DRN-4325573

The complaint

Mrs B and Mr B say Vacation Finance Limited, who I'll call "VFL", unfairly declined their claims regarding a timeshare agreement, that VFL partly financed for them, in May 2018.

What happened

I issued a provisional decision on this complaint in July 2023. An extract from that provisional decision is set out below.

Mrs B and Mr B signed up for a timeshare agreement with a company I'll call "A" in May 2018 (the Time of Sale). The cost of the credits they secured was £45,000 and the purchase was partly funded through a fixed sum loan for £31,485.

Mrs B and Mr B complained to VFL in June 2021. There were a number of allegations and it's not practical to list them in detail here, but I have taken note of them. They said that A wasn't authorised to broker the finance agreement and was committing a criminal offence by doing so. And they added that VFL were restricted by the Financial Conduct Authority from "canvassing off trade premises" and that as VFL traded from the UK and A were their representatives, A were subject to the same restrictions and weren't allowed to canvass in Malta where the timeshare was sold to them, and the finance was brokered. They also said they'd been put under pressure and had been subjected to aggressive sales practices by A, and that they hadn't been given any time to read the contracts or benefit from any 14 day withdrawal period as the finance agreement hadn't been given to them until three weeks after the agreement had started. Mrs B and Mr B were also upset that VFL hadn't completed the requisite affordability checks, and they noted they'd now been asked to pay instalments to a company who I'll call "F" and not to VFL with whom they had entered into the finance agreement; they thought that was a scam.

VFL didn't agree that A weren't authorised at the Time of Sale or that A were restricted from brokering the agreement abroad. They didn't think Mrs B and Mr B had provided sufficient evidence that they were unduly pressured or that the agreement hadn't been provided to them on time. They explained that a copy of the finance agreement would always have been provided at the Time of Sale. They said they had completed the necessary affordability checks and explained that F were a direct debit collection service approved by them to collect Mrs B and Mr B's finance instalments and that they weren't therefore part of a scam. VFL also commented on concerns Mrs B and Mr B raised about the timeshare being sold as an investment. They didn't think there was evidence in the contractual paperwork that was the case.

Our investigator agreed with VFL but Mrs B and Mr B didn't. They provided several documents relating to their and their action group's broader complaints and they asked for a decision by an ombudsman. The complaint has therefore been referred to me.

What I've provisionally 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'm not expecting to uphold this complaint but as it's been some time since our investigator provided her view on the matter, and as I don't think we covered all of the issues, I'm issuing a provisional decision.

This service can't usually consider the merits of new complaints if they haven't been made to the business first. So, I've only considered the complaint points Mrs B and Mr B raised with VFL in June 2021, along with any further points that VFL have already engaged with.
I'm required by DISP 3.6.4R of the Financial Conduct Authority's (FCA's) Handbook to take into account the relevant, laws and regulations; regulators rules, guidance, and standards; codes of practice and, when appropriate, what I consider to have been good industry practice at the relevant time.

The Financial Ombudsman Service is designed to be a quick and informal alternative to the courts under the Financial Services and Markets Act 2000 (FSMA). Given that, my role as an ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable given the circumstances of this complaint. And for that reason, I am only going to refer to what I think are the most salient points. But I have read all of the submissions from both sides in full and I keep in mind all of the points that have been made when I set out my decision.

There has been limited information available to me when considering this complaint. It seems unlikely, given the passage of time, that any further documentary evidence is available. So, I've made my decision on the information on file and will consider any further evidence if it's provided in response to this provisional decision.

The claim under section 140A of the CCA

Under section 140A and section 140B of the CCA 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.

Section 56 of the CCA is also relevant in the context of section 140A of the CCA, as the pre-contractual acts or omissions of the credit broker (A) or supplier will be deemed to be the responsibility of the lender (VFL), and this may be taken into account by a court in deciding whether an unfair relationship exists between Mrs B and Mr B and VFL.

Mrs B and Mr B say they were pressured into agreeing the deal.

We know it is common that these sales presentations often lasted for a number of hours. I've therefore considered whether there is evidence that Mrs B and Mr B's ability to exercise choice was significantly impaired by the lengthy presentation, the pressure, lack of breaks, and the lack of time alone to think, that they say they experienced as that may have created an unfair relationship between them and the supplier.

Mrs B and Mr B had already attended presentations and entered into timeshare agreements with A before, so I think they would have been likely to have had an understanding of the approach that would be taken. I don't think I've been provided with sufficient information to suggest Mrs B and Mr B didn't understand they didn't have to say yes to the agreement or that they didn't understand they could walk away without entering into it.

Having seen other agreements with A I think it's highly likely Mrs B and Mr B were given a

14 day cooling off period, and while I understand their assertion that they didn't receive a copy of the finance agreement until after that cooling off period was over, I note VFL don't think that was likely and I agree. I think it would be unlikely Mrs B and Mr B would not take a copy of the agreement away with them especially as it was for a considerable amount of money; I also note they'd had similar agreements before, and I think they would have expected to receive a finance agreement and have questioned it if they hadn't; and I think it would be unusual for a finance agreement not to have been provided on the day. I'm not therefore persuaded there was any delay in supplying a copy of the finance agreement that would lead a court to decide there was an unfair debtor-creditor relationship.

The claim that the agreement was sold as an investment

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.

Mrs B and Mr B say that the timeshare agreement was misrepresented to them as they were told it was an investment.

Section 75 of the CCA says that in certain circumstances, the borrower under a credit agreement has a right to make the same claim against the credit provider as against the supplier if there's a breach of contract or misrepresentation by the supplier. But section 75, that Mrs B and Mr B have relied on, only applies when the cash value of the goods is equal to or less than £30,000 and here the cash price was more than that. Section 75a extends the protection given to include claims for breach of contract when the cash value of the goods or service is more than £30,000 and less than or equal to £60,260. But unlike section 75 of the CCA, section 75a does not give consumers a right to make a claim if there's been a misrepresentation. So, I don't think a court would decide a claim for misrepresentation could succeed.

And even if I'm wrong about that, Mrs B and Mr B haven't provided any substantive evidence to support their assertion they were sold an investment.

Was A authorised and did they commit an offence when canvassing business

This Service's records show that A was registered as a representative of VFL from 25 April 2016. And VFL was authorised under this service's compulsory jurisdiction from 31 March 2016 which means they held the required authorisation from the FCA. And as their representative, A was able to introduce credit business to them. So, I don't agree that A didn't hold the required authorisation to introduce business to VFL under section 19 of the Financial Services and Markets Act 2000 ("FSMA)".

Section 154 of the CCA says, "It is an offence to canvass off trade premises the services of a person carrying on a business of credit-brokerage […]". The Financial Conduct Authority ("FCA") Handbook defines "canvassing off trade premises" as: (a) an activity by an individual ("the canvasser") of soliciting the entry of another individual ("B") into an agreement by making oral representations to B during a visit by the canvasser to any place (other than a place in (b)) where B is, being a visit made by the canvasser for the purpose of making such oral representations. (b) a place where a business is carried on (whether on a permanent or temporary basis) by: (i) the lender or owner; or (ii) a supplier; or (iii) the canvasser; or (iv) a person who employs the canvasser or has appointed the canvasser as an agent; or (v) B; is excluded from (a). Mrs B and Mr B haven't provided information to demonstrate where the brokering took place. It's my understanding that the sale, and resultant credit application, were usually completed at A's offices/premises at the resort Mrs B and Mr B were visiting. And given I've established that A was a registered representative of VFL at the time of the

sale, I think they were entitled to do that. So, I can't reasonably say there was a regulatory breach in doing so. And I don't think I have sufficient information to suggest the broker of an agreement had to broker those agreements in the same locality as the provider of credit, so I don't find it unusual, or unacceptable, that A was based in Malta. Having considered the arguments put forward by Mrs B and Mr B, I don't think there appears to be any circumstances, based upon the evidence available, that would likely lead to the agreement(s) being determined as null and void or that A committed an offence when they brokered the deal.

Affordability checks

Mrs B and Mr B say that VFL were in breach of their obligations to carry out an adequate credit assessment to determine whether they could afford to repay the loan.

However, even if VFL didn't complete adequate affordability checks (and I make no finding about that) when considering a complaint about unaffordable lending, a large consideration is whether the borrowing was likely to prove unaffordable in practice and whether the complainant has actually lost out due to any failings on the part of the lender. So, for me to say VFL needed to do something to put things right, I would need to see that the credit granted by VFL was likely to be unaffordable and that Mrs B and Mr B suffered a loss as a result. As there's little evidence that they have found, nor found, it difficult to repay what they were lent by VFL, I'm not persuaded the agreement was unaffordable for them.

The involvement of F

VFL have explained F has a merchant and direct debit license and offers a Direct Debit collection service. They explained that it is for this reason that Mrs B and Mr B's loan repayments were taken by F. F informed Mrs B and Mr B that were doing so in a letter to them in May 2019. I don't think VFL have done anything wrong in that respect.
And ultimately I am not persuaded that VFL have been unreasonable in their response to Mrs B and Mr B's complaints

My provisional decision

For the reasons I've given above I am not expecting to uphold this complaint.

Further comments and/or evidence

VFL didn't respond to my provisional decision and Mrs B and Mr B didn't provide any further comments, but they did provide some additional documentation I'd asked for.

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.

The fixed sum loan agreement provided by Mrs B and Mr B confirms the funding I set out in my provisional decision and supports my view that the sums involved were in excess of £30,000 and VFL were therefore entitled not to consider a claim under section 75 for misrepresentation. The finance agreement also clarifies that a 14 day cooling off period was applied in this case.

The Standard Information Form confirms:

"You are purchasing Credits which can be exchanged for rights of occupation and use in a

unit of accommodation or a yacht or use of other lifestyle products such as luxury cars at various locations …". It makes no mention of the timeshare being an investment.

I'm not persuaded that the additional documentation, provided by Mrs B and Mr B at my request, would suggest my provisional decision needs to change. My provisional decision therefore becomes my final decision on this complaint.

My final decision

For the reasons I've given above I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 28 September 2023.

Phillip McMahon
Ombudsman