DRN-4729927

The complaint

Mr D complains, in summary, that a timeshare product was misrepresented to him. The purchase was financed with a loan provided by Honeycomb Finance Limited ("Honeycomb"). That loan has now been transferred to Oplo PL Ltd, but for ease of reference I'll refer to the lender as Honeycomb.

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

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

What happened

In March 2019 Mr D and his wife attended a holiday 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 £13,950. The price included membership fees for the first five years and membership of RCI, a timeshare exchange programme. 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 from Honeycomb for the full purchase price in Mr D's sole name.

In 2020 Azure XP Limited and Azure Resorts Limited, another company within the Azure Group, were placed into liquidation. The management of the Club was transferred to a new management company, so members such as Mr and Mrs D could continue to use their membership and the Club's facilities.

In or around June 2022 Mr D repaid the loan by transferring it to a different provider. Shortly after that, he complained to Honeycomb, initially on his account but later through N. He said, in summary: 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; he hadn't been provided with the information required by the Timeshare Regulations; the lending had been irresponsible and unaffordable; the loan created an unfair relationship.

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

Honeycomb did not accept the complaint, and Mr D referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr 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 D. The loan statements indicate that payments were made in full and on time until the loan was repaid in June 2022. Mr D made no mention of having any difficulty with the loan payments until some months later. Notes on the loan statements suggest that he re-financed the debt with another provider because he could reduce his monthly payments by doing so. That doesn't mean however that the payments to Honeycomb were unaffordable or that the loan was not appropriate.

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 D 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.

For completeness, I note that Mr D questioned the settlement figure when he repaid the loan. I have no reason to think however that it was not calculated in line with the Consumer Credit (Early Settlement) Regulations 2004 – a piece of consumer protection legislation which sets out how early repayments should be calculated so that consumers are not unduly disadvantaged.

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.

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.

N's submissions about what Mr D was told at the sales presentation are generic, lack detail, and are largely unsupported by any documentation. N 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.

Mr and Mrs D's Application for Membership recorded that they had received Azure's Standard Information Document, the Rules of Membership, the Reservation Rules, and the Deed of Trust. None of those documents suggested that Mr and Mrs D were buying an investment; they were buying rights to use holiday accommodation and to book holiday experiences on an annual basis, subject to their right to accelerate that usage if they wished.

Mr D says he was told that he would be able to book accommodation at any time of the year. He has not provided any evidence of any occasions when he has or has not been able to make use of his Club membership. Be that as it may, the contractual documents were clear that all services were subject to availability. That is, I think, unsurprising – the Club could not guarantee unlimited choice and availability to all its members at all times. It did however provide information about how much accommodation was available in different categories.

In addition, the Application for Membership 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, the inclusion of "entire agreement" provisions was an attempt to ensure that anything on which Mr D sought to rely was included in the contract itself. Such provisions are not uncommon, even in consumer contracts. I am not persuaded in this case that Mr D 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.

N says that Mr and Mrs D were not provided with the information required under The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). The documents I have seen, however, include a six-page document in three parts, headed "Standard Information Form for Timeshare Contracts". It has been signed by Mr and Mrs D and appears to set out the information required by the Timeshare Regulations. N's submissions on this point are, therefore, contradicted by the documentary evidence.

N also says that the provisions of the contract relating to management fees are "unfair" within the meaning of the Consumer Rights Act 2015, because they appear to give the Club the power to change those fees at will. I note first of all that the fees were fixed for the first five years of Mr and Mrs D's membership; that five-year period has not yet come to an end, so I make no comment on the fairness of any provision about fees. If, however, a contractual clause is found to be unfair by a court, the usual remedy is that it cannot be enforced against a consumer, not that the contract is at an end or that the consumer is entitled to a full refund. But, whatever changes might be made to fees in the future, the current position is that any unfairness has not led to any detriment to Mr D.

Mr D says too that he was pressured into signing the sale contract and loan agreement. However, Azure provided Honeycomb with what it refers to as a compliance video, showing the Azure representative discussing the agreements with Mr and Mrs D before they sign the documents. They appear to understand what they are agreeing to, and show no signs of being rushed or pressured.

It's significant too in my view that Mr D 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 anything as a result of undue pressure, it is not clear to me why he didn't take advantage of the option to withdraw. The 14-day cooling-off period was included in Timeshare Regulations in part to address the problem of timeshare customers not being able to consider things fully at the point of sale.

Conclusions

It is not for me to decide whether Mr D 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 D's complaint. For the reasons I have indicated above, however, I do not believe it would be fair or reasonable to uphold it.

I indicated that I would consider any further evidence and arguments which the parties wished to provide before I issued a final decision. I gave them until 26 February to respond. Honeycomb said it had nothing to add, and Mr D did not reply.

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 any further evidence or arguments for me to consider, I don't believe there is any good reason for me to reach a different conclusion from that set out in my provisional decision. In saying that, I stress that I have reviewed everything in full before issuing this final decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 8 May 2024.
Mike Ingram
Ombudsman