DRN-3947262

The complaint

Mr T, who is represented by a professional representative ("PR") complains that Vacation Finance Limited trading as VFL Finance Solutions ("VFL") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. I gather the purchase was made by Mr T and his wife, but as the finance agreement was in Mr T's name he is the eligible complainant. In this decision for simplicity I will refer to Mr T as the sole purchaser.

What happened

In October 2015 Mr T purchased a holiday product from a company I will call A. In November he made a second purchase which was funded in part by a loan from VFL. It is this purchase which is the subject of this complaint.

In June 2021 PR submitted a letter of claim to VFL. The details of this are well known to both parties so in the interest of brevity I will summarise the key points.

It said A had breach the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. In particular it said the product had been marketed as an investment, Mr T had been told it was reduced in price for that day and that he had been the subject of aggressive sales practices. It alleged that the product had been misrepresented. It also said that the Consumer Protection from Unfair Trading Regulations (CPUT) had been breached. PR said Mr T had not been told of commission paid by VFL to A and as the company was now in liquidation there had been a breach of contract.

VFL rejected the claim and rebutted each of the allegations pointing out the lack of supporting evidence. It said no commission had been paid and there was no basis for the remaining claims.

PR brought a complaint to this service where it was considered by one of our investigators who didn't recommend it be upheld. She asked for testimony from Mr T and PR supplied a brief note from him which asserted that he had been told he was buying an investment for the future. He said he had been told that the value would rise by 10% each year.

Our investigator concluded that there was insufficient evidence of any misrepresentation and PR had not established that there had been an unfair relationship or a breach of contract. PR didn't agree and made general points about A saying that it churned sales and Mr T thought he was buying an investment. It said that it was very likely that A sold the product as an investment and that Mr T was led to believe it could be easily resold.

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.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

“(1) relevant:

(a) law and regulations;

(b) regulators’ rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time.”

And when evidence is incomplete, inconclusive, incongruent or contradictory, I’ve made my decision 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 available evidence and the wider circumstances.

Having read and considered all the available evidence and arguments, I don’t think this complaint should be upheld. PR has made a number of claims, but has not submitted much evidence in support of them. I have noted Mr T’s testimony, but I have not seen a copy of the agreement signed by Mr T (apart from a single page) nor any other paperwork supplied by A at the time of sale. PR has simply made several assertions which are not supported by the documentary evidence.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr T) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (VFL) is equally and concurrently liable for that claim – enabling the debtor to make a ‘like claim’ against the creditor should he choose to.

It’s important to note that, as VFL was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

Misrepresentation

Misrepresentation is, in very broad terms, a statement of law or of fact, made by one party to a contract to the other, which is untrue, and which materially influenced the other party to enter into the contract.

PR has said that Mr T was told that his purchase was an investment. It also supplied written testimony from Mr T as to what he recalled being told. While I was not present at the sale I do not consider that the evidence allows me to conclude the product was misrepresented. I have seen no explanation of how that could be the case or why Mr T believed that the purchase of points would be an investment. If he had been told that – or had otherwise believed that to be the case – I would have expected him to ask for more information.

Although I am aware of the types of agreement used by A I cannot be certain what Mr T signed. PR has suggested that it is likely A sold the product as an investment, but I don’t believe that is sufficiently persuasive to allow me to require VFL to refund the costs to Mr T.

In short I do not believe I can say that there was misrepresentation such that I can uphold this complaint.

Breach of Contract

I do not believe that the liquidation of A in 2020 led to a breach of contract. I gather a new management company was appointed, and Mr T was able to use the timeshare as usual after that date.

In July 2020 the trustee wrote to all the club members. Its letter said: "*The JLs are pleased to confirm that FNTC has taken over as the new manager of the Clubs and further confirm that, as a result, the Clubs will continue to operate for the benefit of members*." I presume Mr T received a copy of this letter or something similar.

On the face of it, therefore, the services linked to Mr T's purchase of the points remain available to him and are unaffected by the liquidation. Indeed the agreements used by A usually allow for the liquidation of A and its replacement by another provider. That said, I cannot say if this was in Mr T's contract since I have not seen a copy of it.

Given I have not been persuaded that the product was sold as a financial investment I cannot conclude that the removal of a sales service by A can been regarded as a breach of contract.

S. 140A claims

Only a court has the power to decide whether the relationships between Mr T and VFL were unfair for the purpose of s. 140A. But, as it's relevant law, I do have to consider it if it applies to the credit agreement – which it does.

However, as a claim under Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 9 of the LA, I've considered that provision here.

It was held in Patel v Patel [2009] EWHC 3264 (QB) ('Patel v Patel') that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. The limitation period is six years and the claim was made within this period.

However, I'm not persuaded that Mr T could be said to have a cause of action in negligence against VFL anyway.

Mr T's alleged loss isn't related to damage to property or to him personally, which must mean it's purely financial. And that type of loss isn't usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a claimant against that type of harm.

Yet I've seen little or nothing to persuade me that VFL assumed such responsibility – whether willingly or unwillingly.

PR seems to suggest that VFL owed Mr T a duty of care to ensure that A complied with the 2010 Regulations and it argues at length that the payment of commission created an unfair relationship. However VFL has confirmed it paid no commission. Nor can I see any clear evidence that shows A breached the Timeshare Regulations or CPUT rules.

I appreciate Mr T is dissatisfied with his purchase and he has my sympathies for this, but, in summary I cannot see why any of his claims were likely to have succeeded. So overall I think that VFL acted reasonably in declining the claims under s.75 and s. 140A CCA.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 12 January 2024.

Ivor Graham
Ombudsman