DRN-4456360

The complaint

Mr R complains through his representative, P, that Tandem Bank Limited ("Tandem") didn't fairly or reasonably deal with his claims under s. 75 and s. 140A of the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a holiday product in June 2015. The purchase was in Mr and Mrs R's name but, as it was funded by a loan taken out by Mr R, he is the eligible complainant. For simplicity, in this decision I will refer to him as the sole purchaser. The loan was originally granted by another lender but it is now owned by Tandem and I will refer to it as the lender throughout.

What happened

In 2019 Mr R purchased a holiday product from a company I will call A. It cost £12,950 and was funded by a loan from Tandem. In November 2020 P submitted a letter of claim to Tandem. It said that the contract was misrepresented and it was also breached. It claimed that Mr R had not been told about commission paid to A and the loan was unaffordable. Finally, it noted that A had gone into liquidation in May 2020.

Tandem rejected the claim and disputed the claims of breach of contract and misrepresentation. It said no commission had been paid and said it had carried suitable checks before lending. Tandem explained that A had not gone into liquidation, but a management company had ceased to trade and had been replaced by another company.

P brought a complaint on behalf of Mr R to this service. It was considered by one of our investigators who didn't recommend it be upheld. P didn't agree and said another bank had accepted A didn't meet the standards it expected with regard to credit broking. It provided a generic submission relating to A and said that A's cancellation terms were in line with a decision in a court case. It added that this complaint was in line with a precedent decision issued by this service upholding a complaint about fractional timeshares.

Finally, it said it had concerns about the way finance was sold to its clients and asked that this service seek answers to a list of questions.

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.

Firstly I would like to address what P has said about the findings of the High Court following the recent judicial review of the Financial Ombudsman Service and the approach P thinks it should take to this complaint, which in simple terms is that I should take an identical approach.

The High Court did affirm that my fellow ombudsman's findings on s.56 CCA and the extent to which it creates a statutory agency relationship between a creditor and a supplier when there is a debtor-creditor-supplier agreement in place – such that any negotiations between Mr R and A before his purchase are deemed to have been conducted by A as an agent of Tandem. P argued this complaint should be treated in the same way, but I do not agree.

The complaints at the centre of the judicial review were concerned with a particular type of asset backed timeshare known as a 'fractional ownership timeshare.' Such timeshares offered prospective members the same sort of holiday rights commonly associated with timeshares more generally. But they also offered prospective members a share in the 'ownership' of a specific property. They didn't usually confer any rights to stay in that property. But under the terms of the purchase agreement the property is usually set to be sold at the end of the membership period and the net proceeds distributed on a pro rata basis among the fractional owners.

However, that is not the type of timeshare Mr R bought and I do not consider that it follows that the same decision should be reached in this complaint as in those addressed by the judicial review.

While fractional and non-fractional timeshares may have been sold in a similar way, the fact that the non-fractional timeshares weren't designed with an investment element front and centre is an important distinction to consider when determining what a fair and reasonable outcome to a complaint might look like.

I accept that some non-fractional timeshares may share a number of contractual terms that were subject of the judicial review and may fall foul of the relevant law on unfair contract terms. However, an assessment of unfairness under s.140A CCA does not necessarily stop at a regulatory breach. It's often necessary to then assess the impact of that breach on the consumer. That much is clear from case law and – including the latest judicial review.

In other words, complaints must be decided on their individual merits which is what I will do in this case.

S.75 CCA

S. 75 of the CCA states that, when a debtor (Mr R) under a debtor-creditor-supplier agreement has a claim of misrepresentation or breach of contract against the supplier that relates to a transaction financed by the agreement, the creditor (Tandem) is equally and concurrently liable for that claim – enabling the debtor to make a 'like claim' against the creditor should they choose to.

It's important to note that, as Tandem was the lender rather than the supplier, under the Act a claim is limited to one for misrepresentation or breach of contract, rather than general unhappiness with what was available under the contract.

Misrepresentation

On Mr R's behalf P alleges that the holiday product was mispresented to him, in particular that the product was an investment.

Not having been present at the sale it's not possible for me to say exactly what was said, and in what circumstances. But the terms of the contract set out fairly clearly what was being purchased and Mr R had considerable experience of D's products having held one or more of them for many years.

I have not had any testimony from Mr R as to what was said and other than the claim made by P. Furthermore, I have seen no supporting evidence to back up the claim that he was told the purchase was of an investment. The documentation supplied at the time of sale does not refer to the points being held as an investment.

As our investigator has said the sales representatives would have put the best gloss on the product and emphasised the benefits membership would offer, but that does not mean that this amounted to misrepresentation.

Overall it is difficult for me to conclude that any misrepresentations were made.

Breach of Contract

As our investigator has explained under s.75 of the CCA, we can only consider whether the D failed to perform one or more of the contract's terms – thereby breaching the contract. I have not seen evidence that this occurred which makes it difficult for me to conclude there has been one or more breaches. P has said the fact a company within the group ceased to trade amounted to a breach but the running of the club has been taken over by another company and Mr R is entitled to make use of his points.

Affordability

P says no or insufficient checks were carried out at the time of sale and this means the lending was irresponsible. Our investigator said that she could not see any evidence that Mr R 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 R lost out as a result of its failings. Mr R has provided no evidence whatsoever that he would have found, nor has he found it difficult to repay the loan, so I do not need to consider this point further.

S.140A CCA

Under s. 140A and s. 140B of the Consumer Credit Act a court has the power to consider whether a credit agreement creates an unfair relationship and, if it does, to make appropriate orders in respect of it. Those orders can include imposing different terms on the parties and refunding payments.

In considering whether a credit agreement creates an unfair relationship, a court can have regard to any linked transaction.

If the loan was made under pre-existing arrangements between Tandem and the seller (or an associate of the seller), the timeshare agreement was a "linked transaction" within the meaning of s. 19 of the Consumer Credit Act.

An ombudsman does not have the power to make an order under s. 140B. I must however take relevant law into account in deciding what I consider to be fair and reasonable.

And I have the power to make a wide range of awards – including, for example, requiring a borrower to refund interest or charges, and to write off or reduce the balance of a loan. I am not persuaded however that I should do so here.

I accept that there were links between Tandem and the A group of companies. I do not believe however that this led to a conflict of interest in respect of their relationship with Mr R. A was selling club membership and points. Whilst it introduced finance options, it was not acting as Mr R's financial adviser or agent and was under no obligation to make an impartial or disinterested recommendation or to give advice or information on that basis.

P suggests that the sale was pressured. It has not really elaborated on that, but I note that standard documents included a statement from the buyer to say they had not been put under pressure. It's significant too in my view that Mr R had 14 days in which to review the documents and withdraw from both the sale and the loan agreements. If he thought he had agreed to any of those agreements as a result of undue pressure, it is not clear to me why he didn't take advantage of the option to withdraw.

It is not for me to decide whether Mr R 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. 140B of the same Act.

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

I would add that 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.

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

Mr R'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.

P seems to suggest that Tandem owed Mr R a duty of care to ensure that A complied with the 2010 Regulations amongst other regulations. And P says that Tandem breached that duty by failing to carry out – before granting Mr R credit and paying A – the due diligence necessary to ensure that the product purchased by Mr R wasn't sold by D in breach of the 2010 Regulations.

It also raised the matter of commission paid to A, but Tandem has confirmed that none was paid so those arguments fall away.

I appreciate Mr R is dissatisfied with his purchase and he has my sympathies for this, but, in summary I cannot see why any of his claims were likely to have succeeded. So overall I think that Tandem acted reasonably in declining the claims under s.75 and s. 140A CCA."

Tandem had no comment to make and P didn't respond despite being reminded.

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.

In the circumstances as I have been given no grounds which would allow me to amend my provisional decision it stands.

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 13 December 2023.

Ivor Graham
Ombudsman