

## The complaint

Mr H complains that Tandem Personal Loans Ltd (“Tandem”) unfairly declined his claims under sections 75 and 140A of the Consumer Credit Act 1974 (“CCA”) in relation to a timeshare product he purchased with a loan they provided to him.

## What happened

Mr H’s loan was originally provided by another financial business. That business sold its loans to another business and these are ultimately now owned and serviced by Tandem. For simplicity, I will refer to the lender as being Tandem at all times throughout my decision.

In October 2018, while on holiday on his timeshare, Mr H attended a meeting with a representative of a timeshare supplier who I’ll refer to as “A”. During that meeting, Mr H agreed to purchase a timeshare product from A at a cost of £37,500. The purchase was funded by a fixed sum loan of £35,000 provided by Tandem.

In or around early 2021, using a professional representative (the “PR”), Mr H submitted a claim to Tandem under sections 75 and 140A of the CCA.

In particular, the PR thought the timeshare product had been misrepresented to Mr H as an *“excellent investment, and that this product could be sold at a profit whenever [Mr H] wished as part of [A’s] resale scheme.”* They also said that A represented that Mr H *“would be able to rent out the timeshare and that they would make a profit from the rental income”*, but Mr H wasn’t able to do that. The PR said A had entered liquidation and couldn’t provide the service sold, so were also in breach of contract.

The PR also thought the debtor-creditor-supplier relationship was unfair as:

- the terms of the purchase agreement were *“so egregious to be unfair in themselves”*, as the payment of commission by Tandem to A wasn’t disclosed to Mr H;
- maintenance costs continued to rise;
- Mr H was *“aggressively targeted”* and *“pressured into entering the agreement”*;
- Mr H wasn’t given time to read and understand the purchase and loan agreements; and
- A provided no comparisons to other loan companies and failed to inform Mr H he was free to arrange his own finance.

Finally, the PR said Tandem (and A) hadn’t completed any checks on Mr H’s ability to afford the loan being offered.

Tandem responded to Mr H’s claim in July 2021. In summary, they said they were *“unable to uphold your complaint”*. They didn’t agree there was any evidence to support the misrepresentations. They also didn’t agree there’d been a breach of contract as *“all customers enjoyed the continued use of their membership [and] at no time have the rights of use and occupation [...] been affected by the liquidation [...]”*. Tandem went on to confirm they’d carried out the relevant checks when agreeing the finance and the responsibility to seek out their own lender lay with Mr H.

As Mr H was unhappy with Tandem’s response to his claim, the PR referred his complaint to this service. Having considered all the circumstances and information, our investigator didn’t

think Mr H's complaint should be upheld. But Mr H didn't agree with their findings. So asked that his complaint be passed to an ombudsman to reach a final decision.

### **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.

#### Relevant Considerations

When considering what's fair and reasonable, DISP 3.6.4R of the Financial Conduct Authority ("FCA") Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

Section 75 ("S75") provides protection to consumers for goods or services bought using credit. Mr H paid for the timeshare product under a regulated agreement with Tandem, so it's possible S75 may apply here – subject to any limitations. This means it's possible Mr H is afforded the protection offered to borrowers like him under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

Section 140A ("S140A") looks at the fairness of the relationship between Mr B and Tandem arising out of the credit agreement (taken together with any related agreements). And because the product(s) were funded under the credit agreement, they are deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

It's important to stress that this service's role as an Alternative Dispute Resolution Service (ADR) is to provide mediation in the event of a dispute. The complaint being considered here specifically relates to whether I believe Tandem's treatment of Mr H's claim was fair and reasonable given all the evidence and information available. This service isn't able to make legal findings – as I've already said, that is the role of the courts. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address, in my decision, every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

#### The claim for misrepresentation

S75(3) says that "*Subsection (1)<sup>1</sup> does not apply to a claim – (so far as any claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000[...]*". The purchase price shown within the purchase agreement in October 2018 was £37,500. So, I don't believe a valid claim can be made under S75. But it is possible that any alleged misrepresentation could be considered under S140A if it was found to have resulted in an unfair debtor-creditor-supplier relationship.

#### The claim for breach of contract

A claim under S75 is also subject to the purchase price limit mentioned above. So, I also don't think a valid claim can be made under that provision. Section 75A ("S75A") of the CCA

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<sup>1</sup> In relation a misrepresentation or breach of contract.

provides similar (although narrower) rights to S75 and has a higher purchase price limit. Specifically, this section covers certain situations where there's evidence of a breach of contract - but not misrepresentation. Having considered that, I think Mr H's breach of contract claim could be considered under this provision.

However, for me to uphold Mr H's complaint, I would need to see evidence that A had failed to deliver one or more of the terms and benefits within the product agreement and accompanying terms and conditions.

In their response, Tandem explained that whilst A (as the seller of the product) together with the timeshare management company had entered liquidation, a new management company had been appointed by the trustee/liquidator. This ensures Mr H is still able to fully utilise the benefits of the product purchased and his associated membership. So, in the absence of any evidence suggesting there was a loss of benefits or that any financial loss was incurred, I can't reasonably say that Tandem's response was unfair or unreasonable.

#### The unfair relationship claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (Tandem) and the debtor (Mr H) is unfair to the debtor because of one or more of the following (from S140A):

- a) any of the terms of the agreement or of any related agreement;
- b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;
- c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor).

- Misrepresentations

In determining if the relationship is unfair, the courts must have regard for "*any other thing done (or not done) by or on behalf of, the creditor*"<sup>2</sup>. I think the alleged misrepresentations are, therefore, relevant here. Further, even though I think it likely they couldn't be considered under S75 due to the purchase price limitation, I thought they could still be considered under S140A<sup>3</sup>. So, in trying to establish whether I think a court would likely find that an unfair relationship existed, I've considered the alleged misrepresentations further in addition to the various other points raised by the PR.

The PR allege A misrepresented the product by representing it as an investment contrary to section 14 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

For me to conclude there was a misrepresentation by A in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that A made false statements of fact when selling the holiday product in October 2018. In other words, that they told Mr H something that wasn't true in relation to one or more of any points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr H to enter the contract. This means I would need to be persuaded that Mr H reasonably relied on these false statements when deciding to buy the timeshare product.

The difficulty I have is identifying what was actually said at the time of the sale in 2018. The PR have provided limited details and evidence to support the misrepresentations they say A

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<sup>2</sup> Under S140A(1)(c) of the CCA

<sup>3</sup> See *Scotland & Reast v. British Credit Trust Limited* [2014] EWCA Civ 790

made, although I acknowledge that Mr H does say he was told these things. So, I've thought about this and whether there's any evidence available from the time of his purchase in 2018.

Although not determinative of the matter, I've seen limited specific evidence from the time of the sale in 2018, such as marketing material or any of the wider purchase or membership documentation. I have seen a letter from A confirming Mr H's purchase together with an *"Initial Disclosure Document"* extending to six pages. There doesn't appear to be anything within these documents to corroborate the allegations.

It's important to recognise that the contract can't have been marketed and sold as an investment contrary to the TRs simply because there might have been some inherent value to Mr H's membership. A would have had to have presented the membership in such a way that used its investment element to persuade Mr P to contract. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3)<sup>4</sup>.

On balance and in light of what I've said above, I think it's unlikely that the product was marketed and sold by A as an investment contrary to the TRs. And because of that, I can't reasonably reach the conclusion that Mr H was told something by A that amounted to misrepresentation.

- Comparison to other lenders and disclosure of commissions

It's argued that the payment of commission by Tandem to A wasn't declared to Mr H. That said, the second page of the loan agreement does say, under the heading *"Commission Payment - On or after the date when both you and we have signed this agreement, a commission payment may be made by us to one or more of the Credit Intermediaries named above"*. I think this is quite clear.

But I don't think the fact that Tandem might have paid A a commission was incompatible with their role in the transaction. A wasn't acting as an agent for Mr H, but as the supplier of contractual rights obtained under a timeshare product agreement. And, in relation to any loan, based upon what I've seen so far, it doesn't appear it was A's role to make an impartial or disinterested recommendation or to give Mr H advice or information on that basis. As far as I'm aware, Mr H was always at liberty to choose how he wanted to fund any purchase and there was no requirement or duty upon H to provide funding recommendations or options.

What's more, I haven't found anything to suggest Tandem were under any regulatory duty to disclose the amount of commission paid in these circumstances. Nor is there any suggestion or evidence that Mr H requested those details from Tandem. As I understand it, the typical amounts of commission paid by lenders (like Tandem) to suppliers (like A in this case) was unlikely to be much more than 10%. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure and payment of commission created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

- The allegations of pressure

The PR suggests that Mr H was pressured into entering into the timeshare and finance agreements. But they haven't provided any explanation or evidence to support that claim.

I can understand why it might be argued that the prolonged nature of the presentation might have felt like a pressured sale – especially if, as Mr H approached the closing stages, he was going to have to make a decision on the day in order to avoid missing out on an offer that may not have been available at a later date.

Against the straightforward measure of pressure as it's commonly understood, and in the absence of any explanation or evidence, I think it's very difficult to say that Mr H agreed to the purchase at the time of the sale when he simply didn't want to. I haven't seen any

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<sup>4</sup> The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

evidence to demonstrate that he went on to say something to A, after the purchase, that suggests he'd agreed to the purchase and finance when he didn't want to. And he hasn't provided a credible explanation for why he didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted here.

If it's suggested he only agreed to the purchase because he was pressured, I find this aspect difficult to reconcile. I haven't seen anything substantive to suggest Mr H was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr H made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the Consumer Protection from Unfair Trading Regulations ("CPUT").

- Maintenance Fees

The Initial Disclosure Documents provides an *"Outline of additional obligatory costs imposed under the contract..."* and later goes on to say that these are *"calculated and payable in accordance with the Rules of Membership and Reservations Rules and covers all items specified in the Rules of Membership"*.

As I've already explained, not all documentation from the time of the sale has been provided or appears to be available. But based upon what I've seen, I can't reasonably conclude that Mr H wasn't adequately or clearly told what maintenance fees would fall due or how they would be calculated

One of the main aims of the various regulations that applied here was to enable consumers to understand the financial implications of their purchase so that they were/are put in a position to make an informed decision. If A's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Mr H ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications he didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

However, as the Supreme Court decision in Plevin<sup>5</sup> makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. So, it's wide enough to include any ongoing exposure to unfairness in the future under the terms in question and how A has enforced any terms that are or might be unfair.

I've not seen anything substantive to show that A enforced any of the terms in such a way as to result in loss for Mr H, or consequently unfairness.

- Time to consider the agreement(s)

I've seen very limited documentation from the time of the sale. But having previously seen similar documents relating to A's product sales, I'm aware they normally include a period of 14 days from the date of agreeing to the purchase within which to cancel the agreement without giving any reason – as required under the TRs. This is confirmed in Part 3 of the Initial Disclosure Document.

So, even if I were to find that Mr H wasn't given adequate opportunity to read, consider and understand the purchase documentation at the time of the sale - and I make no such finding - I would expect him to have had sufficient time in which to consider his decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before the loan was drawn and the purchase completed. There's no suggestion or evidence that Mr H did raise any questions or concerns prior to the sale being completed. Or that he had any intention of cancelling the agreement.

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<sup>5</sup> *Plevin vs Paragon Personal Finance Ltd [2014]* ('Plevin')

Furthermore, the loan agreement also includes a similar withdrawal provision which is clear detailed and explained at the foot of the front page of the agreement. Again, there appears to be no suggestion or evidence that Mr H raised any questions or concerns prior to the loan being drawn. Or that he had any intention of cancelling the loan agreement before it was drawn.

#### Were the required lending checks undertaken?

There are certain aspects of Mr H's claim that could be considered outside of S75 and S140A. In particular, in relation to whether Tandem undertook a proper credit assessment. The PR have made an allegation which suggests the loan was provided irresponsibly. In particular that no affordability checks were undertaken by A or Tandem.

Mr H hasn't provided any evidence to show that the loan was unaffordable or unsuitable for him. And I've not seen anything that supports any allegation of financial difficulty from that time.

In their response, Tandem confirm the relevant checks were carried out prior to agreeing the finance. And that they completed an income and expenditure and were satisfied the loan was affordable. But I haven't seen any evidence of the checks and tests they completed.

So, If I were to find they hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that the loan repayments weren't sustainably affordable for Mr H in order to uphold his complaint here. However, with limited specific information provided, and no supporting evidence that he struggled to maintain repayments, I can't reasonably conclude the loan was unaffordable for him or that he suffered loss as a consequence.

#### Summary

As I've explained, I don't think Mr H has a valid claim under S75. However, I have considered the claim for misrepresentation under S140A together with the other various allegations. I've also considered the breach of contract claim under S75a. Having done so, I can't say that Tandem's ultimate response to his claims appears unfair or unreasonable. And because of that, I won't be asking Tandem to do anything more here.

#### **My final decision**

For the reasons set out above, I don't uphold Mr H's complaint

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 21 September 2023.

Dave Morgan  
**Ombudsman**