DRN-4209856

The complaint

Mr M and Mrs M complain that GE Money Consumer Lending Limited ("GE Money") unfairly turned down claims they made under the Consumer Credit Act 1974 ("CCA") and failed to carry out proper checks before lending.

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

What happened

In February 2002 Mr M and Mrs M bought a timeshare membership (three hundred points in a vacation club) from a supplier (that I'll refer to as C). The timeshare cost over £3,000 and they took out a joint loan with GE Money to fund the purchase, which was repayable over 120 months at about £55 a month.

S claims that misrepresentations were made at the point of sale and there were breaches of the timeshare contract. S considers GE Money may be held equally liable for those under section 75 CCA and the circumstances gave rise to an unfair relationship between Mr M and Mrs M and GE Money under section 140A CCA. In summary, S says Mr M and Mrs M bought the timeshare to have different travel options and then sell it but they found it difficult to secure the holidays they wanted when they wanted - they had to book a long way in advance, which was unrealistic and wasn't explained at the outset. In addition, they've been unable to sell due to a glut on the market and didn't realise the contract refers to floating weeks, not a specified property for a period in the year. S says this sort of agreement has been found to be null and void under an EU Directive and Mr M and Mrs M wouldn't have purchased the timeshare, and taken out the loan, if they'd known what C said wasn't right. They were also unaware that the loan interest rate was 16.4% and they consider GE Money failed to carry out proper affordability checks before lending.

In August 2021 Mr M and Mrs M contacted GE Money about their claims and GE Money rejected the complaint. GE Money said the loan was paid off on 20 April 2009, any relevant information would have been destroyed around six years later and, given the date of the transaction, Mr M and Mrs M's claims were made too late under the Limitation Act 1980 ("LA").

Mr M and Mrs M referred the matter to our service and one of our investigators looked into things. He thought the claims were brought too late under the LA and GE Money didn't need to do anything else. Unhappy with that outcome Mr M and Mrs M asked for an ombudsman's decision. S doesn't think claims are out of time under the LA and made further submissions which I've summarised below:-

- Section14A LA applies to extend time as GE Money owed Mr M and Mrs M 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 here 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 M and Mrs M couldn't have known the agreement was null and void until they took advice from S in October 2020 so they had three years from then to claim under the 'date of knowledge rule' but the investigator failed to consider this.

Having considered the evidence, I wasn't minded to uphold the complaint but my reasons were a bit different to the investigator's and I'd considered additional issues. I thought it was fair to let the parties see my provisional findings and make further submissions (if they wanted to). I issued two provisional decisions (which form part of my final decision) and I've summarised these below.

My first provisional decision

I explained that I'd considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. And, 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 said 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. And if I don't address every point that's been raised, it's not because I haven't thought about it. I have considered everything that's been said and sent to us but I intend to concentrate on what I think is relevant and material to reaching a fair and reasonable outcome overall.

I explained in a separate decision why this service doesn't have jurisdiction to consider the complaint brought under section 75 CCA. I was satisfied the claims raised under sections 75 and 140A CCA are separate causes of action however, different considerations apply and I would deal with the merits of the remainder of the complaint in this decision.

Among other things, Mr M and Mrs M 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 February 2002 until April 2009. I was satisfied that GE Money was regulated during this time and we are able to look into the section 140A complaint.

<u>The claim under s.140A CCA</u>
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 considered this is relevant law and I took it into account. The LA applies to a claim under section140A CCA and I was satisfied the relevant limitation period is six years. I thought it

looked as if this loan was paid off by 20 April 2009 and Mr M and Mrs M would have needed to bring an action by 2015. They didn't and I considered their section 140A was raised too late.

I explained that I'm not deciding if any right that Mr M and Mrs M may have to bring these claims has expired under the LA - that's a matter for the courts. I'm looking at whether GE Money has acted fairly and reasonably and I didn't think it was unreasonable of GE Money to take limitation into account when it decided to decline Mr M and Mrs M's claim. I realised Mr M and Mrs M may say they didn't know about the time limits referred to but that's not generally accepted as grounds for extending the limitation period and I went on to consider other arguments below.

Arguments on limitation

S referred to section 14A LA which provides for a second period in which a claim for negligence can be made. I wasn't persuaded that this provision assists Mr M and Mrs M in these particular circumstances. Looking at what happened when they purchased the timeshare and took out the finance, I thought there was an obligation to provide sufficient, appropriate and timely information to enable them to make an informed choice about whether to take out the loan. But I couldn't see that a duty of care arose - or advice was provided - that could give rise to a claim to which section14A LA could apply.

I considered section 32 LA which says - in cases of fraud, deliberate 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). Mr M and Mrs M's representatives hadn't set out how this would apply here specifically and, based on what I'd seen, I didn't think there was any fraud, deliberate concealment or mistake. In a statement they provided Mr M and Mrs M say they were involved with C for some years before they made this purchase and they booked and took several holidays during this time. I thought it more likely than not they used this timeshare product not long after purchase. So, even if I were to accept that section 32 applied, they probably would have realised they weren't receiving the services they expected and/or the benefits they say they were told would be provided fairly early on – given the nature of the misrepresentations alleged. And I was minded to find they likely had enough information to start the clock running not long after they purchased this timeshare.

S also made reference to concerns around commission arrangements - that might have been paid by GE Money to C for arranging the loan and the failure to disclose that. I hadn't seen any evidence about what, if any, commission was paid. If commission was paid, I thought it was likely to have less than 10% - based on what I've seen across the industry. I was satisfied that 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 the circumstances. And I didn't think the levels of commission that are normally paid in this situation were sufficiently high to mean that GE Money should have appreciated not disclosing commission to Mr M and Mrs M risked the relationship being unfair under section 140A.

I wasn't persuaded that Mr M and Mrs M are able to rely on s.32 LA. And I'd seen nothing to show that C was acting as agent to them or that its role was to make an impartial or dis-interested recommendation about taking out the loan. I didn't think C needed to disclose the fact that it might have received a commission to Mr M and Mrs M in this situation. I thought any commission paid here was unlikely to be more than 10% so, even if I was satisfied that Mr M and Mrs M 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 debtor-creditor relationship.

S mentioned another decision made by this service and the "three years from the date of

knowledge rule". I thought they were referring to time limits set out under 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 of when a consumer realised they had a reason to complain. The "DISP" rules apply 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 and that's why I've considered that legislation here.

Is the agreement 'null and void'?

S also argued that the timeshare agreement was "null and void" which creates an unfair relationship between Mr M and Mrs M and GE Money under section 140A and renders the loan, a related agreement, null and void. If the timeshare agreement was voidable as suggested it's possible the loan was voidable - on recission of the agreement it was used to fund. This is something that could be considered under a section140A claim. I thought that claim was brought too late but I accepted this could be a freestanding claim in its own right and I went on to consider it separately.

Among other things, I was referred to an EU Directive, some Spanish legislation and a Spanish court judgment which S considers show that a timeshare which provides for a "floating week" (or the ability to use points to book holidays with a provider) was a voidable agreement. I wasn't persuaded that's right. S seemed to accept the timeshare agreement is governed by English (not Spanish) law and I wasn't persuaded that Spanish legislation and/or judgments can be applied directly to the question of whether the timeshare contract is voidable under English law. I hadn't been asked to consider any specific provision that would point to this timeshare being voidable.

Having considered the relevant legislation, rules and regulations, I couldn't see anything which would have the impact S suggests. A House of Commons Library Briefing Paper, "Timeshares: common problems faced by UK owners" says a 'floating week' or 'points' based timeshare were basic timeshare models - they weren't described as being problems in and of themselves. I didn't think these types of agreement have been prohibited from sale under English law - either at the time of Mr M and Mrs M's purchase or after. And, based on the current evidence, I wasn't persuaded that the relevant agreements here are voidable.

Unaffordable lending

Mr M and Mrs M also say it was irresponsible of GE Money to provide this loan and proper credit checks were not carried out. This service doesn't have jurisdiction to consider complaints about the affordability of point of sale loans taken out before the change in regulation on 6 April 2007. This means I was unable to consider a complaint about the decision to lend to Mr M and Mrs M in February 2002 and it wouldn't be appropriate for me to comment further on this aspect of the complaint.

In conclusion, I thought GE Money fairly considered the things it needed to when it said the relevant claims were brought too late. It's ultimately for the courts to decide whether or not any claim that Mr M and Mrs M may have against C or GE Money has expired under the LA. But, as far as I could see from the information available, any relevant claim they might have has most likely exceeded the time limits set out in the LA, it's reasonable to take this into account in these circumstances and I wasn't persuaded that GE Money acted unfairly in declining this complaint.

Responses to my first provisional decision

GE Money had nothing further to add and Mr M and Mrs M disagreed with my provisional conclusions. S supplied additional detailed submissions which are summarised below.

S confirmed it's not stating that the timeshare agreement is void or points based or floating weeks timeshares were prohibited from sale under English law and it accepts 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 clarified that it did not mean to refer to the DISP rules when raising the "three years from the date of knowledge "argument but rather the three years allowed under section 14A LA. S referred me to its previous submissions about alleged breaches of The Timeshare Act 1992 by C and GE Money. In particular, S argued that a failure to provide information required by that legislation in this timeshare agreement means C committed an offence, the withdrawal period is extended from 14 days to 3 months and 10 days and no advance payment can be made during this period - but GE Money made such a payment to C.

S considers 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 M and Mrs M. S thinks this, not only renders the relationship between Mrs M and Mr M and GE Money unfair under section 140A, but also extends the limitation period for such a claim under section 14A LA. S argued that 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 M and Mrs M became aware of the breach - which was in October 2020, when they approached S for advice.

I wasn't persuaded to change my mind but, in light of the new submissions and additional arguments S raised, I thought it was fair to explain why in more detail in a second provisional decision - and give the parties the chance to consider this and respond (if they wanted to) before I made my final decision. I've summarised the findings set out in my second provisional decision (which also forms part of my final decision) below.

My second provisional decision

In my second provisional decision I said I thought the crux of this matter is whether time for bringing the section 140A CCA claim can be extended under section 14A LA. I wasn't persuaded it can for the reasons I'd given already - and I expanded upon this further.

Relevant UK timeshare legislation

S referred in correspondence to various provisions under UK timeshare legislation - including the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the 2010 Regulations"). S acknowledged that Mr M and Mrs M took out this timeshare agreement in 2002 and the relevant timeshare legislation is the Timeshare Act 1992 ("the 1992 Act") as amended by 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 so I was satisfied that the 2010 legislation does not apply to Mr M and Mrs M's timeshare agreement.

Section 14A LA

I set out the wording of this provision and explained why I can't see that GE Money owed Mr M and Mrs M the sort of duty of care required. I was satisfied that their claim against GE Money under section 140A is purely financial – that is, not a loss which is dependent on personal injury or direct property damage - and this type of loss is not generally recoverable in negligence unless (broadly speaking) there's been an assumption of responsibility by the allegedly negligent party (such as in the provision of professional services or advice). I thought GE Money had an obligation, in this instance, to supply sufficient information about the finance in order to enable Mr M and Mrs M to decide if they wanted to take this out. But I'd seen nothing to show that GE Money took on a higher obligation (by providing advice, for example) and I couldn't see that a duty of care arises to which section 14A would apply. The requirement for GE Money to provide information was in connection with the loan agreement

- not any associated purchase – and GE Money wasn't required to supply information in connection with the timeshare agreement itself.

I thought S may also be suggesting 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 timeshare legislation. I wasn't satisfied that this timeshare agreement was non-compliant but, even if I accepted that, 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. I said I'd need some compelling evidence to show that GE Money assumed such responsibility. I'd seen nothing to suggest that's the case and I wasn't persuaded it's likely.

Finally, S stated that GE Money itself breached timeshare legislation directly by making an advance payment within the withdrawal period - which 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" referred to in the relevant legislation so, even if I were to accept the withdrawal period was extended as suggested, I wasn't persuaded that GE Money breached the relevant legislation by making any advance payment.

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 very detailed response to my second provisional decision (over 21 pages with several documents annexed) which I have considered carefully. I'm not going to repeat all of S's submissions here. I think they include a number of points that have been raised before, I'm satisfied I've dealt with those already and nothing that S has said 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.

I note S disagrees with my interpretation of sections 140A CCA, 14A LA and the 1992 Timeshare Act in particular - as far as this legislation relates to Mr M and Mrs M's claim. S goes on to address the merits of the section 140A claim but, for the reasons I've given already, I remain satisfied that's out of time under the LA.

S seeks to persuade me that time should be extended under section 14A LA – it says Mr M and Mrs M'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 M and Mrs M. I'm not persuaded by these arguments. 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 made reference to a decision made by another ombudsman which was considered recently by the courts. That wasn't concerned with limitation and it involved a different type of timeshare to the one Mr M and Mrs M 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 think any section 140A claim is likely to have been made outside relevant time limits, I consider it's reasonable to take that into account and I can't fairly require GE Money to do anything further.

I realise this decision is likely to come as a disappointment to Mr M and Mrs M 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 M and Mrs M to accept or reject my decision before 4 August 2023.

Claire Jackson
Ombudsman