DRN-3347684

The complaint

Mr and Mrs D complain that Tesco Personal Finance Plc (Tesco) has unfairly declined their claim under section 75 and section 140A of the Consumer Credit Act 1974 (CCA) in relation to a timeshare product they were sold.

What happened

In July 2012, Mr and Mrs D purchased a trial membership timeshare through a timeshare provider (Company A). This timeshare cost £3,950.00 and was paid for by card by another finance provider.

In 2013, when first using this timeshare, Mr and Mrs D were invited to a presentation. They say they were persuaded to trade in the trial membership and pay an additional fee to upgrade to a full membership. They'd been told in 2012 the full membership would cost £10,000 but were offered to upgrade for only an additional £2,990.00. This was part funded by Mr D's Tesco credit card.

Mr and Mrs D feel the timeshare was misrepresented, they realised this after purchasing the upgrade and attempting to use it. They've highlighted the following points:

- The timeshare was sold as an investment that could be sold at a later date for profit.

- That the timeshare was affiliated with a timeshare exchange scheme and that Mr and Mrs D would be able to trade in any weeks they didn't use each year into these schemes and bank these towards a "*special future holiday*". They believed they'd get 10,000 points if they made this exchange and these points would be worth more than the annual maintenance fees. And the holidays could be booked when they wanted with this flexibility.

Mr and Mrs D say when they tried to use the benefits of the timeshare, they realised Company A had misrepresented it.

Tesco looked at Mr and Mrs D's claim but didn't think the payment had been made to Company A. Instead it felt the payment was made to a separate third party business that acted as a trustee, (Company B). Because of this, they didn't think s75 of the CCA could be applied. It also said the contract between Mr and Mrs D and Company A didn't give any information about an investment value and it believed the timeshare and its benefits remained available to Mr and Mrs D to use in the future, so it declined their claim under s75 of the CCA. Unhappy with the response, Mr and Mrs D complained and brought their complaint to this service.

Our investigator looked at the complaint and didn't think Tesco had acted unfairly when declining the claim. She thought it was fair to say that there was a link between Company A and Company B. Everything submitted indicated the service paid for by Mr and Mrs D was provided by Company A. Company B did nothing more than process the payment and so she was satisfied s75 of the CCA was applicable.

However, she felt the overall decision to decline the claim was fair. She didn't see anything to demonstrate the timeshare had been misrepresented by Company A – although she acknowledged the benefits of the product would have been highlighted during the sale, she wasn't persuaded there was a misrepresentation. She also considered s140A of the CCA and whether there is an unfair debtor creditor relationship, but felt it was unlikely a court would conclude the actions of Company A as an agent of Tesco would have created one. Nor did she think there was anything to demonstrate a breach of contract under s75 of the CCA.

Mr and Mrs D disagreed with the outcome and said that the timeshare was portrayed as an investment and this was a key reason for purchasing it.

Because Mr and Mrs D disagreed, the complaint has been passed to me for 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.

I've decided not to uphold this complaint for the same reasons as our investigator. I know this will be disappointing for Mr and Mrs D, but I'll explain why.

Mr and Mrs D have brought two complaints to this service about their timeshare purchased with Company A. One against the finance provider for the trial membership purchase and one for the upgraded purchase and sale of the full membership against Tesco. This decision focuses on the full sale as Tesco can only be held jointly liable for anything financed by it, so the previous trial membership and this sale are not its responsibility. I'm simply addressing whether Tesco made a fair decision when it declined the claim made under s75 and s140A of the CCA.

Our investigator said she felt there was the right sort of link between Company A and Company B that meant s75 of the CCA could be applied. Tesco hasn't responded to the view to dispute this link, nor have Mr and Mrs D, so I've taken it as no longer disputed. But in any event, I need not make any firm finding on this point as, even if there is the right sort of link in place, I don't think Tesco needs to do anything further having considered the merits of the s75 and s140A claims.

I've previously issued a final decision addressing the trial membership sale against another business. Many of the concerns about the second sale mirror those raised with the first. For the avoidance of doubt, I have considered all of the points of complaint I think relevant to the 2013 sale.

Did company A misrepresent the timeshare as an investment?

Mr and Mrs D have said that they were told the timeshare could be sold at a later date for a profit. In short they feel it was sold as an investment and this is one of the reasons why they purchased the timeshare when upgrading from the trial membership.

The sale took place some time ago and Mr and Mrs D haven't been able to be specific on exactly what was said during the sale which is understandable. They've pointed to the overall sale price being cheaper than first quoted when the trial membership was taken out. They only paid £6,940 in total (allowing for the price of the superseded trial membership to be included) compared with the initial £10,000 quoted. But haven't indicated that they were told the timeshare could be resold for the price quoted originally. Nor have they given any indication of the return they expected to receive.

The contract for the timeshare does explain that this can be resold, so being told this is an option would be true. It also says that Company A doesn't currently run a resale programme. And nowhere within the contract is there talk of any return. Having considered the timeshare agreement, I can't see that it has any obvious investment element or clear way of generating a profit for the timeshare members. And Mr and Mrs D haven't set out how they thought they would be able to get money out of the timeshare, save for a possible resale opportunity. So while I think it was possible the timeshare was described as an investment by Company A, I don't have the evidence that suggests it was probable that happened. So I don't make any finding that the timeshare was represented as an investment.

Did Company A misrepresent the products ability to be used with the exchange schemes?

I think it is likely that the benefits of being affiliated with the exchange schemes were discussed at length with Mr and Mrs D and that focus was given on the flexibility of this as a selling point for the timeshare. That would make sense as it would enable Mr and Mrs D to holiday outside of the resorts offered only by Business A. However, I'm not persuaded these were misrepresented based on what Mr and Mrs D have said.

The timeshare contract has a number of sections which talk about and reference the exchange schemes. It sets out deadlines that need to be met to use each of these each year and details the number of points that will be provided when the timeshare is taken out. This is confirmed as 10,000 reward points with one of the schemes. It also explains that exchanges are subject to availability.

The contract doesn't support a set number of points being provided when a week is traded in. The only reference to any level of reward points is the reference made to the 10,000 points awarded when the contract was taken out. And I can't see any promise that the value of the trade in will be in excess of the annual maintenance fee. Mr and Mrs D haven't explained how they thought this would work in practice either, so it is unclear whether they say they thought they wouldn't need to pay maintenance fees or that the benefits they'd get from the exchange programme would be worth more than the cost of their maintenance fees. As Mr and Mrs D haven't been able to set out in detail what the alleged representation was, I am not able to make a finding on that issue.

The sale documents also make it clear that the subscription to each scheme is not included indefinitely. Mr and Mrs D received a limited membership for each of the schemes with the purchase, but future renewals were optional. These would also cost Mr and Mrs D more and this was detailed in the contract. And they'd need to decide whether the cost of the schemes was outweighed by the benefit of them. So I don't think it was probable that they were told they wouldn't have to pay any fees later on to the exchange schemes.

Weeks can be brought forward to future years and traded with the schemes and the contract explains when further payments might be needed when booking through these. But being able to keep the banked/traded points indefinitely would likely depend on Mr and Mrs D deciding to renew the subscription. Mr and Mrs D said they'd been told that they could bank points from the trade for a "*future special holiday*" but this has only resulted in a discount of a future booking. And the total number of points that can be used at anyone time is limited to 2,500, limiting the discount available. But this doesn't mean these points and discount can't be used against future holidays. Nor can I see that Mr and Mrs D are alleging that they were told a specific thing about the way in which the schemes worked that turned out to be untrue. I understand that Mr and Mrs D say they weren't given all of the information about how the schemes worked at the time of sale, but that is different to saying there was a false representation about how the schemes worked.

Overall, I don't think it would be untrue to say Mr and Mrs D could exchange their week with the schemes or that they could bank these weeks. And these could be used towards a future holiday. I've not seen anything to show what was said in relation to these schemes and the timeshare that was untrue. So I'm not persuaded the use of the schemes was misrepresented to Mr and Mrs D.

Breach of contract

Mr and Mrs D say that there was a breach of contract that Tesco can be responsible for under s75 CCA. They have pointed to a number of European Directives and UK Regulations that they say were breached, in particular by taking a deposit at the point of sale, by not providing sufficient information and by pressuring them into taking out the full membership.

However, those directives and regulations did not form terms of the timeshare contract Mr and Mrs D took out. So I don't think Tesco would need to do anything else under s75 CAA, even if I agreed there was a breach of regulations as this wouldn't amount to a breach of contract under s75 of the CCA. So Tesco wouldn't be responsible under this provision.

Was there an unfair debtor creditor relationship?

Mr and Mrs D have also complained that they weren't provided with all information during the sale and that other finance providers were not considered. They also say that there was a breach of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010. They feel the lack of information provided led to an imbalance of knowledge that made the relationship unfair.

Only a court can determine whether there is an unfair relationship and there is no universal test for this, but it is relevant law that I consider what is a fair and reasonable outcome. But I've taken account of the actions taken by Company A when deciding whether Mr and Mrs D have been treated fairly as the timeshare agreement is a related agreement to the credit agreement under s19 of the CCA.

I've also taken into account the relevant regulations applicable to Company A as a timeshare provider at the point of sale. It's not my role to decide Company A's legal liability in regard to these regulations. But they are relevant in determining a standard of commercial conduct expected of Company A. Any potential breach of the rules isn't determinative of the question posed by s140A, but it may have a legitimate influence on whether an unfair relationship existed between Mr and Mrs D and Tesco.

As our investigator said, S56 of the CCA is relevant and means Company A acted as Tesco's agent when conducting the negotiations with Mr and Mrs D. And this can include all communication, advertisement and representations made by the negotiator. This can be considered when considering whether things have been done or not done when thinking about s140A (1)(c)[1].

As section 140A (2) sets out, a court will take account of all matters it considers relevant, both in relation to the creditor and debtor. This means I must also take into account Mr and Mrs D's individual circumstances when the sale took place. Considerations which may be relevant to the fairness of the relationship include Mr and Mrs D's previous experience with timeshare products and the supplier's sales presentations, their sophistication or vulnerability, and their level of knowledge about the product they were buying.

[1] *Scotland V British Credit Trust [2014] EWCA Civ 790*

I also have in mind the judgement of the Supreme Court in the case of *Plevin v. Paragon Finance Ltd* [2014] UKSC 61, where it was held (in summary) the question is whether the relationship between the creditor and debtor is unfair, not whether the creditor or anyone else has breached a duty. It was also held that relationships between businesses and consumers are often characterised by large differences of knowledge, which can make a relationship unfair if the imbalance is "sufficiently extreme".

Keeping all of the above in mind, I have considered all of the evidence and submissions in this case, to determine whether I think it's likely a court would find an unfair relationship existed between Mr and Mrs D and Tesco under section 140A (1)(c), by virtue of anything the Company A did or didn't do on Tesco's behalf

Mr and Mrs D and their representative have argued that the timeshare provider failed to consider other finance options when it accepted the payment via credit card and it didn't make the terms of the timeshare clear.

Mr and Mrs D already had the credit card in place with Tesco when they bought the timeshare from Company A (paid via Company B acting as the payment processor). There was no application for the borrowing or an increased credit limit at this point and I think the arguments made in relation to other loans not being considered are likely generic points brought by the representative of Mr and Mrs D. I can't see it has any real bearing on their complaint or whether Tesco or Company A acting on its behalf did anything wrong when accepting the credit card payment.

Mr and Mrs D had previously purchased a trial membership of a very similar product with the same company and so I think it would be fair to say they knew they were buying a timeshare. And I think even if some information could have been clearer during the sale, it's unlikely that a court might say this would lead to a sufficiently extreme imbalance in knowledge, or that the relationship is unfair.

Mr and Mrs D have also argued the sales presentation was not advertised as such and they didn't know what they were attending until there. And like their first sale, they've complained about the pressurised tactics used.

I don't doubt that Mr and Mrs D found it difficult to say 'no' to Company A when purchasing the upgrade, not least because they may have felt they were getting this at a considerable saving compared with the price offered the year before. But I've seen very little to show that Company A didn't allow Mr and Mrs D to say 'no' to the sale. It's likely a lot of time was spent talking about the benefits of the product but Mr and Mrs D were returning customers who'd purchased a trial membership only a year before. And at this point they'd declined the full timeshare and I think it's reasonable to believe they were aware that they didn't need to purchase the full timeshare again when attending the sales presentation.

Overall, thinking about their circumstances at the time of the sale and how the sales process took place, I think it is unlikely a court would determine this created an unfair relationship under s140A of the CCA.

Ultimately, I've not seen anything to demonstrate that Tesco has made an unfair claim decision under S75 or s140A of the CCA.

My final decision

I don't uphold Mr and Mrs D's complaint against Tesco Personal Finance PLC.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Mrs D to

accept or reject my decision before 26 July 2022.

Thomas Brissenden
Ombudsman