DRN-4620544

The complaint

Mr and Mrs W complain that a timeshare product was misrepresented to them and that the seller is in breach of contract. The purchase was partly financed with credit provided by Vacation Finance Limited ("VFL"). Because of that, Mr and Mrs W say they have a claim against VFL in the same way they have a claim against the timeshare company, and that VFL is responsible for the timeshare company's actions.

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

What happened

In 2016 Mr and Mrs W bought a timeshare product from a company within the Azure Group of companies. In 2018 they relinquished that product and bought instead a points based product and Azure Club membership.

In June 2019 Mr and Mrs W were on holiday in Malta, using their existing timeshare membership. While there, they attended a sales presentation, at the end of which they bought a further points based timeshare product from Azure XP limited, a company registered in the British Virgin Islands. They bought 14,136 XP points and Level 3 club membership at a total cost of £11,000. 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 joint loan of £7,700 from VFL.

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

In June 2021 Mr and Mrs W complained to VFL through F about the June 2019 sale and loan. 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; they had not been given a choice of lender; 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 and Mrs W referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr and Mrs 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 and Mrs W have provided very limited documentation in support of their claim. 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. I have therefore approached this case on the assumption that the same or very similar standard wording was used for Mr and Mrs W's purchase. If that (or any other assumption I have made) is incorrect, the parties can explain that and provide the necessary evidence in their response to this provisional decision.

Whilst Mr and Mrs W have commented on the earlier sales in 2016 and 2018, this complaint concerns only the June 2019 sale and loan.

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 W. Mr and Mrs W do not appear to have indicated at any time before they complained to VFL they were having difficulty making payments.

The fact that a borrower has not missed any payments or fallen into significant arrears does not necessarily show that the lender did carry out appropriate checks before agreeing the loan. It does indicate in this case however that Mr and Mrs W 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, Azure Services Limited was named in the loan agreement as the credit intermediary; that company was also a representative of VFL and part of the same group of companies as the seller, Azure XP Limited. Those links were such that the section 75 conditions were met. I have therefore considered what has been said about the sale in June 2019 and subsequent events.

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 W'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.

F's submissions about what Mr and Mrs W were told at the sales presentation are generic, lack detail, and are largely unsupported by any documentation or other supporting evidence.

Where those submissions are more specific, I do not find them credible. For example, F says that it was not explained to Mr and Mrs W that they had to use 400 XP points each year until the end of their membership in 2049. That was insufficient to allow them to book the accommodation they wanted. It was however clear from the sale documents that members could accelerate the use of points – that is, they could use more than the minimum annual allocation in any given year if they chose to do so. The information about the Club and its operation made it clear that membership was available at five different levels and that members with a higher level of membership would have a wider choice of accommodation and experiences. It was also made clear that all services were subject to availability. It was clear too that XP points would expire if a minimum number were not used in any given year.

Mr and Mrs W say too that all the timeshare products were sold as investments and that they have been unable to sell them. I have however seen no evidence of any attempt to sell any of the products they bought, still less of any attempt to sell the XP points they bought in June 2019 before they made their claim in June 2021.

There is also some evidence that Mr and Mrs W's recollection is not entirely reliable. For example, their initial submission referred to a sales presentation they attended in the year after the June 2019 purchase. But Covid-19 restrictions meant that they would almost certainly have been unable to attend any such presentation in 2020.

It is likely too that Azure's documentation would have been of some assistance in defeating a claim in misrepresentation. 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 and Mrs W would have been

provided with those documents. That is relevant to the question of whether they were misled about what they were buying.

I believe the sale documents 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 W signed and initialled a Compliance Statement in these terms.

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 W 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.

In addition, clause 13 of the standard Membership Application in use in 2018 said:

"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."

Again, I think it more likely than not that the agreement Mr and Mrs W signed included these clauses. In my view, the inclusion of "entire agreement" provisions was an attempt to ensure that anything on which Mr and Mrs W sought to rely was included in the contract itself. I am not persuaded in this case that they were misled, but, if I were to take a different view on that, I would need to consider the effect of those provisions.

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 the intermediary. I do not believe however that this led to a conflict of interest in respect of their relationship with Mr and Mrs 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 and Mrs 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.

Mr and Mrs W say they given no choice but to take out a loan with VFL. I don't accept that; indeed, around one quarter of the purchase price in June 2019 was paid without a loan. There was no reason to think Mr and Mrs W had to take out a loan, still less a loan with VFL.

F says that VFL did not disclose the commission paid to Azure. VFL says it did not pay any, and I accept that it didn't. 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 W, either at the point of sale or subsequently.

Mr and Mrs W say too that the 2019 sale was pressured – as were those in 2016 and 2018. 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 W 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 W have a claim against the seller, 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 W'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 submissions the parties wished to make and gave them until 13 February 2024 to provide me with any additional evidence or arguments. VFL said it had nothing to add; Mr and Mrs W did not respond to my provisional decision.

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 been sent any further evidence or arguments following my provisional decision, I see no reason to reach any different conclusion about Mr and Mrs W's complaint should be resolved. In saying that, however, I stress that I have considered everything afresh before reaching this final decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W and Mr W to accept or reject my decision before 20 March 2024.
Mike Ingram
Ombudsman