DRN-4012729

The complaint

Mr and Mrs G, who are represented by a professional representative ("PR") complain that Vacation Finance Limited ("VFL") rejected their claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

Mr and Mrs G have made eight purchases of holiday products from a company I will call A. The subject of this complaint is the purchase of membership points in August 2018 at a cost of £17,000 which was funded in part with a loan from VFL.

In February 2022 PR submitted a letter of claim to VFL. As both parties are aware of the claim in the interests of brevity I will include a brief summary here.

It claimed there had been a breach of contract as A was now in liquidation. It said Mr and Mrs G had tried to sell a previous product and while on holiday they were told the needed to purchase a new points based product to be able to sell it at a profit. PR said this was misrepresentation in contravention of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. It also claimed Mr and Mrs G had been subjected to aggressive commercial practices in contravention of the Consumer Protection from Unfair Trading Regulations (CPUT).

PR said Mr and Mrs G had been pressed to borrow from VFL and it had not undertaken a proper affordability check. It said that they had not been told of the commission paid by VFL to A.

VFL rejected the claims and rebutted the allegations made by PR. It said Mr and Mrs G had 14 days from the date of signing to withdraw from the contract if they felt they had been misled or unduly pressurised. It disputed the claim that they had been told it was an investment and said no commission had been paid. The club was still running despite the liquidation and so there had been no breach of contract. Overall it concluded that there was no evidence provided in support of the claim.,

PR brought a complaint to this service on behalf of Mr and Mrs G reiterating the points made in the claim. It was considered by one of our investigators who asked for testimony from Mr and Mrs G which they provided. They said all the products they had bought were sold as investments and they had been told the points they purchased would increase in value. They also supplied a manuscript written by the sales representative which they said showed he had predicted they would make a profit by 2020.

Our investigator concluded there was insufficient evidence of either misrepresentation or a breach of contract. Nor did she think there was an unfair relation under s.140A CAA.

PR didn't agree and reiterated that the product had been sold as an investment. They had been pressed to make numerous upgrades. The points they purchased could not be sold as there was no market for them. Mr and Mrs G had not been given clear information in order for them to have been able to make an informed decision.

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.

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. I will explain why. Firstly I should explain that there is little in the way of documentary material and apart from one page I have not seen the 2018 agreement.

Sections 56 and 75 of the Consumer Credit Act 1974

The nature of the loan means that it would have been a regulated credit agreement covered by the Consumer Credit Act. I have assumed that A acted as credit broker as well as being the seller of the timeshare.

Under s. 56 of the Consumer Credit Act statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender. In this case, that means that anything A said about the timeshare or the loan is to be treated in the same way as if it had been said by VFL.

In addition, one effect of s. 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

I am satisfied that the loan financed the purchase of the club membership. I must therefore consider what the position might be if Mr and Mrs G were to bring a claim or claims against A, either for misrepresentation of for breach of contract.

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.

PR has said that Mr and Mrs G were told that their purchase was an investment. It also supplied written testimony from them about their purchases. While I was not present and cannot say precisely what was said I do not consider that I am able to conclude the product was misrepresented. I have seen no explanation of how that could be the case or why Mr and Mrs G believed that the purchase of points would be an investment. If they had been told that – or had otherwise believed that to be the case – I would have expected them to ask for more information.

I have read their testimony and I have noted they believe they were purchasing an investment. That does not mean they were told it was a financial investment. These products can be described as investments in future holidays etc. I accept that the sales representatives will have but the best gloss on the product they were selling, but that of itself does not amount to misrepresentation.

PR has said they were seeking to sell one of their previous purchases, but I have seen no evidence in support of that. They have had a long history of making purchases from A and it seems likely that they will have been aware of the sales process and the products A was selling.

In short I do not believe I can say that there was misrepresentation such that I can uphold this complaint.

Breach of Contract

I do not believe that the liquidation of A in 2020 led to a breach of contract. I gather a new management company was appointed, and Mr and Mrs G were able to use the timeshare as usual after that date.

In July 2020 the trustee wrote to all the club members. Its letter said: "*The JLs are pleased to confirm that FNTC has taken over as the new manager of the Clubs and further confirm that, as a result, the Clubs will continue to operate for the benefit of members*." I presume Mr and Mrs G received a copy of this letter or something similar.

On the face of it, therefore, the services linked to Mr and Mrs G's purchase of the points remain available to them and are unaffected by the liquidation. Indeed the agreements used by A usually allow for the liquidation of A and its replacement by another provider. That said, I cannot say if this was in Mr and Mrs G's contract since I have not seen a copy of it.

Given I have not been persuaded that the product was sold as a financial investment I cannot conclude that the removal of a sales service by A can been regarded as a breach of contract.

S. 140A claims

Only a court has the power to decide whether the relationships between Mr and Mrs G 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 s. 140A is "an action to recover any sum recoverable by virtue of any enactment" under s. 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 G could be said to have a cause of action in negligence against VFL anyway.

Mr and Mrs G'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.

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

Furthermore, one of the main planks of the claim was the allegation that VFL had paid commission, but it has denied that it paid commission.

I appreciate Mr and Mrs G are dissatisfied with their purchase and he has 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.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible.

Our investigator said that she could not see any evidence that Mr and Mrs G found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if VFL did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr and Mrs G lost out as a result of its failings. PR has provided no evidence whatsoever that they would have found, or did find, it difficult to repay the loan, so I do not need to consider this point further.

Conclusion

It is not for me to decide whether Mr and Mrs G have a claim against A, or whether they might therefore have a "like claim" under s. 75 of the Consumer Credit Act. Nor can I make orders under s. 140A and s. 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr and Mrs G's complaint. In the circumstances, I think that VFL's response to Mr and Mrs G's claims was fair and reasonable.

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 Mr G and Mrs G to accept or reject my decision before 12 January 2024.

Ivor Graham
Ombudsman