DRN-3963591

The complaint

Mr and Mrs D, who are represented by a professional representative ("PR") complain that Vacation Finance Limited trading as VFL Finance Solutions ("VFL") rejected their claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

In August 2018 Mr and Mrs D purchased a points based holiday product from a company I will call A which was funded in part with a loan from VFL. This cost £42,816. Mr and Mrs D have made seven purchases of holiday products from A between 2011 and 2019, including the 2018 one which is the subject of this complaint.

In December 2021 PR submitted a letter of claim to VFL. As both parties are aware of the details of the claim, for the sake of brevity, I will provide a short summary of the key points.

It claimed there had been a breach of contract as A was now in liquidation. It said Mr and Mrs D had been approached while on holiday and aggressively targeted. They were told the new points based product could be sold at a profit. PR said this was misrepresentation in contravention of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. It also claimed Mr and Mrs D had been subjected to aggressive commercial practices in contravention of the Consumer Protection from Unfair Trading Regulations (CPUT). It said they had been told the special price was available only at that time and the following year they were told a new more desirable product should be purchased.

PR said Mr and Mrs D had been pressed to borrow from VFL and it had not undertaken a proper affordability check. Insufficient time had been given to allow them to consider the purchase properly and they had not been told of the commission paid by VFL to A.

VFL rejected the claims and disputed the allegations made by PR. It said Mr and Mrs D had 14 days from the date of signing to withdraw from the contract if they felt they had been misled or unduly pressurised. They had a responsibility to make sure they were satisfied with what they were signing. It disputed the claim that they had been told it was an investment and said no commission had been paid. The club was still running despite the liquidation and so there had been no breach of contract. It also noted that the loan had been repaid in full in September 2018 which did not indicate it was unaffordable. It also said that they had made multiple purchases which indicated they were satisfied with the products sold by A. Overall, it concluded that there was no evidence provided in support of the claim.

PR brought a complaint to this service on behalf of Mr and Mrs D reiterating the points made in the claim. It was considered by one of our investigators who didn't consider it should be upheld. Our investigator concluded there was insufficient evidence of either misrepresentation or a breach of contract. Nor did she think there was an unfair relationship under s.140A CAA.

PR didn't agree and reiterated that the product had been sold as an investment. They had been pressed to make numerous upgrades. The points they purchased could not be sold as

there was no market for them. Mr and Mrs D had not been given clear information in order for them to have been able to make an informed decision. A had not complied with the various regulations and Mr and Mrs D had only made the purchase because of the misrepresentations.

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. I will explain why. Firstly I should explain that there is little in the way of documentary material. PR refers to 100s of pages but apart from a nine page agreement with A and the loan agreement I have not seen the full documentation.

Sections 56 and 75 of the Consumer Credit Act 1974

The nature of the loan means that it would have been a regulated credit agreement covered by the Consumer Credit Act. I have assumed that A acted as credit broker as well as being the seller of the timeshare.

Under s. 56 of the Consumer Credit Act statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender. In this case, that means that anything A said about the timeshare or the loan is to be treated in the same way as if it had been said by VFL.

In addition, one effect of s. 75(1) of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a lender. Those conditions include:

- that the lending financed the contract giving rise to the claim; and
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

I am satisfied that the loan financed the purchase of the club membership. I must therefore

consider what the position might be if Mr and Mrs D were to bring a claim or claims against A, either for misrepresentation of for breach of 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 and Mrs D were told that their purchase was an investment. While I was not present at the time of sale I do not consider that I am able to conclude the product was misrepresented. I have seen no explanation of how that could be the case or why Mr and Mrs D believed that the purchase of points would be an investment. If they had been told that – or had otherwise believed that to be the case – I would have expected them to ask for more information.

I appreciate their claim that they believed they were purchasing an investment, but the frequent purchases they made does not support that claim. The belief they were buying an investment does not mean they were told it was a financial investment. These products can be described as investments in future holidays etc. I accept that the sales representatives will have but the best gloss on the product they were selling, but that of itself does not amount to misrepresentation.

PR has said they were seeking to sell the product, but I have seen no evidence in support of that. I would also mention that as they have had a long history of making purchases from A and it seems likely that they will have been aware of the sales process and the products A was selling.

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 and Mrs D were 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 and Mrs D received a copy of this letter or something similar.

On the face of it, therefore, the services linked to Mr and Mrs D's purchase of the points remain available to them 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 and Mrs D's contract since I have not seen a full 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 relationship between Mr and Mrs D 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 and Mrs D could be said to have a cause of action in negligence against VFL anyway.

Mr and Mrs D’s alleged loss isn’t related to damage to property or to them 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.

Furthermore, one of the main planks of the claim was the allegation that VFL had paid commission, but it has denied that it paid commission.

I appreciate Mr and Mrs D are dissatisfied with their purchase and they have my sympathies for this, but, in summary I cannot see why any of their 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.

As such I can see no basis for a successful claim under s.140A. Nor do I think the alleged pressure to which PR says Mr and Mrs D had been subjected at the time of the sale would allow me to uphold this complaint.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible.

Our investigator said that she could not see any evidence that Mr and Mrs D found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if VFL 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 Mr and Mrs D lost out as a result of its failings. VFL has pointed out they repaid the loan after a relatively short time which does not indicate it was unaffordable. PR has provided no evidence whatsoever that they would have found, or did find, it difficult to repay the loan, so I do not need to consider this point further.

Conclusion

It is not for me to decide whether Mr and Mrs D have a claim against A, or whether they might therefore have a “like claim” under s. 75 of the Consumer Credit Act. Nor can I make orders under s. 140A and s. 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr and Mrs D's complaint. In the circumstances, I think that VFL's response to Mr and Mrs D's claims was fair and reasonable.

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 Mrs D and Mr D to accept or reject my decision before 18 January 2024.

Ivor Graham
Ombudsman