DRN-4313092

## The complaint

Mr W, who is represented by a professional representative ("PR") complains that Tandem Personal Loans Ltd ("Tandem") rejected his claims under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product. I gather the purchase was made by Mr and Mrs W, but as the finance agreement was in Mr W's name he is the eligible complainant. In this decision for simplicity I will refer to Mr W as the sole purchaser.

## What happened

In June 2018 Mr W was making use of his timeshare when he was invited to a meeting. He says that he was pressurised to purchase a new holiday product from a company I will call A. This cost £21,500 and was funded by a loan from Tandem.

In June 2021 PR submitted a letter of claim to Tandem. It said that the product was mis-sold and A had gone into liquidation. PR said Mr W was told he was buying an investment, but a year later A tried to sell him another product on the basis it would be easier to sell. Later Mr W paid to have the product placed in A's resale scheme, but it had not sold. It also claimed Mr W had not been given a choice of lender. PR said that A had contravened a number of regulations as set out in The Consumer Protection from Unfair Trading Regulations (CPUT) 2008. Finally it said Mr W had not been told of any commission paid by Tandem. PR claimed a refund of all costs under s.75 CCA and s.130A CCA.

Tandem rejected the claim. It said due process was followed and Mr W had been offered a choice of lenders. It said a credit check had been carried out and no commission had been paid.

PR brought a complaint to this service on behalf of Mr W repeating the points raised in the letter of claim. It was considered by one of our investigators who didn't recommend it be upheld. She said there was insufficient evidence of either misrepresentation or breach of contract. Nor did she believe there was an unfair relationship and she was not persuaded the loan was unaffordable.

PR didn't agree and said Mr W was dismayed that the product didn't allow him access to the level of luxury he had been promised. As he was only allowed to redeem 400 points a year it would take him 31 years to use them all. The resale programme had now ceased despite the product being sold as an investment.

## 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.

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.

Having read and considered all the available evidence and arguments, I don't think this complaint should be upheld. I will explain why.

S. 56 and S. 75 of the Consumer Credit Act 1974

The nature of the loan means that it would have been a regulated credit agreement covered by the Consumer Credit Act. I have assumed that A acted as credit broker as well as being the seller of the timeshare.

Under s. 56 of the Consumer Credit Act statements made by a broker in connection with a consumer loan are to be taken as made as agent for the lender. In this case, that means that anything A said about the timeshare or the loan is to be treated in the same way as if it had been said by Tandem.

In addition, one effect of s. 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.

I am satisfied that the loan financed the purchase of the club membership. I must therefore consider what the position might be if Mr W were to bring a claim or claims against A, either for misrepresentation of for breach of contract.

Misrepresentation

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 materially influenced the other party to enter into the contract.

PR has said that Mr W was told that his purchase was an investment. It also supplied written testimony from Mr W as to what he recalled being told. While I was not present so I cannot say what was said I do not consider that I am able to conclude the product was misrepresented. I have seen no explanation of how that could be the case or why Mr W believed that the purchase of points would be an investment. If he had been told that – or had otherwise believed that to be the case – I would have expected him to ask for more information.

Although I am aware of the types of agreement used by A I cannot be certain what Mr W signed and as I wasn't present at the time of the sale I cannot be certain what was said by A's representative. PR has suggested that it is likely A sold the product as an investment, but I don't believe that is sufficiently persuasive to allow me to require Tandem to refund the costs to Mr W.

In short I do not believe I can say that there was misrepresentation such that I can uphold this complaint.

Breach of Contract

I do not believe that the liquidation of A in 2020 led to a breach of contract. I gather new management companies were appointed, and Mr W was able to use the timeshare as usual after that date.

In July 2020 the trustee wrote to all the club members. Its letter said: "*The JLs are pleased to confirm that FNTC has taken over as the new manager of the Clubs and further confirm that, as a result, the Clubs will continue to operate for the benefit of members*." I presume Mr W received a copy of this letter or something similar.

On the face of it, therefore, the services linked to Mr W's purchase of the points remain available to him and are unaffected by the liquidation. Indeed the agreements used by A usually allow for the liquidation of A and its replacement by another provider. That said, I cannot say if this was in Mr W's contract since I have not seen a copy of it.

Given I have not been persuaded that the product was sold as a financial investment I cannot conclude that the removal of a sales service by A can been regarded as a breach of contract.

S. 140A claims

Only a court has the power to decide whether the relationships between Mr W 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 s. 140A is "an action to recover any sum recoverable by virtue of any enactment" under s. 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 W could be said to have a cause of action in negligence against Tandem anyway.

Mr W's 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.

Furthermore, one of the main planks of the claim was the allegation that Tandem had paid

commission, but it has denied that it paid commission.

Affordability

PR says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Tandem has said that it carried out a full credit and affordability check and Mr W met its lending criteria.

Our investigator said that she could not see any evidence that Mr W found the loan unaffordable. When considering a complaint about unaffordable lending, a large consideration is whether the complainant has actually lost out due to any failings on the part of the lender. So, if Tandem did not do appropriate checks (and I make no such finding), for me to say it needed to do something to put things right, I would need to see that Mr W lost out as a result of its failings. Mr W has provided no evidence whatsoever that they would have found, nor found, it difficult to repay the loan, so I do not need to consider this point further.

Conclusion

It is not for me to decide whether Mr W has a claim against A, or whether he might therefore have a "like claim" under s. 75 of the Consumer Credit Act. Nor can I make orders under s. 140A and s. 140A of the same Act – by which a court can decide that a credit agreement creates an unfair relationship and make orders amending it.

Rather, I must decide what I consider to be a fair and reasonable resolution to Mr W's complaint. In the circumstances, I think that Tandem's response to Mr W's claims was fair and reasonable.

**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 W to accept or reject my decision before 15 December 2023.

Ivor Graham
**Ombudsman**