DRN-4378467

## The complaint

Mrs J complains that a timeshare product was misrepresented to her and that the timeshare company is in breach of contract. The purchase was financed with credit provided by Honeycomb Finance Limited ("Honeycomb"). Because of that, Mrs J says that she has a claim against Honeycomb in the same way she has a claim against the timeshare company.

The loan (and with it responsibility for this complaint) was transferred in August 2022 to Oplo PL Ltd and then to Tandem Personal Loans Ltd, but, for simplicity, I shall refer to the respondent as "Honeycomb".

Mrs J has been represented by a claims management business, which I'll call "F". Where I refer to her arguments and submissions, I include those made on her behalf.

## What happened

In May 2017 Mrs J and her husband had bought a timeshare product from Azure. In May the following year they bought a points based timeshare product from Azure XP Limited ("Azure"), together with membership of the Azure Experiences Club and of a timeshare exchange business. They bought 7,500 points (referred to as XPs) at a cost of £15,000, part-exchanging their existing timeshare. XPs could be exchanged for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences The purchase was financed with a 15-year loan from Honeycomb in Mrs J's sole name. The 2017 purchase had been financed by a different lender.

Unfortunately, Mrs J's partner passed away at the end of 2018. She contacted Azure to explain that this would make it difficult for her to finance her club membership and XPs, but she says it did not offer any meaningful solution. Honeycomb's notes indicate she contacted it as well, but it does not appear that any changes were made to the loan repayments.

In or around 2020 Azure Resorts Limited and Azure XP Limited went into liquidation.

In April 2021 F contacted Honeycomb on behalf of Mrs J. F said that the XPs had been misrepresented to its client. Mrs J had been told when buying the previous timeshare that it was an investment, but in May 2018 she had been told it could not realistically be sold after all. She was told that Azure was switching to points-based timeshare products, for which there was a better market.

F said too that, because they were in liquidation, the Azure companies could no longer provide the services sold. The seller was therefore in breach of contract. F said as well that Azure had said the XPs were an investment, but that was not the case.

Further, F said, it was not disclosed to Mrs J that a commission would be paid, insufficient checks were carried out to ensure Mrs J could afford the loan payments, and Mrs J was pressured into buying the XPs on the day. The result was that the loan agreement created an unfair relationship between Mrs J and Honeycomb.

Honeycomb did not accept the complaints made, and F referred the matter to this service, where one of our investigators considered what had happened. The investigator did not recommend that the complaint be upheld, and Mrs J asked that an ombudsman review the case. I did that and issued a provisional decision, in which I said:

***Affordability***

*When it referred the complaint to this service, F said that Honeycomb had not carried out sufficient checks to ensure that the loan was affordable for Mrs J.*

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

*Mrs J has not in this case provided any evidence of her income and outgoings in May 2018, but I note that Honeycomb said she had met the payments due under the loan agreement. I note as well that Mrs J indicated when she took out the loan that it was affordable. That is not, of itself, evidence that it was, still less that Honeycomb carried out proper checks. I would however expect to see some evidence to support the assertion that proper checks were not carried out and that the loan was not therefore affordable.*

*I do note however that Mrs J contacted Azure and Honeycomb early in 2019 to explain that she would find things difficult, following the death of her husband. If she is having difficulty making the loan repayments (or has difficulty in the future), she should contact the lender with a view to reaching a solution. She has not however provided any information about any such request or the response. Specifically, she has not complained about any response, so I will make no further comment on that issue at this stage.*

***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.*

*It is clear in this case that the loan financed the purchase of the XP points. The loan documents refer to three credit intermediaries – Business Brokers Limited; Vacation Finance Limited; and Freedom Finance. The "supplier" was a different company, Azure XP Limited. Honeycomb has not suggested however that the necessary arrangements were not in place for sections 56 and 75 to apply, and I have therefore approached the case on the assumption that they were. It is of course open to the parties to make further submissions on this point, should they wish to do so.*

*I must therefore consider what F has said about the alleged breach of contract and misrepresentations.*

***Breach of contract***

*F says that the liquidation of Azure companies means that the services which Mrs J bought cannot now be provided. In its letter of 29 April 2021 to Honeycomb, it said:*

*"Azure are now in liquidation. They cannot provide the service sold. They are in breach of contract."*

*The first of those statements was true, but it did not follow that there was a breach of contract. Azure XP Limited had founded the Azure Experiences Membership Club and had sold the XPs to Mrs J. 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 Mrs J's purchase of XPs therefore remain available to her and are unaffected by the liquidation of the Azure companies.*

*F did not suggest that it would be a breach of contract for any company other than Azure to provide the membership services. If that is Mrs J's case, then I disagree. The contract is performed if the services are provided; they do not have to be provided by Azure.*

***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.*

*Much of what Mrs J says she was told about the possibility of selling appears to relate to the timeshare bought in 2017. The purchase of that timeshare was funded by a different lender, which has made an offer of settlement. And the timeshare itself was used in part to fund the purchase of the XPs.*

*I do not believe that the XPs were sold as an investment. There is little or no evidence to support that. 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. The resale programme was however opened in 2022 and, Honeycomb says, XPs have been sold for other customers. I am not aware that Mrs J has sought to sell her XPs.*

*Mrs J says that it is not possible to use all her XPs in the 25 years she has agreed to be a member. That is not my understanding, however. Section 3 of the Club Rules sets out the minimum number of XPs which must be used each year. For level 1 membership, which Mrs J has, that is 160 points.*

*If Mrs J uses only the minimum number of points each year, it would take her nearly 47 years to use her allocation of 7,500 XPs. The Reservation Rules indicate however that members can accelerate the use of XPs – that is, they can use them early. And the contractual documents say that the membership will last for 25 years or until the XPs are fully utilised through Accelerated Usage. The facility for accelerated usage appears to have been a feature which Azure regarded as positive, and I think it likely that it would have been explained to Mrs J.*

*Finally, I note that the sale agreement 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."*

*In my view, that was an attempt to ensure that anything on which Mrs J sought to rely was included in the contract itself. I am not persuaded in this case that she was misled, but, if I were to take a different view on that, I would need to consider the effect of that provision.*

***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.*

*If the loan was made under pre-existing arrangements between Honeycomb and the seller (or an associate of 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.*

*I accept that there were links between Honeycomb and the Azure companies. I do not believe however that this led to a conflict of interest in respect of their relationship with Mrs J. Azure was selling club membership and XP points. Whilst it introduced finance options, it was not acting as Mrs J'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.*

*Mrs J says too that the sale was pressured. She has not really elaborated on that, but I note that 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 Mrs J had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. If she thought she had agreed to any of those agreements as a result of undue pressure, it is not clear to me why she didn't take advantage of the option to withdraw.*

*It is not for me to decide whether Mrs J has a claim against Azure, or whether she 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 Mrs J's complaint. In the circumstances of this case, however, I think that Honeycomb's response to Mrs J's claims was fair and reasonable.*

Mrs J did not accept my provisional decision. In further submissions made on her behalf, F said that the 2017 timeshare purchase had entitled Mr and Mrs J to two weeks accommodation at any time of the year, other than five weeks during the summer school holidays. They were told that the XPs would give them equal or better entitlement.

F said as well that Mrs J's recollection of being told the XPs would be an investment was consistent with what other clients had said. It is widely accepted however that there is no meaningful resale market for timeshare products.

**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.

Having done so, however, I have not changed my conclusions from those set out in my provisional decision.

F has explained that the timeshare Mr and Mrs J bought in 2017 entitled them to book accommodation at any time of year apart from the school summer holidays. That suggests they had a points-based timeshare. But Mr and Mrs J's reason for buying XPs in 2018 was, they said previously, because Azure was switching from week-based timeshares to points-based products. That switch can only have been relevant – if at all – to club members who had week-based products.

I am not persuaded that Mr and Mrs J were told that they would be able to book accommodation at any time of the year. Their benefits as Level 1 club members were set out in the contractual documentation, which explained that holidays were subject to availability. Mrs J had to use a minimum of 160 XPs each year, but could accelerate her use of XPs by paying a fee; that would enable her to book better accommodation or to book at busier times of year.

**My final decision**

For these reasons, as well as those set out in my provisional decision, my final decision is that I do not uphold Mrs J's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J to accept or reject my decision before 8 November 2023.
Mike Ingram
**Ombudsman**