DRN-3902887

The complaint

Mr F 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 F says that he has a claim against Honeycomb in the same way he has a claim against the timeshare company.

Mr F has been represented in this complaint, and so any reference to his submissions and arguments include those made on his behalf.

What happened

In 2017 Mr F bought from Azure Services Limited a timeshare at the Radisson Blu Azure resort in Malta. My understanding is that this was a traditional timeshare, where Mr F had the use of an identified property for a fixed week each year.

The following year Mr F bought a points based timeshare product and level 3 membership of the Azure Experiences Membership Club. He bought 14,175 points (referred to as XPs) at a cost of £15,407. 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 loan from Honeycomb. Honeycomb says that loan was repaid in August 2019.

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

In October 2021 Mr F contacted Honeycomb. He said that the XPs had been misrepresented to him. He said that, when he was on holiday in 2018 he had expressed an interest in selling the timeshare he had bought the previous year. He was invited to attend a meeting to discuss that, but it turned out to be a marketing presentation. He was told that XP points would give him flexibility which was not available through a traditional timeshare.

Mr F says he explained that, having taken out a large loan the previous year, he could not afford to take out another one. He was told that he could sell the XPs to pay off the previous loan. They would be an investment.

Mr F said too that the credit intermediary had close links with Azure Services Limited and that this created a conflict of interest. He was not told that Honeycomb would pay commission to Azure Services Limited.

Further, Mr F said, the lending was irresponsible and he was pressured into buying the XPs on the day. The result was that the loan agreement created an unfair relationship between him and Honeycomb.

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

- There was no conflict of interest. Azure Services Limited was a representative of the intermediary, Vacation Finance Limited. Both were properly authorised by the FCA. They were not connected with Honeycomb.

- Mr F had said that the liquidators had ended the sale and rental schemes in respect of the Azure Resorts Limited Heavenly Collection. It had not however financed Mr F's purchase of that membership and had no responsibility for it. Azure XP members retained the same rights and benefits they had had before the liquidation.
- Its records showed that Mr P had provided information about his income. He had made loan payments on time and repaid the loan early. He had never suggested during the currency of the loan or when it was repaid that it was not affordable.
- Mr F had said he would not be able to use the XPs in his lifetime, as he was limited to using around 270 a year. That was, however, a minimum usage. He could use more than that if he wanted to – until he had used all the XPs he had bought.
- Mr F would have attended a compliance interview and signed a compliance statement. He had indicated that he was happy with the service provided and that he was not put under any pressure.
- Mr F's claim had included a claim under section 140A of the Consumer Credit Act 1974. Such a claim can only be brought in court.

Mr F referred the matter to this service. Our investigator did not recommend that it be upheld. Mr F did not accept that assessment and asked that an ombudsman review the case. I did that and issued a provisional decision, in which I said:

Affordability

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

It is clear in this case that Honeycomb did make some checks, since it confirmed Mr F's salary. It is significant too that Mr F repaid the loan after little more than a year, but at no point suggested he was having difficulty making payments – even though his initial complaint letter to Honeycomb says he had concerns about affordability at the time. I note too that Honeycomb says he signed a statement confirming he could afford the payments.

Those matters do not necessarily show that Honeycomb did carry out appropriate checks before agreeing the loan. They do indicate however that Mr F suffered no loss as a result of taking out 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 XPs. 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 Services 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.

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

Breach of contract

Mr F says that the liquidators have closed resale and rental operations in respect of the Azure Resorts Limited Heavenly Collection. It does not appear however that Honeycomb financed the purchase of Mr F's membership of that collection.

It is my understanding that the services linked to Mr F's purchase of XPs and membership of the Azure Experiences Membership Club therefore remain available to him and are unaffected by the liquidation of the Azure companies.

There has been no suggestion of any other breach of contract in this case, and I am not persuaded there has been any.

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 F's statements about what he was told at the sales presentation are largely unsupported by any documentation. For example, there is no evidence of any attempt to sell either the timeshare or the XPs. Nor is there any evidence that Mr F has 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 minimum.

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 F 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.

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 Act. There was a debtor-creditor-supplier agreement, and the timeshare agreement was financed by the loan.

Honeycomb says that an ombudsman does not have the power to make an order under section 140B. That is correct. 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 Honeycomb says, any links between the Azure companies and the intermediary did not create a conflict of interest in respect of the lender.

I am not persuaded that Mr F bought XPs simply to sell them. I have seen nothing in any sales documents relating to investments, but they would have included information about, for example, type and standard of accommodation, Club Rules, management fees and the connected exchange programme. The reason was that Mr F was buying XPs and club membership, not an investment.

Mr F says too that the sale was pressured. He has not really elaborated on that, but I note that Honeycomb says he signed a document confirming he was not put under pressure. It's significant too in my view that he had 14 days in which to review the documents and withdraw from both the sale and the loan agreement. If he thought he had agreed to either as a result of undue pressure, it is not clear to me why he didn't take advantage of the option to withdraw.

Mr F says that he was not provided with details of any commission paid to Honeycomb. He does not suggest that he asked about commission, but I have no reason to think he would not have been told what it was if he had done so. Honeycomb would have been under a duty to provide that information, although it has said its arrangements with Azure did not include the payment of commission.

In any event, Azure Services Limited wasn't acting as Mr F's agent, but as the seller of the XPs and club membership. It also introduced Honeycomb to Mr F, but it does not appear to me that it was Azure's role to make an impartial or disinterested recommendation or to give advice or information on that basis.

I invited both parties to make further submissions, if they wanted to do so. I have however received no further evidence or arguments.

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 see no reason to reach any different conclusion. In saying that, however, I stress that I have considered Mr F's complaint afresh.

My final decision

For these reasons, my final decision is that I do not uphold Mr F's complaint and do not require Honeycomb Finance Limited to do anything further to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 25 October 2023.
Mike Ingram
Ombudsman