DRN-4489233

The complaint

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

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

What happened

In January 2018 Mr and Mrs O were on holiday in Malta. While there, they attended a sales presentation, at the end of which they bought a points based timeshare product from Azure XP Limited, a company registered in the British Virgin Islands. They bought 4,000 XP points and Level 1 club membership at a total cost of £11,400. 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 by a 10-year loan of £7,980 from VFL, brokered by Azure Services Limited. The loan was in Mr and Mrs O's joint names.

In 2020 Azure XP Limited and Azure Services Limited were placed into liquidation.

Also in September 2020 Mr and Mrs O complained to VFL through C. They said: they had been pressured into buying the XPs; the product had been misrepresented to them; the points 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 O referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr and Mrs O did not accept that recommendation and asked that an ombudsman review the case. In its further submissions on their behalf, C made a number of generic submissions about timeshare sales and about the Azure timeshare companies. It also said that the credit intermediary had not been properly authorised at the time of the sale. The investigator was not persuaded to reach a different view, however, and the complaint was passed to me to review.

I considered the evidence and arguments and issued a provisional decision, in which I said:

In responding to Mr and Mrs O's complaint VFL made the observation that many of the arguments made on their behalf are identical, or nearly identical, to those made on behalf of other clients of C. There do indeed appear to be many similarities. That might of course be evidence that large numbers of customers were treated in the same way – misled about the nature of the timeshare product or pressured into buying, for example. But I do note that there is very little detail in this case about what happened and – perhaps more significantly – almost no evidence directly from Mr and Mrs O about their experience of the timeshare sales process and subsequent events.

I think it's important to note as well that my role as the ombudsman dealing with Mr and Mrs O's complaint is primarily to resolve it in a way which I consider to be fair and reasonable in all the circumstances of the complaint. It is not, for example, to review wider industry practices or to make general observations which are not directly relevant to those circumstances. I shall therefore discuss the complaint points made in this case.

Authorisation

C has suggested that the credit intermediary in this case did not have the necessary authorisation at the time to arrange the loan. The intermediary named in the loan documents was Azure Services Limited. Our records show that it was an authorised representative of VFL in January 2018 and that VFL was itself authorised by the regulator, the Financial Conduct Authority. I am satisfied therefore that there is no merit in this element of the complaint.

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 not seen any evidence to suggest that the loan was not affordable for Mr and Mrs O. VFL says its checks indicated that they had a disposable income of more than £800 a month after usual expenses – far more than the loan repayments of £103.70. As far as I'm aware, Mr and Mrs O have not suggested they have had difficulty making payments or, if they have, when and why those difficulties began.

The fact that a borrower has been able to meet loan repayments does not necessarily show that the lender did carry out appropriate checks before agreeing the loan. They are likely to indicate however that a borrower has suffered no loss as a result of taking the loan out. They also indicate that, even if more detailed checks had been made, it's likely the loan would have been granted in very similar terms in any event.

I am not persuaded on the basis of what I've seen so far that the loan was not affordable. In order to reach a different view on that, I believe I would need to see concrete evidence of any difficulties Mr and Mrs O have experienced.

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 am satisfied that the links among Axure XP Limited (as seller), Azure Services Limited (as intermediary) and VFL (as lender) were such that those conditions were met in this case. I have therefore considered what has been said about the sale in January 2018.

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.

The Application for Membership recorded that Mr K and Ms T 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.

Following the investigator's preliminary assessment, Mr O submitted a brief statement, in which he said:

"We were told that we were BUYING into an investment flat at the resort which they would rent out and collect the proceeds on our behalf and remit same to us annually. We were also told that we could stay at the flat anytime we wanted as it was exclusively ours. We only needed to give them 1 week notice to make sure it was vacant and available for us. Also, if we wanted to stay anywhere else in the world, they would make the arrangements and we only needed to pay 199 GBP for a 2 week stay anywhere in the world. Furthermore, we were told we could pass on the INVESTMENT to our children."

The statement that he and Mrs O were told they had bought a flat which was exclusively theirs bears no relation at all to the points-based holiday club membership which they actually bought, and which was explained in the documents. No individual property is identified, no rental income is mentioned, and it is simply not plausible that Mr and Mrs O thought they could buy a flat for just £11,400. I am afraid I simply do not believe that a sales pitch would describe a product so differently from what was actually being sold and which was so different from what was set out in writing.

I think it's notable as well that no mention of this was made when the complaint was first made. I might have expected it to be raised as soon as the first rental payment was expected but not paid.

I am not persuaded that the XPs were sold as an investment that Mr and Mrs O could sell. They were sold as a means of funding holiday accommodation and experiences. I note as well that 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. I have however seen no evidence that Mr and Mrs O have sought to sell their XPs.

I am not persuaded that Mr and Mrs O were misled.

But in any event, 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 O 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 those provisions.

Breach of contract

C says that the liquidation of Azure companies means 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 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 O's purchase of XPs therefore remain available to them and are unaffected by the liquidation of the Azure companies.

C also said that the XPs provided no benefit to its clients and were effectively worthless. VFL noted however that Mr and Mrs O had used their Azure membership as part of an exchange programme. Whatever Mr and Mrs O may think about the overall value of their purchase, I do not believe their membership is worthless. Even if it is poor value (on which I make no comment), that is not, of itself, grounds for a claim.

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.

Because 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 O. Azure XP 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 O'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.

C says that VFL did not disclose the commission paid to Azure. VFL says it did not pay any. It does not appear that C asked whether any commission 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 O, either at the point of sale or subsequently.

Mr and Mrs O 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 O 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 any of those agreements 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 O have a claim against Azure XP, 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 Mr and Mrs O's complaint. In the circumstances of this case, however, I think that VFL's response to the claims was fair and reasonable.

Neither party responded to my provisional decision within the time limit I stipulated for further submissions.

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 reply to my provisional decision, I see no reason to reach a different conclusion from that which I set out in it.

In saying that, I stress that I have considered all the evidence and arguments afresh before reaching this final decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O and Mr O to accept or reject my decision before 3 January 2024.

Mike Ingram
Ombudsman