

The complaint

Mrs M complains that Tandem Personal Loans Ltd (“Tandem”) unfairly declined her claim under sections 75 and 140A of the Consumer Credit Act 1974 (“CCA”) in relation to a timeshare product she purchased with a loan they provided to her.

What happened

Mrs M’s loan was originally provided by another financial business. That business sold its loans to a different business, and these are ultimately now owned and serviced by Tandem. For simplicity, I will refer to the lender as being Tandem at all times throughout my decision.

In or around June 2018, whilst on holiday using her existing timeshare product, Mrs M met with her timeshare supplier, who I’ll refer to as “A”. During that meeting, Mrs M agreed to upgrade her existing membership by purchasing a new points-based timeshare product from A. The purchase price agreed was £11,800 which was funded under a fixed sum loan agreement with Tandem over 180 months.

In May 2022, using a professional representative (“the PR”), Mrs M submitted a claim to Tandem under sections 75 and 140A of the CCA. The PR allege that Mrs M purchased the timeshare product having relied upon representations made by A which turned out not to be true. And under section 75 of the CCA (“S75”), Tandem are jointly liable for those misrepresentations.

In particular, the PR allege A sold the points-based timeshare product to Mrs M as an investment that could be sold at a profit. They said that during the presentation in June 2018, A told Mrs M the timeshare points could be sold at a profit as part of their re-sale scheme, But Mrs M says that the timeshare hasn’t sold. The PR believe that selling timeshare products as an investment falls contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (“the TRs”).

The PR also allege that the misrepresentations, together with other things done (or not done) by A renders the relationship with Tandem, under the agreements, unfair pursuant to section 140A of the CCA (“S140A”). In particular, the PR allege that A:

- pressured Mrs M into entering the purchase and loan agreements using aggressive commercial practices contrary to the Consumer Protection from Unfair Trading Regulations 2008 (“CPUT”);
- didn’t provide Mrs M with the key information necessary for her to make an informed decision regarding her purchase in breach of regulation 12(4)(b) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (“the TRs”);
- allowed her no time to read or consider the information provided;
- failed to advise Mrs M of any commission that might be payable to them by Tandem;
- made no comparisons to other loan companies;
- didn’t inform Mrs M she was free to arrange her own finance;
- failed to undertake appropriate affordability checks for the loan; and
- advised Mrs M at a subsequent sales presentation the following years that another

more desirable product should be purchased.

The PR also said that A are in liquidation and can't provide the service sold. They suggest this constitutes a breach of contract which Tandem are jointly liable for under S75.

Tandem didn't uphold Mrs M's claim. They didn't agree there was any evidence to support the allegations of misrepresentation. They also didn't think they were under any obligation to respond to allegations of unfairness under S140A in the absence of a civil court action. And in any event, said there was no commission arrangement in place for the loan. Tandem say they'd undertaken an appropriate affordability assessment before agreeing the loan. They also didn't think there was any evidence of loss to support the alleged breach of contract.

The PR didn't agree with Tandem's findings, so referred Mrs M's claim to this service as a complaint. One of this service's investigators considered all the information and evidence provided. Having done so, they didn't think Tandem's failure to uphold Mrs M's claim was unfair or unreasonable. In particular, our investigator said they weren't able to find evidence to support any of the various allegations and couldn't see any evidence to suggest the loan was unaffordable.

The PR didn't think our investigator had provided any specific reasons for rejecting Mrs M's complaint. They argued that based upon the testimonies of many other consumers, they believe A had consistently marketed and sold the timeshare product as an investment that was extremely desirable and could easily be resold at a profit. The PR also raised further allegations and observations not previously included within the original claim. In particular, relating to

- the term of the timeshare contract relative to Mrs M's age; and
- observations about A's timeshare resale scheme.

As an informal resolution couldn't be achieved, Mrs M's complaint has been passed to me to consider further. Having done that, while I was inclined to reach the same outcome as our investigator, I considered a number of issues which I don't feel were previously fully addressed or explained. So, I issued a provisional decision on 2 January 2024 giving both sides the chance to respond before I reach a final decision.

In my provisional decision I said:

Relevant considerations

When considering what's fair and reasonable, DISP¹ 3.6.4R of the FCA² 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.

S75 provides consumers with protection for goods or services bought using credit. Mrs M paid for the timeshare product under a restricted use fixed sum loan agreement. So, it isn't in dispute that S75 applies. This means Mrs M is afforded the protection offered to borrowers like her under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this complaint.

S140A looks at the fairness of the relationship between Mrs M and Tandem arising out of the credit agreement (taken together with any related agreements). And because the product purchased was funded under that credit agreement, they're 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 distinguish between the complaint being considered here and the legal claim. The complaint this service is able to consider specifically relates to whether I believe Tandem's failure to uphold Mrs M's claim was fair and reasonable given all the evidence and information available to me, rather than actually deciding the legal claim itself.

It's also relevant to stress that this service's role as an Alternative Dispute Resolution Service ("ADR") is to provide mediation in the event of a dispute. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we don't provide a legal service. And as I've said, this service isn't able to make legal findings – that is the role of the courts. 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.

Was the timeshare product misrepresented?

For me to conclude there was 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 Mrs M something that wasn't true in relation to the allegations raised. I would also need to be satisfied that the misrepresentations were material in inducing Mrs M to enter into the purchase contract. This means I would need to be persuaded that she reasonably relied upon false statements when deciding to buy the timeshare product.

From the information available, I can't be certain about what Mrs M was specifically told (or not told) about the benefits of the product she purchased. It was, however, indicated that she was told these things. So, I've thought about that alongside the evidence that is available from the time. Although not determinative of the matter, I haven't seen any documentation which supports the assertions in Mrs M's claim, such as marketing material or documentation from the time of the sale that echoes what the PR says she was told. In particular that the product was represented as an investment that could be sold at a profit. There's simply no reference to this within the limited documentation provided.

The PR have referenced subsequent representations made by A to Mrs M in the following years. But as these don't form part of the sale presentation and Mrs M's resulting purchase decision in 2018, I don't see their relevance to Mrs M's claim here.

I think it unlikely the product can have been marketed and sold as an investment contrary to the TRs simply because there might have been some inherent value to it. 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 Mrs M purchased here. A would have had to have presented the timeshare points in such a way that used any investment element to persuade her to contract. Only then would they have fallen foul of the prohibition on marketing and selling certain holiday products as an investment, contrary to Regulation 14(3) of the TRs.

Furthermore, I haven't seen any evidence to suggest that A were contractually bound to provide a timeshare resale service. And even if they were, I've seen nothing that suggests they gave any guarantee that a successful sale and a subsequent profit could be achieved. While Mrs M may have intended to purchase her timeshare points

as a financial investment, I can't conclude, with any certainty, that intention was due to anything A said to her. And whilst I acknowledge the PR's comments about the testimonies of other consumers, I don't think that helps me to establish what happened in Mrs M's specific circumstances.

Based upon the specific evidence available relating to Mrs M's claim here, I can't say, with any certainty, that A did misrepresent the product in the manner alleged.

The breach of contract claim under S75

As far as I understand, whilst A may have entered an insolvency process, the current management company have confirmed that timeshare owners remain able to fully utilise their timeshare products subject to the associated agreements. So, in the absence of any specific explanation to support why Mrs M believes there's been a breach of contract which resulted in an evidentially supported financial loss for her, 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 (Mrs M) 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).

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks are relevant (including matters relating to the creditor and matters relating to the debtor). And I think it's relevant to acknowledge Mrs M's existing membership and relationship with A. She'd previously purchased a product from them. So, I think it's reasonable to conclude that at the time of the purchase in June 2018, she had a reasonably strong awareness about the product she'd previously purchased, how it operated and any associated costs. I also think it's reasonable to conclude Mrs M was familiar with A (as a timeshare supplier) the format of their meetings and sales presentations, and their documentation. Particularly as the purchase in June 2018 wasn't her first.

- The pressured sale and process

The claim suggests Mrs M was pressured into purchasing the product and entering into the finance agreement with Tandem. I acknowledge what the PR have said about this. So, I can understand why it might be argued that any prolonged presentation might have felt like a pressured sale – especially if, as Mrs M approached the closing stages, she 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 Mrs M agreed to the purchase and the finance agreement in 2018 when she simply didn't want to. I haven't seen any evidence to demonstrate that she went on to say something to A, after the purchase, suggesting she'd agreed to it when she didn't want to. And neither the PR, nor Mrs M have provided a credible explanation for why she didn't subsequently seek to cancel the transaction within the 14-day cooling off period permitted here – both under the purchase and loan agreements.

If Mrs M only agreed to the purchase because she felt pressured, I find this aspect difficult to reconcile with the allegation in question. I haven't seen anything substantive to suggest Mrs M was obviously harassed or coerced into the agreements. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that she made the decision to proceed because her ability to exercise choice was – or was likely to have been – significantly impaired contrary to the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT").

- Time to read and consider the information provided

I've thought about the information that I believe should have been provided to Mrs M as required under the TRs. I've seen some documentation from the time of the sale and Tandem have also explained what would've been provided by A and checked during their compliance process before the purchase was completed.. They confirm that Mrs M would've attended a meeting with A's compliance/contracts manager before being able to proceed.

Of course, it is possible Mrs M wasn't given sufficient time to read and consider the contents of the documentation at the time of the sale. But even if I were to find that was the case – and I make no such finding – it's clear she still had 14 days to consider the purchase and raise any questions or concerns she might've had. And ultimately, if she was unhappy or uncertain, she could've cancelled the agreement without incurring any costs.

Furthermore, the finance agreement also included a withdrawal/cancellation period of 14 days. The copy of the finance agreement provided by Tandem clearly includes Mrs M's cancellation/withdrawal rights. But I haven't seen any evidence that Mrs M did raise any questions or concerns about either agreement or seek to cancel them within the 14 days permitted.

- A's responsibilities and disclosure of commission paid

Part of Mrs M's S140A claim is based upon the status of A (as the introducer of the loan) and their (and Tandem's) resultant responsibilities towards her. In particular, it's argued that the payment of commission by Tandem to A was kept from her. In response to the claim, it's been confirmed there were no commission arrangements in place at the time the loan was agreed and provided..

That said, I don't think any payment of commission by Tandem to A would've been incompatible with their role in the transaction. A weren't acting as an agent for Mrs M, but as the supplier of contractual rights she 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 Mrs M advice or information on that basis. As far as I can see, she was always at liberty to choose how she wanted to fund the transaction.

What's more, I haven't found anything to suggest Tandem were under any regulatory duty to disclose any commission paid in these circumstances. Nor is there any suggestion or evidence that Mrs M requested those details from Tandem (or A) at any point. And on that basis, I'm not persuaded it's likely that a court would find that any non-disclosure or payment of commission would've created an unfair debtor-creditor relationship under S140A, given the circumstances of this complaint.

Were the required lending checks undertaken?

There are certain aspects of Mrs M's complaint that could be considered outside of S75 and S140A. In particular, in relation to whether Tandem undertook a proper credit affordability assessment. The PR allege that a proper affordability check wasn't completed by A.

Ordinarily, responsibility falls with the lender (Tandem in this case) to conduct affordability checks as set out within the Consumer Credit Sourcebook ("CONC") - part of the FCA handbook. Tandem have confirmed that Mrs M's loan application was underwritten based upon information provided by Mrs M in her application form which showed the loan was affordable with plenty of disposable income.

It's relevant that the PR haven't provided any evidence to show that the loan was unaffordable or unsuitable for Mrs M. And I've not seen anything that supports any suggestion of financial difficulty from that time.

If I were to find that Tandem hadn't complied with the regulatory guidelines and requirements that applied here – 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 Mrs M in order to uphold her complaint here. Furthermore, I don't believe any regulatory failure would automatically mean that the loan agreement is null and void. It would need to be proven that any such failure resulted in a loss to Mrs M as a consequence.

As I've seen no specific information about Mrs M's actual position at the time and no supporting evidence that she struggled to maintain repayments, I can't reasonably conclude the loan was unaffordable for her. Or that she suffered any loss as a consequence.

Summary

The PR have suggested they're aware of other consumers who allegedly had similar experiences to those of Mrs M. But in considering her complaint, my decision must be based upon the specific facts and evidence relating to Mrs M. I can't see how other consumers allegations (evidentially supported or not) help in establishing the facts of Mrs M's own personal experience in June 2018.

I also haven't considered the subsequent allegations raised by the PR. These weren't included in the original claim or complaint, so haven't been considered and responded to by Tandem.

I want to reassure Mrs M that I've carefully considered everything that's been said and provided. Having done so, I haven't found any evidence from the time of the sale to support the allegations included within her claim. So, I can't say that Tandem's failure to uphold it was ultimately unfair or unreasonable. And because of that, I don't currently 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 have acknowledged receipt of my provisional findings and confirmed they have no further comments. Despite follow up from this service, neither the PR nor Mrs M have responded or provided anything new for me to consider.

In the circumstances, I've no reason to vary from my provisional findings. So won't be asking Tandem to do anything more here.

My final decision

For the reasons set out above, I don't uphold Mrs M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 28 February 2024.

Dave Morgan
Ombudsman