DRN-4263666

The complaint

Mr and Mrs M complain that Vacation Finance Limited ("VFL") unfairly turned down their claim under the Consumer Credit Act 1974 [as amended] ("the CCA") relating to a loan provided to them to purchase a timeshare membership.

What happened

Mr and Mrs M have been members and holders of various timeshare interests purchased through a timeshare supplier (who I'll refer to as "A") since around 2008. Over time, Mr and Mrs M agreed to subsequent purchases and upgrades elevating their membership status and benefits, having attended various sales presentations given by A. The timeshares purchased are located in a popular holiday destination outside of the UK.

The purchases are said to have been funded under various credit agreements through various finance providers, including three such purchases that Mr and Mrs M believed were financed by VFL.

In or around June 2021, Mr and Mrs M submitted a complaint to VFL in relation to the three purchases they believe were funded by loans provided by them. They included:

- 23 August 2016 for £87,000 funded with a loan of £60,900
- 24 October 2018 for £65,500 funded with a loan of £45,850;
- 16 September 2019 for £39,950 with funding undetermined.

The various complaint points raised included:

- A had fraudulently represented the products purchased as investments;
- A were not authorised to carry our finance brokering activities;
- as an appointed representative of VFL, A were *"Not allowed to canvass off trade premises.* They said VFL's premises were registered in the UK and so A had breached that restriction;
- VFL (and A, as their representative) breached the rules and guidelines within CONC[1];
- A used outlawed sales techniques including high pressure tactics, aggressive behaviors, harassment and coercion;
- A had failed to provide time to read the purchase agreements;
- agreements were posted to Mr and Mrs M's home address by A, arriving after the contractual withdrawal period; and
- no affordability assessment was undertaken in relation to the loans agreed.

While VFL acknowledged Mr and Mrs M's complaint in writing, a substantive response wasn't received. So, Mr and Mrs M referred their complaint to this service. In doing so, they said their complaint and claim were made under sections 75 and 140A, B and C of the *"Consumer Credit Act 2006"*. They also provided details of their underlying concerns and

[1] The Consumer Credit Sourcebook – Part of the Financial Conduct Authority's Handbook

referenced various laws, rules, regulations and guidance, with allegations of how they believed they'd been breached.

In or around February 2022, VFL provided their written response to Mr and Mrs M's complaint. They didn't think Mr and Mrs M had provided evidence to support the various claims made and didn't agree either A or they had failed to comply with the various requirements referred to. In doing so, they didn't uphold Mr and Mrs M's complaint.

Having considered everything Mr and Mrs M had said, together with the documentation provided, one of this service's investigators didn't think the claims in respect of two of the purchases referred to could be considered. They couldn't find any evidence to suggest those purchases were, in fact, funded by VFL. But they did consider the purchase completed in or around October 2018.

In doing so, the investigator didn't think Mr and Mrs M were able to make a claim for misrepresentation under section 75 of the CCA (S75) as the purchase amount exceeded the limits covered under that provision. However, they did think the alleged misrepresentations, together with many of the other allegations, could be considered under section 140A of the CCA ("S140A"). Particularly if it was found they created an unfair relationship under those provisions.

Having considered that, the investigator thought Mr and Mrs complaint against VFL should be upheld. In particular, they were persuaded that Mr and Mrs M's agreement to complete the purchase was influenced by representations made by A that were considered false and misleading. Furthermore, the investigator thought A appeared to have breached various regulations. And when combined with the misrepresentations, thought a court was likely to find this had created an unfair relationship under S140A.

The investigator thought VFL should cancel the Mr and Mrs M's loan and refund all repayments made, adding 8% simple interest per annum. They also thought VFL should reimburse Mr and Mrs M's cash contribution (subject to proof of payment) together with 8% interest. Finally, the investigator though VFL should reimburse Mr and Mrs M for any maintenance fees paid under the timeshare subject to proof of payment.

Although I can't find anything to show that Mr and Mrs M specifically accepted the investigator's findings, they did acknowledge receiving them and didn't raise any further concerns. VFL rejected the investigator's findings as they thought there was very little reference to documents which Mr and Mrs M would've signed. They also thought there'd been no recognition of Mr and Mrs M's previous and continued use of the timeshare membership including their agreement to changes in their membership in 2020.

As an informal agreement couldn't be reached, Mr and Mrs M's complaint has been passed to me to consider and issue a decision.

Having considered the relevant information about this complaint, I reached a different outcome to that of our investigator. Because of that, I issued a provisional decision ("PD") on 27 June 2023 – giving Mr M, Mrs M and VFL the opportunity to respond to my findings 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[2] 3.6.4R of the FCA[3] 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.

[2] Dispute Resolution: the Complaints sourcebook (DISP)
[3] Financial Conduct Authority

S75 provides consumers with protection for goods or services bought using credit. Where Mr and Mrs M paid for their timeshare membership, having financed it with a restricted use regulated loan from VFL, they are afforded the protection offered to borrowers like them under those provisions – subject to any restrictions and limitations. So, I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Mr M, Mrs M and VFL arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under the 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 response to Mr and Mrs M'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 or services and provide rules and guidance about what this service is able to consider. 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 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.

Mr and Mrs M's timeshare product experience

In referring their complaint to this service, Mr and Mrs M said their first experience of A was during a *"free holiday"* trip to a resort in 2008. During that trip, they said they attended *"the expected 'sales pitch'"* and made their *"first of many unit purchases"* from A, receiving various discounts, benefits and vouchers. Mr and Mrs M also confirmed they subsequently visited the resort *"every year, some years twice, with the same lengthy 'high pressure' sales meetings every time".* They said they'd visited the resort 12 times between 2008 and 2018. They also appear to have made a further purchase in 2019.

So, based upon this information, I think it's reasonable to conclude that Mr and Mrs M had a reasonably strong awareness about the products they'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude that Mr and Mrs M were familiar with A (as a timeshare supplier) and the sales presentations given by them.

The claim for misrepresentation

Mr and Mrs M's claim to VFL references three purchases they made from A. However, it appears the purchase made in or around August 2016 wasn't financed by VFL. It was financed by another business. Because of that, any claim under that

agreement needs to be made to that business. So, I'm unable to consider the circumstances of that purchase within my decision here as it doesn't appear to relate to VFL.

Furthermore, I also haven't seen any evidence to demonstrate that Mr and Mrs M's purchase from A, in or around September 2019, was funded under a loan agreement with VFL. So, I'm not able to consider that element of Mr and Mrs A's compliant either.

S75(3) says that *"Subsection (1)[4] 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 cash price shown within the loan agreement in October 2018 was £65,500. As a consequence, I don't believe a valid claim can be made under S75. But it is possible that any misrepresentation could be considered under S140A if it was found to have resulted in an unfair debtor-creditor-supplier relationship.

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 M) 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 must have regard for *"anything done (or not done) by or on behalf of the creditor".* So, I think the alleged misrepresentations were, therefore, relevant here. Even though I don't think they can be considered under S75 due to the restriction within S75(3).

Misrepresentation

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 holiday product to Mr and Mrs M in 2018. In other words, that they told them something that wasn't true in relation to one or more of any points raised. I would also need to be satisfied that any misrepresentation was material in inducing them to enter the contract. This means I would need to be persuaded that Mr and Mrs M reasonably relied upon any false statements when deciding to buy the timeshare product

The difficulty I have is identifying what was actually said at the time of the sale in 2018. Mr and Mrs M have provided limited details and evidence to support the misrepresentations they say A made, although I acknowledge that they do say they were told these things. So, I've thought about this and whether there's any evidence available from the time of their purchase in 2018.

Mr and Mrs M told this service that A *"fraudulently represented the product as an investment. It was described as an investment in property […] thereby breaching The Timeshare Holiday Products, Resale and Exchange Contracts Regulations 2010* [the TRs*] s.14(3) and creating an unfair relationship as defined by s.140 CCA".*

Although not determinative of the matter, I've seen limited specific evidence from the time of the sale in 2018, such as marketing material or any of the wider purchase or

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

membership documentation. I have seen a one-page document headed *"Membership Application Agreement"* together with a welcome letter addressed to Mr and Mrs M. They are both dated 24 October 2018 – the date of the purchase. There's also a copy of Mr and Mrs M's credit application and a document headed *"Pre-contract credit information".* There doesn't appear to be anything within these documents to corroborate Mr and Mrs M's allegation. And because of that, I can't reasonably reach the conclusion that Mr and Mrs A were told something by A that amounted to misrepresentation. Specifically, that A represented their purchase in 2018 as an investment.

Mr and Mrs M have also provided information from various reports and decisions relating to alleged breaches of legislation and regulations they believe applies here. However, these examples weren't specific to Mr and Mrs M's recollections of their own particular purchase. So, I don't think they offered much help in making factual findings in their particular case.

The sales process

Mr and Mrs M allege that A used *"illegal and outlawed sales techniques"* and, as a result, they were pressured into entering the agreement. I acknowledge what Mr and Mrs M say in their testimony about the length of sales presentations they attended. So, I can understand why it's argued that the prolonged nature of these presentations might have felt like a pressured sale – especially if, as they 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 M agreed to the purchase in 2018 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 usually permitted here.

If they 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 Mr and Mrs M 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 contrary to Regulation 7 of the Consumer Protection from Unfair Trading Regulations ("CPUT").

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 M]*)*.

Mr and Mrs M already held existing timeshare products they'd purchased previously from A. And they've confirmed they'd attended many previous meetings and presentations with A. Importantly, this purchase appears to relate to an upgrade of their existing timeshare product holding. It wasn't a new product purchase. And Mr and Mrs M weren't new customers. So, it's likely they would've benefitted from their previous experience and what they might expect from the meeting and sales presentation in 2018.

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 Mr and Mrs M's 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 a court might say this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

Time to consider the agreement(s)

I've seen limited documentation from the time of the sale. But having previously seen similar documents relating to A's product sales, I'm aware they normally include a period of 14 days from the date of agreeing to the purchase within which to cancel the agreement without giving any reason – as required under the TRs.

So, even if I were to find that Mr and Mrs M weren't given adequate opportunity to read and consider the purchase documentation at the time of the sale - and I make no such finding - I would expect them to have had sufficient time in which to consider their decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before the loan was drawn and the purchase completed. There's no suggestion or evidence that Mr and Mrs M did raise any questions or concerns prior to the sale being completed. Or that they had any intention of cancelling the agreement.

Mr and Mrs M allege they didn't receive any documentation at the time of the sale. Rather that this was posted to their home address three weeks after the purchase was agreed. In their response, VFL have denied this stating that *"upon the signing of any agreement, either a hard copy or soft copy of the original signed agreement is always given to the customer [by A]".*

To support Mr and Mrs M's allegation here, at the very least I would expect to see some evidence they only received the documents three weeks after the product purchase was agreed. Alternatively, evidence that they'd contacted A about the alleged missing documentation. But I haven't seen that here. So, I can't reasonably conclude that A's actions here differed from their usual accepted process. Even if I were to find that Mr and Mrs M weren't given time to consider the documents at the time of the sale - and I make no such finding - in the absence of any evidence to the contrary, I can't fairly conclude that there would have been any cause for making the relationship unfair under Section 140A.

Is Mr and Mrs M's agreement null and void?

Various arguments have been made to support a belief that the timeshare and lending agreements here are null and void as a result of various alleged regulatory breaches.

Specifically:

The authorised status of A – This service's records show that A was registered as a representative of VFL from 25 April 2016. And VFL was authorised under this service's compulsory jurisdiction from 31 March 2016 which means they held the required authorisation from the FCA. And as their representative, A was able to introduce credit business to them. So, I don't agree that A didn't hold the required authorisation to introduce business to VFL under section 19 of the Financial Services and Markets Act 2000 ("FSMA)".

Canvassing off trade premises - Section 154 of the CCA says, *"It is an offence to canvass off trade premises the services of a person carrying on a business of credit-brokerage […]".* The Financial Conduct Authority ("FCA") Handbook defines *"canvassing off trade premises"* as:

(a) an activity by an individual ("the canvasser") of soliciting the entry of another individual ("B") into an agreement by making oral representations to B during a visit by the canvasser to any place (other than a place in (b)) where B is,

being a visit made by the canvasser for the purpose of making such oral representations.

(b) a place where a business is carried on (whether on a permanent or temporary basis) by:

(i) the lender or owner; or

(ii) a supplier; or

(iii) the canvasser; or

(iv) a person who employs the canvasser or has appointed the canvasser as an agent; or

(v) B;

is excluded from (a).

It's my understanding that the sale, and resultant credit application, was completed at A's offices/premises at the resort Mr and Mrs M were visiting. And given I've established that A was a registered representative of VFL at the time of the sale, I think they were entitled to do that. So, I can't reasonably say there was a regulatory breach in doing so.

Having considered the arguments put forward by Mr and Mrs M, I don't think there appears to be any circumstances, based upon the evidence available, that would likely lead to the agreement(s) being determined as null and void.

Were the required lending checks undertaken?

There are certain aspects of Mr and Mrs M's claim that could be considered outside of S75 and S140A. In particular, in relation to whether VFL undertook a proper credit assessment. Mr and Mrs M have made an allegation suggesting the loan was provided irresponsibly. In particular that no affordability checks were undertaken by A or VFL.

Mr and Mrs M haven't provided any evidence to show that the loan was unaffordable or unsuitable for them. And I've not seen anything that supports any allegation of financial difficulty from that time.

In their response to Mr and Mrs M, VFL said they followed their usual process and conducted an appropriate affordability assessment. But VFL haven't provided specific details of the checks they undertook. So, If I were to find that they hadn't completed all the required checks and tests – 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 M in order to uphold their complaint here.

I have seen a document headed "Credit Application" which appears to have been completed and signed by Mr and Mrs M at the time of the purchase. It includes their employment and income details together with details of their property value detailing no outstanding mortgage. However, with no other specific information about Mr and Mrs M'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 loss as a consequence.

Summary

I would like to reassure Mr and Mrs M that I've carefully considered everything they've said together with all the information they've provided and referred to. I appreciate they will be disappointed, but in the absence of specific evidence from the time of the sale in 2018, for the reasons I've said above, I can't reasonably say that

VFL's decision to turn down their claim was unfair or unreasonable. Because of that, I currently don't intend to ask VFL 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 have neither acknowledged receipt of my provisional decision nor provided any further comment.

Mr and Mrs M have responded and agree that the purchases in August 2016 and September 2019 weren't funded by loans provided by VFL. But they have reiterated their allegation that the product purchased was represented as an investment *"for our future".* They also took exception to my conclusion there was nothing to suggest the loan was unaffordable for them. They base their argument on an assertion they were told the purchase was an investment. And they say this *"time considered promise of a sale"* was taken into consideration by them when agreeing to take the loan. But I can't see anything suggesting their loan application was, or should've been, assessed on that basis.

Furthermore, the contract can't have been marketed and sold as an investment contrary to the TRs simply because there might have been some inherent value to Mr and Mrs M's membership. And in any event, I've found nothing within the evidence provided to suggest that A had provided any assurances or guarantees about the future value of the product they purchased. A would had to have presented the membership in such a way that used its investment element to persuade them 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).

In my PD, I said that I hadn't been provided with any evidence from the time of the sale to support the investment allegation. And that's still the case here. So, with nothing to corroborate Mr and Mrs M's assertions, I'm not persuaded to vary from my provisional findings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M and Mr M to accept or reject my decision before 24 August 2023.

Dave Morgan
Ombudsman