DRN-4702483

The complaint

Mrs O complains that a timeshare product was misrepresented to her and her husband and that the timeshare company is in breach of contract. The purchase was financed with credit provided to Mrs O 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, Mrs O says that she has a claim against it in the same way she has a claim against the timeshare company.

Mrs O has been represented in this complaint by a claims management business, and so any reference to Mrs O's submissions and arguments include those made on her behalf.

What happened

In September 2018 Mrs O and her husband were on holiday in Malta, having been offered a "free" holiday. 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 £15,000. 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 Mrs S's sole name.

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

In July 2022 Mrs O complained to Honeycomb through her representative. She said, in summary:

- the credit intermediary had not been authorised to arrange consumer credit loans;
- the liquidation of the Azure companies meant she had a claim for breach of contract;
- she had been pressured into buying the XP points;
- the product had been misrepresented to her;
- 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, Mrs O said that Honeycomb was responsible for the actions of the seller; alternatively, she could bring claims against Honeycomb as a result of the seller's actions.

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

Authorisation of the credit intermediary

Mrs O's representative says a business introducing consumer credit requires authorisation from the regulator, the Financial Conduct Authority (FCA), and that the credit intermediary in this case did not have the necessary authorisation. The effect of not having the necessary authorisation is that the loan cannot be enforced without permission of the FCA. The representative referred at length to a ruling of the Upper Tribunal which came about because a company within the Azure Group had been acting without the necessary authorisation for several years. As a result, a large number of customers received refunds of money paid under connected loan agreements. The case involved a different lender, not Honeycomb.

The lender in this case was Honeycomb. The seller of the timeshare product was Azure XP Ltd. Three credit intermediaries were named in the loan agreement – Business Brokers Ltd, Vacation Finance Ltd and Freedom Finance. None of those was the intermediary involved in the Upper Tribunal case, and all three were properly authorised when Mrs O took out the loan in September 2018. I do not believe therefore that there is any merit in this argument.

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 Mrs O. Honeycomb says that that the monthly loan payments have been made in full, and it does not appear that Mrs O ever suggested before making this complaint that she was having difficulty making the payments.

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 Mrs O 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 on the same or very similar terms in any event.

Mrs O has said that she and her husband are finding it difficult to keep up the payments, in part because of the impact of the Covid-19 pandemic. If that is the case, I would expect Honeycomb to seek to come to some arrangement with her.

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 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 seller. I have therefore considered what has been said about the sale and subsequent events.

Breach of contract

Mrs O's representative 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."

Subsequently, club members were informed that a new resort manager, VCMS, had been appointed. I am satisfied therefore that the services linked to Mr and Mrs O's purchase of XP points and club membership remain available to them and are unaffected by the liquidation of the Azure companies.

Mrs O's representative says as well that the yacht charters are no longer available as part of the membership package. I have not seen any confirmation of that, but even if it is the case, it is not clear that Mr and Mrs O would be affected by it. The Club's Membership Rules appear to show that yacht charters are only available to those holding level 3, 4 or 5 membership; Mr and Mrs O hold level 1 membership only.

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.

Mrs O says that the timeshare product was sold as an investment, contrary to relevant regulations.

The Application for Membership recorded that Mr and Mrs O had received Azure's Standard Information Document, Rules of Membership, Reservation Rules, and a Deed of Trust. I am satisfied that they did receive these documents – and indeed they have provided some of them.

I am not persuaded that the XPs were sold as an investment that Mr and Mrs O could sell at a profit. They were sold as a means of funding holiday accommodation and experiences.

I accept that Mrs O was told – as she says she was – that XP points could be sold. But I believe the contractual documents made clear that she was not buying an investment, and the possibility that something can be sold does not mean that it is investment. The options were limited, and that was apparent from the sale documents, which included (in the Standard Information):

"The Resale Facility for Azure XP Ltd will be available to be applied for as of the year 2023 and cannot be relied upon as the basis for entering into a Membership. Resale values or timeframes cannot be guaranteed and are subject to offer and demand Azure XP Ltd is the only authorised vendor offering this facility, currently the transaction fee is £49.00 and is subject to prevailing Resales Terms and Conditions applicable at the time of registration."

I am not persuaded that Mrs O 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 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..

Whilst Mrs O has not provided it, I believe the sale documents used at the time 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 and Mrs O 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 and Mrs O to think that was what they were 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.

Azure also provided a compliance video, which shows Mr and Mrs O apparently confirming that they understood what they were buying and were happy to proceed. Mrs O says that her body language suggests the contrary and that she and Mr O were reluctant buyers. That is not however what they told the sales representative, and I do not believe that I can safely conclude that the video shows they were misled.

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 Mrs O. 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

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.

Mrs O's representative 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, the representative 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 Mrs O, either at the point of sale or subsequently.

Mrs O says too that the sale was pressured. In particular, she says that, had she and Mr O not bought club membership, they were told that they would have to pay for their holiday – which otherwise would have been free. I have not seen the terms on which the holiday was originally offered, but if Mrs O was told this, it is in my view surprising that she did not raise it at the time. I note that Azure's standard documents included a statement from the buyer to say they had not been put under pressure. Had Mr and Mrs O been presented with the ultimatum they say they were given, I think it unlikely that they would have confirmed in the compliance meeting that they were happy to go ahead or that they would have signed a statement saying they had not been pressured into the sale.

Mrs O acknowledges that she had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. She says that she tried to withdraw at the time of sale, but was dissuaded from doing so. She says too that she and Mr O intended to withdraw later but that she was dealing with a serious health issue at the time and, by the time they decided to do so, they were a few days outside the withdrawal period. I have however seen no evidence to confirm that, but it does not appear that either Azure or Honeycomb received a withdrawal notice – either before or after the expiry of 14 days.

Finally, Mrs O's representative has identified some provisions of the timeshare contract which, it is said, appear to give the timeshare provider a broad discretion to change, for example, management fees and to withdraw membership if fees are not paid promptly. Similar provisions have in the past led to courts deciding that they are "unfair" within the meaning of the Consumer Rights Act 2015 and making orders under section 140B.

I am required by law to make my decision on the basis of what I consider to be fair and reasonable in all the circumstances. In this case, I note that Mr and Mrs O have not in fact paid any management fees for several years (because they are unhappy with the timeshare product), but that their membership has not been withdrawn. And the usual remedy where a term is found to be "unfair" is that it is not enforceable against a consumer. Against that background, I do not believe I can fairly require Honeycomb to make refunds or otherwise change the terms of the loan agreement.

It is not for me to decide whether Mrs O has a claim against Azure XP, 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 O'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 which the parties might submit before issuing a final decision, and gave them until 21 March 2024 to respond to my provisional decision. I have not received anything further from either Honeycomb or Mrs O.

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 information from either party, I see no reason to reach a different conclusion from that set out in my provisional decision. In saying that, 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 Mrs O's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O to accept or reject my decision before 24 April 2024.
Mike Ingram
Ombudsman