DRN-4438701

The complaint

Mr and Mrs S 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 S say they have a claim against VFL in the same way they have a claim against the timeshare company.

Mr and Mrs S 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 S have said that they had been timeshare owners since the late 1990s. In 2013 they "swapped" their timeshare week (or weeks) in Tenerife through RCI, a timeshare exchange programme. They went to Malta and stayed at the Radisson Blu Resort. Following a presentation, Mr and Mrs S decided to buy a 2-week timeshare in Malta, together with resort membership. This was financed by a loan from a different lender – not VFL.

Mr and Mrs S say they asked about resale of the timeshare, were told it would not be a problem, and put their timeshare up for sale the following year.

The timeshare unit did not sell, and in 2014 Mr and Mrs S exchanged it for a larger unit and paid a further fee to upgrade their membership. They paid the fee with a further loan – again, not from VFL. Mr and Mrs S again tried, unsuccessfully, to sell the timeshare they had bought in 2014.

In 2015 Mr and Mrs S remortgaged their house to pay off the two outstanding timeshare loans at a significantly lower interest rate. They also made a lump sum payment to reduce the mortgage balance.

In 2017 Mr and Mrs S again traded in their existing timeshare for two weeks in a different unit. Again, they paid a further fee. Again, they tried to sell the timeshare weeks, but were not successful in doing so.

By 2019, therefore, Mr and Mrs S still had the timeshare they had bought in 2017 and had tried unsuccessfully to sell three different timeshare arrangements. They remained members of the Radisson Blu Resort and Spa in Malta.

In July 2019 Mr and Mrs S were again staying at the resort. They say they were told that the Azure Group, which operated the resort, was switching from traditional timeshare ownership to points-based membership. As a result, they bought 17,550 points (referred to as XPs) and Level 3 club membership at a total cost of £17,950; in addition, they traded in the timeshare they had bought in 2017. 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 £12,565 loan from VFL in Mrs S's name.

In April 2021 Mr and Mrs S complained to VFL. They said: they had been pressured into buying the XPs; 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; and commission had not been disclosed as it should have been.

VFL did not accept the complaint, and Mr and Mrs S referred the matter to this service. Our investigator recommended that it be upheld and that appropriate loan refunds be made, putting Mrs S broadly in the position she would have been in if the purchase had not gone ahead in 2019 and the loan had not been granted. VFL did not accept the investigator's recommendation and asked that an ombudsman review the case.

I did that and, because I did not agree that the complaint should be upheld, issued a provisional decision. In summary, I said:

- I had not seen any evidence to suggest that the loan was not affordable for Mr and Mrs S.
- The arrangements between VFL and the seller of the XPs were such that VFL could be held liable for any claims for breach of contract or misrepresentation which Mr and Mrs S might have arising from the sale in 2019.
- I was not however persuaded that they had any such claims.
- It did not appear that the overall circumstances of the case created an unfair relationship between Mr and Mrs S as borrowers and VFL as lender.

Mr and Mrs S asked for more time to provide evidence and arguments in response to my provisional decision. They have not however done so within the extended time allowed. I have therefore considered the matter afresh.

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 set out above, Mr and Mrs S have been club members for several years and have bought four timeshare products in that time. But only the 2019 purchase was financed by VFL. Whilst the other purchases are relevant background, therefore, they cannot give rise to a complaint about VFL. I won't therefore comment any further on them.

Affordability

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

Mr and Mrs S have said that, by 2019, their previous lender would no longer provide them with further credit, largely due to their age. I have not however seen any other evidence to suggest that the loan was not affordable for them. They have not suggested, for example, that they have missed payments or that the loan is in arrears. And, whilst age may be a factor for lenders to consider (not least because retirement income is generally less than employed income), it does not follow that lenders should always decline loan applications from older customers.

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. In this case, however, they do indicate that Mr and Mrs S suffered no loss as a result of taking the loan out. They also indicate 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.

I do not understand VFL to dispute that the loans were made under pre-existing arrangements between it and Azure XP Limited, the seller of the membership and the XPs. I note that Azure Services Limited was, at the time, an authorised representative of VFL. I have therefore considered what has been said about the sale in 2019.

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 S's statements about what they were told at the sales presentation are largely unsupported by any documentation. They have said that they were told the XPs would be more marketable than a traditional timeshare and that they were sold as an investment.

The Application for Membership recorded that Mr and Mrs S had received the Standard Information Document, the Rules of Membership, the Reservation Rules, and the Deed of Trust. That is relevant to the question of whether they were misled about what they were buying.

Mr and Mrs S say that they had been trying to sell their existing timeshares, and I accept that was the case. In 2014 and 2017 they had only been able to exchange them for similar products. So, to the extent that they no longer wished to be traditional timeshare owners, a points-based membership achieved that aim; attempts at an open-market sale had not done so.

I am not persuaded however that the XPs were sold as an investment that Mr and Mrs S could sell. They were sold as a means of funding holiday accommodation and experiences. I note as well that the contractual documents made it clear that XPs could only be sold through Azure and once they had been held for five years. I understand the resale programme was opened in 2022, after this complaint was first brought. I have however seen no evidence that Mr and Mrs S have sought to sell their XPs.

The usual remedy where a successful claim for misrepresentation is made is to place the claimant in the position they would have been in had no misrepresentation been made.

Mr and Mrs S's position when they bought the XPs was that they had a timeshare which they did not want. They had been trying to sell it and earlier timeshares for around five years, if not longer. They had concluded there was no real market. In my view, therefore, there is a real possibility that they would have gone ahead with the purchase in any event. At the very least, it would give them greater flexibility than they had previously.

In addition, 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 S sought to rely was included in the contract itself. I am not persuaded in this case that they were in fact misled, so I do not need to comment on 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.

As I have indicated, 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 S. Azure was selling club membership and XPs. Whilst it introduced finance options, it was not acting as Mr and Mrs S'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 S say that any commission paid to Azure should have been disclosed. For the reasons above, I don't agree. But in any event, VFL says none was paid.

Mr and Mrs S say too that the sale was pressured. They initially declined to buy XPs, but were persuaded to go ahead the following day. I note however 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 S 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 sign up 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.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs S to accept or reject my decision before 5 December 2023.
Mike Ingram
Ombudsman