DRN-4450213

The complaint

Mr and Mrs P complain that Vacation Finance Limited ("VFL") unfairly turned down their claims under sections 75 and 140A of the Consumer Credit Act 1974 ("the CCA") relating to a loan they provided to them to purchase a timeshare product.

What happened

Mr and Mrs P were existing timeshare owners having purchased products from a supplier - who I'll refer to as "A" - in 2014. In or around November 2017, having attended a sales presentation with A, Mr and Mrs P decided to trade in their existing timeshare holdings against the purchase of specified timeshare units at a resort they'd previously used and were familiar with. The purchase price agreed was £42,560, with £25,000 funded by a loan from another business and £17,560 under a fixed sum loan agreement with VFL.

In or around November 2020, using a claims management company (the "CMC"), Mr and Mrs P submitted claims to VFL under sections 75 and 140A of the CCA. In particular, the CMC alleged that A had misrepresented the product purchased by Mr and Mrs P by advising:

- the product was of some substance – *"it is now clear it is worthless"*; and
- the purchase would be an investment that would increase in value and could be sold at a considerable profit.

The CMC said that A have ceased to trade and have committed a repudiatory breach of contract. They believe that both the misrepresentations and the breach satisfy the criteria for a claim under section 75 of the CCA ("S75").

They also said that the relationship between VFL and Mr and Mrs P arising out of the loan agreement, taken with the related purchase agreement with A, is unfair pursuant to section 140A of the CCA ("S140A"). In particular, they said:

- Mr and Mrs P was subjected to a high-pressure sales presentation;
- A were acting as an agent of Mr and Mrs P and there was a breach of fiduciary duty
- VFL deliberately chose not to disclose the fact that commission was paid to A, or the amount paid;
- Mr and Mrs P weren't presented with a choice of finance options; and
- VFL failed to carry out a sound and proper credit assessment.

Shortly after submitting the claim and in the absence of a substantive response from VFL, the CMC referred Mr and Mrs P's claims to this service as a complaint.

During the course of this service's investigations, VFL provided their response to the claims. Having considered the various allegations together with evidence from the time of the sale and their own records, VFL said that Mr and Mrs P didn't proceed with the loan agreed in November 2017. They said Mr and Mrs P had misunderstood the consequences of the proposed funding arrangements and no longer wanted to proceed on that basis. As a consequence, A had restructured the agreed purchase reducing the agreed price to

£33,560. In turn, a new loan was agreed with VFL for £8,560. And this was the loan Mr and Mrs P decided to go ahead with.

Despite Mr and Mrs P' claims relating specifically to the earlier (larger) loan, VFL did consider the allegations against the loan that was actually taken. Having done so, they didn't agree the product had been misrepresented to Mr and Mrs P. Or that there was any evidence there'd been a breach of contract. VFL didn't find anything that would lead them to uphold any other part of Mr and Mrs P's claim.

One of this service's investigators considered all the evidence and information provided. Having done so, they didn't think Mr and Mrs P had a valid claim under S75 as the purchase amount exceeded the limit permitted within that section of the CCA. Further, our investigator didn't think there was any evidence to suggest a court was likely to find the relationship unfair under S140A. They also didn't think there was anything to suggest the loan was unaffordable for Mr and Mrs P. And because of their findings, our investigator didn't think Mr and Mrs P's complaint should be upheld.

The CMC didn't accept our investigator's findings and various exchanges followed in which they:

- insisted all products sold by A were represented as an investment;
- referred to a points-based timeshare product sold by A where it was alleged the ability to rent out and receive an income was regularly highlighted as part of the sales process;
- referenced previous complaint outcomes relating to the financing of sales by A;
- raised questions about the fairness of the contract terms where annual maintenance fees hadn't been paid;
- provided a 36 page document containing *"Generic submissions on behalf of complainants"* specific to the points-based timeshare products sold by A; and
- asked this service to obtain information and provide responses to questions about the procedures and policies that applied to the sale of loans with VFL for the purchase of timeshare products.

As an informal resolution couldn't be achieved, Mr and Mrs P's complaint has been passed to me to consider and reach a final decision. Having done so, while I reached a similar outcome to that of our investigator, I'd addressed various aspects that I feel weren't fully considered or explained previously. Because of that, I issued a provisional decision on 13 October 2023 – giving the parties the opportunity to respond to my findings before I reach a final decision.

In my provisional decision, I said:

> 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 P paid for their timeshare product having financed it with a restricted use regulated loan from VFL, so t's possible S75 may apply here, subject to any restrictions and limitations. Because of that, I've taken this section into account when deciding what's fair in the circumstances of this case.

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

S140A looks at the fairness of the relationship between Mr P, Mrs P and VFL arising out of any credit agreement (taken together with any related agreements). And where the product purchased was funded under a credit agreement, it's deemed to be a related agreement. 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.

It's important to distinguish between the complaint being considered here and the legal claim. The complaint referred to this service specifically relates to whether I believe VFL's treatment of Mr and Mrs P's claim was fair and reasonable given all the evidence and information available to me. This service isn't afforded powers to determine any legal claim itself. That is the role of the courts.

The FCA's DISP rules specifically relate to complaints about regulated financial products and services and provides rules and guidance about what this service is able to consider. It isn't the role of this service to supervise, regulate or impose fines on any business. It's also not our role to ask a business to alter their policies or procedures or impose improvements on the level of service offered to their customers. These aspects fall firmly within the remit of the regulator – in this case, the FCA. But it is our role to examine and decide whether a business has been fair and reasonable in the manner in which those policies and procedures are applied in the individual circumstances of Mr and Mrs P's experience with them.

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 do not provide a legal service. And as I've said above, 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, it 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.

Do Mr and Mrs P have a valid claim?

The original claim submitted by the CMC to VFL specifically refers to a purchase agreed on 22 November 2017 for £42,560 together with the associated loan. However, VFL have pointed out that this purchase didn't proceed, and the loan agreed wasn't drawn. So, it appears Mr and Mrs P may not have submitted a valid claim.

That said, VFL have explained the circumstances that led up to the changes in the purchase agreement and how they resulted in a new loan being agreed and taken by Mr and Mrs P. VFL have then gone on to consider the merits of Mr and Mrs P's claim against the new loan agreed in December 2017. So, on that basis, I believe it's reasonable I consider the fairness of VFL's response.

The claim for misrepresentation

S75(3) says that *"Subsection (1)[3] does not apply to a claim – (so far as any claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000[…]").* The purchase price shown within the purchase agreement in November 2017 was £42,560. But as I've already said, this

[3] In relation a misrepresentation or breach of contract.

purchase didn't proceed. The subsequent purchase agreed in December 2017 was for £33,560. So, I don't believe a valid claim can be made under S75. But it is possible that any alleged misrepresentation could be considered under S140A if it was found to have resulted in an unfair debtor-creditor-supplier relationship.

The claim for breach of contract

Such a claim under S75 is also subject to the purchase price limit mentioned above. So, I also don't think there's a valid claim for breach of contract under that provision. Section 75A of the CCA ("S75A") provides similar (although narrower) rights to S75 and has a higher purchase price limit. Specifically, this section covers certain situations where there's evidence of a breach of contract - but not misrepresentation. Having considered that, I think Mr and Mrs P's breach of contract claim could be considered under this provision.

However, VFL have said that 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 P believes 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 P) 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 and matters relating to the debtor).

- Misrepresentations

In determining if the relationship is unfair, the courts must have regard for *"any other thing done (or not done) by or on behalf of, the creditor"*[4]. I think the alleged misrepresentations are, therefore, relevant here. So, even though I think it's likely they couldn't be considered under S75 due to the purchase price limitation, I thought they could still be considered under S140A[5]. Therefore, in trying to establish whether I think a court would likely find that an unfair relationship existed, I've considered the alleged misrepresentations further in addition to the various other points raised by the CMC.

For me to conclude there was a 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 P something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr and Mrs P to enter the contract. This

[4] Under S140A(1)(c) of the CCA

[5] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

means I would need to be persuaded that they reasonably relied on those false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what they 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 other evidence available. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr and Mrs P's claim, such as marketing material or documentation from the time of the sale that echoes what they say they were told. In particular that the product purchased was represented as a financial investment.

I don't think the contract can have been marketed and sold as an 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 Mr and Mrs P's membership. 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 purchased. A would had to have presented the membership in such a way that used its investment element to persuade Mr and Mrs P to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

Subsequent submissions to this service by the CMC appear to reference a points-based product sold by A. But from the evidence I've seen, I don't think this was the type of product Mr and Mrs P purchased as the documentation appears to relate to clearly defined accommodation and weeks rather than points.

I've also considered the 36-page 'Generic submissions' document provided by the CMC. However, this also appears to relate to a points-based product sold by A rather than the product Mr and Mrs P actually purchased. And in any event, given the generic nature of the document, I don't think it's helpful in establishing the specific facts of Mr and Mrs P's own Purchase.

On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that A did in fact make the alleged misrepresentations.

- <u>The pressured sale and process</u>

The claim makes an allegation that Mr and Mrs P were subjected to a high-pressure sales presentation.

Against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that Mr and Mrs P agreed to the purchase 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, to suggest they'd agreed to it when they didn't want to. And they haven't provided a credible explanation for why they didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If Mr and Mrs P only agreed to the purchase because they felt they were pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest they were obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate they made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired.

In deciding whether to make a determination under S140A, *"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 P]*)"*.

Mr and Mrs P already held an existing timeshare product they'd purchased previously from A. Importantly; the new purchase appears to relate to an upgrade and/or change to their existing timeshare product holding. It doesn't appear it was their first product purchase from A, and Mr and Mrs P weren't new customers. So, it's likely they would've benefitted from their previous experience and what might be expected from the meeting and sales presentation in 2017.

Whilst there could be potential for a court to decide that some of the allegations might have led to an unfair debtor-creditor relationship here, I think any decision is likely to be taken within the context of their overall experience. And even if I was to find that some of the information could've been clearer during the sale – and I make no such finding – I think it's unlikely this would lead to a court finding this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

- A's responsibilities and disclosure of commission paid

Part of Mr and Mrs P's S140A claim is based upon the status of A (as the introducer of the loan) and their resultant responsibilities towards them. In particular, it's argued that the payment of commission by VFL to A 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 P, 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 P advice or information on that basis. As far as I'm aware, they were 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 P requested those details from VFL. VFL have said that no commission was paid. As I understand it, where commission is paid, the typical amounts paid by VFL to suppliers (like A in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure or payment of commission created and unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

- The terms and conditions of the purchase agreement

In subsequent submissions to this service, the CMC have suggested that some of the terms of the purchase agreement are unfair. Particularly where Mr and Mrs P have stopped paying annual maintenance fees under their contract. However, I can't see that this aspect formed part of the claim that was made. And because of that, I don't think this is something I can fairly consider here. That said, I believe VFL have acknowledged the current position and offered to discuss Mr and Mrs P's current situation and circumstances so that a mutually acceptable resolution can be found. This approach feels fair in the circumstances here.

Were the required lending checks undertaken?

There are certain aspects of Mr and Mrs P's claim that could be considered outside of S75 and S140A. In particular, in relation to whether VFL undertook a proper credit assessment. The CMC allege a sound and proper affordability check wasn't completed.

It's relevant that the CMC haven't provided any evidence to show that the loan was unaffordable or unsuitable for Mr and Mrs P. And I've not seen anything that supports any suggestion of financial difficulty from that time.

In their response to Mr and Mrs P's claim, VFL explained to this service the affordability assessment they'd completed which they believe showed the loan was sustainably affordable for them. If I were to find that the checks and tests completed by VFL didn't comply with the regulatory guidelines and requirements that applied – 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 P in order to uphold their complaint here. And in any event, I don't believe any compliance failure would automatically mean that their loan agreement was null and void. It would need to be shown that any such failure resulted in a loss to Mr and Mrs P as a consequence.

I've seen no specific information about their actual position at the time and no supporting evidence that they struggled to maintain repayments. And VFL have confirmed that Mr and Mrs P maintained all repayments as they fell due without any suggestion of financial difficulty. Based upon these findings, I can't reasonably conclude the loan was unaffordable for them or that they've suffered any loss as a consequence.

Summary

Whilst the original claims appear to relate to a loan that wasn't actually taken up, VFL's engagement in relation to the subsequent loan means that I think it's fair I consider how this was handled and whether VFL's response was fair and reasonable. That's what I've done here. However, I haven't found anything that persuades me that VFL have acted unfairly or unreasonably. And because of that, I'm not currently inclined 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.

VFL haven't acknowledged or responded to my provisional decision. The CMC have confirmed they've received it and have shared its contents with Mr and Mrs P. But despite follow up by this service, they haven't provided anything new for me to consider.

In the circumstances and having not seen anything that persuades me to vary from my provisional findings, my final decision remains unchanged.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P and Mr P to accept or reject my decision before 12 December 2023.

Dave Morgan
Ombudsman