DRN-4535953

The complaint

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

Mr and Mrs M have been represented in this complaint by a claims management business, which I'll call "F". Any reference to Mr and Mrs M's submissions and arguments, therefore, includes those made on their behalf.

What happened

Mr and Mrs M were existing timeshare owners, having bought two timeshare units linked to Azure, a holiday club and timeshare business.

In June 2018 Mr and Mrs M were on holiday in Malta. They say they were persuaded to buy a points based timeshare product from a company within the Azure Group. They bought 16,000 XP points and Level 3 membership of the Azure XP club at a total cost of £42,360. In addition, they traded in one of their timeshare units. XP points 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 loan of £32,360 from VFL.

In 2020 two of the Azure companies, Azure XP Limited and Azure Resorts Limited, were placed into liquidation.

In August 2021 Mr and Mrs M complained to VFL through F. They said: they had been pressured into buying the XP points; the product had been misrepresented to them; they had been told it would be easier to sell the points than to sell the timeshare units; 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 M referred the matter to this service. Our investigator recommended that the complaint be upheld and refunds made. VFL – which until then had made only very limited submissions – did not accept the investigator's recommendation and asked that an ombudsman review the case.

I did that and, because I was minded to reach a different conclusion from that reached by the investigator, issued a provisional decision, in which I said:

I would observe first of all that Mr and Mrs M have provided very limited documentation in support of their claim. I do not, for example, have complete copies of the June 2018 sale documents. However, this service has seen a number of complaints about Azure timeshare sales from around the same time. As is to be expected, the sellers and VFL used largely standard contract wording, so I have approached this case on the assumption that the same standard wording was used in this case. If that (or any other assumption I have made) is incorrect, the parties can explain that in their response to this provisional decision.

In addition, the evidence which Mr and Mrs M have provided suggests that their recollection of events is not entirely reliable. For example, they have said they were offered 25,000 XP points in exchange for £15,000 and one of their timeshare units. That is however rather different from what the (admittedly very limited) written evidence shows.

I will therefore address the arguments made on that basis.

Affordability

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

I have however seen very little evidence in this case to suggest that the loan was not affordable for Mr and Mrs M. I note that they have said they traded in a second timeshare unit the following year for more XP points, but I have no information about how that transaction was financed. Nor have they said how they financed the timeshare units they already owned.

Perhaps even more significantly, Mr and Mrs M have not alluded to any actual difficulties they had in meeting the loan payments or whether they approached VFL to seek any kind of help or accommodation. In short, I don't believe there is currently any evidence on which I could properly uphold this part of the complaint.

I will however consider any further evidence which Mr and Mrs M may wish to provide on this point before I issue a final decision.

Sections 56, 75 and 75A 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 claim does not relate to any single item to which the seller has attached a cash price of more than £30,000;*
- *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.*

The loan agreement in this case named Azure Services Ltd, a Maltese company, as the intermediary – that is, the company with which VFL had pre-existing arrangements. Because I only have some of the paperwork from the sale itself, it is not clear who the seller was. I believe however that it was likely to be another company in the Azure Group, such that the sale contract and the loan agreement were linked transactions within the meaning of section 19 of the Consumer Credit Act.

Section 75A of the Consumer Credit Act says if a debtor under a linked transaction has a claim for breach of contract they may pursue that claim against the debtor if (i) the value of the goods or services is more than £30,000 and (ii) the amount of credit is £60,260 or less.

In this case, the price attached to the XP points and the amount of the loan mean that the transaction fell outside the limits of section 75 but within the limits of section 75A. I do not therefore need to consider under this sub-heading any claim Mr and Mrs M may have for misrepresentation, but I do need to consider the claim for breach of contract.

Breach of contract

F says that the liquidation of Azure companies means that there is a breach of contract.

I don't believe that was the case. Club properties were held in a trust. 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."

Any services linked to Mr and Mrs M's purchase of XP points therefore remain available to them and are unaffected by the liquidation of the Azure companies.

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.

Assuming the loan was made under pre-existing arrangements between VFL and a company closely linked to 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 do 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.

There were links between VFL and the Azure companies. I do not believe however that this led to a conflict of interest in respect of their relationship with Mr and Mrs M. One of the

Azure companies was selling club membership and XP points, and Azure Services was acting as intermediary (and VFL's agent). Whilst it introduced finance options, it was not acting as Mr and Mrs M'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.

I don't believe Mr and Mrs M were told they had to finance their purchase with a loan from VFL. Indeed, it appears that they funded it in part by way of a £10,000 cash payment.

F says that VFL did not disclose the commission paid to Azure. VFL says it did not pay any, and I have no reason to doubt that. I note in any event that, before alleging that an unfair commission had been paid, F does not appear to have taken any steps to ask whether any had been paid or, if so, what it was. That does not suggest that the issue was a real concern to Mr and Mrs M, either at the point of sale or subsequently.

Mr and Mrs M say too that the sale was pressured. They have not really elaborated on that, but I note 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 M 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 anything as a result of undue pressure, it is not clear to me why they didn't take advantage of the option to withdraw.

It is not for me to decide whether Mr and Mrs M have a claim against the seller, or whether they might therefore have a claim under section 75A 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 Mr and Mrs M's complaint. In the circumstances of this case, however, I do not believe I can properly uphold it.

I gave the parties until 2 January 2024 to provide me with any further evidence or arguments they wanted me to consider before I issued a final decision. Neither Mr and Mrs M nor VFL has submitted anything further. I have therefore reviewed the complaint on the basis of the information I do have.

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 no further evidence or arguments in response to my provisional decision, I see no reason to reach a different conclusion from that which I set out in it. In saying that, however, I stress that I have considered the complete file afresh before reaching this final decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 1 February 2024.

Mike Ingram
Ombudsman