DRN-4259718

The complaint

Mr P complains that a timeshare product was misrepresented to him and that the timeshare company is in breach of contract. The purchase was financed with credit provided by Honeycomb Finance Limited ("Honeycomb"). Because of that, Mr P says that he has a claim against Honeycomb in the same way he has a claim against the timeshare company.

The loan (and with it responsibility for this complaint) was transferred in August 2022 to Oplo PL Ltd ("Oplo"), but, for simplicity, I shall refer to the respondent as Honeycomb.

Mr P has been represented by a claims management business, which I'll call "F".

What happened

In 2016 and 2017 Mr P had bought from Azure Resorts Limited three timeshares at the Island Residence Club in Malta. They were traditional timeshares, where Mr P was given the use of an identified property for fixed weeks each year.

In July 2018 Mr P bought a points based timeshare product from Azure XP Limited ("Azure"). He bought 18,500 points (referred to as XPs) at a cost of £20,000. XPs could be exchanged for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences The purchase was financed with a 15-year £20,000 loan from Honeycomb. Mr P's earlier purchases had been financed by a different lender.

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

In April 2021 F contacted Honeycomb on behalf of Mr P. F said that the XP points had been misrepresented to its client. He had been told when buying previous timeshare products that they were an investment, but in July 2018 he had been told they could not be sold after all. Mr P was told that he would have to buy XP points in order to sell his timeshares. They have not been sold.

F said too that, because they were in liquidation, the Azure companies could no longer provide the services sold. They were therefore in breach of contract.

Further, F said, it was not disclosed to Mr P that a commission would be paid, no checks were carried out to ensure Mr P could afford the loan payments, and Mr P was pressured into buying the XP points on the day. The result was that the loan agreement created an unfair relationship between Mr P and Honeycomb.

Honeycomb did not uphold Mr P's complaint. It said, in summary:

- There was no evidence that the traditional timeshares or the XPs had been sold as an investment.
- Its records showed that Mr P had provided information about his income. He had made loan payments on time.

- There was no evidence that Mr P had sought to sell either the timeshares or the XPs. On the contrary, he had used the XPs in 2019 and 2020 – in a way which suggested he understood how they worked.

F referred the matter to this service, where one of our investigators considered what had happened. He thought that Mr P had only bought the XPs because he had been given assurances that they could be sold. He recommended that the complaint be upheld.

Honeycomb did not accept the investigator's assessment and asked that an ombudsman review the case. It also forwarded a video recording of the compliance meeting which Mr P had had with a representative of Azure. It said that showed that Mr P had properly understood the product he was buying.

I reviewed the complaint and, because I was minded to reach a different overall conclusion from that reached by the investigator, issued a provisional decision. In that provisional decision, I said:

As a general point, it's important to note that Mr P's complaint arises from the sale and purchase of XP points in July 2018, and it can be brought against Honeycomb because Honeycomb financed that transaction.

Much of Mr P's concern, however, appears to arise from what he says he was told previously about the possibility of selling the timeshares bought in 2016 and 2017, not about the agreement for the sale and purchase of XP points. Honeycomb did not finance those timeshare purchases.

Also, my role is to determine Mr P's complaint by reference to what I consider to be fair and reasonable in all the circumstances of the individual complaint. I won't therefore be commenting directly on F's observations about the general operation of the Azure companies, although I have had regard to them.

Affordability

When it referred the complaint to this service, F said that Honeycomb had not carried out any checks to ensure that the loan was affordable and appropriate to Mr P's needs.

Lenders are required to ensure that loans are affordable and appropriate. What that means in practice will vary from case to case. But I do not believe here that it is correct to say that no checks were carried out. Honeycomb's submissions included details of Mr P's earnings. Given that Mr P must have provided that information himself, it is surprising in my view that F said no checks had been made. Mr P answered a questionnaire prepared by F by confirming that his salary was what Honeycomb said it was and that he was not having difficulty making repayments. The video of the compliance meeting also records him confirming that he could comfortably afford the payments; he confirms too that, in saying that, he has taken the earlier timeshare loans into account.

I am satisfied that Honeycomb did make appropriate checks before agreeing to the loan.

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.*

It is clear in this case that the loan financed the purchase of the XP points. The loan documents refer to three credit intermediaries – Business Brokers Limited; Vacation Finance Limited; and Freedom Finance. It appears that the "seller" was a different company, Azure XP Limited. Honeycomb has not suggested however that the necessary arrangements were not in place for sections 56 and 75 to apply, and I have therefore approached the case on the assumption that they were. It is of course open to the parties to make further submissions on this point, should they wish to do so.

I must therefore consider what F has said about the alleged breach of contract and misrepresentations.

Breach of contract

F says that the liquidation of Azure companies means that the services which Mr P bought cannot now be provided. In its letter of 27 April 2021 to Honeycomb, it said:

"Azure are now in liquidation. They cannot provide the service sold. They are in breach of contract."

The first of those statements was true, but it did not follow that there was a breach of contract. Azure XP Limited had founded the Azure Experiences Membership Club and had sold the XPs to Mr P. It had ownership of or access to properties which were to be used by members, but transferred those ownership and access rights to a different company, the sole shareholder in which was to be a trustee.

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."

The services linked to Mr P's purchase of XPs therefore remain available to him and are unaffected by the liquidation of the Azure companies.

F did not suggest that it would be a breach of contract for any company other than Azure to provide the membership services. If that is Mr P's case, then I disagree. The contract is performed if the services are provided; they do not have to be provided by 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.

As I have said, much of what Mr P says he was told here concerns the possibility of selling his timeshares. But he says too that he was told the purchase of XPs would make that easier. I am afraid however that I am not persuaded he was told that. It is most unlikely that Azure would agree that the earlier timeshares had been mis-sold and that Mr P would seek to resolve that by making a further purchase from a closely linked company.

In any event, the compliance video shows that, when Mr P was asked about his reason for buying XPs, he said that he thought it would give him greater flexibility. He did not mention the opportunity to sell either the timeshares or the XPs. I am not persuaded that the XPs were sold as an investment or that Mr P believed he was buying them on that basis.

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. The resale programme was however opened in 2022 and, Honeycomb says, XPs have been sold for other customers. It says however that there is no evidence that Mr P has sought to sell his XPs.

Mr P says that it is not possible to use all his XPs in the 30 years he has agreed to be a member. That is not my understanding, however. Section 3 of the Club Rules sets out the minimum number of XPs which must be used each year. For level 3 membership, which Mr P has, that is 400 points.

If Mr P uses only the minimum number of points each year, it would take him just over 46 years to use his allocation of 18,500 XPs. The Reservation Rules indicate however that members can accelerate the use of XPs – that is, they can use them early.

Indeed, that appears to be exactly what Mr P has done. He took two week holidays in peak season in 2019 and 2020, using around 700 XPs in each case. That indicates that he understood how to use the XPs and is consistent with his stated aim of obtaining flexibility. It is also consistent with the compliance meeting video, in which Mr P confirms that he understands minimum usage and points acceleration.

Finally, I note that the sale agreement 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 P sought to rely was included in the contract itself. I am not persuaded in this case that he was misled, but, if I were to take a different view on that, I would need to consider the effect of that provision.

Other matters

F says that Mr P was not given a choice of lenders. I have however seen Azure's Initial Disclosure Document, which explains that Honeycomb is its preferred lender. But there is nothing to suggest that Mr P could not have selected his own lender (although doing so would have lost him some of the protections under the Consumer Credit Act).

F says too that the payment of commission should have been disclosed to Mr P. There is however no suggestion that it was important to him, or that it would have made any difference to his decision to purchase. Honeycomb says that no commission was paid.

In any event, Azure wasn't acting as an agent of Mr P, but as the supplier of XP points. It also introduced Honeycomb as a preferred lender, if Mr P wanted to take out a loan. But it does not appear to me that it was Azure's role to make an impartial or disinterested recommendation or to give Mr P advice or information on that basis.

I do not believe either that Mr P was pressured into the purchase of XPs. As an existing timeshare owner, he would have been familiar with the sales process and would have known that he did not have to buy. The compliance video shows Azure's representative reminding him of his right to change his mind and inviting him to peruse the documents at his leisure. He also invites Mr P to contact him if he has any questions when he returns home.

It is not for me to decide whether Mr P has a claim against Azure, or whether he 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 – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr P's complaint. That could include requiring Honeycomb to write off all or part of the loan, to accept different repayments, or to change the interest rate. In the circumstances of this case, however, I think that Honeycomb's response to Mr P's claims was fair and reasonable.

Oplo had nothing to add in response to my provisional decision. F said that Mr P had further evidence to submit and sought additional time in which to respond. It did not however send any further evidence relating specifically to Mr P's experience. Rather, it provided extracts from (i) an investigator's preliminary assessment of a different case involving Azure and (ii) the recent judicial review of two decisions of the Financial Ombudsman Service relating to timeshare sales (reported at [2023] EWHC 1069).

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 have considered carefully the further submissions made on behalf of Mr P. F did not explain how the preliminary assessment and the judicial review case from which it provided extracts related to Mr P's case. I accept of course that they are relevant – at least in the sense that they concern the financing of timeshare transactions and that similar legal and regulatory considerations apply – but they are not directly supportive of Mr P's case.

I must of course consider and determine each complaint on its individual merits, and that is what I have done in this case.

One of the main elements of Mr P's complaint was that he says he was told that the timeshare product he bought in 2018 would be an investment. But there is video evidence showing that, when he was asked about his reason for buying, he did not mention that. Rather, he was seeking greater flexibility – which he achieved.

For these reasons, I have not changed my view from that set out in my provisional decision.

My final decision

My final decision is that I do not uphold Mr P's complaint and I do not require Oplo PL Ltd to do anything more to resolve his complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 22 August 2023.
Mike Ingram
Ombudsman