DRN-4100242

The complaint

Mr and Mrs K complain that a timeshare product was misrepresented to them and that the timeshare company is in breach of contract. The purchase was partly financed with credit provided by Vacation Finance Limited (VFL). Because of that, Mr and Mrs K say that they have a claim against VFL in the same way they have a claim against the timeshare company.

They say too that the company which arranged the loan was not authorised to do so and that the circumstances of the sale were such that the loan agreement created an unfair relationship between them and VFL.

Mr and Mrs K have been represented in this complaint, and so any reference to their submissions and arguments includes those made on their behalf.

What happened

In August 2018 Mr and Mrs K agreed to buy, and Azure XP Limited agreed to sell, a points-based timeshare product and membership of a holiday club in Malta. They bought 4,000 points (referred to as XPs) at a cost of £11,360. XPs could be exchanged for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences The purchase was partly financed with a 10-year loan from VFL.

In 2020 Azure XP Limited and Azure Resorts Limited, a company in the same group, went into liquidation.

In January 2021 Mr and Mrs K wrote to Azure to say that they were unhappy with the timeshare product and that they wanted to terminate their club membership. They followed that in April 2021 with a letter to VFL. In that letter they said that they had claims under section 75 and section 140A of the Consumer Credit Act 1974. Their letter said, in summary:

- They had been subject to pressured sales tactics.
- The timeshare product had been misrepresented to them.
- The product had been sold as an investment, but there is no resale market.
- The seller is in liquidation and is therefore in breach of contract.
- VFL had not carried out any proper affordability checks.

VFL did not respond in full to Mr and Mrs P's allegations, and they referred the matter to this service. One of our investigators considered what had happened but did not recommend that the complaint be upheld. Mr and Mrs K did not accept the investigator's recommendation and asked that an ombudsman review the case. In doing so, they added that the credit intermediary had not been properly authorised to arrange the loan.

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.

Authorisation

Where a loan is arranged by an intermediary without the necessary authorisation from the Financial Conduct Authority (FCA), the lender cannot enforce it without confirmation from the FCA.

The loan agreement in this case says that the intermediary was Azure Services Limited. It was FCA authorised at the time. Mr and Mrs K say that Azure XP Limited was the broker and was not authorised. That was not the case, however; that company was the seller of the timeshare product, not the named intermediary.

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 K have provided no evidence suggesting they had difficulty making loan repayments. On the contrary, they indicated when they made the complaint that they had been able to meet the payments and that their financial position was satisfactory and unchanged from the time they took out the loan. And I note as well that they repaid it in October 2018 – that is, within a few weeks of drawdown. In the circumstances, I cannot properly uphold this part of the complaint.

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 loan was made under pre-existing arrangements between it and Azure XP Limited, the seller of the membership and the XPs. It was certainly made under arrangements which VFL had with Azure Services Limited, a company in the same group as Azure XP Limited and a representative of VFL. I have therefore considered Mr and Mrs K's claims against the seller.

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 K'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 could be sold at a profit and that they were sold as an investment.

The Application for Membership recorded that Mr and Mrs K 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.

I am not persuaded that the XPs were sold as an investment, even if there was some provision for them to be sold. They were sold as a means of funding holiday accommodation and experiences. 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. But the fact that there is a resale programme does not mean that the XPs were sold as an investment.

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

Breach of contract

Mr and Mrs K say that the liquidation of Azure companies means that the services which they bought cannot now be provided and that there is a breach of contract.

I do not agree that there was a breach of contract. Azure XP Limited had founded the Azure Experiences Membership Club and had sold the XPs to Mr and Mrs K. 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 and Mrs K's purchase of XPs therefore 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.

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.

I have therefore considered what it is alleged was said at the point of sale and the effect of the liquidation of Azure companies and whether that is likely to mean that the loan agreement created an unfair relationship.

For the reasons I have explained, I am not persuaded that Mr and Mrs K were misled about the timeshare or that the liquidation of the Azure companies amounted to a breach of contract.

There is no detail about the pressure which Mr and Mrs K say they were subjected to at the time of sale – for example, what form that pressure took and who exerted it. Nor have Mr and Mrs K explained why, if they felt they had been pressured into the sale, they did not take advantage of their right to cancel the sale and loan within 14 days.

Mr and Mrs K say that they were not told they were buying a timeshare. I don't accept that. The sale documents included a document headed "*Standard Information Form for Timeshare Contracts*". And, because they were buying a timeshare product, they had the benefit of, for example, the protections set out in The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. Those protections included the 14-day cooling-off period.

Mr and Mrs K say they were not provided with details of any commission paid to VFL. They do not suggest that they asked about commission, but I have no reason to think they would not have been told what it was if they had done. VFL would have been under a duty to provide that information. VFL has said however that its arrangements with Azure did not include the payment of commission.

In any event, Azure XP Limited and Azure Services Limited weren't acting as agents of Mr and Mrs K, but as the seller of the timeshare interest. They also introduced VFL to Mr and Mrs K, but it does not appear to me that it was their role to make an impartial or disinterested recommendation or to give advice or information on that basis.

My final decision

For these reasons, my final decision is that I do not uphold Mr and Mrs K's complaint and I 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 Mr and Mrs K to accept or reject my decision before 3 November 2023.
Mike Ingram
Ombudsman