DRN-4526579

The complaint

Mr and Mrs S complain that Vacation Finance Limited ("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

In or around April 2018, whilst on holiday utilising their existing timeshare product, Mr and Mrs S met with a representative of their timeshare supplier who I'll refer to as "A". During that meeting, Mr and Mrs S agreed to upgrade their existing timeshare arrangements with A to purchase a new points-based product. The purchase price agreed was £16,230 which, after payment of a deposit of £2,985, was funded under a fixed sum loan agreement with VFL for £13,245 over 120 months.

In January 2021, using a professional representative ("the PR"), Mr and Mrs S submitted a claim to VFL under sections 75 and 140A of the CCA. The PR alleged that Mr and Mrs S 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 told Mr and Mrs S that their existing timeshare product holding was unsellable. But purchasing the points-based product would enable them to sell their timeshare holding in the future for a profit. The PR allege A had previously misrepresented timeshare products to Mr and Mrs S as investments contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

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

- pressured Mr and Mrs S into entering the purchase and loan agreements using aggressive commercial practices;
- allowed them no time to read or consider the information provided;
- failed to advise Mr and Mrs S of any commission they received from VFL;
- made no comparisons to other loan companies;
- didn't inform Mr and Mrs S that they were free to arrange their own finance; and
- failed to undertake appropriate affordability checks for the loan.

The PR also 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.

VFL didn't uphold Mr and Mrs S'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. VFL confirmed they had undertaken an appropriate affordability assessment. They didn't think there was any evidence of loss to support the alleged breach of contract.

The PR didn't agree with VFL's findings, so referred Mr and Mrs S'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's failure to uphold Mr and Mrs S's claim was unfair or unreasonable. In particular, our investigator said they weren't able to find evidence to support any of the various allegations.

The PR didn't agree with our investigator's findings and suggested they had failed to properly assess the claim. They asked that Mr and Mrs S's complaint be referred to an ombudsman to consider further. To support their arguments, they reiterated much of what had already been included in Mr and Mrs S's claim, and included:

- that the product had been represented as an investment, consistent with previous sales and purchase with A that Mr and Mrs S were party to:
- details of other purchases Mr and Mrs S had made through A;
- further reference to the alleged breaches of the TRs;

As an informal resolution couldn't be achieved, Mr and Mrs S's complaint was passed to me to consider further. Having done that, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I didn't feel were previously fully addressed or explained. So, I issued a provisional decision giving both sides the opportunity to respond further before I reached my 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.
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> S75 provides consumers with protection for goods or services bought using credit. It's claimed that Mr and Mrs S paid for the timeshare product under a restricted use fixed sum loan agreement. So, it isn't in dispute that S75 applies. This means Mr and Mrs S are 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.
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> S140A looks at the fairness of the relationship between Mr S, Mrs S 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.
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> It's important to distinguish between the complaint being considered here and the legal claim. In response to our investigator's findings, the PR suggest they'd failed to assess Mr and Mrs S's claim properly. The complaint this service is able to consider specifically relates to whether I believe VFL's failure to uphold Mr and Mrs S's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.
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> 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 said, this service isn't able to make legal findings

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

– 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.

Was the timeshare product misrepresented?

For me to conclude there was 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 Mr and Mrs S something that wasn't true in relation to the allegation raised. I would also need to be satisfied that the misrepresentation was material in inducing Mr and Mrs S 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 S were specifically told (or not told) about the benefits of the 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 S'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 that the product was represented as an investment that could be sold at a profit. There's simply no reference to this within the limited documentation provided.

The PR have referenced purchases made by Mr and Mrs S from A in 2014 and 2015. But these don't form part of their claim and subsequent complaint here. And, in any event, I can't see that VFL were involved in financing those purchases. So, I don't think I can fairly hold VFL responsible for anything allegedly said or done in relation to the earlier purchases. And I also don't think any allegations specifically relating to the circumstances of those purchases help me in establishing the facts of what happened in April 2018.

I think it unlikely the product can have been marketed and sold as an investment contrary to 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 S 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.

Furthermore, I haven't seen any evidence to suggest that A were contractually bound to provide a timeshare resale service. And even if they were, I've seen nothing that suggests they gave any guarantee of a successful sale or that a profit could be achieved. An email sent by A to Mr and Mrs S relating to their enquiry to sell part of their product holding makes it clear *"there is no guarantee on a times frame or amount being given".* While Mr and Mrs S may have intended to purchase their timeshare product as a financial investment, I can't conclude, with any certainty, that intention was due to anything A said to them.

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

The breach of contract claim under S75

As far as I understand, whilst A may have entered an insolvency process, the current management company have confirmed 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 Mr and Mrs S 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 S) 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).

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 (VFL) and matters relating to the debtor (Mr and Mrs S)). And I think it's relevant to acknowledge Mr and Mrs S'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 April 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 S were familiar with A (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the purchase in April 2018 certainly wasn't their first.

- The pressured sale and process

The claim suggests Mr and Mrs S 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 S 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 S agreed to the purchase and the finance agreement 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 S 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 because they felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr and Mrs S 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 2008 ("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 S 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 S 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 S did raise any questions or concerns about either agreement.

- A's responsibilities and disclosure of commission paid

Part of Mr and Mrs S'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 S, 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 S advice or information on that basis. As far as I'm aware, they was 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 any amount of commission paid in these circumstances. Nor is there any suggestion or evidence that Mr and Mrs S 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 S'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 (VFL in this case) to conduct affordability checks as set out within the Consumer Credit Sourcebook ("CONC"), part of the FCA handbook. 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 S. 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 S 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 S as a consequence.

As I've seen no specific information about Mr and Mrs S'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 want to reassure Mr and Mrs S that 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.

Despite follow up by this service, none of the parties have responded to my provisional decision with any new comments, information or evidence for me to consider. In the circumstances, I've no reason to vary from those findings. Because of that, I won't be asking VFL to do anything more here.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 31 January 2024.

Dave Morgan
Ombudsman