DRN-4557930

## The complaint

Mr and Mrs B complain that a timeshare product was misrepresented to them. The purchase was partly financed with credit provided by Vacation Finance Limited ("VFL"). Because of that, Mr and Mrs B say they have a claim against VFL in the same way they have a claim against the timeshare company.

Mr and Mrs B have been represented in this complaint by a claims management business, which I'll call "F". Any reference to Mr and Mrs B's submissions and arguments, therefore, includes those made on their behalf.

## What happened

Starting in 2011, Mr and Mrs B have bought four timeshare products from companies within the Azure Group. They made purchases in 2011, 2013, 2014, and in May 2018. Their complaint here concerns the May 2018 purchase.

In May 2018 Mr and Mrs B were on holiday in Malta, using an existing timeshare product . While there, they attended a sales presentation, at the end of which they bought a points based timeshare product from Azure XP Limited. They bought 24,300 XP points and Level 4 membership of the Azure XP club at a total cost of £26,479. They also traded in their existing timeshare weeks. 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 £6,479 from VFL.

In 2020 Azure XP Limited and Azure Services Limited, another company within the Azure Group, were placed into liquidation.

In June 2020 Mr and Mrs B complained to VFL through F. They said: they had been pressured into buying the XP points; the product had been misrepresented to them; the points had been sold as an investment; the lending had been irresponsible; the loan created an unfair relationship; commission had not been disclosed as it should have been; and information had not been provided as it should have been under The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the 2010 Regulations").

VFL did not accept the claim, and Mr and Mrs B referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr and Mrs B 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 do not believe that I have been provided with a complete set of documentation relating to the sale. 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.*

***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 and Mrs B. They do not appear to have indicated at any time that they were having difficulty making payments. The loan statements indicate that payments had been made in full and on time, and were up to date when the matter was referred to this service.*

*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 and Mrs B have 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.*

*In this case, the sale was financed in part by VFL; the seller was Axure XP Limited; and Azure Services Limited, a company registered in Malta, was the credit intermediary. The links between those Azure companies and VFL were such that section 75 conditions were met. I have therefore considered what has been said about the sale in May 2018.*

***Breach of contract***

*F says that the liquidation of Azure companies means that there is a breach of contract. I don't believe that is the case. Club properties were held in a trust. The trust deed included a provision allowing the trustee to appoint a replacement entity to administer the club, should the existing management company go out of business. That is what happened.*

*On 7 May 2020 the liquidators of Azure XP Limited wrote to all club members to tell them that the company had been placed into liquidation. That letter noted as well that the club's resort continued to operate normally – albeit subject to Covid-19 restrictions in place at the time. The liquidators also made reference to the liquidation of other Azure companies.*

*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."*

*Subsequently, club members were informed that a new resort manager, VCMS, had been appointed. I am satisfied therefore that the services linked to Mr and Mrs B's purchase of XP points and club membership remain available to them and are unaffected by the liquidation of the Azure companies.*

***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 and Mrs B have said that they were told the XP points would be an investment which could be sold for a profit or which could provide an income.*

*Mr and Mrs B's Application for Membership recorded that they had received Azure's Standard Information Document, the Rules of Membership, the Reservation Rules, and the Deed of Trust. I believe Mr and Mrs B were provided with those documents, even if they do not recall them. That is relevant to the question of whether they were misled about what he was buying.*

*I am not persuaded that the XP points were sold as an investment that Mr and Mrs B 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 a certain period of time. I understand the resale programme was opened only after Mr and Mrs B first said they had a claim for misrepresentation. I have however seen no evidence that Mr and Mrs B have sought to sell their XP points.*

*I am not persuaded that Mr and Mrs B were misled about what they were buying. In particular, I do not believe they were told they were buying an investment.*

*But in any event, the Membership Application (each page of which Mr and Mrs B signed) 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 and Mrs B sought to rely was included in the contract itself. Their inclusion helped to provide clarity. I am not persuaded in this case that Mr and Mrs B were misled, but, if I were to take a different view on that, I would need to consider the effect of those provisions.*

*In addition, the sale documents which Azure used at the time included a Compliance Statement, comprising ten numbered statements, each one of which customers were required to initial. They included:*

- *"The primary purpose of our Membership is to access holiday accommodation and is not a financial investment for a return. We also understand that the membership price paid does not necessarily reflect the market value of our membership." [para 6]*
- *"We have been informed of the various options we have to exit our Membership. We understand that the Azure Resale's facility will be available with effect from the year 2020. We have also been advised should we wish to initiate the process to exit our membership through the Azure resale's facility we would first need to enter into a listing agreement. We have not been given any resale's timeframe guarantees since finding a new buyer depends on market conditions and could potentially take one or more years. We are not reliant on any resale's proceeds to pay off any financial commitments relating to any Memberships we own. Furthermore we understand that the future value of the Club Membership cannot be guaranteed and past trends are not an indication of future value." [para 8]*
- *"We confirm that the Membership Application and all other documentation presented to us during our compliance Interview constitute the entire written contract between both parties. … In addition, we also confirm and acknowledge that we have relied on no representation made to us, whether oral or written, other than those contained in the documentation provided to us and that we have been advised by the Resorts Contract Manager that any representations made to us whether orally or in writing by a Club representative are not binding and that we cannot rely on any such representations as the basis for executing this contract. [para 9]*

*I think it likely that Mr and Mrs B signed and initialled a Compliance Statement in these or very similar terms. Had they believed they were buying an investment, I think it unlikely that they would have done so.*

*The warning in paragraph 8 ("… past trends are not an indication of future value…") is of course associated with investments and may have encouraged Mr and Mrs B to think that was what they were buying. Taken alongside the very clear statement in paragraph 6 that the Membership is not an investment, however, I do not believe that it is a reason for me to conclude that the timeshare was sold as an investment.*

***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.*

*As the loan was made under pre-existing arrangements between VFL and a company closely linked to the seller, I am satisfied 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 Azure Services. I do not believe however that this led to a conflict of interest in respect of their relationship with Mr and Mrs B. 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 and Mrs B'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 has said in other complaints that it did not pay any, and I can see no reason why this case should be any different. 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 had been paid or, if so, what it was. That does not suggest that the issue of commission was a real concern to Mr and Mrs B, either at the point of sale or subsequently.*

*F says that Mr and Mrs B were not provided with the information required under the 2010 Regulations. But they signed an Application for Membership which recorded that they had received, amongst other things, Azure's Standard Information Document. That was a document which Azure produced to seek to comply with the 2010 Regulations. It is persuasive evidence that they did receive the information required.*

*Mr and Mrs B say too that the sale was pressured. They have 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 and Mrs B had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. If they thought they had agreed to anything as a result of undue pressure, it is not clear to me why they didn't take advantage of the option to withdraw.*

*It is not for me to decide whether Mr and Mrs B have a claim against the seller, Azure XP Limited, or whether they 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 and Mrs B's complaint. In the circumstances of this case, however, I do not believe that I can properly uphold that complaint.*

I indicated that I would consider any further evidence or arguments which the parties wanted to provide before issuing a final decision. I gave them until 2 April 2024 to respond. I have not been sent any further information, however.

## 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 not received any response to my provisional decision, I do not believe there is any reason for me to reach a different conclusion. In saying that, I stress that I have considered the case afresh before issuing this final decision.

## My final decision

For these reasons, my final decision is that I do not uphold Mr and Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 13 May 2024.
Mike Ingram
**Ombudsman**