DRN-4485638

The complaint

Mr R complains that Tandem Personal Loans Ltd ("Tandem") unfairly rejected his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("CCA") in relation to a timeshare product he purchased with a loan from them.

What happened

The loan that is the subject of this complaint was originally provided by another business. That loan was subsequently acquired with Tandem now having overall responsibility for it. So, this means that Tandem are the respondent in this complaint. For simplicity, I'll refer to Tandem throughout my decision rather than the original lender.

In or around October 2018, while on holiday under an existing timeshare product, Mr R attended a meeting with a timeshare supplier who I'll refer to as "A". During that meeting, Mr R discussed concerns he had about his existing timeshare product with A. In particular, that the accommodation that product provided wasn't sufficient for his needs due to the size of his family.

As a consequence of those discussions, Mr R agreed to purchase a different product supplied by A. The new product provided an allocation of points/credits which could be used to provide access to accommodation and holiday experiences from a portfolio offered by A. The purchase price agreed for the new (points-based) product was £17,500, funded by a loan with Tandem over 180 months.

In August 2021, using a professional representative ("the PR"), Mr R submitted a claim to Tandem under sections 75 and 140A of the CCA.

The PR allege that Mr R purchased the points-based product having relied upon misrepresentations made by A. And under section 75 of the CCA ('S75'), Tandem is jointly liable for those misrepresentations. In particular, the PR allege that A told Mr R that the purchase of product points would address issues he had voiced about the suitability of his existing timeshare given the size of his family. Furthermore, the PR allege A told Mr R the product could be easily sold if required.

The PR also believe there to be a breach of contract as a consequence of the liquidation of A, as they are now unable to provide the service sold.

The R went on to say that the alleged misrepresentations, together with various regulatory and legislative breaches, amongst other things, led to an unfair debtor-creditor relationship under section 140A of the CCA ("S140A"). In particular:

- Mr R was pressured into entering into the purchase and loan agreements and felt under duress due to aggressive commercial practices contrary to The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT");
- the commercial purpose and nature of the meeting wasn't indicated to Mr R, contrary to regulation 14 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs");
- there were breaches of the Finance Leasing Association ("FLA") code of practice in so far as:
    - Mr R wasn't given time to read and consider all the information provided;

    - A failed to review and compare finance available from other providers;
    - A failed to inform Mr R he was free to arrange his own finance;
    - A failed undertake a proper affordability check to ensure the loan was sustainably affordable for Mr R; and
- the terms of the agreement are so egregious so as to be unfair in themselves since an aspect of the relationship was hidden from view – that being a payment of commission (by Tandem to A).

In response, Tandem didn't agree there was any evidence the product had been misrepresented to Mr R. Or that there was anything that would lead a court to find that an unfair relationship existed as a consequence of the agreement(s).

The PR didn't accept Tandem's findings, so referred Mr R's complaint to this service. One of our investigators considered all the information available before issuing their findings. They also didn't think there was sufficient evidence to support Mr R's claim. Or that there was any other reason why his complaint should be upheld.

Having consulted with Mr R, the PR rejected our investigator's findings and asked that the complaint be referred to an ombudsman for a final decision. The PR provided detailed reasons and comments to support the rejections of our investigator's findings. I don't propose to repeat everything they said here. But in summary, they said:

- the timeshare had been sold to Mr R as an investment that was extremely desirable and could easily be sold at a profit;
- the purchase should be viewed as wholly unnecessary unless it was being purchased on the basis it was an investment; and
- the purchase was represented as the only method of Mr R realising his investment.

As an informal resolution couldn't be achieved, Mr R's complaint has been passed to me to consider further a reach a decision. In doing so, while I was inclined to reach the same outcome as our investigator, I considered some issues which I don't feel were previously fully addressed. So, I issued a provisional decision on 31 October 2023 giving both sides the chance to respond.

In my provisional decision I said:

> Relevant Considerations
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> When considering what's fair and reasonable, DISP[1] 3.6.4R of the FCA[2] 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.
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> S75 provides protection to consumers for goods or services bought using credit. Mr R 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 R 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.
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> S140A looks at the fairness of the relationship between Mr R 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.

[1] Dispute Resolution: The Complaints sourcebook (DISP)
[2] Financial Conduct Authority

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 R'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.

Mr R's timeshare product experience

Based upon the information available, at the time of the product sale in October 2018, it appears Mr R was an existing customer of A and had previously bought a timeshare product from them in February 2017. So, I think it's reasonable to conclude that Mr R had some awareness about the product he'd purchased, how it operated and any associated costs. I also think it's reasonable to conclude that Mr R was familiar with A (as a timeshare supplier) and the sales presentations given by them. Particularly as the presentation referred to in 2018 (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 R 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 R to enter the contract. This means I would need to be persuaded that Mr R 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 R 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 R's claim, such as marketing material or documentation from the time of the sale that echoes what he says he was told.

The original claim suggest the points-based product was sold as a means to provide Mr R with greater flexibility to secure accommodation more appropriate to the size of his family. The information suggests that Mr R (and his partner) had a child following the original purchase in 2017. Documentation provided shows that the 2017 product related to a studio accommodation at a specific location with a maximum occupancy of 2 persons. So, given this change of circumstances, I can understand why the original timeshare purchased may not have continued to meet his needs.

The product purchased in 2018 appears to provide flexibility to make bookings from a range of options and various resorts across A's portfolio. So, I can see why this might have been a more attractive proposition for Mr R given his change of circumstances.

In Mr R's claim, reference is made to him struggling to access availability. But from the information and documentation I've seen, I can't see that A provided any guarantees or assurances as regards availability. The documentation suggests reservations *"are on a first come first served basis"* and subject to availability. And in any event, I haven't seen any evidence to support Mr R's alleged experience.

In response to our investigator's findings, the PR introduced an allegation that the timeshare was sold as an investment albeit this wasn't an allegation specifically included in the original claim. That said, I haven't seen anything evidence to support this allegation. Furthermore, I don't think the points-based product can have been marketed and sold as an investment contrary to The TRs simply because there might have been some inherent value to Mr R'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 had to have presented the membership in such a way that used its investment element to persuade Mr R 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.

The PR appear to suggest the points-based product was represented as a means to make it easier for Mr R to exit from his timeshare holding. And that the new product points were represented as having the ability to be sold after a qualification period. But as I've said already, I've found nothing within the documentation provided that appears to provide any guarantees or assurances about the resale of the points Mr R purchased. Furthermore, the original claim to Tandem appears to suggest the primary reason for purchase was to address issues with accommodation size for Mr R's family – not as a means to exit the product 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 R 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 R) 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 – where appropriate – in deciding whether Tandem's response to Mr R's claim appears fair and reasonable.

- The pressured sale and process

The claim and subsequent submissions set out an allegation that Mr R was subjected to a pressurised sale and was made to feel under duress. I acknowledge what has been said about the sales presentation he attended. I can appreciate why the presentation might have felt like a pressured sale – especially if, as Mr R 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 R agreed to the purchase in 2018 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 R 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 R 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 contrary to Regulation 7 of the CPUT Regulations.

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 R]*)"*.

Mr R already held an existing timeshare product 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 R 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 2018.

Even if there was 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 R'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.

- Time to consider the agreement(s)

It appears the purchase agreement 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.

So, even if I were to find that Mr R 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 R did raise any questions or concerns prior to the sale being completed. Or that he had any intention of cancelling the agreement.

I also understand the loan agreement included the same 14 day cooling off period. But there's no suggestion or evidence that Mr R raised any questions or concerns about this either.

- A's responsibilities and disclosure of commission paid

Part of Mr R'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 R, 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 R advice or information on that basis. As far as I'm aware, Mr R 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 R requested those details from Tandem or A anyway.

Were the required lending checks undertaken?

There are certain aspects of Mr R'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 compelling evidence to show that the loan was unaffordable or unsuitable for Mr R. And I've not seen anything that supports any suggestion of financial difficulty from that time. I have seen bank statements covering a period shortly before the purchase in October 2018 and beyond. Having considered these, it appears Mr R's bank account was well managed. And whilst the balances held may not have been large, I can't reasonably say they suggest Mr R was experiencing financial difficulties.

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 R in order to uphold his complaint here. And I don't believe any proven compliance failure would automatically mean that Mr R'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 R as a consequence.

I've seen no other specific information about Mr R's actual position at the time. However, it is suggested that Mr R later suffered some financial distress as an impact of the Global Pandemic in 2020. Although, I can't reasonably hold Tandem responsible for that. Nor do I believe that was reasonably foreseeable by them. Tandem have confirmed that Mr R's repayments have been maintained in line with the loan agreement.

Based upon these findings, I can't reasonably conclude the loan was likely to be unaffordable for him given the information available at that time. Or that he suffered any loss as a consequence.

Summary

As I've explained above, this service isn't afforded powers to decide legal claims. I can only consider whether Tandem's treatment and response to Mr R's claim appears fair and reasonable given all the information available. Based upon my

findings above, 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 responded to my provisional decision and confirmed they have no further points to make. Despite follow up from this service, the PR haven't acknowledged or responded to my provisional decision.

In these circumstances, and with nothing new to consider here, I've no reason to vary from my provisional findings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 27 December 2023.

Dave Morgan
Ombudsman