DRN-4233600

The complaint

Mr B and Mrs B complain that GE Money Consumer Lending Limited ("GE Money") unfairly turned down their claims including claims they made under sections 75 and 140A of the Consumer Credit Act 1974 ("CCA").

Mr B and Mrs B are represented by a claims management company but I'll refer generally to anything that's been said on their behalf as if they said it themselves, to keep things simple.

What happened

Mr B and Mrs B bought a timeshare product from a business (that I'll call C) on 20 December 2006. The product cost nearly £15,000 and Mr B and Mrs B took out a loan in joint names with GE Money to part fund the purchase. Mr B and Mrs B say misrepresentations were made by C at the outset and GE Money may be held equally liable with C under section 75 CCA. They also consider the circumstances gave rise to an unfair relationship between them and GE Money under section 140A CCA. Among other things, they feel they were treated unfairly during the sale process and pressured into making the purchase. And they say the relationship was unfair due to the terms of the timeshare agreement and the loan – and things done (or not done) by GE Money and/or C on behalf of GE Money. They also consider GE Money failed to check properly if they could afford the loan.

Mr B and Mrs B contacted GE Money in January 2021, via their representatives, and GE Money responded shortly after rejecting the claims. GE Money said it didn't retain much information about the loan - due to the passage of time – but it was repaid on 26 January 2009 and Mr B and Mrs B's claims were raised too late under the Limitation Act 1980 ("LA).

Mr B and Mrs B didn't think that was fair and they referred the matter to our service. One of our investigators considered the evidence and he didn't think GE Money needed to do anything else. He said the claims raised were brought too late under the LA so GE Money didn't need to consider the substance. And he didn't think there was enough evidence to show that the loan was unaffordable for Mr B and Mrs B.

Mr B and Mrs B asked for the matter to be referred to an ombudsman for review. Their representatives made detailed submissions as to why they consider the claims were brought in time - referring to various English and Spanish laws, Spanish court judgments and section 14A of the LA, among other things. I've summarised these below:-

- Section14A LA applies to extend time because GE Money owed Mr B and Mrs B a duty of care to ensure that C complied with the law and it was wrong of GE Money to provide a loan for this sort of timeshare;
- The Timeshare Act 1992 applies to this agreement and (among other things) advance payments made by GE Money (in breach of duty) contravene legislation and gives rise to an unfair relationship under section 140A CCA;
- Spanish Courts have ruled that 'points-based' and 'floating weeks' timeshares are null and void - and the UK Courts should reach the same conclusion - if the contract does not accurately describe accommodation, including the specified time for use;
- The timeshare agreement wasn't compliant with UK and European legislation

meaning it's null and void, the ombudsman should comment specifically on this and if the timeshare agreement is null and void, so is the loan - as these are "related" agreements under the CCA - which also gives rise to an unfair relationship under section 140A;
- Mr B and Mrs B couldn't have known the agreement was null and void until they took advice in 2020 so they had three years from then to claim under the 'date of knowledge rule' and the investigator failed to consider this.

Having considered the evidence available, I wasn't minded to uphold the complaint. My reasons weren't quite the same as the investigator's however - I thought this service is unable to consider some parts of the complaint which fall outside our jurisdiction and Mr B and Mrs B's representatives also raised new points after the investigator provided his view. I considered it was fair to let the parties see my provisional findings and make further submissions (if they wanted to) and I issued my first provisional decision on 9 March 2023. This forms part of my final decision and I've summarised what I said below.

My first provisional decision

I explained that I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I wasn't minded to tell GE Money to do anything further to resolve the matter and I went on to set out why.

I said where evidence is incomplete, inconclusive or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances. In addition I have to take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice (where appropriate) when I make my decision. I assured the parties, if I don't address every point that's been raised, it's not because I haven't thought about it. I've considered everything that's been said and sent to us but I was going to concentrate on what I think is relevant and material to reaching a fair and reasonable outcome.

I'd already explained (in a separate decision issued to the parties) why this service doesn't have jurisdiction to consider the complaints Mr B and Mrs B raised about affordability and under section 75 CCA. I was satisfied those claims and claims under 140A CCA are separate causes of action however, different considerations apply and I would deal with the remainder of the complaint in this decision.

Among other things, Mr B and Mrs B say there were various acts and omissions by C and GE Money that made the relationship between them and GE Money unfair. I was satisfied the relevant "regulated activity" is the exercise of a "lender's rights and duties under a regulated credit agreement" and this service has jurisdiction to consider such complaints since 6 April 2007. I thought the acts and omissions complained about would have occurred at the time of sale and throughout the duration of the loan agreement - from 2006 until 2009 and I was satisfied we are able to look into the section 140A complaint.

<u>Section 140A CCA</u>
I explained that under this section a court may make an order under section 140B 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 I thought this is relevant law and I took it into account.

The LA applies to a claim under section140A and I was satisfied the relevant limitation period is six years and time starts to run here from the date the credit agreement ended. GE Money supplied evidence that indicates this loan was paid off on 26 January 2009. In a letter

to this service (dated 14 May 2021) Mr B and Mrs B's representatives said the loan wasn't repaid until 25 August 2011 - but they hadn't provided any evidence of that.

From the evidence I'd seen, I found it likely this loan was settled in 2009 but, even if I accepted the loan didn't end until 2011, I was satisfied that Mr B and Mrs B didn't contact GE Money about their claim until 2021 – which is more than six years later. They didn't bring their section 140A claim within the time limits set out in the LA and I didn't think it was unreasonable for GE Money to take this into account when it declined their claims.

Additional arguments on limitation

Mr B and Mrs B referred to section 14A LA - which provides for a second period in which a claim for negligence can be made but I didn't think this provision assisted them in the circumstances here. Looking at what happened, when they bought the timeshare and took out the finance, I wasn't persuaded a duty of care arose or advice was provided that could give rise to a claim to which section 14A could apply.

I also considered section 32 LA - which provides (in relevant cases) that the limitation period only starts to run from when a claimant discovers fraud, deliberate concealment or mistake (or could have discovered it using reasonable diligence). Mr B and Mrs B's representatives hadn't set out how this would apply here specifically. And, based on what I'd seen, I wasn't persuaded that there was any relevant fraud, deliberate concealment or mistake.

I thought about commission that they said might have been paid by GE Money to C for arranging the loan – and whether GE Money was obliged to disclose that. GE Money hasn't supplied the details of what, if anything, was paid. From what I'd seen across the industry, if commission was ever paid it tended to less than 10%. I was satisfied GE Money didn't breach any duty in making such a payment – nor was it under any regulatory duty to disclose the amount of commission paid in these circumstances. And I didn't think the levels of commission normally paid in this situation were sufficiently high to mean that GE Money should have appreciated not disclosing commission to Mr B and Mrs B risked the relationship being unfair under section 140A.

I wasn't persuaded that Mr B and Mrs B are able to rely on section 32 LA to extend time and I'd seen nothing to show that C was acting as agent to Mr B and Mrs B. I didn't think C's role was to make an impartial or dis-interested recommendation about taking out the loan and C didn't need to disclose the fact that it might have received a commission. I thought any commission paid was unlikely to be more than 10%. So, even if I was satisfied that Mr B and Mrs B could rely on section 32 LA to assist with this part of their complaint, I wasn't persuaded it's likely a court would conclude that any commission paid created an unfair relationship under section 140A.

Mr B and Mrs B's representatives also referred to the "three years from the date of knowledge rule". By this I thought they probably meant time limits set out in our rules (known as the "DISP" rules) under which a consumer can make a complaint to a business within six years of the event happening - or three years from the time the consumer realised they had a reason to complain. The "DISP" rules apply to Financial Conduct Authority ("FCA") governed complaint handling - they don't operate to extend the time periods set out in the LA – which is the reason GE Money decided to turn down the relevant claims here, That's why I've considered the operation of the LA and, for the reasons given, I thought the section 140A claim is out of time under that legislation.

Was the loan voidable?

Mr B and Mrs B's representatives argued that the timeshare agreement was 'null and void' which means the related loan was voidable and they want to rescind. If the timeshare agreement was voidable, I thought it likely the related loan was also voidable on the

recission of the agreement it was used to fund. This is something that could be considered under a section 140A CCA claim but I thought that claim was brought too late. This could also be a freestanding claim in its own right however so I considered it separately.

Mr B and Mrs B's representatives refer to an EU Directive, some Spanish legislation and a Spanish court judgment which (they say) taken together, demonstrate that a timeshare that provides for a 'floating week' or the ability to use points to book holidays with a provider, is a voidable agreement. I didn't agree that Mr B and Mrs B's timeshare agreement is voidable. I was satisfied the timeshare agreement states that it's governed by English law. And I didn't think that Spanish law or the Spanish judgment (which relates to a different product, in any event) can be applied directly to the question of whether the contract is voidable under English law.

Having considered relevant legislation, rules and regulations, I couldn't see anything that would have the effect that Mr B and Mrs B's representatives suggest. I noted a House of Commons Library Briefing Paper, "Timeshares: common problems faced by UK owners", said 'floating week' or 'points' based timeshares were basic timeshare models and they weren't described as being problems in and of themselves. I wasn't persuaded that either timeshare agreement or the related credit agreement is voidable as suggested (and I'd seen nothing else that would lead me to this conclusion).

In conclusion

I explained that I thought GE Money fairly considered the things it needed to when it said Mr and Mrs B's claims were brought too late. Ultimately, it's for the courts to decide whether or not any claim that they may have against the supplier or GE Money has expired under the LA. But, as far as I could see from the information available, any such claim has most likely exceeded the time limits set out in that legislation. I thought it was reasonable to take this into account and I wasn't persuaded that GE Money acted unfairly in declining the claim.

Responses to my first provisional decision

GE Money had nothing further to add and Mr B and Mrs B disagreed with my provisional conclusions. S supplied more detailed submissions which I've summarised below.

I was grateful that S confirmed it's not stating that the timeshare agreement is void or saying that points based or floating weeks timeshares were prohibited from sale under English law and it accepted this timeshare agreement is governed by English law. Referring to my provisional conclusion that the section 140A claim was likely time barred under the LA, S also clarified that it did not mean to refer to the DISP rules when raising the "three years from the date of knowledge "argument - it was referring instead to three years as allowed under section 14A LA.

S referred me again to earlier submissions about alleged breaches of The Timeshare Act 1992 by C and GE Money. S argued that a failure to provide information required by that legislation in this timeshare agreement means C committed an offence and the withdrawal period is extended from 14 days to 3 months and 10 days during which time no advance payment can be made but GE Money made an advance payment to C during this time. S submits that making an advance payment within the extended withdrawal period means GE Money acted in breach of timeshare legislation and it also negligently breached a duty of care owed to Mr B and Mrs B.

S went on to say this not only renders the relationship between Mrs B and Mr B and GE Money unfair under section 140A but it extends the limitation period for such a claim under section 14A LA. S considers the section 140A CCA claim is not time barred therefore because time only started to run (under section 14A LA) three years from the date that Mr B

and Mrs B became aware of the breach - which was when they approached S for advice in 2020.

I wasn't persuaded to change my mind but, in light of the detailed new submissions and the additional arguments S raised, I thought it was fair to explain why in another provisional decision and allow the parties an opportunity to respond (if they wanted to) before I made my final decision. I issued a second provisional decision (which also forms part of my final decision) and I've summarised what I said there below.

My second provisional decision

I explained that, having thought carefully about the points raised, I considered the crux of the matter is whether time for bringing the section 140A CCA claim can be extended under section 14A LA and I wasn't persuaded that it can - for the reasons I'd given already and as expanded upon below.

Relevant UK timeshare legislation

S referred to various provisions under UK timeshare legislation - including the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the 2010 Regulations"). I reminded the parties that Mr B and Mrs B took out this timeshare agreement in 2006 - so the relevant timeshare legislation here is the Timeshare Act 1992 ("the 1992 Act") as amended (following an EU Directive) under the Timeshare Regulations 1997. The 1992 Act was repealed and replaced (following EU Directive 2008/122/EC) under the 2010 Regulations which came into force in February 2011. The 2010 legislation does not therefore apply to Mr B and Mrs B's timeshare agreement.

Section 14A LA

I set out the wording of this provision and explained why I couldn't see that GE Money owed Mr B and Mrs B the sort of duty of care required in this situation. I was satisfied that the claims raised by Mr B and Mrs B here are purely financial - that is, loss which is not dependent on personal injury or direct property damage. And this type of loss is not generally recoverable in negligence unless (broadly speaking) there has been an assumption of responsibility by the other party – such as in the provision of professional services or advice.

I thought GE Money had an obligation to supply sufficient information about the finance in order to enable them to decide if they wanted to take out the loan but I'd seen nothing to show GE Money took on a higher obligation – by providing advice, for example. And I wasn't persuaded that a duty of care arises to which section 14A would apply. I was satisfied that GE Money wasn't required to supply information in connection with the timeshare agreement itself. The requirement to provide information was in connection with the loan agreement - not any associated purchase.

I thought S also seemed to suggest that GE Money had a relevant duty of care because it was required to protect borrowers from purchasing timeshare products/entering into timeshare agreements that didn't comply with relevant legislation. I wasn't satisfied that this timeshare agreement was non-compliant but, even if I accepted that it was, I saw no grounds to find GE Money was required to ensure that any such agreement complied with the relevant legislation. I thought an obligation like that would require a level of due diligence that's not generally required of a lender in this situation and I'd need some compelling evidence to show that it's likely GE Money assumed such responsibility in these particular circumstances. I'd seen nothing to suggest that's the case - and I wasn't persuaded it's likely.

S states that GE Money itself was in breach of relevant timeshare legislation by

making an advance payment within the withdrawal period and this breach of legislation amounts to negligence. By this I think S is referring to Regulation 10 of the 1997 Regulations. I was satisfied that GE Money wasn't the "offeror" here so, even if I accepted the withdrawal period was extended as suggested, I wasn't persuaded that GE Money breached the relevant legislation by making any advance payment.

I explained it's for the courts to decide whether or not any claim against C or GE Money has expired under the LA. But, as far as I could see, any section 140A claim is likely to have been made outside the relevant time limit and I was unable to fairly require GE Money to take any steps to put things right.

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.

S provided a detailed response to my second provisional decision running to 21 pages with several documents annexed. I have considered these submissions carefully but I'm not going to repeat everything that S said here. I think S makes a number of points that have been raised previously, I'm satisfied I've dealt with those already and nothing that's been supplied since has persuaded me to change my mind.

I'm grateful to S for clarifying that it accepts C was the offeror under the 1992 Act (as I said in my provisional decision) and responsibility for ensuring compliance with the legislation rested directly with C not GE Money. S goes on to disagree with my interpretation of sections 140A CCA, 14A LA and the 1992 Timeshare Act in particular - as far as this legislation relates to Mr B and Mrs B's claim – and seeks to address the specific merits of their section 140A claim. For the reasons I've given already, I remain satisfied that claim is out of time under the LA so GE Money didn't have to deal with the substance.

I realise S considers time should be extended under section 14A LA – it says Mr B and Mrs B's claim is not purely financial – it relates to a timeshare purchase so it is property related. And there is an assumption of responsibility by C who was GE Money's agent (under section 56 CCA) and the negligent party that sold the timeshare to Mr B and Mrs B. I'm not persuaded by these arguments however - I think S is confusing the role of section 56 CCA in an assessment of unfairness under section 140A with the grounds to extend time under section 14A LA. And, for the reasons explained already, I remain of the view section 14A does not apply in the circumstances here.

S has also made reference to a decision made by another ombudsman - which was considered recently by the courts. I'm satisfied that wasn't concerned with limitation and it involved a different type of timeshare to the one Mr B and Mrs B purchased here. And I'm not persuaded the outcome of that other decision impacts on what I have to consider in this case.

I've dealt with S's arguments (insofar as they're material and relevant to my reaching a fair and reasonable outcome in this complaint) and, for the reasons set out, I remain of the view this claim was brought too late under the LA. Nothing that's been said or sent to us has persuaded me to change my mind. I'm satisfied that section 14A doesn't apply in these particular circumstances. I consider any section 140A claim is likely to have been made outside relevant time limits and it's reasonable to take that into account. It follows I can't fairly require GE Money to do anything further.

I realise this decision is likely to come as a disappointment to Mr B and Mrs B and I'm sorry if they feel let down. They're not obliged to accept what I've said however - in which case it

remains open to them to pursue this matter by any other means available.

My final decision

For the reasons set out above, my decision is I am unable to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 4 August 2023.

Claire Jackson
Ombudsman