DRN-4719084

The complaint

Mr R, who is represented by a professional representative ("PR") complains that Tandem Personal Loans Ltd trading as Oplo ("Tandem") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. The product was purchased by Mr and Mrs R, but the loan was taken out by Mr R alone and so he is the eligible complainant. For the purposes of simplicity in this decision I will refer to him as the sole purchaser.

What happened

In July 2018 Mr R took a subsidised holiday during which he was required to attend a presentation. He did so and at the end of which he bought a points based timeshare product from Azure XP Limited, a company registered in the British Virgin Islands.

He bought 3,000 XP points and Level 1 membership of the Azure XP club at a total cost of £9,180. I believe 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 for the full purchase price from Tandem in Mr R's sole name.

In June 2022 PR submitted a letter of claim to Tandem. It responded to say that Mr R had already made a claim under s.75 CAA in 2021 and it had issued a final response letter on 10 September 2021 giving him referral rights to this service. It considered he would not be entitled to take a complaint to this service regarding his s.75 claim. However, it accepted Mr R could make a claim under s.140A, but it believed this service had no power to enforce s.140A.

The claim under s.140A was based on the following:

PR considered Mr R was pressured into purchasing a membership for the following reasons:

a. The sales process was very long.

b. He was told by the sales representatives that the membership was for the purposes he required.

c. He was told that the membership would only be available on particular terms and/or tied to particular properties for a limited time in order to elicit an immediate decision; and,

d. He was given the impression that he couldn't leave until he agreed to purchase the membership.

PR said that Azure had breached the Consumer Protection from Unfair Trading Regulations ("CPUT") as the sales process impaired Mr R's freedom of choice. It added that it believed the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the 2010 regulations") had been breached as the product had been sold as an investment. PR also said that Azure had not supplied sufficient and key information. It concluded that there had been an unfair relationship.

The complaint was considered by one of our investigators who didn't recommend it be

upheld. He said the claim made under s.75 could not be considered by this service as it had been brought too late. He asked of Mr R could provide written testimony and this he did. Mr R said various promises had been made which turned out not to be true. He had never used the product.

Our investigator didn't' think there was an unfair relationship as set out in s.140A even if it may have been guilty of technical breaches. PR didn't agree and said the product was a fractional timeshare which should be upheld in line with recent decisions made by this service.

I issued a provisional decision as follows:

"*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision 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 available evidence and the wider circumstances.

I do not believe that I have been provided with a complete set of the sale documents. However, this service has seen a number of complaints about Azure timeshare sales from around the same time. As is to be expected, the sellers and Tandem used largely standard contract wording. I have therefore approached this case on the assumption that the same standard wording was used for Mr R's purchase. If that (or any other assumption I have made) is incorrect, the parties can explain that and provide the necessary evidence in their response to this provisional decision.

Jurisdiction

I believe it is accepted that the claim under s.75 CAA is outside our jurisdiction. A consumer has six months from receipt of a final response letter to bring a claim to this service, but Mr R failed to do so. He may not have realised this, but the letter sent by Tandem on 10 September 2021 states:

"This is our final response letter, should you still remain dissatisfied you have the right to refer your complaint to the Financial Ombudsman Service, free of charge – but you must do so within six months of the date of this letter."

Tandem also said that it would not give permission to this service to consider the complaint save for exceptional circumstances. PR has not given us any reason to conclude there were

exceptional circumstances and so I agree that we cannot consider a complaint about the s.75 claim.

S.140 A

Only a court has the power to decide whether the relationships between Mr R and Tandem were unfair for the purpose of s. 140A. But, as it's relevant law, I do have to consider it if it applies to the credit agreement – which it does.

However, as a claim under Section 140A is "an action to recover any sum recoverable by virtue of any enactment" under Section 9 of the LA, I've considered that provision here. It was held in Patel v Patel [2009] EWHC 3264 (QB) ('Patel v Patel') that the time for limitation purposes ran from the date the credit agreement ended if it wasn't in place at the time the claim was made. The limitation period is six years and the claim was made within this period.

However, I'm not persuaded that Mr R could be said to have a cause of action in negligence against Tandem anyway.

His alleged loss isn't related to damage to property or to him personally, which must mean it's purely financial. And that type of loss isn't usually recoverable in a claim of negligence unless there was some responsibility on the allegedly negligent party to protect a claimant against that type of harm.

Yet I've seen little or nothing to persuade me that Tandem assumed such responsibility – whether willingly or unwillingly.

Even if Tandem had accepted that responsibility I have not been given persuasive evidence that there was an unfair relationship.

PR seems to suggest that Tandem owed Mr R a duty of care to ensure that Azure complied with the 2010 Regulations and CPUT. It argues that the product was sold as an investment, undue pressure was applied and key information was omitted.

In line with laws designed to protect timeshare buyers, however, Mr R had 14 days in which to cancel the purchase agreement and he had 14 days in which to cancel he loan agreement with Tandem. If Mr R felt he had been unduly pressured into the purchase, or had other concerns, I think it likely that he would have cancelled. Even if there were a breach of the Timeshare Regulations, that would not necessarily give rise to a claim which an individual club member could bring against Azure. Nor would it necessarily mean that the loan agreement created an unfair relationship between Mr R and Tandem.

PR says that some terms of the contract are "unfair" within the definition in CPUT. That is not for me to say, although I must have regard to relevant law, including CPUT. The remedy if a contractual provision is "unfair" is however that the provision is unenforceable against the consumer – not that the whole contract falls. Mr R has not said whether any of the provisions which he says is unfair has been relied on by Azure or what the effect has been on him. In the circumstances, I think it unlikely that a court would have said that the loan agreement created an unfair relationship between Mr R and Tandem.

Fractional Timeshare

PR has, in its more recent claim suggested that the product was a fractional timeshare. It has not supplied much documentary evidence of what was purchased. However the paperwork I have seen refers to the purchase being of XP Points and Level 1 membership.

In my experience this is not a fractional timeshare, but given PR's claim and the lack of documentary material it has supplied I am issuing this as a provisional decision to allow it the opportunity to provide evidence that this is a fractional timeshare."

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.

BPF said it had nothing further to add and PR did not respond, so my provisional decision stands unaltered.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 1 May 2024.

Ivor Graham
Ombudsman