DRN-4378381

The complaint

Mrs G complains that a timeshare product was misrepresented to her and that the timeshare company is in breach of contract. The purchase was financed with credit provided by Honeycomb Finance Limited ("Honeycomb"). That loan has now been transferred to Tandem Personal Loans Ltd, but for ease of reference I'll refer to the lender as Honeycomb.

Because it financed the purchase, Mrs G says that he shas a claim against Honeycomb in the same way she has a claim against the timeshare company.

Mrs G has been represented in this complaint, and so any reference to her submissions and arguments include those made on her behalf.

What happened

In June 2018 Mr and Mrs G bought a points based timeshare product from a company in the Azure group. They bought 6,000 XP points and Level 1 club membership at a total cost of £18,360. XP points could be exchanged for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences The purchase was financed by a 15-year loan from Honeycomb. The loan was in Mrs G's name.

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

In or around July 2021 Mr and Mrs G contacted Honeycomb to say they thought they had a claim arising from the liquidation. They said too that they had been unable to book holidays as they had been promised. Honeycomb treated that contact as a complaint, but did not accept the claims made.

In September 2021 Mr and Mrs G expanded on the points they had made earlier. They said:

- They 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.
- Honeycomb had not carried out proper affordability checks.

Honeycomb did not accept the allegations made, and Mrs G referred the matter to this service. One of our investigators considered what had happened but did not recommend that the complaint be upheld. Mrs G 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 the timeshare 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.

In addition, whilst Mr and Mrs G bought the XP points and membership jointly, the loan agreement was in her name only, so only Mrs G 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.

The investigator thought that Honeycomb should have carried out more detailed checks in this case to determine whether the loan was affordable for Mrs G. She thought that, given the length of the loan period and the sum which Mrs G was borrowing, Honeycomb should have asked more questions about her financial circumstances. She thought however that, even if more detailed checks had been carried out, it was unlikely they would have revealed any financial difficulty. That is, the lending decision was likely to have been the same.

I have reached broadly the same conclusion and for similar reasons. I would however add that, if Mrs G is having difficulty making payments, she should discuss the position with the lender to try to reach a mutually acceptable solution. That is the case whether the loan repayments were unaffordable from the outset or have become unaffordable as a result of any change in Mrs G's circumstances.

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 Honeycomb to dispute that the loans were made under pre-existing arrangements between it and one of the Azure group of companies (the seller of the membership and the XP points) or 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

As I have indicated, I have not been provided with a full set of contractual documents for either sale. I believe however that Mrs G would have 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.

Mrs G says that there was a breach of contract when the Azure companies 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 G's purchase of XP points 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 G'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 XP points. The sales documentation made clear that accommodation and other benefits were subject to availability, so I think it unlikely Mrs G was told any particular accommodation was guaranteed to be available.

Neither party has provided me with a complete set of the sale documents. It is my understanding however that the Club Rules include information about how to use XP points, 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.

Mrs G says she was told she had to use 160 XP points a year and that it would therefore take 37½ years to use the 6,000 points she had bought. She says too that 160 XP points are not enough to give access to anything other than the most basic accommodation. That however suggests a misunderstanding of how the points system operates – which is set out in the standard documents. Mrs G can "accelerate" the use of points – that is, she can use more than 160 points each year, but any additional points she uses won't then be available later on. But that gives a wider choice of accommodation and means that the points will be used in less than 37½ years. I think this was probably explained at the time; it is also apparent from the contractual documents.

I am not persuaded either that the XPs were sold as an investment that Mr and Mrs G 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 G 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.

If the loan was made under pre-existing arrangements between Honeycomb and the seller (or an associate of 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.

I accept that there were links between Honeycomb and the Azure companies. I do not believe however that this led to a conflict of interest in respect of their relationship with Mrs G. Azure was selling club membership and XP points. Whilst it introduced finance options, it was not acting as Mrs G'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.

Mrs G says too that the sale was pressured. She has 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 Mrs G had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. If she thought she had agreed to any of those agreements as a result of undue pressure, it is not clear to me why she didn't take advantage of the option to withdraw.

Finally, I note that Mrs G's initial letter of complaint referred to having to attend an "update" meeting and to an intention to sell a timeshare. Those statements indicate to me an existing membership of the Azure holiday club. Mrs G did however subsequently confirm that this points-based timeshare was the only one that she and Mr G owned.

It is not for me to decide whether Mrs G has a claim against Azure, or whether she 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 Mrs G's complaint. In the circumstances of this case, however, I think that Honeycomb's response to Mrs G's claims was fair and reasonable.

Mrs G did not accept my provisional decision. As well as repeating some of her earlier submissions, she provided evidence of her attempts to book accommodation for a week in May 2020. She also said that clause 13 of the sale agreement (quoted above) was an attempt to contract out of statutory rights, which is not permitted. It was also unfair and therefore not enforceable. And she said she had not been provided with a full set of documents.

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.

I shan't repeat the findings I set put in my provisional decision here, but will comment on the new points Mrs G has made.

As I indicated in my provisional decision, bookings were subject to availability. The exchanges in connection with the May 2020 booking show that Mr and Mrs G were unable to secure their preferred accommodation, but were offered (and accepted) an alternative. They also show that the acceleration of XPs operated as set out in the contractual documentation. In the event, the Covid-19 pandemic meant that Mr and Mrs G were unable to take their holiday in May 2020, but adjustments were made which, on the face of it, mean that they will be able to rebook without losing out.

Mrs G says that the only documents she received were the finance agreement, a certificate of ownership and a certificate of transfer. I think it unlikely however that she agreed to pay more than £18,000 without any paperwork setting out what it was she and Mr G had bought.

I note Mrs G's comments about clause 13 of the sale agreement. I do not accept however that it seeks to remove any statutory protection or that it is likely to be unfair within the meaning of the Consumer Rights Act 2015 – although that would be for a court decide. In any event, I said in my provisional decision that I did not believe Mrs G had been misled, and so I did not make any finding on those points.

My final decision

For these reasons, as well as those set out in my provisional decision, I do not uphold Mrs G's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 7 November 2023.

Mike Ingram
Ombudsman