DRN-4595033

The complaint

Mr and Mrs D complain that a timeshare product was misrepresented to them and that the seller is in breach of contract. The purchase was partly financed with credit provided by Vacation Finance Limited ("VFL"). Because of that, Mr and Mrs D say they have a claim against VFL in the same way they have a claim against the timeshare company.

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

What happened

Mr and Mrs D have been timeshare owners since around 2011, having bought seven timeshare products from companies in the Azure Group, including the product which is the subject of this complaint.

In September 2019 Mr and Mrs D were on holiday in Malta. At that time, they still held two of the timeshare products they had bought – a property based timeshare and a points based product. While in Malta, they attended a sales presentation, at the end of which they bought an interest in a timeshare unit from Azure Resorts Limited, a company registered in the British Virgin Islands (BVI) and part of the Azure Group. The timeshare interest was priced at £30,500, and the purchase was financed in part by a loan of £21,350 from VFL.

The sale agreement recorded that Mr and Mrs D relinquished their occupancy rights for 2020, 2021 and 2022 and that the relinquishment sum of £4,500 was reflected in the purchase price.

In 2020 two of the Azure companies, Azure XP Limited and Azure Resorts Limited, were placed into liquidation in BVI proceedings. F says they are therefore unable to provide the services which Mr and Mrs D bought and that the seller is in breach of contract.

In December 2021 Mr and Mrs D complained to VFL through F. They said, in summary: they had been pressured into buying the timeshare in 2019; the product had been misrepresented to them; it 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 D referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr and Mrs D 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.

I have not however seen any evidence to suggest that the loan was not affordable for Mr and Mrs D. They do not appear to have indicated at any time that they were having difficulty making payments, and I note that the loan was repaid in full in July 2020 – that is, within a year of it being taken out.

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 in this case however that Mr and Mrs D have 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, 75 and 75A 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 sections 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 price attached to any single item which is the subject of the contract is not more than £30,000. The price attached to the timeshare product in this case was £30,500, so I am not persuaded that section 75(1) applies.

Section 75A of the Consumer Credit Act, however, includes similar provisions where the borrower has a claim for breach of contract under a "linked agreement" (defined in section 19), if the cash price is more than £30,000, and the credit agreement is for £60,260 or less. I believe those conditions were met here. The credit intermediary, Azure Services Limited, was part of the same group of companies as the seller and was a representative of VFL. I have therefore considered the claim for 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. 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."

The services linked to Mr and Mrs D's timeshare purchase therefore remain available to them 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. For the reasons I have explained, I am satisfied that the loan and the sale agreements were linked in this case.

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 D. Azure Resorts was selling the 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 D'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. There is no evidence that Mr and Mrs D were told they had to take out a loan, still less one with VFL. On the contrary, the documents indicate they were given options.

Mr and Mrs D have said that Azure did not properly explain how they could rent out their timeshare to earn income from it. They say too that the sale was inappropriate for them, since they did not want to spend lots of time outside the UK, and they had an existing timeshare. That seems to me however to be inconsistent with their claim that the timeshare was sold as an investment. But, even if true, I do not believe it would be fair to hold VFL responsible for a sale which did not meet Mr and Mrs D's needs.

I note as well that Mr and Mrs D say they did not use their timeshare in 2020 or 2021 due to the Covid-19 pandemic. They went to Malta in 2022, but say they did not use the timeshare because they were in dispute over the sale. Those explanations are however not consistent with the documents, and they cast some doubt on the reliability of Mr and Mrs D's recollections. As I have indicated, Mr and Mrs D relinquished their occupancy rights for the first three years of ownership when they bought the timeshare in 2019. Covid-19 would have prevented them from using the unit in 2020 and 2021 in any event, but they had already decided not to use it in those years. Their decision not to use it in 2022 had been made well before any dispute had arisen.

F says that VFL did not disclose the commission paid to Azure. VFL says it did not pay any, and I accept that it didn't. 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 D, either at the point of sale or subsequently.

Mr and Mrs D 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 D 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.

It is not for me to decide whether Mr and Mrs D have a claim against the seller, or whether they might therefore have a "like claim" under section 75A 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 D's complaint. In the circumstances of this case, however, I think that VFL's response to the claims was fair and reasonable.

I said that I would consider any further evidence and arguments before issuing a final decision, and I gave VFL and Mr and Mrs D until 31 January 2024 to provide me with anything more they wanted me to consider. Neither party had anything more to add.

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. In saying that, however, I stress that I have considered the entire complaint afresh before issuing this final decision.

My final decision

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

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