DRN-4506269

The complaint

Mr and Mrs D 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 December 2017, Mr and Mrs D agreed to purchase a timeshare product from a supplier, who I'll refer to as "A". At that time, Mr and Mrs D were already existed customers of A and, as such, already held a timeshare product with them. The purchase price agreed was £27,600 which was partially funded under a Fixed-sum loan agreement of £22,500 over 120 months with VFL.

In June 2021, using a professional representative ("the PR"), Mr and Mrs D submitted a claim to VFL under sections 75 and 140A of the CCA. The PR alleged that Mr and Mrs D 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 had misrepresented the product as something which was highly desirable and could be sold easily at a profit – *"an investment for re-sale".*

The PR also allege that the misrepresentation, 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:

- told Mr and Mrs D that VFL had the best (finance) deal on offer but made no comparisons to other lenders nor informed them they could arrange their own finance;
- failed to disclose whether a commission had been paid to them by VFL;
- didn't give Mr and Mrs D the opportunity to read and understand the purchase and loan agreements;
- undertook no checks to ensure the loan was sustainably affordable for Mr and Mrs D; and
- pressured Mr and Mrs D into entering into the purchase and credit agreements.

The PR suggest A's actions and omissions also constituted breaches of the legislation and regulations that applied here.

While VFL provided acknowledgement of Mr and Mrs D's claim, it appears a substantive response wasn't forthcoming. So, the PR referred the 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 D's claim was unfair or unreasonable. In particular, our investigator said they weren't able to find any evidence to support the various allegations.

The PR didn't agree with our investigator's findings and didn't believe the claim under S75 and S140A had been properly considered. They provided a lengthy submission reiterating

many of the original allegations and making reference to other (similar) cases and complaints together with examples of case law they believe should apply here.

As an informal resolution couldn't be achieved, Mr and Mrs D's complaint was passed to me to consider and reach a decision. Having done that, while I was inclined to reach the same outcome as our investigator, I'd considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 10 November 2023 giving both sides the chance to respond before I reached a 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. Mr and Mrs D paid for the timeshare product under a restricted use fixed sum loan agreement. So it isn't in dispute that S75 applies here. This means Mr and Mrs D 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 D, Mrs D 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. The complaint this service is able to consider specifically relates to whether I believe VFL's failure to uphold Mr and Mrs D'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 already said, 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, this doesn't prejudice their right to pursue their claim in other ways.
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> 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.
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> Was the timeshare product misrepresented?
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> 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

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

evidence, that A made false statements of fact when selling the timeshare product. In other words, that they told Mr and Mrs D 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 D to enter into the 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 D were specifically told (or not told) about the benefits of the products 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 D'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 relating to the product being represented as highly desirable and easy to sell for a profit. Or that it was sold as a financial investment. There's simply no reference to this within any of the documentation provided.

I think it unlikely the product can have been marketed and sold as 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 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 D 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.

The PR have referred to other (similar) cases and complaints suggesting that these give clear evidence of systematic failures and breaches in A's sales presentations and representations. My role here is to consider the evidence available specifically relating to Mr and Mrs D's experience. Whilst I acknowledge the PR's comments, it isn't the role of this service to make legal findings (or otherwise) about A or their actions – substantiated or not. Because of that, I'm unable to consider findings in other (unrelated) complaints as I can't see how these would assist me in establishing the facts of what actually happened in Mr and Mrs D's specific circumstances.

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. While Mr and Mrs D may well have intended to purchase the timeshare product as a financial investment, I can't reasonably say that intention was due to anything A said to them.

Based upon the specific evidence available in Mr and Mrs D's case, 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 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 Mr and Mrs D 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 D) 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).

The breadth of the unfair relationship test under S140A is stark. But a simple breach of a legal or equitable duty doesn't necessarily make the relationship unfair. It also isn't just about 'hard-edged requirements' – though the standard of commercial conduct reasonably expected can be important. And while there may be features of the transaction that operates harshly against the debtor, it doesn't necessarily follow that the relationship is unfair. After all, such features may be required in order to protect what a court regards as legitimate interests.

Relationships between businesses and private individuals are also often characterised by large differences of knowledge and expertise – which means they're inherently unequal as a result. But as far as the Supreme Court was concerned in *Plevin*[3], it can't have been parliament's intention that such relationships should be liable to be reopened for that reason alone.

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 and matters relating to the debtor). And I think it's relevant to acknowledge Mr and Mrs D's existing membership and relationship with A. They'd previously purchased products from A, so I think it's reasonable to conclude they had a reasonably strong awareness about the product they purchased, how it operated and any associated costs. I also think it's reasonable to conclude Mr and Mrs D were familiar with A (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the purchase in December 2017 certainly wasn't their first.

- The pressured sale and process

The claim suggests Mr and Mrs D were pressured into purchasing the product and entering into the finance agreement with VFL. It's also suggested they felt they couldn't leave meetings with A until a purchase was agreed.

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 D 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 D agreed to the purchase and the finance agreement in 2017 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 D 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.

[3] The Supreme Court's judgement in *Plevin v Paragon Personal Finance Ltd [2014]*

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 D were obviously harassed or coerced into the agreements. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr and Mrs D 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 ("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 D as required under the TRs. It appears Mr and Mrs D signed a document headed "Membership Application Terms & Conditions". Point 2 of that document references the various documents I would expect to see here. It also includes the statement, *"The Applicant acknowledges receipt of such documents* […]*".* Based upon this, it appears Mr and Mrs D were provided with all the required documentation.

Furthermore, point 10 of the Membership Application Agreement – also signed by Mr and Mrs D – makes it clear they have the right to cancel and withdraw from the contract within 14 days. It's possible Mr and Mrs D weren't given sufficient time to read and consider the contents of the documentation at the times of the sale. But even if I were to find that was the case – and I make no such finding – It's clear Mr and Mrs D 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, the finance agreement also included a withdrawal/cancellation period of 14 days. But I haven't seen any evidence that Mr and Mrs D did raise any questions or concerns about either agreement.

- A's responsibilities and disclosure of commission paid

Part of Mr and Mrs D'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 D was kept from them. But I don't think the fact that VFL might have paid A commission was incompatible with their role in the transaction.

A weren't acting as an agent of Mr and Mrs D, 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 D 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 the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr and Mrs D 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 D's claim 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 to conduct affordability checks as set out within the rules and guidance in the FCA Handbook (CONC[4]) – VFL in this case. But they haven't explained what (if any) affordability assessment they undertook when Mr and Mrs D first applied for the loan with them.

It's relevant that the PR haven't provided any evidence to show that the loan was unaffordable or unsuitable for Mr and Mrs D. 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 D in order to uphold their complaint here. Furthermore, even if I were to find that VFL failed to comply with those regulations – and I also make no such finding - I don't believe that would automatically mean that Mr and Mrs D's loan agreement is null and void. It would need to be proven that any such failures resulted in a loss to Mr and Mrs D as a consequence.

But as I've seen no specific information about Mr and Mrs D'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 D 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, whilst it appears VFL haven't yet issued a substantive response, I can't say that their failure to uphold their claim 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 to this complaint have provided any comment or further information for consideration. In the circumstances, I've no reason to vary from my provisional findings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs D to accept or reject my decision before 9 January 2024.

Dave Morgan
Ombudsman

[4] The Consumer Credit Sourcebook