

The complaint

Mr S complains about the sale of a timeshare. He says that Vacation Finance Limited (who I'll call Vacation Finance) financed the purchase and that he, therefore, has claims against it.

Mr S brought his complaint through a representative, so references to his submissions and arguments include those made on his behalf.

What happened

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

In June 2018 Mr S entered into a timeshare membership with a company I will call "Az". The purchase was funded through a fixed sum loan with Vacation Finance.

Mr S complained to Vacation Finance in February 2022. His claim was detailed but in essence he said that he had a claim under sections 75 and 140A of the Consumer Credit Act 1974 (CCA) as the agreement had been misrepresented to him and there had been an unfair relationship. He also said Vacation Finance hadn't performed adequate checks to ensure the loan was affordable for him.

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

Our investigator considered what had happened but didn't think that Vacation Finance had been unreasonable to reject Mr S's claims.

Mr S 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.

Mr S has provided very limited documentation in support of his claim. However, this service has seen a number of complaints about Az timeshare sales from around the same time. Az and the lender used largely standard contract wording. I have, therefore, approached this case on the assumption that the same standard wording was used in this case. If that (or any other assumption I have made) is incorrect, the parties can explain that and provide the necessary evidence in their response to this provisional decision.

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.

The claim under the CCA

When something goes wrong and the payment was made with a fixed sum loan, as was 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 Mr S 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 Mr S and the lender.

It's not for me to decide the outcome of a claim Mr S 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 his claims.

The claim under section 75 of the CCA

Mr S 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 Mr S's use of his timeshare would, therefore, have been unchanged.

Mr S says the agreement was misrepresented to him as an investment but other than his testimony, I've not seen evidence to corroborate that or to corroborate Mr S's suggestion that he wanted to sell the timeshare and was promised he'd be able to. Mr S has explained that he paid to be a member of Az's resale program from 2015, so I think by the time of this sale, in 2018, he would have been well aware of any difficulties encountered selling the product. 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.

Mr S relies upon a number of clauses in the Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regulations) that his representatives suggest created an unfair relationship between him 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 his ability to exercise choice was significantly impaired by the pressure and aggressive sales tactics he says he 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."

Mr S had already attended a number of presentations by Az as he had been a member of their timeshare schemes for several years and had taken out several previous agreements. So, I think he 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 Mr S didn't understand he didn't have to say yes to the agreement or that he didn't understand he could walk away without entering into it. Experience suggests that contractual paperwork provided by Az and Vacation Finance around the time of this sale would have provided a 14 day cooling off period. I think that would have allowed Mr S to reflect and withdraw from the agreement and the loan if he wished.

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

Mr S says that he 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 nor would, in my opinion, a court be likely to support a claim under section 140A on that basis.

Mr S also claims that an unfair relationship existed because he was not 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.

Mr S says that an unfair relationship also existed because he was not offered a choice of lenders. Az wasn't acting as an agent of Mr S but as the supplier of contractual rights he 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 Mr S advice or information on that basis. However, even if it's right to suggest that he should have been presented with a range of lenders to choose from, there's little to nothing to demonstrate that he suffered a financial loss because he 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?

Mr S says that Vacation Finance was in breach of its obligations to conduct an adequate credit assessment to determine whether he 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 Mr S suffered a loss as a result. I've not been provided with sufficient evidence from Mr S to suggest he 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 expecting to uphold this complaint.

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.

Neither party provided any additional comments or evidence and I've not, therefore, been persuaded to change my provisional decision. My provisional decision, 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 Mr S to accept or reject my decision before 15 February 2024.

Phillip McMahon
Ombudsman