch-up. Mr and Mrs R say this meeting rapidly turned into a sales presentation during which they agreed to exchange their existing timeshare product(s) for a points-based product offered by A.

In addition to the product(s) exchanged, it was agreed that Mr and Mrs R would pay £26,500 towards the points they purchased. They paid part of this with a by bank transfer of £7,950 and the balance of £18,550 was funded under a fixed sum loan agreement over 120 months with VFL.

In April 2021, using a professional representative ("the PR"), Mr and Mrs R submitted a claim to VFL under sections 75 and 140A of the CCA. In the claim, the PR alleged that Mr and Mrs R purchased the timeshare product having relied upon representations made by A which turned out not to be true. And under section 75 of the CCA ("S75"), VFL are jointly liable for those misrepresentations. In particular, the PR allege A had suggested the purchase of the points-based product:

- would reduce annual maintenance fees payable to £1,500;
- would provide access the whole year round with the option to sell points to receive an income;
- apartments could be sold for £45,000 each which would replace some of Mr and Mrs R's savings; and
- would enable Mr and Mrs R to go on camper van holidays with guests and/or family – but it was later discovered there was an age restriction impacting Mr and Mrs R and guests could only be taken every four years.

Further, the PR said that as A are in liquidation, they can't provide the service sold. They suggest this constitutes a breach of contract which VFL are jointly liable for under S75.

The PR also allege that the misrepresentations, together with other things done (or not done) by A renders the relationship with VFL, under the agreements, unfair pursuant to section 140A of the CCA ("S140A). In particular, the PR allege that A breached various regulations and legislation that applies and:

- pressured Mr and Mrs R into entering the purchase and loan agreements;
- allowed them no time to read or consider the agreements;
- failed to undertake appropriate affordability checks for the loan;
- failed to advise Mr and Mrs R of any commission they received from VFL;

- made no comparisons to other loan companies; and
- didn't inform Mr and Mrs R that they were free to arrange their own finance.

VFL didn't uphold Mr and Mrs R's claim. They didn't agree there was any evidence to support the allegations of misrepresentation. Or that there was any evidence to support the allegations of unfairness under S140A. They also didn't think there was any evidence of loss from the alleged breach of contract.

The PR didn't agree with VFL's findings, so referred Mr and Mrs R's claim to this service as a complaint. One of this service's investigators considered all the information and evidence provided. Having done so, they didn't think VFL had acted fairly. In particular, they were persuaded that A had represented the points-based product to Mr and Mrs R as something that could be sold more easily and provide an income. But they haven't been able to do that, and our investigator thought A would've known that at the time of the sale. Our investigator thought VFL hadn't fairly assessed Mr and Mrs R's claim under S75. And had it done so, believes it would've been upheld. They thought VFL should put things right but didn't suggest how that should be done.

The PR acknowledged our investigator's findings but said they haven't received any subsequent offer of settlement from VFL. VFL asked that the investigator consider their own findings further taking into consideration the contents of the original claim response. I can't see that we've received anything further from VFL and they don't appear to have accepted our investigator's findings. So, as an informal resolution couldn't be achieved, Mr and Mrs R's complaint has been passed to me to consider further.

Having done that, I reached a different outcome to that of our investigator. So, I issued a provisional decision on 15 November 2023 giving the parties to this complaint the opportunity to respond to my findings before I reach 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.
>
> S75 provides consumers with protection for goods or services bought using credit. Mr and Mrs R paid for the timeshare product under a restricted use fixed sum loan agreement. So, it isn't in dispute that S75 applies here. This means they would be afforded the protection offered to borrowers like them under those provisions. And as a result, 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 and Mrs R and VFL arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, 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 this service is able to consider specifically relates to whether I believe VFL's failure to uphold Mr and Mrs R's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.

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

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 don't 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, this 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.

Based upon the information provided, it appears Mr and Mrs R's claim here is one of a number of separate and concurrent claims submitted relating to various timeshare purchases made by Mr and Mrs R over a period of time. VFL have pointed this out in their claim response. So, it's important to make clear that my decision here is only looking at the purchase Mr and Mrs R made in June 2018. And while I may consider other purchases made, I will do that where I feel it has relevance to the claim being considered.

Mr and Mrs R's timeshare experience

In their written testimony, Mr and Mrs R have provided details of their various purchases and product holdings with A over the years. These include purchases made in 2007, 2008, 2009, 2010, 2011, 2012 (x 2), 2014 (x2), 2015 (x2), 2016, 2018 (the subject of this complaint) and 2019.

From what Mr and Mrs R have said, the original purchase in 2007 appears to relate to a traditional timeshare apartment in a specified season. Additional timeshare apartments were then purchased and subsequently upgraded to higher specifications and seasons over time. Mr and Mrs R suggest that many of the purchase decisions were driven by a desire to derive a rental income with an opportunity to sell them later for a profit.

It's important to acknowledge that as part of this complaint, I've not been provided with anything suggesting that VFL were involved in financing any of the aforementioned purchases. And in any event, they don't form part of this complaint – other than for background information. So, in considering Mr and Mrs R's complaint here, I haven't investigated any of the (alleged) circumstances of those transactions.

Was the timeshare product misrepresented?

For me to conclude there was misrepresentation by A in the ways that have 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 and Mrs R something that wasn't true in relation to the allegations raised. I would also need to be satisfied that those misrepresentations were material in inducing Mr and Mrs R to enter into the purchase contract. This means I would need to be persuaded that they reasonably relied upon false statements when deciding to buy the timeshare points.

From the information available, I can't be certain about what Mr and Mrs R were specifically told (or not told) about the benefits of the points-based product they purchased. It was, however, indicated that they were told these things. So, I've thought about that alongside the evidence that is available from the time. Although

not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr and Mrs R's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says they were told.

In particular the PR mention that the points-based product would result in reducing the annual maintenance fees to £1,500. But I've not seen this documented. And I haven't seen any comparison of what Mr and Mrs R were previously or subsequently required to pay. I've also not seen anything that describes how the points could be used. Let alone whether they provide access the whole year round with an option to sell points to receive an income. And I've seen no documentary evidence from the time to substantiate Mr and Mrs R's suggestion that they were told they could go on a camper van holiday with family and friends. Or that any restrictions to that weren't explained or provided to them at the time of the sale.

Part of the claim references an allegation that A told Mr and Mrs R they would be able to sell apartments for £45,000 each. Again, I've seen nothing to substantiate this. And as the product purchased was points-based, I fail to see how this would operate in any event. Ultimately, some of the allegations suggest the product was sold as an investment that could then be sold at a profit and/or derive an income. But there's simply no reference to this within the limited documentation provided.

I do think it unlikely the product 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 it. 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 Mr and Mrs R purchased. A would had to have presented the product in such a way that used any investment element to persuade them 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.

Mr and Mrs R have provided copies of their email exchanges with A in which they requested paperwork to enable them to sell part of their points allocation in 2020. So, I'm persuaded that they intended to dispose of part of their points holding. And Mr and Mrs R may well have made the purchase as part of their own personal investment strategy. However, the question here is whether that strategy was specifically driven by any promises or assurances given by A. I acknowledge what Mr and Mrs R have said, but I haven't found anything from the time of the sale that supports their assertions. And given their allegations around their ability to use the points towards a camper van holiday, I'm not persuaded that they purchased the points solely as a form of investment. It seem clear they did intend to use them for holiday purposes.

In one of A's email responses relating to Mr and Mrs R's desire to sell points, they point out *"there is no guarantee on a timeframe or amount being given".* So, I can't reasonably say, with any certainty, that A did guarantee the product could be sold for a profit. I'm aware that A did previously offer a timeshare resale service. But I haven't seen anything that shows they were contractually obliged to do so. And even if they were, I haven't seen anything suggesting they gave any guarantees of a successful sale or the price that could be achieved. Because of that, it's not possible to quantify if Mr and Mrs R did, in fact, incur any attributable loss in these circumstances.

Based upon the evidence available specifically relating to Mr and Mrs R's claim here, I can't say, with any certainty, that A did misrepresent the points-based product in the manner alleged.

<u>The breach of contract claim under S75</u>

As far as I understand, 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 agreement requirements. So, in the absence of any specific explanation or evidence to support why Mr and Mrs R 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 R) 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).

The breadth of the unfair relationship test under S140A is stark. But a simple breach of a legal or equitable duty doesn't necessarily make the relationship unfair. It also isn't just about 'hard-edged requirements' – though the standard of commercial conduct reasonably expected can be important. And while there may be features of the transaction that operate harshly against the debtor, it doesn't necessarily follow that the relationship is unfair. After all, such features may be required in order to protect what a court regards as legitimate interests.

Relationships between businesses and private individuals are also often characterised by large differences of knowledge and expertise – which means they're inherently unequal as a result. But as far as the Supreme Court was concerned in *Plevin*[3], it can't have been parliament's intention that such relationships should be liable to be reopened for that reason alone.

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). And I think it's relevant to acknowledge Mr and Mrs R's existing membership and relationship with A. They'd previously purchased products from A. So, I think it's reasonable to conclude that, at the time of the purchase in June 2018, they 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 Mr and Mrs R were familiar with A (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the purchase in June 2018 certainly wasn't their first.

- The pressured sale and process

The claim suggests Mr and Mrs R were pressured into purchasing the product and entering into the finance agreement with VFL. I acknowledge what the PR have said about this. So, I can understand why it might be argued that any prolonged presentation might have felt like a pressured sale – especially if, as Mr and Mrs R 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 R agreed to the purchase and the finance agreement

[3] The Supreme Court's judgement in *Plevin v Paragon Personal Finance Ltd [2014]*

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, suggesting they'd agreed to it when they didn't want to. And neither the PR nor Mr and Mrs R have provided a credible explanation for why they didn't subsequently seek to cancel the transaction within the 14-day cooling off period permitted here – both under the purchase and loan agreements.

If they only agreed to the purchase and finance agreement because they felt 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 agreements. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that they made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired contrary to the Consumer Protection from Unfair Trading Regulations ("CPUT").

- Time to read and consider the information provided

I've thought about the information that I believe should have been provided to Mr and Mrs R as required under the TRs. I've seen very little from the time of the sale here, although there's no suggestion that A didn't provide all the required documentation.

Whilst it's possible Mr and Mrs R weren't given sufficient time to read and consider the contents of the documentation at the time of the sale, even if I were to find that was the case – and I make no such finding – it's clear they still had 14 days to consider their purchase and raise any questions or concerns they might've had. And ultimately, if they were unhappy or uncertain, they could've cancelled the agreement without incurring any costs.

Furthermore, I understand the finance agreement also included a withdrawal/cancellation period of 14 days. But I haven't seen any evidence that Mr and Mrs R did raise any questions or concerns about either agreement.

- A's responsibilities and disclosure of commission paid

Part of Mr and Mrs R's S140A claim is based upon the status of A (as the introducer of the loan) and their (and VFL's) resultant responsibilities towards them. In particular, it's argued that the payment of commission by VFL to A was kept from them. In response to the claim, VFL confirm that no commission was paid here.

That said, I don't think any payment of commission by VFL to A would've been incompatible with their role in the transaction. A weren't acting as an agent of Mr and Mrs R, 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 and Mrs R 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 and Mrs R requested those details from VFL (or A) 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.

Were the required lending checks undertaken?

There are certain aspects of Mr and Mrs R's complaint that could be considered outside of S75 and S140A. In particular, in relation to whether VFL undertook a

proper credit assessment. The PR allege that a proper affordability check wasn't completed by A.

Ordinarily, responsibility falls with the lender to conduct affordability checks as set out within the rules and guidance in the FCA Handbook (CONC[4]) – VFL in this case. In response to the claim, VFL said they'd followed their usual process and conducted an appropriate affordability assessment.

It's relevant that the PR haven't provided any evidence to show that the loans were unaffordable or unsuitable for Mr and Mrs R. And I've not seen anything that supports any suggestion of financial difficulty from that time.

If I were to find that VFL hadn't complied with the regulatory guidelines and requirements that applied here – 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 R in order to uphold their complaint here. Furthermore, I don't believe any regulatory failure would automatically mean that the loan agreement is null and void. It would need to be proven that any such failures resulted in a loss to Mr and Mrs R as a consequence.

But as I've seen no specific information about Mr and Mrs R'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 any loss as a consequence.

Summary

I do realise Mr and Mrs R will be disappointed in my findings. And I want to reassure them I've carefully considered everything that's been said and provided. Having done so, I haven't found any evidence from the time of the sale to support the allegations included within their claim. So, I can't say that VFL's failure to uphold it was ultimately unfair or unreasonable. And because of that, I don't currently intend to ask them 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. But the PR did acknowledge receipt and confirmed they would seek further instruction from Mr and Mrs R. But since then, no further comment, information or evidence has been provided. So, in these 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 R's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R and Mrs R to accept or reject my decision before 11 January 2024.

Dave Morgan
Ombudsman

[4] The Consumer Credit Sourcebook