

## The complaint

Mr M 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 M’s loan was originally provided by another financial business. That business sold its loans to a different 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 or around March 2019, Mr M was on holiday using an existing timeshare product supplied to him by a timeshare supplier who I’ll refer to as “A”. During his holiday, Mr M was approached by A for a catch-up meeting.

As a result of the meeting, Mr M agreed to trade in his existing timeshare product and purchase a points-based product providing access to a portfolio of holidays, accommodation and experiences offered by A. The purchase required a payment by Mr M of £15,950 which was funded under a fixed sum loan agreement with Tandem over 180 months.

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

The PR alleged that the points-based product had been misrepresented to Mr M as an investment contrary to regulation 14(3) of the Timeshare, Holiday Products and Exchange Contracts Regulations 2010 (“the TRs”). They also said Mr M was told the points-based product was more flexible given Mr M’s personal circumstances. But this didn’t prove to be the case. The PR allege that Mr M purchased the product having relied upon misrepresentations made by A. And under section 75 of the CCA (‘S75’), BPF is jointly liable for those misrepresentations.

The PR allege there is a breach of contract as A is in liquidation and can’t provide the service sold.

The PR also suggest that the misrepresentations, together with various regulatory and legislative breaches amongst other things, led to an unfair debtor-creditor relationship under section 140 of the CCA (‘S140A’). In particular:

- Mr M was aggressively targeted and pressured in to entering the agreement, contrary to the Consumer Protection from Unfair Trading Regulations 2008 (“CPUT”);
- the payment of commission by Tandem to A was hidden from Mr M;
- there were no comparisons to other loan companies, and it wasn’t mentioned that Mr M was free to arrange his own finance; and
- no checks and tests were carried out to ensure the loan was sustainably affordable for Mr M.

In response, Tandem didn’t uphold Mr M’s claim. They didn’t agree there was any evidence to support the alleged misrepresentations. Or that there was evidence of anything likely to lead a court to find that the debtor-creditor relationship was unfair pursuant to S140A.

Tandem said full credit checks were completed including affordability and eligibility. They also didn't agree there was any evidence of a breach of contract.

Unhappy with Tandem's response, the PR referred Mr M's claim to this service as a complaint. One of our investigators considered all the evidence and information available. Having done so, they didn't think Tandem's response to Mr M's claim was unfair or unreasonable. So, didn't think Tandem needed to do anything more.

The PR didn't agree with our investigator's findings and asked for Mr M's complaint to be referred to an ombudsman for a final decision. In doing so, they made various points and observations to support why they weren't in agreement with our investigator. They explained that previous timeshare products supplied to Mr M by A had also been represented as investments. But due to difficulties in both using and later trying to sell the products, Mr M was persuaded to upgrade to the points-based product. The PR insist that the alleged misrepresentations and failings were common placed in the testimonies and experiences of other consumers.

As an informal resolution couldn't be achieved, Mr M's complaint has been forward to me to consider further. Having done so, while I reached a similar outcome to that of our investigator, I considered various aspects that I feel weren't fully addressed previously. Because of that, I issued a provisional decision on 24 October 2023, giving Mr M and Tandem Personal Loans Ltd the opportunity to respond to my findings, before I reach a final decision.

In my provisional decision, I said:

#### Relevant Considerations

When considering what's fair and reasonable, DISP<sup>1</sup> 3.6.4R of the FCA<sup>2</sup> 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.

S75 provides protection to consumers for goods or services bought using credit. Mr M paid for the timeshare product under a regulated loan agreement with Tandem, so it isn't in dispute that S75 applies here. This means Mr M 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 M and Tandem arising out of the credit agreement (taken together with any related agreements). And because the product was 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 M'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.

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<sup>1</sup> Dispute Resolution: The Complaints sourcebook (DISP)

<sup>2</sup> Financial Conduct Authority

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.

#### Mr M's timeshare product experience

Based upon the information available, at the time of the product sale in March 2019 it appears Mr M was an existing customer of A and had previously bought timeshare products from them. In particular, he'd bought products from A in November 2014 and April 2017. So, I think it's reasonable to conclude that Mr M had a reasonably strong awareness about the products he'd purchased, how they operated and any associated costs. I also think it's reasonable to conclude that Mr M was familiar with A (as a timeshare supplier) and the sales presentations given by them. Particularly as the presentation referred to in 2019 (the subject of his claim here) wasn't his first experience.

#### The claim for misrepresentation under S75

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 timeshare product. In other words, that they told Mr M something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr M to enter the contract. This means I would need to be persuaded that Mr M reasonably relied on those false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mr M was specifically told (or not told) about the benefits of the product he purchased here. It was, however, indicated that he was told these things. So, I've thought about that alongside the other evidence available. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mr M's claim, such as marketing material or documentation from the time of the sale that echoes what he says he was told. In particular that the product purchased was represented as a financial investment.

I don't think the contract can have been marketed and sold as an investment contrary to The TRs simply because there might have been some inherent value to Mr M's membership. And in any event, I've found nothing within the evidence provided to suggest A gave any assurances or guarantees about the future value of the product purchased. A would have had to have presented the membership in such a way that used its investment element to persuade Mr M 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) of the TRs.

Subsequent submissions to this service by the PR appear to suggest the points-based product was represented as a means to make it easier for Mr M to exit from his timeshare holdings. And that the new product points were represented as having the ability to be sold from 2023. I've found nothing within the documentation provided that appears to provide any guarantees or assurances about the resale of the points Mr M purchased.

On balance, and in the absence of supporting evidence from the time of the sale, I therefore can't reasonably say, with any certainty, that A did in fact make the alleged misrepresentations.

### The breach of contract claim under S75

Tandem have said that whilst A may have entered an insolvency process, the current management company confirm that timeshare owners remain able to fully utilise their timeshare products subject to the associated agreements. So, in the absence of any specific explanation or evidence to support why Mr M believes there's been a breach of contract which resulted in a loss for him, I haven't seen anything that would lead me to conclude there was such a breach.

### 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 M) 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).

As I've said previously, it's important to acknowledge that only a court can make a determination under S140A. But as this is relevant law, I need to take it into account in reaching my decision – where appropriate.

- The pressured sale and process

The claim and subsequent submissions set out an allegation that Mr M was subjected to a pressurised sale. I acknowledge what has been said about the sales presentation he attended. And I can appreciate why the presentation might have felt like a pressured sale – especially if, as Mr M 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, I find it hard to argue that Mr M agreed to the purchase in 2019 when he simply didn't want to. I haven't seen any evidence to demonstrate that he went on to say something to A, after the purchase, to suggest he'd agreed to it 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 Mr M only agreed to the purchase because he felt he was pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mr M was obviously harassed or coerced into the purchase. And because of that, I'm not persuaded there's sufficient evidence to demonstrate he made the decision to proceed because his ability to exercise choice was – or was likely to have been – significantly impaired.

In deciding whether to make a determination under S140A, *“the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor [Tandem] and matters relating to the debtor [Mr M])”*.

Mr M had already held existing timeshare products he'd purchased previously from A. Importantly; the new purchase appears to relate to an upgrade and/or change from his existing timeshare product holding at the time. It doesn't appear it was his first product purchase from A and Mr M wasn't a new customer. So, it's likely he would've benefitted from his previous experience and what might be expected from the meeting and sales presentation in 2019.

Whilst there could be potential for a court to decide that some of the allegations might have led to an unfair debtor-creditor relationship here, I think any decision is likely to be taken within the context of Mr M's overall experience. And even if I was to find that some of the information could've been clearer during the sale – and I make no such finding – I think it's unlikely this would lead to a court finding this led to a sufficiently extreme imbalance in knowledge to render the debtor-creditor relationship unfair.

- A's responsibilities and disclosure of commission paid

Part of Mr M's S140A claim is based upon the status of A (as the introducer of the loan) and their resultant responsibilities towards him. In particular, it's argued that the payment of commission by Tandem to A was kept from him. But it appears no commission was in fact paid here. And in any event. I don't think any payment of commission to A was incompatible with its role in the transaction anyway.

A wasn't acting as an agent of Mr M, but as the supplier of contractual rights he obtained under the timeshare product agreement. And, in relation to the 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 M advice or information on that basis. As far as I'm aware, Mr M was always at liberty to choose how he wanted to fund the transaction.

What's more, I haven't found anything to suggest Tandem would've been under any regulatory duty to disclose the amount of any commission paid in these circumstances. Nor is there any suggestion or evidence that Mr M requested those details from Tandem or A. As I understand it, where commission is paid, the typical amounts paid 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 would've created an unfair debtor-creditor relationship under S140A.

Were the required lending checks undertaken?

There are certain aspects of Mr M'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 allege a proper affordability check wasn't completed.

It's relevant that the PR haven't provided any evidence to show that the loan was unaffordable or unsuitable for Mr M. And I've not seen anything that supports any suggestion of financial difficulty from that time.

Tandem have explained to this service the affordability assessment they completed which they believe showed the loan was sustainably affordable for him. If I were to find that the checks and tests completed by Tandem didn't comply with the regulatory guidelines and requirements that applied – 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 M in order to uphold his complaint here. And I don't believe any proven compliance failure would automatically mean that Mr M's loan agreement was null and void in any event. It would need to be shown that any such failure resulted in a loss to Mr M as a consequence.

I've seen no specific information about Mr M's actual position at the time and no supporting evidence that he struggled to maintain repayments. Tandem have confirmed that Mr M's repayments have been maintained in line with the loan agreement. Based upon these findings, I can't reasonably conclude the loan was unaffordable for him or that he suffered any loss as a consequence.

Summary

As I've explained above, I can only consider whether Tandem's treatment and response to Mr M's claim appears fair and reasonable given all the information available. Based upon my findings, I can't say that it wasn't. So, as things currently stand, I don't intend to ask them to do anything more.

### **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.

Tandem have acknowledged receipt of my provisional findings and confirmed they have nothing further to add. Despite follow up attempts by this service, the PR haven't responded or provided anything new for me to consider. In these circumstances, I have no reason to vary from the findings in my provisional decision. So, 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 M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 20 December 2023.

Dave Morgan  
**Ombudsman**