DRN-4244744

The complaint

Ms P and Mr W say that GE Money Consumer Lending Limited ("GE") unfairly handled their claims under section 75 and 140A of the Consumer Credit Act 1974 ("CCA").

What happened

In or around January 2006, Ms P and Mr W agreed to purchase a trial membership in a timeshare product with a supplier who I'll refer to as "C".

In or around July 2006, Ms P and Mr W attended a meeting and presentation with C in which they agreed to upgrade their trial membership to a full points-based membership with C. The cost of the points-based membership was £13,441, less a £4,595 trade-in allowance against their existing trial membership. The balance of £8,846 was funded with a fixed sum loan in their joint names - provided by GE. The loan was repaid by Ms P and Mr W from their personal savings in November 2006.

In or around August 2007, Ms P and Mr W attended a further meeting and presentation with C in which they agreed to upgrade their membership by purchasing a further 501 points. The total cost of £5,947 was funded with a fixed sum loan in their joint names – also provided by GE.

On 25 September 2018, using a professional representative ("the PR"), Ms P and Mr W submitted claims to GE under the CCA. The original letter of claim runs to several pages. So, it isn't practical to repeat them in full here. But I will provide a summary of the key points below.

The PR allege that Ms P and Mr W purchased the Points Membership and points upgrade having relied upon misrepresentations made by C and, under section 75 of the CCA ("S75"), GE is jointly liable for those misrepresentations. The PR also suggested that those misrepresentations, amongst other things, led to an unfair debtor-creditor relationship under section 140A of the CCA ("S140A").

In particular, the PR allege that the following statements of misrepresentation were made by C as benefits and features associated with the purchase of the timeshare points product:

- Ms P and Mr W could divest themselves from the product by selling or renting out the rights purchased;
- they would be able to holiday at any resort they wished in high season with accommodation of the same standard as experienced during they were currently enjoying;
- annual management fees would only increase in line with inflation; and
- a compliance officer was presented as being impartial.

The PR also thought there'd been various regulatory and legislative breaches together with other reasons why the purchases had led to an unfair debtor-creditor relationship under S140A. In particular:

- the obligation to pay Management Charges for the duration is unfair under Regulation 5 of the Unfair Terms in Consumer Contract Regulations 1999 ("UTCCRs").

- Ms P and Mr W were not informed they could exit the Points Membership by simply giving notice; and
- at no point was an assessment of Ms P's and Mr W's credit worthiness completed resulting in the decision to lend being irresponsible.

GE weren't able to locate records of Ms P and Mr W's loans with them. So, with their claim remaining unresolved, the PR referred their complaint to this service.

Having considered all the information available, our investigator thought Ms P and Mr W's claim had been brought too late under the provisions of the Limitation Act 1980 ("the LA") and didn't think there was any reason that the limitation could be postponed. Our investigator also couldn't find any evidence to suggest the loans were unaffordable for Ms P or Mr W, or that there was any other reason to uphold their complaint.

The PR didn't agree with our investigator's findings. Whilst they accepted that the claim had been made beyond the usual limitation, given Ms P and Mr W's *"date of knowledge was several years later"* they believe the time limit should be extended under section 32 of the LA ("S32"). In particular they believe C had deliberately concealed aspects of the product including:

- that members could exit their membership at any time by giving 28 days' notice; and
- the term of the Points Membership was in perpetuity, contrary to Spanish Law, and therefore unlawful.

As an informal resolution couldn't be reached, Ms P and Mr W's complaint has been passed to me to consider and 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.

Relevant Considerations

When considering what's fair and reasonable, DISP 3.6.4R of the FCA Handbook means I'm required to take into account; relevant law and regulations, relevant regulatory rules, guidance and standards and codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time.

S75 provides protection to consumers for goods or services bought using credit. Ms P and Mr W paid for the timeshare products using restricted use fixed sum loan agreements. So it isn't in dispute that S75 applies here. This means that Ms P and Mr W are afforded the protection offered to borrowers like them under those provisions. And as a result, I've taken this section into account when deciding what's fair in the circumstances of this case.

S140A looks at the fairness of the relationship between Ms P, Mr W and GE arising out of the credit agreements (taken together with any related agreements). And because the products purchased were funded under the credit agreements, they're deemed to be related agreements. Only a court has the power to make a determination under S140A. But as it's relevant law, I've considered it when deciding what I believe is fair and reasonable.

Given the facts of Ms P and Mr W's complaint, relevant law also includes the LA. This is because the original transactions - the purchases funded by a loans with GE - took place in 2006 and 2007. Only a court is able to make a ruling under the LA, but as it's relevant law, I've considered the effect this might also have.

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

service. And this service isn't able to make legal findings – that is the role of the courts. Where a consumer doesn't accept the findings of an ombudsman, this doesn't prejudice their right to pursue their claim in other ways.

Where evidence is incomplete, inconclusive, incongruent or contradictory, my decision is made on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the evidence that's available from the time and the wider circumstances. In doing so, my role isn't necessarily to address in my decision every single point that's been made. And for that reason, I'm only going to refer to what I believe are the most salient points having considered everything that's been said and provided.

Was the claim of misrepresentation under S75 made in time?

The PR says the supplier misrepresented the nature of the purchase agreements and benefits to Ms P and Mr W when they agreed to purchase the products. And they believe this could bring cause for a claim under S75.

But a section 75 claim is *"an action* [that is, court action] *to recover any sum by virtue of any enactment"* under section 9 of the LA. And the limitation period under that provision is six years from the date on which the cause of action accrued. So here, Ms P and Mr W had to make a claim within six years of when they entered into the purchase contract and credit agreement. The PR confirm these took place in July 2006 and August 2007. That's because this is when they say Ms P and Mr W lost out having relied upon the alleged false statements of fact at that time.

Details of the alleged misrepresentations were submitted by the PR to GE in September 2018. But as this was more than six years after the purchase was completed and Ms P and Mr W first say they lost out; I believe a court is likely to find that their claim falls outside of the time limit permitted in the LA.

Was the unfair relationship claim under S140A made in time?

A claim under Section 140A is a claim for a sum recoverable by statute – which is also governed by Section 9 of the LA. As a result, the time limit for making such a claim is also six years from the date on which the cause for action accrued.

However, in determining whether or not the relationship complained of was unfair, the High Court's decision in *Patel v Patel (2009)* decided this could only be determined by *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination".* In that case, that was the date of the trial or otherwise the date the relationship ended.

So, having considered this, I believe the trigger point here is slightly different. Any relationship between Ms P, Mr W and GE continued while the finance agreements remained live. So, that relationship only ended once the agreements ended and any borrowing under them was repaid.

The PR said that Ms P and Mr W *"paid off their borrowing from their savings, in November 2006 and December 2007".* And as this was more than six years before their claim was submitted to GE, I believe it's likely a court would find that their S140A claim also falls outside of the time limit permitted in the LA.

Could the limitation period be postponed?

The PR argue that the limitation period should be extended under Section 32 of the LA because Ms P and Mr W weren't made aware they could relinquish the timeshare by giving 28 days' notice to do so - and that was concealed from them.

Section 32(1)(b) applies when *"any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant"* [my emphasis]. But the PR haven't provided me with anything persuasive to suggest that C deliberately concealed anything

about a 28-day notice period. And as I still can't see why, given the allegations fuelling each claim, this particular issue prevented Ms P and Mr W from making their claim or raising a complaint earlier, my view is that this particular argument by PR doesn't help their cause.

The PR also suggest the purchase agreement is unlawful under Spanish Law as a consequence of a Spanish Court ruling. However, clause 'P' of the Acquisition Agreement Terms and Conditions confirms that the agreement is governed under English Law, not Spanish Law. So, I don't think the Spanish judgment (and resultant enactment into Spanish Law) can be applied directly to a contract governed under English Law. Given when the products were purchased, they would've been governed under The Timeshare Regulations 1997 (which amended the Timeshare Act 1992). None of those provisions prohibited the sale of timeshares like the one Ms P and Mr W bought.

Further, these types of agreements fall within the later definition of a timeshare contained within the Timeshare Regulations 2010. So, I'm satisfied that these types of timeshares have never been prohibited to be sold under English law, either at the time of Ms P and Mr W's purchases or after.

Based upon my findings above, I'm not persuaded that there's any reason why a court might decide time could be extended in keeping with the provisions of the S32 of the LA.

Credit Assessment

Accepting that I believe Ms P and Mr W's claim was brought too late, there are certain aspects that could be considered outside of S140A. In particular, in relation to whether GE undertook a proper credit assessment. GE haven't provided any explanation or evidence to support how and if a credit assessment was completed. And given the passage of time, it's likely this information is no longer available anyway.

If I were to find that GE hadn't completed all the required checks and tests – and I make no such finding – I would need to be satisfied that had such checks been completed, they would've revealed that loan repayments weren't sustainably affordable for Ms P and Mr W in order to uphold their complaint here. However, I haven't seen any information about their actual financial situation at the time. And there's no obvious suggestion or evidence that they struggled to maintain repayments. So, I can't reasonably conclude the loan was unaffordable for them. And given the loans were fully repaid from savings by the end of 2007, there doesn't appear to be any evidence of loss here either.

Summary

Having considered everything available, and for the reasons mentioned above, I believe it's likely a court would find that Ms P and Mr W's complaints were brought to GE too late under the provisions of the LA. And as I've found no other reason to uphold their complaint, I won't be asking GE to do anything more here.

My final decision

For the reasons set out above, I don't uphold Ms P and Mr W's complaint

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms P and Mr W to accept or reject my decision before 10 August 2023.

Dave Morgan
Ombudsman