DRN-5038247

The complaint

Mr E's complaint is, in essence, that Tandem Personal Loans Ltd[1] ("Tandem") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the "CCA") and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr E, together with another party, purchased membership of a timeshare product (the "Timeshare") from a timeshare provider (the "Supplier") on 23 June 2018 (the "Time of Sale"). They entered into an agreement with the Supplier to buy 8,000 membership credits at a cost of £17,000 (the "Purchase Agreement"). Mr E paid for the Timeshare by taking finance of £17,000 from Tandem ("the Finance Agreement") in his sole name.

Mr E – using a professional representative (the "PR") – wrote to Tandem on 26 September 2022 (the "Letter of Complaint") to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against Tandem under Section 75 of the CCA ("S75"), which Tandem didn't accept and pay.
2. Tandem being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA ("S140A").

(1) S75: the Supplier's misrepresentations at the Time of Sale

Mr E says the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- told him membership would ensure that holiday accommodation would be secure for the term of the contract as they could book from the many options available;
- told him they would be able to obtain holidays cheaper than available elsewhere; and
- told him about their entitlement to sell their membership, that the timeshare was an investment and that they would get back the money they invested, plus a specific profit.

Mr E said the Timeshare membership was not as described and that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above. And therefore, under S75, he has a like claim against Tandem who, with the Supplier, is jointly and severally liable to him.

(2) S140A – Tandem's participation in an unfair credit relationship

The Letter of Complaint sets out several reasons why Mr E says that the credit relationship between him and Tandem was unfair to him under S140A. In summary, they include the following:

- The Supplier's sales and marketing practices breached the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT") because:
    - he was pressured into purchasing the Timeshare;

[1] The Finance Agreement was original provided by another lender and later taken over by Tandem.

- the sales process was very long;
- he was told the Timeshare 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
- he was left with the impression that he couldn't leave until he agreed to purchase the Timeshare.

- The Supplier failed to provide them with all of the material information needed to make an informed decision which breached the requirements of CPUT and the Timeshare, Holiday Products and Exchange Contracts Regulations 2010 ("the TRs") including key information material to understanding the investment element of the Timeshare, the ongoing costs and the availability of holidays.
- The requirement to pay a management charge throughout the term of the membership amounted to an unfair contract term under Regulation 5 of the Unfair Terms in Consumer Contract Regulations 1999 ("UTCCR")
- The Supplier breached the requirements of Regulation 14(3) of the TRs by marketing and selling the Timeshare as an investment.

Tandem dealt with Mr E's concerns as a complaint and issued its final response letter on 14 November 2022, rejecting it on every ground.

Mr E then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr E disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. Having done that, I issued a provisional decision ("PD") on 29 August 2008 in which I explained why I didn't think Mr E's complaint should be upheld. I gave both parties to this complaint the opportunity to consider my findings and respond with any new comments or information for me to consider before I reach a final decision.

Tandem acknowledged receipt of my PD and confirmed they have no further points to make. The PR (on Mr E's behalf) didn't accept my provisional findings. They provided a comprehensive 37-page response and provided substantial additional information and evidence for me to consider.

Mr E's complaint was then passed back to me in order to reach a final 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.

In doing so, I've specifically thought about the PR's response to my PD and considered the additional evidence and information provided. Having done that, it appears the PR's response, information and evidence relates to the purchase of a completely different type of timeshare product provided by a completely different Supplier. Specifically, their comments and observations refer to the sale and purchase of a Fractional Timeshare product.

Mr E's complaint relates to the purchase of a Non-Fractional timeshare product. So, I can't see that the PR's response has much (if any) relevance to the complaint being considered here. At my request, our investigator pointed these differences out to the PR asking them to confirm whether they'd sent the correct response. However, despite that, the PR hasn't replied.

For completeness, I included the following in my PD:

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4 R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when appropriate), what I consider was good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Patel v Patel* [2009] EWHC 3264 (QB).
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Having thought about everything provided, I don't currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

What is more, I've made my decision on the balance of probabilities – which 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.

S75: the Supplier's misrepresentations at the Time of Sale

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there's an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under S75 essentially mirrors the claim Mr E could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that S75 applies, if I find that the Supplier is liable for having misrepresented something to Mr E at the Time of Sale, the Lender is also liable.

For me to conclude there was a misrepresentation by the Supplier in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the Timeshare to Mr E in 2018. In other words, that they told Mr E something that wasn't true in relation to one or more of any of the points raised. I would also need to be satisfied that these misrepresentations were material in inducing Mr E to enter into the Purchase Agreement. This means I would need to be persuaded that Mr E reasonably relied on any false statements when deciding to complete his purchase.

Allegations have been made specifically relating to the purchase referenced above. The difficulty I have is identifying what was actually said at the time of the sale. The PR have provided limited details and evidence to support the misrepresentations Mr E says the Supplier made, although I acknowledge he does say he was told these things. So, I've thought about this alongside the limited evidence that's available from the time of his purchase.

Although not determinative of the matter, I've seen very little specific evidence from the time of the sale, such as marketing material or any of the wider purchase documentation which supports Mr E's allegations. The documentation provided by the PR appears to be limited to the "Membership Application Agreement" which was signed by Mr E in a number of places. Having considered this document, it doesn't appear to provide any specific guarantees in relation to the availability holiday accommodation.

The Membership Application Agreement refers to various other documents; *"copies of which are attached to and incorporated in the terms of this Agreement".* These include:

- the Standard Information Document;
- the Rules of Membership;
- the Reservations Rules; and
- the Deed of Trust.

By signing the Membership Application Agreement, Mr E confirmed he'd received all of these documents.

I'm familiar with this particular timeshare product and the documents referred to above. In particular, I'm aware that accommodation booking under the Timeshare is subject to availability and ordinarily booked on a first come first served basis. I haven't seen any evidence that Mr E wasn't able to use his Timeshare to book any accommodation or experiences using his Timeshare.

Mr E alleges he was told he would be able to obtain holidays cheaper than available elsewhere. But again, I've seen nothing within the evidence to support that particular allegation. And in any event, Mr E hasn't provided anything to demonstrate any cost differences he'd experienced in support of that allegation.

It's alleged that the Timeshare was sold to Mr E as an investment that would ensure return off the money he invested with a *"specific profit".* However, I also haven't seen any evidence to support that particular allegation.

I don't think the Timeshare can have been marketed and sold as an investment contrary to Regulation 14(3) of the TRs simply because there might have been some inherent value to Mr E's membership. And in any event, I've found nothing within the evidence provided to suggest the Supplier gave any assurances or guarantees about the future sales value of the Timeshare. The Supplier would had to have presented the Timeshare in such a way that used any investment element to persuade Mr E to purchase it. Only then would it have fallen foul of the prohibition on marketing and selling certain holiday products as an investment contrary to the provisions of the TRs.

While I recognise that Mr E has concerns about the way in which his Timeshare was sold, he hasn't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons alleged. Because of that, I can't reasonably conclude that Tandem acted unfairly or unreasonably when they rejected his claim.

S140A: The unfair relationship complaint

I have already explained why I'm not persuaded that the Purchase Agreement entered into by Mr E was misrepresented by the Supplier in a way that makes for a successful claim under S75 and outcome in this complaint. But Mr E also says that the credit relationship between him and the Lender was unfair under S140A, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that he has concerns about. It is those concerns that I will explore here.

As S140A is relevant law in the context of this complaint, I do have to consider it. So, in arriving at a fair and reasonable outcome to this complaint, it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Mr E and Tandem.

Under S140A, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and 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) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

Tandem doesn't dispute that there was a pre-existing arrangement between them and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr E's Timeshare were conducted in relation to a transaction financed or proposed to

be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for Tandem as per Section 56(2). And such antecedent negotiations were *"any other thing done (or not done) by, or on behalf of, the creditor"* under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

"*By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer*".

In the case of *Scotland & Reast v British Credit Trust Limited* [2014], the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel v Patel* [2009] EWHC 3264 (QB) (which was recently approved by the Supreme Court in the case of

[2] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

Smith), that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr E and Tandem along with all of the circumstances of the complaint and I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. I will explain why. When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me which includes the documentation provided at the Time of Sale.

- The Supplier's sales & marketing practices at the Time of Sale

Mr E's complaint about Tandem being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr E and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the similar reasons given for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I'm not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Mr E says that he was pressured by the Supplier into purchasing the Timeshare at the Time of Sale. I acknowledge that he may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or done by the Supplier during his sales presentation that made him feel as if he had no choice but to purchase the Timeshare when he simply did not want to. He was also given a 14-day cooling off period – clearly explained in Part 2 of the Membership Application Agreement and signed by Mr E. He hasn't provided a credible explanation for why he didn't cancel his Timeshare during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr E made the decision to purchase the Timeshare because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

- The provision of information by the Supplier at the Time of Sale

Here, I will consider Mr E's allegations that:

1. The contractual terms setting out the obligation to pay annual management charges for the duration of their membership were unfair.
2. Certain information wasn't received by Mr E.

I think there was likely to be a lot of information passed between the Supplier and Mr E when he purchased the Timeshare at the Time of Sale. But he and PR say that the Supplier failed to provide him with all of the information he needed to make an informed decision.

The PR also says that the contractual terms governing the Timeshare and the

obligation to pay the annual management charges for the duration were unfair contract terms under the UCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached and potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of S140A. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr E, have flowed from the alleged breaches. The reason being, that those consequences are relevant to an assessment of unfairness under S140A. For example, the judge attached importance to the question of how an unfair term had been operated in practice: see *Link Financial c Wilson* [2014] EWHC 252 (Ch) at [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied unfairly in practice. And as I can't see any evidence that the terms in question have actually been operated unfairly against Mr E, I don't think they gave rise to an unfair relationship under S140A.

I've also thought about the information that I believe should have been provided to Mr E as required under the Timeshare Regulations. The PR have provided a copy of the Membership Application Agreement which Mr E signed at the Time of Sale to say he'd received the following additional documentation (as previously referred to above):

- the Standard Information Document;
- the Rules of Membership;
- the Reservations Rules; and
- the Deed of Trust.

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

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of regulation 12 of the TRs/the CPUT Regulations and the UTCCR are likely to have prejudiced Mr E's purchasing decision at the Time of Sale and rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between Tandem and Mr E was unfair to him because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between Tandem and Mr E was unfair to him for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of his complaint on that basis.

Summary

Given the facts and circumstances of this complaint, I don't think that Tandem acted unfairly or unreasonably when it dealt with Mr E's S75 claim, and I'm not persuaded that Tandem was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of S140A. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct Tandem to compensate him

If there is any further information on this complaint that either party wishes to provide, I would invite them to do so in response to this provisional decision.

Having received no further response from the PR, despite our investigator's efforts, I've found no reason to vary from my provisional findings. In particular because the PR's comments and evidence don't appear to relate to the transaction that forms the basis of Mr E's complaint here.

In the circumstances, my final decision remains unchanged, and I won't be asking Tandem to do anything more.

My final decision

For the reasons set out above, I don't uphold Mr E's complaint about Tandem Personal Loans Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 22 October 2024.

Dave Morgan
Ombudsman