DRN-4516187

The complaint

Mr S complains that a timeshare product was misrepresented to him and his wife. The purchase was financed with credit provided to Mr S by Honeycomb Finance Ltd. The loan and this complaint are now the responsibility of Tandem Personal Loans Ltd, but for simplicity I will refer to the lender as "Honeycomb". Because of the lending arrangements, Mr S says he has a claim against Honeycomb in the same way he has a claim against the timeshare company.

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

What happened

In July 2018 Mr and Mrs S bought a points based timeshare product from Azure XP Limited, a company registered in the British Virgin Islands. They bought 6,000 XP points and Level 1 club membership at a total cost of £18,360. XP points could be exchanged for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences The purchase included membership of RCI, a timeshare exchange organisation, and was financed by a 15-year loan from Honeycomb. The loan was in Mr S's sole name.

In 2020 Azure XP Limited and a related company, Azure Resorts Limited, were placed into liquidation.

In April 2021 Mr S complained to Honeycomb through F. He said, in summary: the liquidation of the Azure companies constituted a breach of contract; he had been pressured into buying the XPs; the product had been misrepresented to him; 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.

Honeycomb did not accept the complaint, and Mr S referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr S 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:

Affordability

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

In this case, I have not seen any evidence to suggest that the loan was not affordable for Mr S. I note that the monthly loan payments have been made in full. Honeycomb says that the loan fell one month into arrears in June 2020, but the arrears were cleared very quickly. Notably, although Mr S has alleged generally that proper checks were not carried out, he has not said anything about what happened in June 2020.

The fact that a borrower has not missed any payments or fallen into arrears does not necessarily show that the lender did carry out appropriate checks before agreeing the loan. It does indicate however that Mr S suffered no loss as a result of taking the loan out. It also indicates that, even if more detailed checks had been made, it's likely the loan would have been granted on the same or very similar terms in any event.

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 lender in this case was Honeycomb. The seller or supplier was Azure XP Ltd. Three credit intermediaries were named in the loan agreement – Business Brokers Ltd, Vacation Finance Ltd and Freedom Finance. One of those was therefore the company with which Honeycomb had pre-existing arrangements and under which the finance was arranged in this case, not Azure XP Ltd. I am aware that the intermediaries had close links with companies within the Azure group, and have therefore approached this complaint on the basis that the conditions in section 75 were met. If either party wishes to provide further evidence on that point, it is open to them to do so.

I have therefore considered what has been said about the sale in July 2018 and subsequent events.

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 S's evidence about what he was told at the sales presentation are generic, lack detail, and are largely unsupported by any documentation. He has said that he and Mrs S were told the XPs would be an investment.

The Application for Membership recorded that Mr and Mrs S had received Azure's Standard Information Document, Rules of Membership, Reservation Rules, and a 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 that Mr and Mrs S could sell at a profit. 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 S have sought to sell their XP points; the possibility of doing so does not appear to have been a significant factor in their decision to purchase.

I am not persuaded that Mr S was 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 S 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

F 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 trustee's letter was followed on 27 July by a letter from the liquidators. That letter said:

"The Joint Liquidators ("JLs") write further to First National Trustee Company (UK) Limited's ("FNTC") letter dated 8 July 2020, in which they advised that a new club manager has been appointed to the Island Residence Club, The Heavenly Collection and Azure X (collectively the "Clubs").

"The JLs are pleased to confirm that FNTC has taken over as the new manager of the Clubs and further confirm that, as a result, the Clubs will continue to operate for the benefit of members. As the JLs have transferred the management of the Clubs to a third party, the JLs no longer consider the members to be stakeholders in the Companies' liquidations. Therefore, the JLs do not anticipate circulating any further correspondence to the Clubs' members and all queries should be directed to the new club manager, the contact details for which are listed below …"

I am not aware that Mr S made a claim in the liquidation, but the letters from the trustee and the liquidators confirm that the services linked to his purchase of XP points remain available to him 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.

I have approached this decision on the basis that the loan was made under pre-existing arrangements between Honeycomb and a company closely linked to the seller. Assuming that to be true, 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 do not believe that any link there may have been between Honeycomb and the seller or intermediary led to a conflict of interest in respect of their relationship with Mr S. One was selling club membership and XP points, and the other was acting as intermediary (and Honeycomb's agent). Whilst the intermediary introduced finance options, it was not acting as Mr S'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 Honeycomb did not disclose the commission paid to the intermediary. Honeycomb says it did not pay any. I note that, before alleging that an unfair commission had been paid, F does not appear to have taken any steps to ask 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 S, either at the point of sale or subsequently.

Mr S says too that the sale was pressured. He has 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 S had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. If he thought he had agreed to either of those agreements as a result of undue pressure, it is not clear to me why he didn't take advantage of the option to withdraw.

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

I indicated that I would consider any further evidence and arguments from the parties before I issued a final decision. Honeycomb said it had nothing to add; Mr S did not respond to my provisional decision.

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 nothing further following my provisional decision, I see no reason to reach a different conclusion about Mr S's complaint. I stress however that I have considered everything afresh before reaching this final decision.

My final decision

For these reasons, my final decision is that I do not uphold Mr S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 21 March 2024.
Mike Ingram
Ombudsman