DRN-3854844

The complaint

Mr and Mrs T have complained that GE Money Consumer Lending Limited ("GE Money"), unfairly turned down their claim under the Consumer Credit Act 1974 ("CCA").

What happened

Mr and Mrs T bought a timeshare membership from a timeshare supplier in June 2006. The total cost of the membership was £16.652 which was paid for by way of trading in an existing timeshare (£6,000) and taking a loan for the balance from GE Money. Mr and Mrs T also purchased a protection plan (£1,048.27), so in total they borrowed £11,700.27 and the loan was set to run for fifteen years.

In October 2017, Mr and Mrs T (using a professional representative) made a claim against GE Money for problems they said they had with the timeshare, claiming damages and interest. They said the nature of the timeshare had been misrepresented to them, so they were able to make a claim against GE Money under s.75 of the CCA.

GE Money responded to the claim, it said any claim brought under s.75 of the CCA was done so outside of the periods set out in the Limitation Act 1980 ("LA"). It also said that as the loan proceeds were not paid directly to the timeshare supplier, the provisions in the CCA Mr and Mrs T relied on did not apply to this claim. Finally, GE Money said that, due to the loan being taken out before this service gained jurisdiction to consider the type of loan Mr and Mrs T had, we could not consider the case[1].

Unhappy with the outcome of GE Money's investigation into their claim, Mr and Mrs T brought a complaint to our service that GE Money had unfairly turned down the claim.

One of our investigator's considered Mr and Mrs T's complaint but did not think it should be upheld. She thought GE Money had acted fairly in turning down the claim. Mr and Mrs T's representative responded to the investigator's assessment disagreeing with the outcome. In summary, the representative argued:

- Mr and Mrs T are part of a 'similar fact evidence' group of complaints and they have contributed to the group evidence. It does not believe the investigator took this evidence into account when reaching her outcome.

- It argues the supplier knowingly or recklessly made untrue statements to secure sales. It considers this should lead to an extension in the time Mr and Mrs T had to bring their claim.

- The investigator's assessment of when the relevant limitation periods under the LA start to run is inaccurate. Specifically, it argues the period starts to run from the date the consumers had knowledge of what had gone wrong.

[1] I understand GE Money is no longer contesting that this service has jurisdiction to consider Mr and Mrs T's loan so I will not comment on this objection in my decision.

- It refers to the FCA's Dispute Resolution: Complaints Sourcebook (DISP) rules, specifically, DISP rule 2.8.2r (2) which it believes confirms the position that the 'date of knowledge' is what starts the period of limitation.

- It considers that s.32 of the LA extends the time Mr and Mrs T had to bring their claim due to the alleged fraud and concealment on the part of the supplier.

Finally, a new claim was raised under s.75 of the CCA as one of the businesses in the timeshare supplier's corporate structure was placed in administration. The representative argues this was a breach of contract as the supplier was and is no longer able to provide the benefits of the contract.

Our investigator told Mr and Mrs T's representative that, as the breach of contract claim related to a separate event to their original claim and had not been raised directly with GE Money, it would not form part of this complaint. Mr and Mrs T's representative disagrees with the investigator's conclusion on this point.

As the complaint could not be resolved informally, it was passed to me for a decision.

Having considered the complaint in a provisional decision, I concluded it was not one that should be upheld in Mr and Mrs T's favour. But as the reasons that led me to that conclusion differed from the investigator's, I invited both parties to let me have any further evidence or arguments they wished me to consider.

My provisional findings were:

- Mr and Mrs T's claim for misrepresentation was likely brought too late under the LA. So, I thought GE Money's decision to decline their claim on that basis was fair.

- While Mr and Mrs T had referred to a claim under s.140A, they had not raised this with GE Money so it would not be appropriate for me to comment on it in my decision.

- The recently raised breach of contract claim did not form part of this complaint and would need to be raised directly with GE Money.

- I did not think the time Mr and Mrs T had to bring their claims could be extended by any of the provisions of the LA.

- I thought a claim that the loan agreement should be viewed as null and void could be considered as a standalone complaint. But having reviewed the evidence, I was not persuaded by the representative's arguments. I did not think the Spanish legislation and case law it was seeking to rely on had the effect it thought it did.

GE Money confirmed receipt of my provisional decision but it did not provide any further comments or evidence for me to consider.

Mr and Mrs T responded, disagreeing with my provisional conclusions. Their representative made further submissions which I have summarised below:

- The promotion, sale and delivery of the timeshare product took place in Spain. So, this service should consider Spanish law.

- The consideration of Spanish Law is mandatory by virtue of EU Directive 94/47/EU – 'Periodic Usage Rights for Holiday Properties and Tax Regulations'. It refers to the

regulations having been adopted by the UK Government of the time.

- The product violated EU Directive 94/47/EU, the product lacked 'business efficacy' and the vendor acted 'contrary to good faith'.

- It would be wrong to exclude Spanish law under the Unfair Terms in Consumer Contracts Regulations (UTCCR).

- Mr and Mrs T were entitled to a three-month cooling off period which was denied. Failure to provide such a cooling off period means the supplier could be liable to pay 100% exemplary damages.

- Section 11A (4) of the LA applies – providing a ten-year time limit, so Mr and Mrs T's claims for misrepresentation and breach of contract should be considered as in time.

- Not all of Mr and Mrs T's submissions have been commented on in the provisional decision.

- In this case, the Club sold a membership for over £16,000 but it did not receive any of the sums charged as the Club allowed its agents to retain all of the money by way of pre-ordained 100% commission. The agent and Club failed to disclose this 'secret commission'.

- Neither the Club nor the Club La Costa ("CLC") company structure owns any of the alleged holiday assets that could be provided to support the delivery of the holiday inventory it represented. CLC has created a 'complex web' of contractual arrangements, undisclosed structures, alleged holiday inventory, booking systems, property ownerships and contractual arrangements. The exact nature of 'the matrix has been concealed' from Mr and Mrs T.

- CLC were not a party to the sale of the product or finance, therefore had no interest in the proceeds of the sale, yet GE Money paid them the proceeds. Where and to whom the proceeds were sent to was concealed.

- The contract considered by the court in the case of Link Financial Ltd was the same as that entered by Mr and Mrs T. The court found an unfair relationship in that case.

- Mr and Mrs T maintain that the sale of this timeshare product amounts to fraud. The agent and the Club sold a membership in a 'worthless club' which, by design, could not fulfil its contract. The proceeds of sale were diverted away from the Club which was not part of the CLC group. Denying the Club any of the proceeds of sale, demonstrates the fraud was intentional.

- The agent and Club failed to provide and concealed all the necessary contractual documents including any and all arrangements which may have been in place. This left Mr and Mrs T financially exposed to others who they had no contractual relationship with.

- It is established that GE Money paid bribes to the CLC group structure and to sell it finance whilst unlawfully concealing 100% commission.

- Mr and Mrs T's loan was brokered by an entity not authorised by the Financial Conduct Authority or its predecessor, the Financial Services Authority. This is a breach of the Financial Services and Markets Act 2000 ("FSMA"). This renders the loan unenforceable.

The representative has asked this service to confirm whether GE Money has applied for and obtained a validation order and whether the FCA is considering authorisation issues in respect to CLC loans as it has done with cases related to another supplier.

Mr and Mrs T's representative also stated it had not had sight of GE Money's submissions. A copy of these submissions was sent to the representative following its response to my provisional decision. Following receipt of these submissions, the representative has said it has no further comments for me to consider.

Both parties have confirmed receipt of my provisional decision and have had the opportunity to provide any comments and evidence they want me to consider. So, it is now appropriate for me to issue my 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.

Under the rules that govern how I decide complaints, I must take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice when I make my decision.

Mr and Mrs T's representative has raised concerns that I have not commented on some of the points it raised. But it is not my role to provide comment on every point made. Instead, I focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read and considered everything that has been supplied to me, it is not necessary for me to comment on ach point if I do not consider it material to the outcome.

Having considered this case in full again, including all of the submissions received from the parties, I do not think it should be upheld. I appreciate this may come as a disappointment to Mr and Mrs T, but I hope the reasons I have set out below help them to understand why I have reached this conclusion.

Consideration of Spanish Law

Mr and Mrs T's representative considers that Spanish law applies to this transaction and should form part of my consideration when deciding what is fair and reasonable in this case.

As I set out in my provisional decision, Mr and Mrs T reside in England and the agreement is said to be governed by English Law. So, it is English Law that I shall take into account when deciding whether or not GE Money acted fairly in its investigation and decline of Mr and Mrs T's claim. Further, I am not excluding Spanish Law (as suggested by the representative), I am instead saying it is English Law that is applicable to my consideration of this case.

It is for the same reason that I am not persuaded that the Spanish legislation referred to has any direct application on whether the contract is voidable under English Law. Nor do I think Spanish Law implied any terms into the contract. So, I am not persuaded that either the timeshare agreement or the related credit agreement are voidable or that GE Money should do anything further in response to this part of the complaint.

If Mr and Mrs T consider a Spanish court to have jurisdiction over their contract with CLC and consider they would have a successful claim in that jurisdiction, it is for them to pursue that angle in a Spanish court should they wish to.

Claims under s.75 of the CCA

Mr and Mrs T say the timeshare supplier misrepresented the nature of the membership to them and that they have a claim for misrepresentation against the supplier. Under s.75 of the CCA, GE Money could be jointly liable for the alleged misrepresentations made by the timeshare supplier – subject to certain conditions being satisfied.

GE Money argued that any claim brought by Mr and Mrs T for any alleged misrepresentations was made too late under the provisions of the LA. I have considered that argument, and having done so, agree with what GE Money has said. For the avoidance of doubt, I have not decided whether the limitation period has expired as that would be a matter for the courts. Rather, I have considered whether GE Money has acted fairly in turning down the claim.

A claim for misrepresentation against the supplier would be brought under s.2(1) of the Misrepresentation Act 1967 ("MA"). A claim under s.2(1) MA is an action founded on tort for the purpose of the LA. The limitation period for actions founded on tort expires six years from the date on which the cause of action accrued (s.2 LA).

Mr and Mrs T brought a like claim against GE Money under s.75 of the CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim. Therefore, the limitation period for the s.75 claim expires six years from the date on which the cause of action accrued.

The date the cause of action accrued is the point at which Mr and Mrs T entered into the agreement to buy the timeshare in June 2006. It was at that time that they entered into an agreement, based, they say, on the misrepresentations of the timeshare supplier and suffered a loss. They say, had the misrepresentations not been made, they would not have bought the timeshare and Mr and Mrs T would not have taken out the associated loan.

It follows, therefore, that the cause of action accrued in June 2006. So, Mr and Mrs T had six years from that date to bring a corresponding claim. But they did not make a claim against GE Money until October 2017, which was outside the time limits set out in the LA. So I think GE Money acted fairly in declining this misrepresentation claim.

Mr and Mrs T's representative says it accepts this finding on limitation. But it says that Mr and Mrs T were sold an unlawful timeshare product which lacked business efficacy and that the supplier acted contrary to good faith. So, it considers s.11A (4) of the LA to apply which provides for a 10-year time limit, rather than six. It argues Mr and Mrs T's claim ought to be considered in time under this section.

I do not agree with the representative's argument on this point as I am not persuaded s.11A (4) of the LA applies to this case.

Section 11A of the LA relates to actions in respect of 'Defective Products'. The term 'Product' is defined in the Consumer Protection Act ("CPA") 1987 (which inserted s.11A into the LA). Most relevant is the definition of 'Product':

"product means any goods or electricity and…includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise…"

In turn, the CPA references the relevant EU Directive which defines 'product' as *"all movables even if incorporated into another movable or into an immovable. 'Product' includes electricity."*

It is clear that s.11A is aimed at physical products, including electricity, and not Mr and Mrs T's timeshare membership. So, I am not persuaded it is applicable to Mr and Mrs T's cause

of action.

Mr and Mrs T's representative also sought to raise a breach of contract claim in light of one of the businesses in the timeshare supplier's corporate structure having been placed in administration. But as I set out in my provisional decision, this is a new claim which falls outside of that originally raised to GE Money. So, it would not be appropriate for me to consider this claim within the scope of this final decision. Mr and Mrs T should contact GE Money directly should they wish to pursue a breach of contract claim.

The claims under S.140A of the CCA

Under this section, a court may make an order under s.140B of the CCA in connection with a credit agreement if it decides that the relationship between the lender and the creditor arising out of the agreement is unfair. Only a court has the power to make such a determination, but this is relevant law and I have taken it into account.

No claim was made to GE Money under s.140A of the CCA, but it was referred to in the 'skeleton argument' sent to our service in October 2017.

As I set out in my provisional decision, it is not appropriate for our service to consider complaints that the business was not given an opportunity to investigate. So, I am not going to comment further on this point other than to say, given the date Mr and Mrs T's loan was repaid, s.140A probably wouldn't apply in any event.

Could time be extended?

I set out in my provisional decision that the LA postpones the limitation period and effectively extends some time limits in certain circumstances. And having considered the facts of this complaint, I did not think the time limits I have set out above could be extended under any of the provisions of the LA.

Having reconsidered this case, including all the submissions sent by the parties, I maintain my conclusions on this point. I have set out my reasons for this below.

In response to my provisional decision, Mr and Mrs T's representative continues to believe that s.32 of the LA would extend the time they had to bring their claim. S.32 provides that in cases of fraud, concealment, or mistake, the limitation period only starts to run from when a claimant discovers the fraud, concealment or mistake (or could have discovered it using reasonable diligence).

In the matter of concealment, the representative has made substantive representations which I have summarised above. But at its core, the arguments centre on the impression that, as the Club sold the memberships but allowed its agent to retain all the money, this amounts to secret commission.

The representative also sets out at length that neither the Club nor the CLC company structure owns any of the alleged holiday assets that could be provided to support the holiday inventory. It considers CLC to have created a 'complex web' of contractual arrangements, undisclosed structures, alleged holiday inventory, booking systems, and property ownerships which was concealed from Mr and Mrs T. Leaving them financially exposed to others who they had no contractual relationship with.

It believes that, in addition to establishing concealment, it has demonstrated that the intentional set up of the corporate structure, routing of monies away from the Club and that the Club could not fulfil its obligations to the consumer, amounts to fraud. It also says it has

established that GE Money paid bribes to the CLC group.

I disagree with the representative's arguments and ultimate conclusions. I can't see what it was about the corporate structure or payment that was concealed from anyone. It just wasn't explicitly set out as I doubt the entire corporate structure of the CLC Group and its holdings would be of much interest to the purchasers when making a decision about whether or not they would like to buy a holiday product. And one part of the business selling the membership and another part of the structure taking funds does not amount to 100% secret commission.

In its summary, the representative said the product was "hideously complex" to understand with benefits "diluted by use of a complex corporate structure." But this does not amount to fraudulent representation and the representative hasn't been able to point to anything in Mr and Mrs T's contract that they were entitled to but haven't received due to the alleged fraudulent corporate structure.

I also disagree that the representative has established that GE Money was paying bribes, as they are commonly understood, to the CLC Group.

Overall, having taken everything into account, I am not persuaded that s.32 of the LA extends time in this case. So, I remain of the opinion that GE Money acted fairly when it chose to rely on the LA in declining Mr and Mrs T's claim.

Unauthorised broker

The representative has asked this service whether GE Money has applied for and obtained a validation order and whether the FCA is considering authorisation issues in respect of CLC loans. As these are questions for the FCA, I suggest the representative contact the FCA directly with any concerns or questions it may have surrounding validation orders and the FCA's regulatory functions.

This final decision will instead focus on the claim and complaint Mr and Mrs T originally raised to GE Money and whether GE Money fairly responded to their concerns.

In its most recent submissions, the representative says Mr and Mrs T's loan was brokered by an entity not authorised by the FCA. It considers this to be a breach of s.19 of FSMA. It argues the loan is therefore unenforceable and this entitles Mr and Mrs T to recover monies paid.

I can't see that this complaint point was raised with GE Money when Mr and Mrs T originally made their claim and complaint in 2017. So, as per the DISP rules, it is not one I have the power to consider within this decision. Should Mr and Mrs T wish to pursue this complaint point, they should contact GE Money to raise a new complaint.

My final decision

For the reasons set out above, I do not uphold Mr and Mrs T's complaint against GE Money Consumer Lending Limited trading as GE Money Home Lending.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T and Mrs T to accept or reject my decision before 19 September 2023.

Lucy Wilson
Ombudsman