

The complaint

Mrs B complains about the sale of a timeshare. She says that Vacation Finance Limited (who I'll call Vacation Finance) financed the purchase and that she therefore has claims against it. Mrs B has brought her complaint through a representative, so references to her submissions and arguments include those made on her behalf.

What happened

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

On 5 March 2017 Mrs B upgraded her timeshare membership with a company I will call "Az". The purchase was funded through a fixed sum loan with Vacation Finance.

Mrs B complained to Vacation Finance in January 2022. Her claim was detailed but in essence she said she had a claim under sections 75 and 140A of the Consumer Credit Act 1974 (CCA) as the agreement had been misrepresented to her and there had been an unfair relationship.

Vacation Finance responded to the complaint later that year and as they didn't uphold it Mrs B escalated the complaint to this Service.

Our investigator considered what had happened but noted no contractual paperwork had been provided by Mrs B with regard to the timeshare product she had purchased. He wasn't persuaded there was sufficient evidence to support her complaint.

Mrs B didn't agree so the complaint has been referred to me, an ombudsman, to provide a decision.

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 issuing a provisional decision here as it's been some time since the investigator provided his view and I can see we didn't respond to all of the issues. I'm not currently expecting to uphold the complaint.

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.

Mrs B hasn't been able to supply a copy of the timeshare membership agreement she had, that she says was misrepresented to her and that forms the basis of much of her complaint. It's true that this Service has seen similar complaints about agreements with the same supplier, most of which we haven't supported. But in the absence of the timeshare contract and associated paperwork I don't think Mrs B's testimony alone is reason to support a claim for misrepresentation or breach of contract.

The claim under the CCA

When something goes wrong and the payment was made with a fixed sum loan, as appears to be the case here, it might be possible to make a section 75 claim. This section 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 either a breach of contract or misrepresentation by the supplier.

From what I can see, all the necessary criteria for a claim to be made under section 75 have been met.

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

It's not for me to decide the outcome of a claim Mrs B may have under sections 75 or 140A but I'm required to take the provisions into account when deciding whether the lender was reasonable to reject Mrs B's claims.

The claim under section 75 of the CCA

Mrs B says that as Az has now been liquidated there has been a breach of contract. I'm not persuaded that's the case as Vacation Finance have confirmed there is a new management company in charge, and it appears Mrs B's use of her timeshare would, therefore, have been unfettered.

Mrs B also says the agreement was misrepresented to her as an investment but other than Mrs B's testimony, I've not seen evidence to corroborate that or to corroborate Mrs B suggestion that she wanted to sell the timeshare and was promised she'd be able to. I don't, therefore, think Vacation Finance were unreasonable to reject those complaints.

The claim under section 140A of the CCA

Section 140A CCA looks at the fairness of the relationship between a debtor and creditor arising out of the credit agreement (taken together with any related agreement).

I do not consider it likely that a court would conclude that the lender's acts and/or omissions, or those of the supplier or credit broker as agents of the lender, generated an unfair debtor – creditor relationship.

Mrs B relies upon a number of clauses in the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) that her representatives suggest created an unfair relationship between her and Az. 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's ability to exercise choice was significantly impaired by the pressure and aggressive sales tactics she says she experienced.

Regulation 7 of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) seems to expand on the everyday definition of pressure. At the time of sale, Regulation 7 stated that a commercial practice was aggressive if, in its factual context and taking account of all of its features and circumstances, it:

- a. significantly impaired or was likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion, or undue influence; and*
- b. caused or was likely to cause the consumer to take a transactional decision they would not have taken otherwise as a result.*

Regulation 7(2) went on to say that consideration must be given to the timing, location, nature, and persistence of the practice. And when thinking about whether "undue influence" was applied, Regulation 7(3) said that thought must be given as to whether the Supplier exploited "a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly [limited] the consumer's ability to make an informed decision."

Mrs B had already attended a number of presentations with the same supplier: she'd first purchased a timeshare product in 2008, so I think she 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 didn't understand she didn't have to say yes to the agreement or that she didn't understand she could walk away without entering into it. She was also provided with a 14 day cooling off period and I think that allowed her to reflect and withdraw from the agreement and the loan if she wished.

Overall, I'm not persuaded that Mrs B's ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT Regulations.

Mrs B says that she was offered a special one off, time limited, price to accept the agreement and that was an aggressive sales practice in contravention of Schedule 1, clause 5 of CPUT. I've not seen any supportive evidence to suggest that was the case and I don't, therefore, think Vacation Finance were unreasonable to reject that complaint point.

Mrs B also claims that an unfair relationship existed because she wasn't told about the commission Az received from Vacation Finance. But Vacation Finance have confirmed that no commission was paid in this case, so I think it's unlikely a court would find there was an unfair relationship for that reason.

Mrs B says that an unfair relationship also existed because she wasn't offered a choice of lenders. Az wasn't acting as an agent of Mrs B but as the supplier of contractual rights they obtained under the Purchase Agreement. And, in relation to the loan, it still doesn't look like it was the Supplier's role to make an impartial or disinterested recommendation or to give Mrs B advice or information on that basis. However, even if it's right to suggest that Mrs B should have been presented with a range of lenders to choose from, there's little to nothing to demonstrate that she has suffered a financial loss because she entered into a credit agreement with Vacation Finance rather than another lender. And, for that reason, I'm not persuaded that created or contributed to an unfair relationship on this occasion given the facts and circumstances of this complaint.

I don't, therefore, think Vacation Finance were wrong to reject the claim under s140A.

Was the loan irresponsible?

Mrs B says that Vacation Finance was in breach of its obligations to carry out an adequate credit assessment to determine whether she could afford to repay the loan.

However, 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 even if I was persuaded that the lender 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 the credit granted by them was likely to be unaffordable and that Mrs B suffered a loss as a result. I've not been provided with sufficient evidence from Mrs B to suggest she didn't have enough disposable income to sustainably afford repayments against this loan, and I don't therefore think it would be reasonable to suggest the lender was irresponsible when providing the credit.

My provisional decision

For the reasons I've given above, I'm not currently expecting to uphold this complaint.

Further evidence and/or comments

Neither party provided any additional evidence or comments for me to consider.

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.

As I've not been provided with any additional evidence, I've not been persuaded to change my provisional decision and that, 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 to accept or reject my decision before 8 February 2024.

Phillip McMahon
Ombudsman