DRN-4751356

The complaint

Mr and Mrs L 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 L say they have a claim against VFL in the same way they have a claim against the timeshare company, and that VFL is responsible for the timeshare company's actions. More widely, they say that the circumstances are such that their credit agreement with VFL creates an unfair relationship.

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

What happened

Mr and Mrs L were existing timeshare owners, having bought eight timeshare products between 2005 and 2015. In June 2017 they were on holiday in Malta. While there, they attended a sales presentation, at the end of which they bought from Azure Resorts Limited, a company registered in the British Virgin Islands, a floating timeshare interest in The Heavenly Collection ("the Club"), along with membership of RCI, a holiday and timeshare exchange service. They paid £46,000, of which £32,300 was funded with a 10-year loan from VFL; the balance was paid from the trade-in value of existing Azure timeshare interests.

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

In March 2021 Mr and Mrs L complained to VFL through F about the June 2017 sale. They said: the seller was in breach of contract; they had been pressured into buying the timeshare product; the product had been misrepresented to them; the timeshare had been sold as an investment; the lending had been irresponsible; they had not been given a choice of lender; the loan created an unfair relationship; in breach of relevant regulations, key information had not been provided; and commission had not been disclosed as it should have been.

VFL did not accept the complaint, and Mr and Mrs L referred the matter to this service. Our investigator did not recommend that the complaint be upheld. Mr and Mrs L 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 L. They do not appear to have indicated at any time since they took out the loan that they have been having difficulty making payments. As far as I am aware, they have made the monthly payments in full and on time.

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 and Mrs L 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.

I note as well that, when they bought the timeshare and took out the loan, Mr and Mrs L signed a statement of compliance ("the Compliance Statement") which included, at paragraph 10:

"Having carefully considered our financial commitments, we confirm we are able to meet the financial obligations being undertaken by us in respect of the Membership Application and any financial commitments and repayments in any related finance agreement. When applicable we understand that we are fully responsible for settling outstanding loans relating to previous memberships we own."

Again, that is not necessarily evidence that VFL made appropriate checks, but it is evidence that Mr and Mrs L themselves believed the loan was affordable.

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.*

In this case, Azure Services Limited was named in the loan agreement as the credit intermediary; that company was also a representative of VFL and part of the same group of companies as the seller, Azure Resorts Limited. Those links were such that the section 75 conditions were met. I have therefore considered what has been said about the sale in June 2017 and subsequent events.

Breach of contract

F says that the liquidation of Azure companies means that there is a breach of contract. I don't believe that was the case. Club properties were held in a trust. On 8 July 2020 the trustee wrote to all Azure 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 and Mrs L's timeshare purchase remain available to them 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.

Mr and Mrs L's statements about what they were told at the sales presentation are generic, lack detail, and are largely unsupported by the documentation. They have said that they were told the timeshares would be an investment which could be sold for a profit or which could provide an income. Other than that, however, they have not identified any statement which led them to buy the timeshare interest and which was not true.

I don't believe however that Mr and Mrs L were told the timeshare would be an investment. Their 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. That is relevant to the question of whether they were misled about what they were buying.

In any event, the Compliance Statement 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]*

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 L 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. In addition, it was clear from

paragraph 8 that the resale options were limited and that there was no guarantee of a sale. In the circumstances, I don't believe that Mr and Mrs L were told that the timeshare was an investment or that it "… could be easily resold…"

Rather, I believe the timeshare was sold to provide Mr and Mrs L with holiday accommodation. In any event, I have seen no evidence that Mr and Mrs L have sought to sell their timeshare interest.

For these reasons, I am not persuaded that Mr and Mrs L were misled about the nature of the timeshare purchase.

I note as well that 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."

F did not provide a complete copy of Mr and Mrs L's Membership Application, but I believe clause 20 would have 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."

Such "entire agreement" clauses are not uncommon, even in consumer contracts. They seek to provide clarity by ensuring that anything on which the parties seek to rely is included in the contract itself. I am not persuaded in this case that Mr and Mrs L were misled, but, if I were to take a different view on that, I would need to consider the effect of those provisions in the Membership Application.

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.

As the loan was made under pre-existing arrangements between VFL and a company closely linked to the seller, 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.

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 L. Azure Resorts was selling timeshare accommodation, and Azure Services was acting as intermediary (and VFL's agent). Whilst it introduced finance options, it was not acting as Mr and Mrs L'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.

Mr and Mrs L say they were given no choice but to take out a loan with VFL. I don't accept that; indeed, around a third of the purchase price of the timeshare was paid without a loan. There was no reason to think Mr and Mrs L had to take out a loan, still less a loan with VFL.

F says that VFL did not disclose the commission paid to Azure. VFL has said that it did not pay any commission on loans linked to Azure sales, 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 L, either at the point of sale or subsequently.

Mr and Mrs L say too that the sale was pressured. They have not really elaborated on that, but I note that the Compliance Statement also included:

"We have had adequate time to review the "Standard Information Form for Timeshare Contracts", before starting the Compliance Interview during which we applied for Membership."

It's significant too in my view that Mr and Mrs L 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.

Finally, Mr and Mrs L say that they were not provided with the key information required under The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). But they quite clearly did receive information which Azure was satisfied met its obligations in that regard. They acknowledged receipt of it by signing the Membership Application and the Compliance Statement; and they included a copy of it in their submissions in support of this complaint.

If Mr and Mrs L's case is that the notices and information did not in fact meet the requirements of the Timeshare Directive, I would expect them – or their representatives – to explain why that was. But their submission appears to be that nothing was provided, even though that is clearly not the case.

It is not for me to decide whether Mr and Mrs L have a claim against Azure, or whether they 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 and Mrs L'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 which the parties wished to provide before I issued a final decision, and I gave them until 18 April 2024 to make further submissions. Neither VFL nor Mr and Mrs L provided any additional information.

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.

Your text here

As I have received nothing further following my provisional decision, I do not believe there is any reason to reach a different conclusion about how this complaint should be resolved. 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 and Mrs L's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L and Mr L to accept or reject my decision before 28 May 2024.
Mike Ingram
Ombudsman