DRN-4664718

The complaint

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

What happened

In May 2018 Mr and Mrs N were on holiday in Malta. They had, in November 2016, bought timeshare interests in two properties at the Island Residence Club.

In May 2018 they attended a presentation, at the end of which they bought a points based timeshare product. They bought 10,000 points (called XPs) and level 2 Azure Club membership at a cost of £25,767. 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 £21,567 loan from VFL. At the same time, Mr and Mrs N relinquished their existing timeshares. This complaint concerns the purchase in May 2018; the 2016 sale and loan are the subject of a separate complaint.

In 2020 Azure Resorts Limited and Azure XP Limited, were placed into liquidation.

In June 2021 Mr and Mrs N complained to VFL through F about both sales. They said in each case: the seller was in breach of contract; they had been pressured into buying the timeshare product; the product had been misrepresented to them; the timeshare 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 N referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr and Mrs N 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 N have provided very limited documentation in support of their claim. For example, they have provided only one page of the May 2018 Application for Membership. 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 standard wording was used for Mr and Mrs N'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.

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 N. Mr and Mrs N do not appear to have indicated before they made this complaint that they were having difficulty making payments. VFL says that the payments were up to date at that point and, as far as I am aware, they still are.

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 N 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.*

As I have said, I have not been provided with a complete set of documents, but I do not understand VFL to dispute that the loan was were made under pre-existing arrangements between it and the seller of the membership and the XP points, or between it and a company closely linked to the Azure Group. I have therefore considered what has been said about the sale 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 under a trust arrangement. 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. On the face of it, therefore, the services linked to Mr and Mrs N'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 N's statements about what they were told at the sales presentation are generic, lack detail, and are largely unsupported by the documentation. They 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.

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

The standard sale documents also 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 N signed and initialled a Compliance Statement in these or very similar 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 N 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.

Rather, I believe the XP points were sold as a means of accessing holiday accommodation and other benefits. In any event, I have seen no evidence that Mr and Mrs N have sought to sell them.

For these reasons, I am not persuaded that Mr and Mrs N were misled about the nature of the timeshare purchase.

I note as well that 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, that was an attempt to ensure that anything on which Mr and Mrs N 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 in the Membership Application.

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, 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 and Mrs N. The Azure companies were selling timeshare products and acting as intermediary (and VFL's agent). Whilst Azure introduced finance options, it was not acting as Mr and Mrs N'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 N say they were given no choice but to take out a loan with VFL. I don't accept that; indeed, part of the purchase price in May 2018 was paid without a loan, as had more than one quarter of the purchase price in November 2016 been. There was no reason to think Mr and Mrs N 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 N, either at the point of sale or subsequently.

Mr and Mrs N 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 N 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 N 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 N's complaint. In the circumstances of this case, however, I think that VFL's response to the claims was fair and reasonable.

I gave both parties until 8 February 2024 to respond to my provisional decision and to send me any additional evidence or arguments they wanted me to consider. Neither has sent me any further 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 nothing further in response to my provisional decision, I don't believe there is any reason for me to reach a different conclusion here. In saying that, I stress that I have reviewed 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 N's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N and Mrs N to accept or reject my decision before 5 April 2024.

Mike Ingram
Ombudsman