DRN-4537858

The complaint

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

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

What happened

Ms C and Ms M were existing timeshare owners, having bought a timeshare in 2013. In December 2016 they were on holiday at their timeshare resort in Malta. They say they were invited to an update meeting which turned out to be a sales presentation. At the end of the presentation they "upgraded" their existing timeshare at a cost of £20,371; of that, £16,186 was provided through a 120 month loan from VFL. The loan also refinanced the loan which Ms C and Mr M had taken out to fund the 2013 purchase.

In September 2021 Ms C and Mr M contacted VFL through F. They said, in summary: they had been pressured into buying the timeshare; the product had been misrepresented to them; the timeshare 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 Ms C and Mr M referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Ms C and Mr M did not accept that recommendation and asked that an ombudsman review the case.

I did that and issued a provisional decision, in which I said:

I would observe first of all that neither party has provided all the information I would expect to see in dealing with a complaint of this nature. For example, F has provided only the first page of a 5-page document detailing the sale of the timeshare. Both F and this service know that the sales documents were much more extensive than that, but there is no explanation for the very limited evidence sent.

VFL's response to the complaint said – wrongly – that Ms C and Mr M had not taken out a loan at all. It then went on to address the merits of a claim about a points-based timeshare product, although it appears that the product in this case was a more traditional timeshare, linked to a specific property.

Both F and VFL are regulated entities and are experienced in bringing and addressing complaints to this service. They may wish to consider what further evidence will assist when responding to this provisional decision.

I will nevertheless consider the arguments made on the basis of the rather limited information I do have.

Affordability

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

Ms C and Mr M have said that the loan was not affordable for them and that they struggled with their mortgage and other bills as a result. They have not provided very much detail about that, however, nor explained why they believe that any difficulties they had or have were triggered by the VFL loan – rather than by other financial commitments or circumstances.

I do note however from the loan account statements that they appear to have made reduced monthly payments in the second half of 2018, and possibly beyond that. Neither they nor VFL has explained how that came about, however. It's not clear, for example, whether there was payment arrangement or, if so, what discussions preceded it.

Even if Ms C and Mr M found themselves in difficulty with the loan payments, however, I don't believe that I can fairly conclude on the basis of the limited information I have that the loan was not affordable when it was made or that VFL did not carry out appropriate checks before agreeing to it.

If I were to conclude that the loan was not affordable at the point it was agreed, I would need to consider the appropriate remedy. That would have to take account of any concessions already made, and the reasons for them. I would also need to take account of the fact that the loan here in part refinanced existing borrowing, agreed in 2013. I have only limited information about that loan.

I will consider any further evidence the parties may wish to provide on this issue before I reach a final conclusion on it, but I do not believe I can properly say at this point that the loan was inappropriate or unaffordable.

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.*

The seller of the timeshare in this case was Azure Resorts Ltd, a company registered in the British Virgin Islands. The credit intermediary named in the loan agreement is Azure Services Ltd, a company with an address in Malta which at the time was an appointed representative of VFL. I am satisfied therefore that the links between the Azure companies and VFL were such that section 75 conditions were met and that I should consider what has been said about the sale in December 2016.

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.

Ms C and Mr M say that they were told that the timeshare would be an investment that they could rent out at a profit or sell at any time.

As I have indicated, I have been provided with only one page of the sale contract. Generally, it is important when dealing allegations of misrepresentation to have sight of the underlying contract. The complaint is usually that the customer was misled about what they were agreeing to – so it is important to know what the agreement was. Be that as it may, this service has seen many complaints about timeshare products sold by companies within the Azure Group. Whatever the exact nature of the timeshare agreement (points based or weeks based), there are some common features. They include:

- *Buyers sign a declaration to say they have not been pressured into a purchase.*
- *The declaration includes a statement that they understand they are buying a holiday product, not an investment.*
- *The contract includes provisions saying that the written contract is the entire agreement between the parties and that the buyers have not relied on any additional representations or statements, written or oral, in deciding whether to proceed.*

I have assumed that similar declarations were made in this case and that similar contractual provisions were included. F can provide a complete set of contractual documents if it wishes to show that was not the case here.

The fact that an individual signs a declaration or that a contract includes a provision along the lines I've described does not necessarily means that either is true. But I would generally need to see very persuasive evidence before concluding that the facts were so different from what the written terms said. I am not persuaded at this stage that Ms C and Mr M were misled in this case or that the timeshare was sold to them as an investment.

Breach of contract

In 2020 two companies in the Azure Group … were placed into liquidation. F says that the liquidations mean that there is a breach of contract. I don't believe that is the case. Club properties were held in a trust. On 8 July 2020 the trustee wrote to all the club members. Its letter explained that the Azure clubs would be taken over by a new management company and that the services provided would remain available as soon as Covid-19 restrictions were lifted.

The services linked to the timeshare purchase therefore remain available 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.

In this case, the loan was made under pre-existing arrangements between VFL and a company closely linked to the seller, so 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.

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 Ms C and Mr M. Azure Resorts was selling the timeshare, and Azure Services was acting as intermediary (and VFL's agent). Whilst it introduced finance options, it was not acting as Ms C's and Mr 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 note as well that, in support of their claim that VFL did not properly assess whether the loan was affordable, Ms C and Mr M said that a different lender had declined their application. But they also said, in support of their claim that the loan created an unfair relationship, that they had been led to believe that they had to take out finance with VFL. Both statements cannot be true.

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 of commission was a real concern to Ms C and Mr M, either at the point of sale or subsequently.

Ms C and Mr M say too that the sale was pressured. In support of that, they say they were not left alone during the presentation and that they were given lunch in the same room. That does not seem to me to be applying undue pressure such that a customer would feel compelled to make a purchase.

It may well be that Ms C and Mr M did not have much time to discuss the purchase in private during the course of the presentation. But they did have 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 Ms C and Mr M didn't take advantage of the option to withdraw.

And, as I have indicated, I think it likely that Ms C and Mr M signed a declaration to say the sale had not been entered into as a result of undue pressure.

It is not for me to decide whether Ms C and Mr M have a claim against the seller, or whether they 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 Ms C's and Mr M's complaint. In the circumstances of this case, however, I do not believe it would be fair or reasonable to uphold it.

I indicated that I would consider any further submissions before issuing a final decision, and I gave the parties until 27 December 2023 to provide further evidence and arguments. Neither part has provided anything further for me to consider.

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 not received any further evidence or arguments, I see no reason to reach a different conclusion from that which I set out in my provisional decision. In saying that, I stress that I have nevertheless considered the case in full before reaching this decision.

My final decision

For these reasons, my final decision is that I do not uphold it and do not require Vacation Finance Limited to do anything more to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C and Mr M to accept or reject my decision before 12 February 2024.
Mike Ingram
Ombudsman