DRN-4594397

The complaint

Mr N complains that a timeshare product was misrepresented to him and that the timeshare company is in breach of contract. The purchase was financed with credit provided by Honeycomb Finance Limited ("Honeycomb"). That loan has now been transferred to Tandem Personal Loans Ltd, but for ease of reference I'll refer to the lender as Honeycomb.

Because Honeycomb financed the purchase, Mr N says that he has a claim against it in the same way he has a claim against the timeshare company.

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

What happened

In December 2018 Mr N and his wife were on holiday in Malta. During the course of that holiday, 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 membership of the Azure XP club at a total cost of £12,555. XP points could be exchanged for holiday accommodation and experiences, including sailing trips, motor home hire, and driving experiences The purchase was financed with a loan for the full purchase price from Honeycomb in Mr N's sole name.

In 2020 Azure XP Limited and Azure Services Limited, another company within the Azure Group, were placed into liquidation.

In January 2022 Mr N complained to Honeycomb through F. He said, in summary: the liquidation of the Azure companies meant he had a claim for breach of contract; he had been pressured into buying the XP points; the product had been misrepresented to him; contrary to The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"), the points had been sold as an investment; the lending had been irresponsible and unaffordable; the loan created an unfair relationship; and commission had not been disclosed as it should have been.

Because it had financed the purchase, F said that Honeycomb was responsible for the actions of the seller; alternatively, Mr N could bring claims against Honeycomb as a result of the seller's actions.

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

I would observe first of all that Mr N has provided very limited documentation in support of his claim. I do not, for example, have complete copies of the December 2018 sale documents. However, this service has seen a number of complaints about Azure timeshare sales from around the same time. As is to be expected, the sellers and Honeycomb used largely standard contract wording, and Honeycomb has provided examples of (and quoted from) some of them in response to Mr N's complaint. I have therefore approached this case on the assumption that the same standard wording was used for Mr and Mrs N's purchase. If that (or any other assumption I have made) is incorrect, the parties can explain that and provide the necessary evidence in their response to this provisional decision.

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 however seen any evidence to suggest that the loan was not affordable for Mr N. He does not appear to have indicated at any time before he referred his complaint to this service that he was having difficulty making payments. The loan statements indicate that payments have been made in full and either on time or very soon after their due date.

The fact that a borrower has not missed any payments or fallen into significant arrears does not necessarily show that the lender did carry out appropriate checks before agreeing the loan. It does indicate in this case however that Mr N has suffered no undue 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 in 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.*

I do not understand Honeycomb to dispute that the loan was were made under pre-existing arrangements between it and Azure XP Ltd, the seller of the membership and the XP points, or between it and a company closely linked to the Azure Group. I have therefore considered what has been said about the sale and subsequent events.

Breach of contract

As I have indicated, I have not been provided with a full set of contractual documents for either sale. I believe however that Mr N would have signed an Application Agreement and would have received copies of the Rules of Membership, the Reservation Rules, and a Deed of Trust. Whether there was a breach of contract depends to a very large degree on what was in those documents compared with what happened.

Mr N says that there was a breach of contract when the Azure companies went into liquidation. I do not believe however that is the case.

Club properties were held under a trust arrangement. The trust deed included a provision allowing the trustee to appoint a replacement entity to administer the club, should the existing management company go out of business. That is what happened.

On 7 May 2020 the liquidators of Azure XP Limited wrote to all club members to tell them that the company had been placed into liquidation. That letter noted as well that the club's resort continued to operate normally – albeit subject to Covid-19 restrictions in place at the time. The liquidators also made reference to the liquidation of other Azure companies.

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."

Subsequently, club members were informed that a new resort manager, VCMS, had been appointed. On the face of it, therefore, the services linked to Mr N's purchase of XP points and club membership remain available to him and are unaffected by the liquidation of the Azure companies.

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.

F's submissions about what Mr N was told at the sales presentation are generic, lack detail, and are largely unsupported by any documentation. F says however that he was told the XP points would be an investment which could be sold for a profit or which could provide an income. That was not true, however, and was in breach of relevant regulations.

Mr N says too that he was not made aware that he would have to pay extra to book accommodation when he wanted it, or that he would need to buy additional XP points. I don't accept that. The information about the Club and its operation made it clear that membership was available at five different levels and that members with a higher level of membership would have a wider choice of accommodation and experiences. It was also made clear that all services were subject to availability.

The standard Application for Membership recorded that buyers had received Azure's Standard Information Document, the Rules of Membership, the Reservation Rules, and the Deed of Trust. I believe Mr N would have been provided with those documents. That is relevant to the question of whether he was misled about what he was buying.

The sale documents used in 2018 also included a Compliance Statement, comprising ten numbered statements, each one of which customers were required to initial. 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]*

I think it likely that Mr N signed and initialled a Compliance Statement in these terms.

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 N to think that was what he was 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.

In addition, clause 13 of the standard Membership Application in use in 2018 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."

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."

Again, I think it more likely than not that the agreement Mr N signed included these clauses. In my view, the inclusion of "entire agreement" provisions was an attempt to ensure that anything on which Mr N sought to rely was included in the contract itself. I am not persuaded

in this case that he was misled, but, if I were to take a different view on that, I would need to consider the effect of those provisions.

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 Honeycomb and Azure XP Ltd or a company closely linked to it, 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.

Even assuming there were links between Honeycomb and the Azure companies, I do not believe this led to a conflict of interest in respect of their relationship with Mr N. The seller was selling club membership and a timeshare product. To the extent it or another Azure company introduced finance options, it was not acting as Mr N'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 Azure. Honeycomb 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 N, either at the point of sale or subsequently.

Mr N says too that the sale was pressured. He hasn't really expanded on that, although I accept he may not have been able to read all the documents in detail before initially agreeing to the sale.

It's significant too in my view that Mr N had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. The 14-day cooling-off period was introduced under the 2008 EU Timeshare Directive and the 2010 Timeshare Regulations, in part to address the problem of timeshare customers not being able to consider things fully at the point of sale. If Mr N thought he had agreed to anything as a result of undue pressure, it is not clear to me why he didn't take advantage of the option to withdraw in the time available for him to do so.

Conclusions

It is not for me to decide whether Mr N has a claim against the seller, 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 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 N'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 25 January 2024 to provide me with any further evidence or arguments they wanted me to consider before I issued my final decision. Honeycomb said it had nothing to add, and Mr N did not respond.

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 neither party has provided anything more in response to my provisional decision, I see no reason to reach a different conclusion about the complaint. In saying that, however, I stress 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 N's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 14 March 2024.
Mike Ingram
Ombudsman