DRN-4451785

The complaint

Mrs M complains that Vacation Finance Limited trading as VFL Finance Solutions ("VFL") unfairly turned down her claims under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") relating to a loan they provided to her to purchase a timeshare product.

What happened

Mrs M has held various timeshare products provided and sold by a company (who I'll refer to as "A") since 2007. Over that time, she purchased various timeshare products and upgrades from A, many of which were funded by loans provided by various different businesses.

In or around November 2018, Mrs M attended a sales meeting with A in which she agreed to exchange her existing timeshare product holding for a points-based timeshare product offered by A. The purchase required payment of an agreed sum of £11,000, part of which was funded under a fixed-sum loan agreement with VFL.

In or around August 2020, using a claims management company (the "CMC"), Mrs M submitted claims to VFL under sections 75 and 140A of the CCA. In particular, the CMC allege that A had misrepresented the product purchased by Mrs M by advising:

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

The CMC said that A have ceased to trade and 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 and Mrs M 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:

- Mrs M was subjected to a high-pressure sales presentation;
- A were acting as an agent of Mrs M and VFL deliberately chose not to disclose the fact that commission was paid to A, or the amount paid;
- Mrs M wasn't presented with a choice of finance options; and
- VFL failed to carry out a sound and proper credit assessment.

Having not received a substantive response to Mrs M's claims, the CMC referred matters to this service as a complaint.

During the course of this service's investigations, VFL provided their response to the claims. Having considered the various allegations together with evidence from the time of the sale and their own records, VFL didn't agree the product had been misrepresented to Mrs M. Or that there was any evidence there'd been a breach of contract. VFL didn't find anything that would lead them to uphold any other part of Mrs M's claim.

One of this service's investigators considered all the evidence and information provided. In doing so, our investigator asked the CMC to provide Mrs M's own description of how the

product had been represented to her, together with details of the products she'd previously purchased from A.

In response, the CMC provided a document from Mrs M in which she explained she'd purchased the points-based product following unsuccessful attempts to sell her previous timeshare products. She said A had suggested that purchase of the points would be the best solution for her allowing her to sell the points acquired in batches from 2023. But she later discovered that many of the accommodation packages provided by A weren't available to her under the product she'd purchased.

Having considered everything said and provided, our investigator didn't think Mrs M's complaint should be upheld. In particular, the investigator didn't think there was any evidence to show the product had been misrepresented in the ways alleged. Or that there'd been a breach of contract. Our investigator also wasn't persuaded there was sufficient cause to lead a court to conclude the relationship was unfair pursuant to S140A. Or that there was anything to suggest the loan was unaffordable for Mrs M.

In response, the CMC provided further evidence to demonstrate Mrs M's desire and attempts to resell the products she previously held with A. This included copies of email exchanges and sale listing agreements. Our investigator didn't think this information helped Mrs M's claim for misrepresentation. In particular as it appeared to contradict her allegation that she purchased the points-based product as it was represented to her as an investment.

The CMC didn't accept our investigator's findings. They provided further evidence they believe shows that other consumers had similar concerns about the product type purchased by Mrs M. The CMC later asked this service to obtain and provide various detailed explanations and documents relating to the provision of finance by VFL for timeshare products, together with A's role in that process.

As an informal resolution couldn't be achieved, Mrs M's complaint was passed to me to consider and reach a final decision. Having done so, while I reached a similar outcome to that of our investigator, I addressed various aspects that I feel weren't fully considered and explained previously. Because of that, I issued a provisional decision on 13 October 2023 giving the parties 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.
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> S75 provides consumers with protection for goods or services bought using credit. Where Mrs M paid for his timeshare product having financed it with a restricted use regulated loan from VFL, she is afforded the protection offered to borrowers like her under those provisions. 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 Mrs M 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.
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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

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

believe VFL's treatment of Mrs M'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.

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. 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 procedures or processes 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 Mrs M'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.

Mr R's timeshare product experience

Based upon the information available, it appears Mrs M has maintained and ongoing association with A and the products they offer. In particular, relating to a holiday destination she and her late husband regularly attended. Mrs M has confirmed that association started in 2007 when they first purchased a timeshare product from A. It appears later purchases and upgrades were agreed and completed in or around November 2010, January 2014, and November 2015.

Over time, Mrs M's product holding varied in terms of the allocated accommodation, time period and flexibility according to the product purchased on each occasion. And I understand many, if not all, of the purchases were completed utilising finance provided by different businesses (including VFL).

So, based upon this information, I think it's reasonable to conclude that Mrs M had a reasonably strong awareness about the products she'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude that Mrs M was familiar with A (as a timeshare supplier) and the sales presentations given by them. Particularly as the presentation referred to in 2018 (the subject of her claim) wasn't her first experience.

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 Mrs M 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 Mrs M to enter the contract. This means

I would need to be persuaded that Mrs M reasonably relied on those false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mrs M was specifically told (or not told) about the benefits of the product she purchased. It was, however, indicated that she was 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 Mrs M's claim, such as marketing material or documentation from the time of the sale that echoes what she says she was 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 Mrs M's 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 Mrs M 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.

Subsequent submissions to this service by the CMC appear to suggest the points-based product was represented as a means to make it easier for Mrs M to exit from her timeshare holdings. And that the new product points were represented as having the ability to be sold in batches from 2023. Although I've seen evidence that Mrs M was previously attempting to sell her timeshare holding(s) prior to 2018, this allegation doesn't appear to form part of the claim submitted to VFL. So, it doesn't appear VFL have had opportunity to consider this new allegation. And in any event, I've found nothing within the documentation provided that appears to provide any guarantees or assurances about the resale of the points she purchased.

On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that A did in fact make the alleged misrepresentations.

The breach of contract claim under S75

VFL have said that 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 agreements. So, in the absence of any specific explanation or evidence to support why Mrs M believes there's been a breach of contract which resulted in a loss for her, 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 (Mrs M) 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).

As I've said previously, it's important to acknowledge that only a court can make a determination under S140A. But as this is relevant law, I need to take it into account in reaching my decision – where appropriate.

- The pressured sale and process

The claim and subsequent submissions set out an allegation that Mrs M was subjected to a pressurised sale. I acknowledge what has been said about the length of the sales presentations she attended. So, I can understand why it's argued that the prolonged nature of any presentation might have felt like a pressured sale – especially if, as she approached the closing stages, she was 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 Mrs M agreed to the purchase in 2018 when she simply didn't want to. I haven't seen any evidence to demonstrate that she went on to say something to A, after the purchase, to suggest she'd agreed to it when she didn't want to. And she hasn't provided a credible explanation for why she didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If Mrs M only agreed to the purchase because she felt she was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mrs M was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate she made the decision to proceed because her ability to exercise choice was – or was likely to have been – significantly impaired.

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* [A] *and matters relating to the debtor* [Mrs M]*)"*.

Mrs M already held an existing timeshare product she'd purchased previously from A. Importantly; the new purchase appears to relate to an upgrade and/or change from her existing timeshare product holding. It doesn't appear it was her first product purchase from A and Mrs M wasn't a new customer. So, it's likely she would've benefitted from her 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 Mrs M'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's responsibilities and disclosure of commission paid

Part of Mrs M's S140A claim is based upon the status of A (as the introducer of the loan) and their resultant responsibilities towards her. In particular, it's argued that the payment of commission by VFL to A was kept from her. But I don't think the fact that VFL might have paid A commission was incompatible with its role in the transaction.

A wasn't acting as an agent of Mrs M, but as the supplier of contractual rights she 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 Mrs M advice or information on that basis.

As far as I'm aware, Mrs M was always at liberty to choose how she 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 Mrs M requested those details from VFL. As I understand it, the typical amounts of commission paid by VFL to suppliers (like A in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that a court would find that the non-disclosure and payment of commission created and unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

Were the required lending checks undertaken?

There are certain aspects of Mrs Ms 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 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 Mrs M. And I've not seen anything that supports any suggestion of financial difficulty from that time.

In their response to Mrs M's claim, VFL explained to this service the affordability assessment they'd completed which they believe showed the loan was sustainably affordable for her. 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 Mrs M in order to uphold her complaint here. And I don't believe any proven compliance failure would automatically mean that Mrs M's loan agreement was null and void in any event. It would need to be shown that any such failure resulted in a loss to Mrs M as a consequence.

I've seen no specific information about Mrs M's actual position at the time and no supporting evidence that she struggled to maintain repayments. VFL have also confirmed Mrs M's loan was repaid in full within the first 12 months resulting in no interest charge being incurred by her. Based upon these findings, I can't reasonably conclude the loan was unaffordable for her or that she suffered any loss as a consequence.

Summary

As a follow up to our investigator's findings, the CMC 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 fairly and reasonably in Mrs M's circumstances.

Based upon everything I've seen; I haven't found anything that leads me to conclude VFL acted unfairly or unreasonably here. And because of that and my findings above, I currently don't 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.

Neither party have responded or acknowledged receipt of my provisional decision, despite follow up attempts by this service. So, as the time given to make further submissions has passed, and in the absence of anything new to consider, there's nothing that persuades me to vary from my provisional findings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 12 December 2023.

Dave Morgan
Ombudsman