DRN-4548167

The complaint

Mr W complains that a timeshare product was misrepresented to him. The purchase was partly financed with credit provided by Vacation Finance Limited (“VFL”). Because of that, Mr W says he has a claim against VFL in the same way he has a claim against the timeshare company.

Mr W has been represented in this complaint by a claims management business, which I’ll call “F”. Any reference to Mr W’s submissions and arguments, therefore, includes those made on his behalf.

What happened

Starting in 2016, Mr W has bought four timeshare products from companies within the Azure Group. He made purchases in July 2016, June 2017, June 2018, and June 2019. His complaint here concerns the June 2018 purchase.

In June 2018 Mr W was on holiday in Malta, using an existing timeshare product . While there, he attended a sales presentation, at the end of which he bought a points based timeshare product from a company in the Azure Group. He bought 11,000 XP points and Level 2 membership of the Azure XP club at a total cost of £10,000. XP points could be exchanged for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences The purchase was financed in part with a loan of £7,000 from VFL.

In 2020 two of the Azure companies, Azure XP Limited and Azure Resorts Limited, were placed into liquidation.

In September 2021 Mr W complained to VFL through F. He said: he had been pressured into buying the XP points; the product had been misrepresented to him; the points had been sold as an investment; the lending had been irresponsible; the loan created an unfair relationship; and commission had not been disclosed as it should have been.

VFL did not accept the complaint, and Mr W referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr W did not accept that recommendation and asked that an ombudsman review the case.

I did that and issued a provisional decision, in which I said:

I would observe first of all that Mr W has provided very limited documentation in support of his claim. I do not, for example, have complete copies of the June 2018 sale or loan documents. However, this service has seen a number of complaints about Azure timeshare sales from around the same time. As is to be expected, the sellers and VFL used largely standard contract wording, so I have 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 in their response to this provisional decision.

In addition, I note that VFL's response to the complaint said both that Mr W had not taken out a loan in connection with the June 2018 sale and that it had lent in a responsible manner. Those statements can't both be correct. I am however satisfied that the purchase was in fact financed in part with a VFL loan to Mr W.

I will therefore consider the arguments made.

Affordability

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case.

I have not however seen any evidence to suggest that the loan was not affordable for Mr W. He does not appear to have indicated at any time that he was having difficulty making payments. The loan statements indicate that payments were made in full and on time, and that the loan was repaid in May 2019. I note as well that Mr W took out a larger loan to fund his 2019 timeshare purchase. I think it unlikely that he would have done that if he had struggled to make the lower payments needed under the 2018 loan agreement.

The fact that a borrower has not missed any payments or fallen into arrears does not necessarily show that the lender did carry out appropriate checks before agreeing the loan. It does indicate however that Mr W has suffered no undue loss as a result of taking the loan out. It also indicates that, even if more detailed checks had been made, it's likely the loan would have been granted in very similar terms in any event.

Sections 56 and 75 of the Consumer Credit Act

Under section 56 of the Consumer Credit Act 1974 statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender.

In addition, one effect of section 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.*

For Azure timeshare contracts made in mid-2018 and financed by VFL, the seller was usually Axure XP Limited, and Azure Services Limited was the credit intermediary. I assume that was the case here, although – as I have indicated – I have not been provided with any documents to show the exact position. The links between those companies and VFL were such that section 75 conditions were met. I have therefore considered what has been said about the sale in June 2018.

Misrepresentation

A 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 induces the other party into the contract.

Mr W's statements about what he was told at the sales presentation are generic, lack detail, and are largely unsupported by any documentation. He has said that he was told the XP points would be an investment which could be sold for a profit or which could provide an income.

The standard Application for Membership recorded that buyers had received Azure's Standard Information Document, the Rules of Membership, the Reservation Rules, and the Deed of Trust. I believe Mr W would have been provided with those documents. That is relevant to the question of whether he was misled about what he was buying.

I am not persuaded that the XP points were sold as an investment that Mr W could easily sell at a profit. They were sold as a means of funding holiday accommodation and experiences. I note as well that the standard contractual documents made it clear that XP points could only be sold through Azure and once they had been held for five years. I understand the resale programme was opened in 2022, after this complaint was first brought. I have however seen no evidence that Mr W has sought to sell his XP points.

I am not persuaded that Mr W was misled about what he was buying. In particular, I do not believe he was told he was buying an investment.

But in any event, the Membership Application included, at clause 13:

"This Agreement shall constitute the sole agreement between the parties and supersedes all prior agreements, representations, discussions and negotiations between the parties with respect to the subject matter hereof."

And clause 20 included:

"This Agreement is irrevocable and legally binding upon all parties and cannot be cancelled or rescinded at any time after the expiry of the statutory withdrawal period stated In this Agreement and will supersede any and all understandings and agreements between the parties hereto whether written or oral and it is mutually understood and agreed that this Agreement and the Standard Information Document and ancillary documents represent the entire agreement between the parties hereto and no representation or inducements made prior hereto which are not included in and embodied In this Agreement, or the documents referred to, will have any force or effect."

In my view, the inclusion of "entire agreement" provisions was an attempt to ensure that anything on which Mr W sought to rely was included in the contract itself. I am not persuaded in this case that he was misled, but, if I were to take a different view on that, I would need to consider the effect of those provisions.

Breach of contract

F says that the liquidation of Azure companies means that there is a breach of contract.

By the time of the liquidation, Mr W had "upgraded" his club membership, in the sense that he had entered into a new contract for the purchase of 13,300 XP points in place of the 11,000 points he bought in 2018. It's arguable therefore that the June 2018 loan did not finance the contract in respect of which the breach is alleged.

Be that as it may, I don't believe there was any breach. Club properties were held in a trust. On 8 July 2020 the trustee wrote to all the club members. Its letter said:

"We have good news for all members. Following discussions with the liquidators of both Azure Resorts Limited and Azure XP Limited and with the directors of Golden Sands Resorts Limited (the owner of the resort) it has been decided that in the best interest of all clubs' members, First National Trustee Company (UK) Limited (FNTC) be requested to establish a new company to act as manager of the clubs on behalf of all clubs' members.

"This new management company will be a non-profit making entity and its only role will be to manage the clubs for, and on behalf of, its members.

…

"We'd like to reassure you that the future of the clubs is secure. From your perspective as a member, there is a lot to look forward to as soon as governmental travel restrictions are lifted. We are also pleased to report to you that Radisson Blu Resort & Spa, Golden Sands in Malta has reopened and is available for member use after the resort has successfully established COVID-19 health and safety precautions."

Any services linked to Mr W's purchase of XP points therefore remain available to him and are unaffected by the liquidation of the Azure companies.

F has said as well that the purchase of the XP points was unnecessary. But that is, of course, true of many purchases and would not usually give rise to a claim against the seller.

Section 140A claims

Under section 140A and section 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments.

In considering whether a credit agreement creates an unfair relationship, a court can have regard to any linked transaction.

Assuming the loan was made under pre-existing arrangements between VFL and a company closely linked to the seller, the timeshare agreement was a "linked transaction" within the meaning of section 19 of the Consumer Credit Act.

An ombudsman does not have the power to make an order under section 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable. And I have the power to make a wide range of awards – including, for example, requiring a borrower to refund interest or charges, and to write off or reduce the balance of a loan. I am not persuaded however that I should do so here.

There were links between VFL and the Azure companies. I do not believe however that this led to a conflict of interest in respect of their relationship with Mr W. Azure XP was selling club membership and XP points, and Azure Services was acting as intermediary (and VFL's agent). Whilst it introduced finance options, it was not acting as Mr W's financial adviser or agent and was under no obligation to make an impartial or disinterested recommendation or to give advice or information on that basis.

F says that VFL did not disclose the commission paid to Azure. VFL says it did not pay any, and I have no reason to doubt that. I note in any event that, before alleging that an unfair commission had been paid, F does not appear to have taken any steps to ask whether any commission had been paid or, if so, what it was. That does not suggest that the issue of commission was a real concern to Mr W, either at the point of sale or subsequently.

Mr W says too that the sale was pressured. He has not really elaborated on that, but I note that Azure's standard documents included a statement from the buyer to say they had not been put under pressure. It's significant too in my view that Mr W had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. If he thought he had agreed to anything as a result of undue pressure, it is not clear to me why he didn't take advantage of the option to withdraw.

It is not for me to decide whether Mr W has a claim against the seller, or whether he might therefore have a “like claim” under section 75 of the Consumer Credit Act. Nor can I make orders under sections 140A and 140B of the same Act.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr W’s complaint. In the circumstances of this case, however, I think that VFL’s response to the claims was fair and reasonable.

I concluded that I was unlikely to uphold Mr W’s complaint. I gave the parties until 21 December 2023 to send me any further evidence or arguments they wanted me to consider. Neither Mr W nor VFL has provided any additional material.

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.

As I have received no additional evidence or arguments, I see no reason to reach a different conclusion from that set out in my provisional decision. In reaching my decision, I stress however that I have considered the entire case file afresh.

My final decision

For these reasons, my final decision is that I do not uphold Mr W’s complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr W to accept or reject my decision before 22 February 2024.

Mike Ingram
Ombudsman