DRN-4536039

The complaint

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

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

What happened

Between September 2015 and April 2018 Mr and Mrs C bought four timeshare products from companies within the Azure Group, a holiday and timeshare business with resorts in Malta. The first three purchases appear to have been traditional timeshares, where customers buy the right to use a designated property for a fixed week or weeks each year. The 2016 and 2017 purchases were upgrades of Mr and Mrs C's existing arrangements; that is, they bought the right to use a larger property or to use a property at more popular times of the year, or both.

The 2018 purchase was of holiday points, which could be exchanged on an annual basis for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences. That purchase was funded in part through a trade-in of Mr and Mrs C's traditional timeshare.

Both the traditional timeshares and the points-based purchase included membership of the linked holiday club.

This complaint concerns the April 2017 "upgrade" of Mr and Mrs C's timeshare interest.

In April 2017 Mr and Mrs C 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 £27,254; of that, £20,354 was provided through a 120 month loan from VFL. It appears that the loan also refinanced the loan which Mr and Mrs C had taken out to fund the previous year's purchase.

Mr and Mrs C have explained that "upgrade" involved the purchase of a 3-bedroom "lock-off" property. They say they were told that its configuration meant that the property could be used as separate 1-bedroom and 2-bedroom properties, increasing its rental potential. In addition, the upgrade gave them platinum club membership, replacing their existing silver membership.

In May 2021 Mr and Mrs C 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 Mr and Mrs C referred the matter to this service. Our investigator recommended that the complaint be upheld, primarily on the grounds that he accepted that the timeshare had been sold to Mr and Mrs C as an investment. That was contrary to relevant legislation. The investigator recommended that VFL write off the balance of the loan, refund payments made under it, refund other payments made under the timeshare agreement, and pay interest on the refunds. VFL did not accept that 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 our investigator, I issued a provisional decision. In that decision, I said:

As a general observation, I would comment that there is very little documentation relating to the 2017 purchase. I have no doubt that is because Mr and Mrs C swapped the timeshare in 2018 to a points-based product and so may have thought they had no reason to retain it. It does mean however that I have had to consider the complaint on the basis of what little paperwork has been retained and Mr and Mrs C's recollection of events.

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 C. I note in particular that they borrowed more the following year. That does not appear to me to be the action of someone having difficulty meeting their existing commitments. Mrs C has also said that changes in the calculation of benefits affected their ability to meet the loan payments. That suggests that, initially at least, the loan had been affordable.

I will however consider any further evidence which Mr and Mrs C may wish to provide on this point.

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 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. The documentation I do have, however, says that the sale agreement was concluded in the British Virgin Islands (it wasn't, although nothing turns on that) and is subject to the laws of BVI. That indicates that the seller was Azure Resorts Ltd, a BVI company within the Azure Group which was active in 2017.

I believe the links between those Azure companies and VFL were such that section 75 conditions were met. I have therefore considered what has been said about the sale in April 2017.

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 C's statements about what they were told at the time of sale focus on the timeshare being an investment that they could rent out for an income, or sell at a profit, or both. Those statements also suggest that Mr and Mrs C had bought and then upgraded their existing timeshare products for similar reasons – they thought they would be able to sell at a profit.

Regulation 14 of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations") prohibit the sale of a timeshare product as an investment.

Mr and Mrs C's evidence about what they were told in April 2017 is inconsistent in some ways. They submitted a written statement which said they were told that Azure was switching to "XPs", which were like points but which were not points. But, whatever the nature of XPs, the 2017 purchase was of a traditional timeshare interest, not XPs.

Mr and Mrs C then submitted a further statement, saying they bought a larger timeshare interest in 2017, because of the better letting and resale opportunities.

At the very least, this significant inconsistency shows that Mr and Mrs C's recollection about what conversations took place, and when, is not particularly reliable. I believe therefore that I should treat their evidence with a degree of caution.

As I have indicated, I have not been provided with a full set of sale papers. The sale documents which Mr and Mrs C have been able to provide are a 2-page Statement of Compliance and pages 3 and 4 of a 5-page Membership Application, page 4 of which comprises only Payment Terms.

The final part of the Compliance Statement says that the Membership Application will be complete when Mr and Mrs C have received:

- *the Membership Application Agreement;*
- *Financial Forms;*
- *Floor plans;*
- *Standard Information for Timeshare Contracts;*
- *Withdrawal Form;*
- *RCI Enrolment; and*
- *Members Directory and Club Rules.*

That indicates how much documentation is missing, but it's also evidence of what Mr and Mrs C were provided with at the time of sale.

The Compliance Statement included ten numbered statements, each of which was initialled by Mr and Mrs C. They included:

- *"The primary purpose of our Membership is to access holiday accommodation and is not a financial investment for a return. We also understand that the membership price paid does not necessarily reflect the market value of our membership." [para 6]*
- *"We have been informed of the various options we have to exit our Membership. We understand that the Azure Resale's facility will be available with effect from the year 2020. We have also been advised should we wish to initiate the process to exit our membership through the Azure resale's facility we would first need to enter into a listing agreement. We have not been given any resale's timeframe guarantees since finding a new buyer depends on market conditions and could potentially take one or more years. We are not reliant on any resale's proceeds to pay off any financial commitments relating to any Memberships we own. Furthermore we understand that the future value of the Club Membership cannot be guaranteed and past trends are not an indication of future value." [para 8]*
- *"We confirm that the Membership Application and all other documentation presented to us during our compliance Interview constitute the entire written contract between both parties. … In addition, we also confirm and acknowledge that we have relied on no representation made to us, whether oral or written, other than those contained in the documentation provided to us and that we have been advised by the Resorts Contract Manager that any representations made to us whether orally or in writing by a Club representative are not binding and that we cannot rely on any such representations as the basis for executing this contract. [para 9]*

In addition, clause 13 of the Membership Application said:

"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."

Mr and Mrs C appear to have been aware of and to have understood what they were signing. They said in a statement:

"In the past when purchasing the properties from Azure we were told that the property would increase in value and was an investment that could be willed to our descendants but that we would have to sign a waiver to say that we hadn't been told this but not to worry about that because it would definitely make money and the waiver was just a legal thing they had to get us to sign."

They appear to be saying therefore that they understood that the Compliance Statement was intended to be legally binding. Indeed, if that was not the intention, there seems to have been little point in including it in the sale documents. The same goes for clause 13 of the Membership Application; it was part of a formal sale agreement of significant value and was intended to be binding on both parties. It could also have the effect of clarifying what was agreed, rather than relying on the recollection of the parties – which in this case has turned out to be unreliable.

I think it very likely that Azure did discuss the possibility of selling the timeshare interest at some point in the future. It did, after all, have a resale facility until around 2018. But the fact that something can be sold does not mean that it is an investment, and the fact that a seller discusses the possibility of a future sale does not mean it is sold as an investment.

The warning in paragraph 8 ("… past trends are not an indication of future value…") is of course associated with investments and may have encouraged Mr and Mrs C to think that was what they were buying. Taken alongside the very clear statement in paragraph 6 that

the Membership is not an investment, however, I do not believe that it is a reason for me to conclude that the timeshare was sold as an investment.

For similar reasons, I am not persuaded that Mr and Mrs C were misled about any other aspect of the transaction either. They were told clearly and understood that the agreement was what was set out in the sale documents.

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, for two reasons.

First, by the time of the liquidation, Mr and Mrs C had swapped their timeshare property for XPs, under a new contract. The April 2017 contract had come to an end and so cannot have been the subject of a breach. If the liquidations did constitute a breach, it was a breach of the contract for the purchase of XPs and associated membership.

In any event, 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.

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 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 C. The seller was selling club membership and a timeshare, and Azure Services was acting as intermediary (and VFL's agent). Whilst it introduced finance options, it was not acting as Mr and Mrs C'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.

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 Mr and Mrs C, either at the point of sale or subsequently.

Mr and Mrs C say too that the sale was pressured. They haven't really expanded on that, although I accept they may not have been able to read all the documents in detail before agreeing to the upgrade. They were however already familiar with timeshare ownership and the club membership that went with it.

It's significant too in my view that Mr and Mrs C 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. The 14-day cooling-off period was introduced under an EU Directive and the Timeshare Regulations in part to address the problem of timeshare customers not being able to consider things fully at the point of sale.

Conclusions

It is not for me to decide whether Mr and Mrs C 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 or decide whether there has been a breach of the Timeshare Regulations.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr and Mrs C's complaint. For the reasons I have indicated above, however, I do not believe it would be fair or reasonable to uphold it.

I gave the parties until 30 December 2023 to provide me with any further evidence and arguments they wanted me to consider before I issued a final decision. Neither VFL nor Mr and Mrs C have provided anything further.

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.

Because neither party has provided me with any further evidence or arguments, I do not believe there is any reason to change my conclusions from those I reached in my provisional decision. In saying that, I stress that I have considered Mr and Mrs C's complaint from the outset.

My final decision

For these reasons, my final decision is that I do not uphold Mr and Mrs C'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 Mrs C and Mr C to accept or reject my decision before 1 February 2024.
Mike Ingram
Ombudsman