DRN-4014168

The complaint

Mr and Mrs D complain that two timeshare products were misrepresented to them and that the timeshare company is in breach of contract. The purchases were partly financed with credit provided by Vacation Finance Limited (VFL). Because of that, Mr and Mrs D say that they have a claim against VFL in the same way they have a claim against the timeshare company.

Mr and Mrs D have been represented in this complaint, and so any reference to their submissions and arguments includes those made on their behalf.

What happened

Mr and Mrs D were existing timeshare owners and members of the Radisson Blu Resort and Spa in Malta. I have not been provided with any information about that membership or their existing arrangements.

In August 2018 Mr and Mrs D bought a points based timeshare product from Azure XP Limited ("Azure"). They bought 12,000 points (referred to as XPs) and Level 3 club membership at a total cost of £27,885. XPs 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 10-year £14,980 loan from VFL.

In August 2019 Mr and Mrs D entered into a similar arrangement. This time they bought 15,475 XPs at a total cost of £25,895, in part with the help of a £12,395 loan from VFL.

In or around 2020 Azure Resorts Limited and Azure XP Limited went into liquidation.

In January 2022 Mr and Mrs D contacted VFL to say they thought the XPs had been mis-sold and that accordingly they had claims against VFL, including under section 75, section 140A and section 140B of the Consumer Credit Act 1974. Their representative's letter included the following allegations:

- Mr and Mrs P had been subject to pressured sales tactics.
- The timeshare products had been misrepresented to them.
- The products had been sold as an investment, but there is no resale market.
- The seller is in liquidation and is therefore in breach of contract.
- VFL had not carried out any proper affordability checks.

VFL did not accept the allegations made, and Mr and Mrs D referred the matter to this service. One of our investigators considered what had happened but did not recommend that the complaint be upheld. Mr and Mrs D did not accept the investigator's assessment and asked that an ombudsman review the case.

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

I would comment first of all that I have not been provided with a full set of documents in respect of either sale. I have therefore relied to some extent on what I understand to have been standard form documents used by Azure companies at the relevant time. But I have not seen the loan agreements either. VFL's account statements however indicated that only Mr D was a borrower; if that's correct, only he has a relationship with VFL and only he can bring this complaint.

Affordability

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

I note however that Mr D repaid the 2018 loan in October 2019. When the complaint was made in January 2022, all payments in respect of the second loan had been made in full and on time. He had not suggested he was having difficulty making payments. I note too that standard documentation included a statement signed by borrowers confirming they could afford the loan payments.

Those matters do not necessarily show that VFL did carry out appropriate checks before agreeing the loans. They do indicate however that Mr D suffered no loss as a result of taking them out. They also indicate that, even if more detailed checks had been made, it's likely the loans 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.*

I do not understand VFL to dispute that the loans were made under pre-existing arrangements between it and Azure, the seller of the membership and the XPs. I have therefore considered what has been said about the sale and subsequent events.

Breach of contract

As I have indicated, I have not been provided with a full set of contractual documents for either sale. The sale contract recorded that Mr and Mrs D had received copies of the Rules of Membership, the Reservation Rules, and a Deed of Trust. Whether there was a breach of contract depends to a very large degree on what was in those documents compared with what happened.

Mr and Mrs D say however that services were not provided after Azure went into liquidation. I do not believe however that is the case. 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."

On the face of it, therefore, the services linked to Mr and Mrs D's purchase of XPs remained available to them and were unaffected by the liquidation of the Azure companies. I note in addition that Mr and Mrs D have, it appears, terminated their membership contract. So they would not now be entitled to membership benefits in any event.

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 D's statements about what they were told at the sales presentation are largely unsupported by any documentation. For example, there is no evidence of any attempt to sell the XPs. Nor is there any evidence that Mr and Mrs D have tried to use them and been unable to do so.

Neither party has provided me with a complete set of the sale documents. It is my understanding however the Club Rules include information about how to use XPs, including the minimum which must be used each year and how to "accelerate" their usage – that is, how to use more than the annual minimum by paying fees sooner than would otherwise be the case.

I am not persuaded either that the XPs were sold as an investment that Mr and Mrs D could sell. They were sold as a means of funding holiday accommodation and experiences.

On the assumption that the sale documents were on Azure's standard terms, they would have 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."

In my view, that was an attempt to ensure that anything on which Mr and Mrs D 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 that provision.

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.

I am satisfied that the timeshare agreement in this case was a "linked transaction" (that is, linked to the loan agreement) within the meaning of section 19 of the Consumer Credit Act. There was a debtor-creditor-supplier agreement, and the timeshare agreements were financed by the loans.

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 a loan. I am not persuaded however that I should do so here.

I accept that there were links between VFL and Azure. I do not believe that this led to a conflict of interest in respect of their relationship with Mr and Mrs D. Azure was selling club membership and XPs. Whilst it introduced finance options, it was not acting as Mr and Mrs D'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 D say too that the sales were pressured. They have not really elaborated on that, but I note that 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 D 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 any of those agreements as a result of undue pressure, it is not clear to me why they didn't take advantage of the option to withdraw.

Finally, Mr and Mrs D's representative has referred to a case in which a different lender, following applications to the Financial Conduct Authority and to a judge of the Upper Tribunal (Tax and Chancery Chamber), agreed to refund payments made under loan agreements with several hundred borrowers. The loans had been used to fund purchases from Azure companies. The main issue in that case, however, was that the Azure company which brokered the loans was not, at the relevant time, authorised to arrange regulated consumer credit agreements. The loans could not therefore be enforced without a Validation Order made under section 28A of the Financial Services and Markets Act 2000. That is not the position here, however. By the time of the loans which are the subject of this complaint were taken out, the brokers were properly authorised.

My provisional decision was not to uphold the complaint, but I invited further comment before I issued a final decision. Neither party has provided any further evidence or argument.

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 anything further from either party, I do not believe there is any reason to reach an outcome which differs from that set out in my provisional decision. In reaching that conclusion, however, I stress that I have reviewed everything afresh.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or

reject my decision before 9 October 2023.

Mike Ingram
Ombudsman