DRN-4384387

The complaint

Mr and Mrs C complain that Vacation Finance Limited ('VFL') didn't fairly or reasonably deal with claims under Sections 75 and 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a timeshare in May 2018. They also say that the credit agreement they entered into with VFL was unaffordable. Mr and Mrs C are represented by a professional representative ("PR").

What happened

In May 2018 Mr and Mrs C purchased timeshare points from a company I will call A. Prior to this they had purchased timeshare products from A in September 2015, September 2016 and April 2017. This product was a point-based holiday club membership which cost £34,286 funded by a loan from VFL for £23,286 with the balance coming from trading in existing products.

This decision concerns the May 2018 purchase although Mr and Mrs C have made reference to the sales process for the previous purchases. They have said that on each occasion they took holidays they were pressurised to make additional purchases. In May 2018 they say they were told A was making changes and they would not be able to sell back their existing timeshare(s) and they would have to convert to a points based membership..

They say they were told that the points would increase in value, but that turned out to be wrong. They also say that they were not told that the points would be lost if they weren't used. Mr and Mrs C say they were reliant on benefit income and didn't want to take on such a large financial commitment.

PR submitted a claim to VFL in June 2021 under s.75 and s.140A Consumer Credit Act 1974 ("CCA"). It said Mr and Mrs C had been subjected to pressure and the product had been misrepresented. They had not been able to sell it. It added that they had not been told about commission payments made by VFL and no affordability checks had been carried out. PR said A had contravened the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, SI 2010/2960 and had acted in a manner which went against the Consumer Protection from Unfair Trading Regulations (CPUT) 2008.

VFL rejected the claim and said they had not been given evidence to support the claims. VFL pointed out that Mr and Mrs C had a 14 day cooling off period which they had not used so even if they had been unable to understand the documentation at the time of sale they could have satisfied themselves subsequently.

It said the requisite affordability checks were carried out and there was no evidence of pressure. Furthermore Mr and Mrs C had made several purchases from A before and would have had some awareness of what they were buying. It explained that although A had gone into liquidation the timeshare club was being operated by another company so there was no breach of contract.

PR brought a complaint on Mr and Mrs C's behalf to this service. It was considered by one of our investigators who recommended it be upheld. She considered they had been misled and

had only made the purchase on the basis that it could be resold. However, she believed this facility was not made available before A went into liquidation. She also said it was known that the ability to sell timeshare at a profit was very rare.

However, she concluded that the s.75 claim fell outside the monetary limits and she thought VFL was right to reject it. She considered the s.140A claim and decided it succeeded because the product had been misrepresented and this had created an inequality of knowledge. She also expressed concern about the level of borrowing, but said that given she was minded to uphold the complaint she need not reach a conclusion on this point. VFL didn't agree and submitted a copy of its final response letter.

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.*

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision 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 available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld.

The S. 75 Claims for Misrepresentation

S. 75 of the CCA states that, when a debtor (Mr and Mrs C) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (VFL) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should they choose to.

As our investigator has pointed out that s.75 only covers purchases up to £30,000 in value and the cost of the timeshare points exceeds that. However s.75A covers purchases up to

£60,260 in value where the supplier has become insolvent. However, it only applies to claims for breach of contract. It does not cover misrepresentation.

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.

The claim made by Mr and Mrs C is that that they were told they could sell the points and effectively sell their timeshare. I have read the Statement of Compliance signed by Mr and Mrs C in April 2017 which states: "The primary purpose of our membership is to access holiday accommodation and is not a financial investment for a return."

I have not been given a copy of the 2018 documentation, but it is reasonable to presume that it will have included a similar caveat. That would suggest it was made fairly clear in the paperwork which they had 14 days to read in the cooling off period. I say that while recognising Mr and Mrs C's testimony which says that they were told about the resale opportunities.

The difficulty I have is that I wasn't present at the sale and the testimony is not supported by documentary evidence. Furthermore, I have not been given any information or evidence showing that Mr and Mrs C attempted to sell the timeshare or had any intentions of selling it rather than using it for holidays. I also note that they made use of the accommodation for holidays which demonstrates the timeshare wasn't purchased solely as a financial investment. Overall I cannot safely conclude that they were told that the product was a financial investment or that A guaranteed it could be re-sold.

S.140A CCA

Only a court has the power to decide whether the relationships between Mr and Mrs C and VFL were unfair for the purpose of s. 140A. But, as it's relevant law, I do have to consider it if it applies to the credit agreement – which it does.

However, as a claim under Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 9 of the LA, I've considered that provision here.

It was held in Patel v Patel [2009] EWHC 3264 (QB) ('Patel v Patel') that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. The limitation period is six years and the claim was made within this period.

However, I'm not persuaded that Mr and Mrs C could be said to have a cause of action in negligence against VFL anyway.

Mr and Mrs C's alleged loss isn't related to damage to property or to them personally, which must mean it's purely financial. And that type of loss isn't usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a claimant against that type of harm.

PR seems to suggest that VFL owed Mr and Mrs C a duty of care to ensure that A complied with the 2010 Regulations. And PR says that VFL breached that duty by failing to carry out – before granting Mr and Mrs C credit and paying A – the due diligence necessary to ensure that the product purchased by Mr and Mrs C wasn't sold by A in breach of the 2010 Regulations.

Yet I've seen little or nothing to persuade me that VFL assumed such responsibility – whether willingly or unwillingly.

Even if it had assumed that responsibility I am not persuaded there was an unfair relationship as required by s.140A.

PR makes much of the alleged breach of Regulations. However, it's the substance of the regulatory breach – and the impact on the consumer – that matters more than the breach itself. So, even if the provision of information by A fell short in some way, that doesn't automatically lead to an uphold on the basis that the debtor-creditor relationship was unfair.

And the fact that the purchase agreement may have been unenforceable (which is different to voidable) under Regulation 15 of the 2010 Timeshare Regulations (in light of a breach of Regulation 12) is, in my view, unlikely to render the debtor-creditor relationship unfair because I can't see why the unenforceability of the purchase agreement against the consumer would be to their disadvantage. To the extent that the contract is advantageous to the consumer and they want to continue with it, nothing changes even if the relevant section of Regulation 15 bites. It is only in the circumstance that the supplier takes enforcement steps against the consumer that the unenforceability becomes relevant, in which case it provides a helpful protection and advantage to the consumer.

Looking at other points raised by PR I note there is very little detail about the nature of the alleged pressure, but I think it most unlikely that Mr and Mrs C would have signed a £34,000 contract under pressure but not taken advantage of the cooling-off period. At the very least, I would expect them to seek to explain why, if they had felt under pressure at the time, they did not review things when they were no longer subject to that pressure.

PR says that Mr and Mrs C were not provided with details of any commission paid to VFL. They do not suggest that they asked about commission, but I have no reason to think they would not have been told what it was if they had done. VFL would have been under a duty to provide that information. However, I gather VFL's arrangements with A did not include the payment of commission.

Affordability and suitability checks

It has been suggested that VFL did not carry out any checks to ensure that the loan was affordable and appropriate to Mr and Mrs C's needs. It also said that they had not been given any choice about the lender they used and the sum borrowed was too great a commitment given their circumstances.

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case. VFL said that it did carry out appropriate checks, although there are few details of what that involved. I have asked VFL for further information on the checks it did carry out but it failed to respond

I note however that, Mr and Mrs C have not suggested they have had difficulty making payments, and they do not appear to have approached VFL seeking any kind of accommodation – for example, a payment break or payment plan. I have been given a statement which shows regular payments were made from May 2018 to February 2020. I have not been told that any subsequent payments have been missed.

The fact that a borrower is able to make repayments is not, of itself, evidence that payments are affordable, still less that the lender made proper checks before agreeing to lend. It might indicate however that, even if proper checks had been carried out, the lending decision – and therefore the overall position – might well have been no different. If PR is able to evidence that the loan was unaffordable I will review my current view.

Conclusion

I appreciate Mr and Mrs C are dissatisfied with their purchase and they have my sympathies for this, but, in summary I cannot see why any of their claims were likely to have succeeded.

So overall I think that VFL acted reasonably in declining the claims under s.75 and s. 140A CCA."

PR did not agree. In summary, it argued that:

- My provisional decision did not take into account that the product had been consistently marketed as an investment.

- The points sold by A were similar to those marketed by another company and a decision upholding a complaint issued by a colleague had been upheld in a judicial review hearing.

- Mr and Mrs C would not have traded their existing products had they not been persuaded that they had a profit making capability. The fact they made use of the points for holidays should not lead to the conclusion the product was not purchased as an investment.

- The claim under s.140A was not undermined by Mr and Mrs C signing an agreement which stated the primary purpose of their membership was to access holiday accommodation. PR said the recent judicial review ("JR") case supported that conclusion.

- PR did not accept my argument that as Mr and Mrs C's loss was financial and VFL did not have a duty of care to ensure A complied with the 2010 Regulations and quoted from the JR case.

- PR said that if there was a breach of Regulation 14 then it was irrelevant what impact that might have.

- On the matter of affordability it expressed concern that VFL had not supplied this service with information. It added that both Mr and Mrs C were retired when they took out the loan and Mr C suffered from ill health which was made known to VFL's agent. They have not made any payments for over two years.

PR summarised the complaint again and said that if A's actions didn't amount to misrepresentation it had been guilty of misleading actions and so fell foul of Consumer Protection from Unfair Trading Regulations 2008. It said that the representative may not have been factually inaccurate, but they presented the product in a way that deceived.

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.

Firstly I would like to address what PR has said about the findings of the High Court following the recent judicial review of the Financial Ombudsman Service and the approach PR thinks it should take to this complaint, which in simple terms is that I should take an identical approach.

The High Court did affirm that my fellow ombudsman's findings on s.56 CCA and the extent to which it creates a statutory agency relationship between a creditor and a supplier when there is a debtor-creditor-supplier agreement in place – such that any negotiations between Mr and Mrs C and A before their purchase are deemed to have been conducted by A as an agent of BPF. PR argued this complaint should be treated in the same way, but I do not agree.

The complaints at the centre of the judicial review were concerned with a particular type of asset backed timeshare known as a 'fractional ownership timeshare.' Such timeshares offered prospective members the same sort of holiday rights commonly associated with timeshares more generally. But they also offered prospective members a share in the 'ownership' of a specific property. They didn't usually confer any rights to stay in that property. But under the terms of the purchase agreement the property is usually set to be sold at the end of the membership period and the net proceeds distributed on a pro rata basis among the fractional owners.

However, that is not the type of timeshare Mr and Mrs C bought and I do not consider that it follows that the same decision should be reached in this complaint as in those addressed by the judicial review.

While fractional and non-fractional timeshares may have been sold in a similar way, the fact that the non-fractional timeshares weren't designed with an investment element front and centre is an important distinction to consider when determining what a fair and reasonable outcome to a complaint might look like.

I accept that some non-fractional timeshares may share a number of contractual terms that were subject of the judicial review and may fall foul of the relevant law on unfair contract terms. However, an assessment of unfairness under s.140A CCA does not necessarily stop at a regulatory breach. It's often necessary to then assess the impact of that breach on the consumer. That much is clear from case law and – including the latest judicial review.

In other words, complaints must be decided on their individual merits which is what I will do in this case.

I have noted PR's assertion that the product was marketed as an investment. Even if I accepted that, it does not show that it was marketed as a financial investment. Mr and Mrs C provided testimony and said they were told that the points would increase in value due to potential increased demand. However, as I explained in my provisional decision I have not seen the papers relating to the purchase, but I noted those for the 2017 purchase which made it clear that the product was not an investment. It is difficult for me to conclude that the claim should succeed in the absence of supporting evidence which show that the product was sold as an investment.

I gather Mr and Mrs C used the product to access accommodation and this supports the view that it was purchased for that purpose. They could have believed that the product may also have some value as an asset, but that does not demonstrate that it was sold as an investment. The sales representatives will have put the best possible gloss on the product they were selling, but that of itself does not allow me to conclude it was misrepresentation.

Nor am I persuaded that VFL had a duty of care to ensure A complied with the regulations. One has to consider the substance of the alleged breach, not just whether there was one.

In deciding whether to make a determination under S140A, "the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor (VFL) and matters

relating to the debtor (Mr and Mrs C)".

Mr and Mrs C had already held existing timeshare products they had purchased previously from A.

Importantly; the new purchase appears to relate to an upgrade and/or change from their existing timeshare product holding at the time. It doesn't appear it was their first product

purchase from A and Mr and Mrs C weren't new customers. So, it's likely they would've benefitted from their previous experience and what might be expected from the meeting and sales presentation in 2018.

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 C'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 this would lead to a court finding this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

A wasn't acting as an agent of Mr and Mrs C, 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 C advice or information on that basis. As far as I'm aware, Mr and Mrs C were always at liberty to choose how they wanted to fund the transaction.

What's more, I haven't found anything to suggest VFL would've been 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 C requested those details from VFL or A. As it happens VFL has said that none was paid.

I would add that the claim under sections 140A and 140B was referred to VFL within the time limit set out in the Limitation Act – which is six years from the end of the loan relationship. Nevertheless, I think it is relevant to the merits of allegations of unfairness that Mr and Mrs C did not suggest that they thought they had been or were being treated unfairly until nearly three years later.

On the matter of affordability I agree that it is disappointing that VFL has not responded. I have to consider if the loan was unaffordable at the time it was made. I have noted that Mr and Mrs C were able to make the payments for several years. PR says that they have not made any payments for over two years, but it has not said this was due to affordability issues. Nor did the letter of claim mention that Mr and Mrs C were unable to repay the loan. It simply asserted that no affordability checks were carried out.

I am satisfied that some checks were carried out and that I have not been give evidence that it was unaffordable and so I do not consider I can uphold this element of the complaint.

Overall, I cannot safely conclude that the product was misrepresented or that there is evidence of unfair commercial practice simply because the sales representative may have expressed an opinion which PR thinks may have been inaccurate.

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 Mrs C and Mr C to accept or reject my decision before 4 December 2023.

Ivor Graham
Ombudsman