DRN-4393886

## The complaint

Mrs S and the estate of Mr S complain that GE Money Consumer Lending Limited ("GEM") unfairly declined their claim under sections 75 and 140A of the Consumer Credit Act 1974 ("CCA") in relation to timeshare products they purchased with loans they provided to them

## What happened

The complaint being considered here is in the name of Mrs S and the estate of Mr S. With a view to clarity and brevity, throughout my decision I may refer instead to Mr and Mrs S.

In 2005, Mr and Mrs S received a letter offering them a free holiday on condition they attended a presentation. Following the presentation, Mr and Mrs S purchased a trial membership in a timeshare membership scheme presented to them by a company who I'll refer to as C. Mr and Mrs S booked their free holiday for September 2005. It included a condition to attend a further meeting and presentation while they were away.

During that holiday, Mr and Mrs S agreed to upgrade their trial membership to a full membership and purchased points to be used in exchange for holiday accommodation and bookings. Over the course of the next two years, they attended further meetings with C while holidaying and agreed to upgrade their points holding on two further occasions.

It's claimed each purchase was funded with fixed sum loans introduced by C and provided by GEM. Each new loan included repayment and consolidation of the previous loan. In summary, the purchases and loans were as follows:

- 15 September 2005 Purchase 1 - Trial membership costing £3,595 providing 5 weeks of holidays over 34 months funded by a loan over 36 months;
- 25 April 2006 Purchase 2 – Trade in of trial membership and upgrade to full membership and 751 points costing £12,194 funded by a loan of £10,898.78* from GEM over 120 months;
- 1 May 2007 Purchase 3 – Trade in of 751 points and upgrade to 1,161 points costing £17,399 funded by a loan of £17,157.85* from GEM over 180 months; and
- 7 October 2007 Purchase 4 – Purchase of additional 340 points costing £4,839 funded by a loan of £23,887.94* from GEM over 180 months.

(*Includes an amount of credit for purchase of a Protected Payments Plan.)

In May 2017, using a professional representative (the "PR"), Mr and Mrs S submitted a claim to GEM under sections 75 and 140A of the CCA.

The PR said that C had misrepresented certain aspects of the products purchased. And it was these misrepresentations that had induced Mr and Mrs S to proceed with the purchases. They held GEM jointly liable for any misrepresentation under section 56 of the CCA ("S56") and believed there was grounds for a claim under section 75 of the CCA ("S75"). In particular, the PR said C misrepresented the product(s) by telling Mr and Mrs S:

- they would be making an "investment" which would always go up in value; and
- they could always get their money back by selling it and make a profit;

The PR also highlighted reasons why they believe an unfair relationship existed under section 140A of the CCA ("S140A"). In particular:

- payment was taken on the day of the first sale in the form of the trade in value of the trial membership;
- Mr and Mrs S weren't made aware of management charges;
- Mr and Mrs S weren't made aware of the duration of the scheme;
- the duration of the full points membership and/or the obligation to pay management charges were unfair terms under Regulation 5 of The Unfair Terms in Consumer Contracts Regulations 1999 (the "UCCRs");
- the interest rate on each loan was significantly higher than that being provided by other lenders;
- Mr and Mrs S were pressured to complete each sale and constantly *"badgered"* to attend further presentations; and
- Mr and Mrs S were encouraged to add their children to the membership but not told they would become part owners, and liable under the agreement.

In response, GEM didn't think Mr and Mrs S were able to make a claim under S75 as the required debtor-creditor-supplier relationship[1] didn't exist. GEM also thought the claim(s) for misrepresentation had been brought too late under section 5 and/or section 9 of the Limitation Act 1980 (the "LA"). GEM said that because they weren't present at the sales meetings referred to, they weren't able to comment on the various other points raised and didn't think there was any other reason to uphold their claim or any related complaint.

Mr and Mrs S didn't agree with GEM's findings. So, they asked the PR to refer their complaint to this service. In doing so, the PR referred to borrowing *"taken out in [2013] to finance the acquisition of a holiday timeshare product in respect of* [C's] *Fractional Property Owners Club".* They included extensive commentary and observations relating to the sale and purchase of timeshare products and fractional timeshare schemes.

Having considered all the information and evidence provided, one of our investigator's didn't think Mr and Mrs S's complaint should be upheld (the 'First View'). In particular, our investigator thought Mr and Mrs S's claim for misrepresentation under S75 had been raised too late under the LA.

The PR didn't agree with our investigator's findings. They thought the action (being the claim of unfairness under S140A) is a speciality for the purposes of section 8 of the LA. And under that provision the limitation period is 12 years rather than six. They also said limitation didn't begin until the point that the relationship (with GEM) ended. And that didn't occur until the borrowing with them had been repaid. The PR said the relationship was, therefore, still ongoing in December 2012. Because of this, they thought Mr and Mrs S's claims should still have been considered under S140A.

Following a period of illness, Mr S sadly passed away in 2019. However, the claim (and the resultant complaint against GEM) remains in the names of Mrs S and the estate of Mr S.

Another of this service's investigators considered Mr and Mrs S's complaint again together with the comments submitted by the PR and issued their findings (the 'Second View'). That investigator also didn't think Mr and Mrs S's complaint should be upheld for broadly similar reasons to the first investigator. Specifically, they thought the first three purchases were out of time under the LA. But they did think the claim under S140A for the fourth purchase could be considered. Having done so, the investigator didn't think the evidence showed it likely

[1] Under section 187 of the CCA as defined by section 184

that a court would find the relationship unfair. So didn't think GEM's response was unreasonable.

The PR didn't agree with our investigator's findings in the 'Second View'. They thought the investigator had failed to consider the alleged breaches of various regulations and legislation relevant to the S140A claim. In particular in relation to unfair contract terms and the provision of information. The PR also provided a 46-page document containing 'Generic submissions on behalf of complainants' to be considered. This document relates specifically to the sale of timeshare products by C.

As an informal resolution couldn't be reached, the complaint has been passed to me to consider further and reach a final decision. Having done that, while I was inclined to reach the same outcome as our investigator, I'd considered a number of issues which I didn't feel had previously been fully addressed. So, I issued a provisional decision on 13 September 2023 giving both sides the chance to respond before I issue my final decision.

In my provisional decision I said:

> Relevant Considerations
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> When considering what's fair and reasonable, DISP 3.6.4R of the Financial Conduct Authority ("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 for consumers for goods or services bought using credit. Mrs S says they paid for the timeshare products under restricted use fixed sum loan agreements. So, it isn't in dispute that S75 may apply here subject to any restrictions and limitations. This means that Mr and Mrs S would be afforded the protection offered to borrowers 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 Mr S, Mrs S and GEM arising out of the credit agreements (taken together with any related agreement). And where the product points 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 Mr and Mrs S's complaint, relevant law also includes the LA. This is because the transactions - the purchases funded by loans with GEM - took place in 2005, 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.
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> It's important to stress that this service's role as an Alternative Dispute Resolution Service (ADR) is to provide mediation in the event of a dispute. The complaint being considered here specifically relates to whether I believe GEM's treatment of Mr and Mrs S's claim was fair and reasonable given all the evidence and information available to me. While the decision of an ombudsman can be legally binding, if accepted by the consumer, we do not provide a legal service. And as I've already said, 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 any claim in other ways.
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> 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 every single point that's been made in my decision. 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.

The trial membership purchase

At the outset, while the PR suggest that the first purchase – that being of the trial membership in 2005 – was funded under a loan agreement provided by a company within the same group as GEM, I've seen no evidence to support that assertion. And GEM haven't been able to recover any record of such a loan. Furthermore, I've not been provided with any product documentation from the time of the sale. I can certainly see that a trade in value was attributed to Mr and Mrs S's trial membership in April 2006. But in the absence of any other information or evidence, I don't think this purchase can be considered further as part of any claim.

Was the claim of misrepresentation under S75 made in time?

The PR says C misrepresented the nature of the purchase agreements and benefits to Mr and Mrs S when they agreed to purchase the products. And they believe this brings 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, Mr and Mrs S had to make a claim within six years of when they entered into each purchase contract and credit agreement. The PR confirm this took place in 2006 and 2007. That's because this is when they say Mr and Mrs S lost out having relied upon the alleged false statements of fact at that time.

The claim was first submitted by the PR in May 2017 – almost ten years after the date of the fourth and final purchase. So, as this was more than six years after the purchases were completed and Mr and Mrs S first say they lost out; I believe a court is likely to find that their claim for misrepresentation under S75 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, it 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 Mr S, Mrs S and GEM continued while the finance agreements remained live. So, that relationship only ended once the agreements ended and any borrowing under them was repaid.

At this service's request, GEM have confirmed the final repayment and closure date for each of the loans. As I've already said, I've seen no evidence supporting the initial (trial membership) loan. However, GEM say that the first loan (in respect of Purchase 2) was repaid and closed in their records on 31 July 2007 and the second (in respect of Purchase 3) was repaid and closed on 18 January 2008. It appears clear the claim was raised more than six years after these closure dates. So, I believe it's likely a court would find any S140A claim also falls outside of the limit permitted in the LA.

The PR contend that where a claimant seeks to re-open a credit bargain on the grounds that the relationship between the lender (GEM) and the creditor (Mr and Mrs

S) is unfair within S140A and invoke relief under section 140B, the action is a speciality for the purposes of section 8 of the LA and the limitation period is 12 years. But I don't agree that's the case here. The loan agreement was a simple contract under the CCA. And as far as I can see, it ran its course – according to the agreement – until it was repaid early by Mr and Mrs S in 2013. There's no suggestion that Mr and Mrs S are seeking to re-open the 'credit bargain' here. So, I don't think section 8 of the LA applies. And because of that, I think the usual six-year limitation applies.

As regards the third loan (in respect of Purchase 4), I believe the circumstances are different. This loan continued until it's closure in December 2013. And because this was less than three years before the claim was submitted, I do think a court is likely to find that claim was made in time.

The claim under S140A

The court may make an order under S140B in connection with a credit agreement if it determines that the relationship between the creditor (GEM) and the debtor (Mr and Mrs S) is unfair to the debtor because of one or more of the following (from S140A):

a) any of the terms of the agreement or of any related agreement;

b) the way in which the creditor has exercised or enforced any of the rights under the agreement or any related agreement;

c) 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).

I think the alleged misrepresentations for Purchase 4 are, therefore, relevant here. Even though I don't think the misrepresentation claim can be considered under S75 due to limitation. So, I've considered this together with the other allegations of unfairness under S140A.

- Misrepresentation

For me to conclude there was a misrepresentation by C in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that C made false statements of fact when selling the timeshare product in 2007. In other words, that they told Mr and Mrs S something that wasn't true in relation to one or more of any points raised. I would also need to be satisfied that these misrepresentations were material in inducing Mr and Mrs S to enter the contract. This means I would need to be persuaded that they reasonably relied on these false statements when deciding to buy the additional product points.

Allegations have been made specifically relating to the product sales referenced above. The difficulty I have is identifying what was actually said at the time of the sale. Particularly as it appears Mr and Mrs S aren't able to recall the circumstances of Purchase 4 at all. The allegations made by the PR appear to relate to the previous sales. Although it's suggested Mr and Mrs S also relied upon those when completing Purchase 4.

The PR have provided limited details and evidence to support the misrepresentations Mr and Mrs S say C made, although I acknowledge they did say they were told these things. So, I've thought about this alongside the limited evidence that's available from the time of their purchase.

Although not determinative of the matter, I've not seen any specific evidence from the time of the sales, such as marketing material or any of the wider purchase documentation. I've only seen the front page of the Acquisition Agreement for each purchase together with a copy of the Member's Declaration for Purchases 2 and 3 only ("The Declaration"). It appears these were all signed by Mr and Mrs S. Having

considered these carefully, I can't see that they support what Mrs S says they was told or that what was said amounted to misrepresentation. Specifically, that the products were sold as an investment that would increase in value and could be sold at a profit.

It's particularly relevant that each Declaration, signed by Mr and Mrs S, includes specific confirmations:

- *"We understand that the purchase of our Membership in* [C] *is for the primary purpose of holiday and is not an investment in real estate";*
- *"We understand that* [C] *does not and will not run any resale or rental programmes"*

In the absence of any other corroborating evidence from the time, I can't say with any certainty that C did make the alleged misrepresentations.

- <u>The allegations of pressure</u>

The claim alleges that Mr and Mrs S were pressured into entering the purchases and loan agreements. However, against the straightforward measure of pressure as it's commonly understood, I find it hard to argue that they agreed to the purchase at the time of the sale when they simply didn't want to. I haven't seen any evidence to demonstrate that they went on to say something to C, after the purchase, to suggest they'd agreed to them when they didn't want to. Mrs S hasn't explained why she and her husband didn't subsequently seek to cancel the purchase within the 14-day cooling off period permitted. So, if they only agreed to the purchase because they were pressured, I find this aspect difficult to reconcile with the allegation in question.

I haven't seen anything substantive to suggest they were obviously harassed or coerced into the purchase. And because of that, I'm not persuaded that there's sufficient evidence to demonstrate that Mr and Mrs S made the decision to proceed because their ability to exercise choice was – or was likely to have been – significantly impaired contrary to Regulation 7 of the CPUT[2] Regulations.

- <u>Time to consider the agreement(s)</u>

Mrs S doesn't seem to recall whether they received all the required documentation and disclosures at the time of the sale. But suggests that even if they did, they weren't given time to consider and understand them.

As I've said, I've seen very limited documentation from the time of the sale. But having previously seen similar documents relating to C's product sales, I'm aware they include a period of 14 days from the date of agreeing to the purchase within which to cancel the agreement without giving any reason – as required under the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the TRs").

So, even if I were to find that Mr and Mrs S weren't given adequate opportunity to read, consider and understand the purchase documentation at the time of the sale - and I make no such finding - I would expect them to have had sufficient time in which to consider their decision within the subsequent 14 days. And, where appropriate, raise any questions or concerns before any loan was drawn and the purchase completed. The Acquisition Agreements explain this in bold typeface immediately above where Mr and Mrs S signed. There's no suggestion or evidence that Mr and Mrs S did raise any questions or concerns prior to the sale(s) being completed. Or that they had any intention of cancelling the agreement(s).

- <u>Management charges</u>

[2] The Consumer Protection from Unfair Trading Regulations 2008

The PR argues that the associated obligation to pay management charges for the duration was unfair under the UTCCRs. It's important to consider how the membership operated in practice, including how Mr and Mrs S could exit the contract beyond the initial 14-day cooling off period.

As I've said, the PR haven't provided all the relevant documentation that governs the points membership held by Mr and Mrs S. But this service has seen various membership associated documents. Although not necessarily from the time of the sale, they ultimately apply to the membership Mr and Mrs S held. In particular, documentation from October 2010, and where subsequently updated in December 2015. So, I've considered if these could've led to unfairness.

Article 12[3], October 2010 details what happens if a member fails to pay the due charge. They include extensive powers for C to make such debts immediately payable. C could also remove a member's points or membership. I cannot see any de minimis debt clause.

In December 2015, article 12.2.7 introduced the concept of membership suspension, rather than removal. And the scheme regulations were also amended. I believe this meant that members' fees didn't continue to accrue during suspension. And based upon this, I think it's unlikely a court would consider the suspension terms created an unfair debtor-creditor relationship.

I also note that the courts previously held that a clause within the acquisition agreement created an unfair debtor-creditor relationship. But it's important to consider each case on its own merits. The presence of an unfair, or potentially unfair term alone won't, in my view, mean a court would automatically deem the relationship unfair. And in Mr and Mrs S's case, I haven't seen (and it hasn't been alleged) that terms have actually been applied or operated unfairly against them.

Under article 7.2, a member could give notice to terminate. When read in conjunction with article 7.5, I believe a member wasn't obliged to pay outstanding fees before being able to give notice to terminate. Any outstanding fees and charges that would still be payable - including in the current year - could be paid after giving termination notice. So, I don't believe they would continue to accrue, and membership would, therefore, be suspended. I understand Mr and Mrs S's membership was relinquished in 2019 on the grounds of Mr S's ill health and I've seen no suggestion that further fees accrued thereafter.

Either way, Mr and Mrs S had options, including termination or suspension with possible reinstatement. The latter may have been more favourable. So, I think it's unlikely a court would say this created an unfair relationship.

I've also considered article 12.5. Specifically in relation to liability for interest and legal costs. I haven't found any suggestion that any of these have been incurred. So, in this instance, I can't see that this is likely to have created an unfair relationship either.

- Regulatory breaches

One of the main aims of the various regulations that applied here was to enable consumers to understand the financial implications of their purchase so that they are put in a position to make an informed decision. If C's disclosure and/or the terms of the purchase didn't recognise and reflect that aim, and Mr and Mrs S ultimately lost out or almost certainly stand to lose out from having entered into a contracts, the financial implications of which they didn't fully understand at the time of contracting, that may amount to unfairness under S140A.

[3] of C's articles of association

However, given the limited documentation provided, I haven't seen any evidence to support the breaches alleged here. And as the Supreme Court decision in Plevin[4] makes clear, it doesn't automatically follow that regulatory breaches create unfairness for the purpose of S140A. Such breaches and their consequences (if there are any) must be looked at in the round, rather than in a narrow or technical way. In other words, if I were to find there'd been regulatory breaches – and I make no such finding - they are only likely to lead to unfairness where there's evidence Mr and Mrs S suffered loss as a consequence.

- The interest rate on the loan

I've carefully considered the rate that applied in this case and whether it feels fair in all the circumstances. Mr and Mrs S accepted the loan, and the loan agreement clearly sets out the annual rate of interest (and the APR). Immediately above the signature section Mr and Mrs S's right to cancel the agreement within 14 days is clearly highlighted in bold typeface.

There's no evidence that Mr and Mrs S raised any concerns or questions about the rate at the time, or subsequently. And as far as I'm aware, they were under no obligation to accept the finance offer and could, if they desired, seek to fund the purchase through alternative means. So, I'm not persuaded that the interest rate payable for the loan demonstrates sufficient cause that a court is likely to find the relationship unfair under S140A.

Was the right arrangement in place

GEM suggest that as payment was made to a company other than C, the required relationship didn't exist to permit a claim under S75.

Under Section 75 of the CCA, a "debtor-creditor-supplier agreement" is a precondition to a claim under that provision. And given the facts of this complaint, that's also the case when claiming under Section 140A of the CCA.

As the purchase agreements indicate that payments under those agreements had to be made to a different company rather than the supplier directly, it's now possible that there was no such agreement in place following the High Court's judgment in the case of Steiner v National Westminster Bank PLC [2022].

However, given the facts and circumstances of this complaint and my overall outcome with those in mind, I don't think it's necessary to make a formal finding on the debtor-creditor-supplier arrangement for the purpose of this decision. That's because I think GEM had and has a defence to the CCA claims for Purchases 2 and 3 under the Limitation Act 1980. And I don't think the complaint relating to Purchase 4 should succeed on its merits anyway.

Other considerations

Following our investigator's view, the PR asked that I consider the contents of a document headed *"Generic submissions on behalf of complainants".* However, given the generic nature of its contents, I don't think it's helpful in establishing the facts of what happened in Mr and Mrs S's specific case.

Summary

Having carefully considered everything that's been said and provided, I haven't found anything that persuades me that C did misrepresent Purchase 4 to Mr and Mrs S. Or that a court is likely to find anything to suggest an unfair relationship existed under S140A. And because of that, I can't reasonably conclude that GEM's treatment of their claim was unfair or unreasonable.

[4] *Plevin vs Paragon Personal Finance Ltd [2014] ('Plevin')*

## 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.

.Despite further follow up from this service, none of the parties have provided any new comments or information in response to my provisional findings. So, I've no reason to vary from those findings in issuing my final decision.

## My final decision

For the reasons set out above, I don't uphold the complaint of Mrs S and the estate of Mr S.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and the estate of Mr S to accept or reject my decision before 14 November 2023.

Dave Morgan
**Ombudsman**