DRN-3573663

The complaint

Mrs B and Mr B complain that GE Money Home Lending Limited (GE Money), unfairly turned down their claim under the Consumer Credit Act (CCA).

What happened

Mrs B and Mr B bought a timeshare membership from a company, (Company A) in May 2004. The timeshare cost £11,299 and was paid for with a loan provided by GE Money. The loan was set to run for 10 years and taken in joint names by Mrs B and Mr B.

Mrs B and Mr B, unhappy with a number of issues with their timeshare, made a claim under s.75 of the CCA and s.140A of the CCA with their appointed representative (SL). They said:

- The nature of the timeshare had been misrepresented.
- GE Money failed to carry out adequate checks when the loan application was made to fund the timeshare.
- The timeshare agreement was 'null and void' due to an EU directive.
- The associated loan agreement was 'null and void' too due to breaches of the CCA and the Unfair Contract Terms in Consumer Regulations 1999.

In January 2021, Mrs B and Mr B, with the assistance of SL, complained to GE Money. GE Money responded to say it was unable to find any records for Mrs B and Mr B's loan. It said this would have been deleted in line with its data retention policy, but it had been able to investigate the complaint using the information provided by Mrs B and Mr B.

GE Money said it believed the complaint about misrepresentation and the affordability of the loan had been brought too late and was time barred under the relevant provisions contained within the Limitation Act 1980 (LA). It also said there was no obligation on GE Money to disclose the commission paid to company A when the loan was taken out.

Our investigator looked at Mrs B and Mr B's complaint and didn't think GE Money needed to do anything else. They agreed that the claim under s.75 and s.140A CCA had been brought too late, so they didn't think GE Money needed to consider the substance of the claim.

He explained he hadn't been provided with the details of any commission paid on Mrs B and Mr B's loan. But from what this service knows about commission paid on these loans, it was unlikely the amount would have been greater than 10%. He didn't think this amount would have meant GE Money should have realised that not disclosing the commission risked an unfair relationship under s.140A.

Overall, he didn't think GE Money needed to do anything else with this claim or complaint.

Mrs B and Mr B didn't agree, they highlighted their main concern was that they considered the agreement with Company A voidable and that this meant the associated credit agreement with GE Money was also voidable. Because they didn't agree with our investigator, the complaint was passed to me for decision.

I issued my provisional decision on this complaint on 14 July 2022. I explained that I was planning on reaching the same outcome as our investigator but for slightly different reasons. So to allow everyone the opportunity to reply, I explained what I was planning on saying. I said the following:

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'm not planning on telling GE Money to do anything further to resolve the matter and I've explained why below.

Where evidence is incomplete, inconclusive or contradictory, I reach my decision about the merits of this complaint 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.

I also have to take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice, when I make my decision. And I want to assure Mrs B and Mr B, 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'm going to concentrate in this decision on what I think is relevant and material to reaching a fair and reasonable outcome.

Was the claim under S.75 CCA brought in time?

Mrs B and Mr B said company A misrepresented the nature of the benefits of the timeshare agreement, so they say GE Money is jointly liable under s.75 CCA. However, under s.9 LA, they had to make a claim within six years of when they entered into the timeshare and credit agreements – this was May 2004. This is because this is the point in time when they say they would have lost out by relying on false statements of fact.

Mrs B and Mr B didn't bring a claim until January 2021. This is outside of the time limit set out in the LA and I don't think GE Money made an unfair claim decision when it's said the claim was brought too late.

The claim under s.140A CCA

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 think this is relevant law and I have taken it into account.

GE Money hasn't been able to provide evidence of when Mrs B and Mr B's loan ended as it says it was closed some time ago and it doesn't have records that go that far back. I'm not surprised by this, there is no requirement for GE Money to keep records indefinitely. But I note that the loan was taken out in May 2004 and set to run for 10 years. Based on the evidence I've seen; I think it's more likely than not that Mrs B and Mr B's agreement ended in May 2014 at the latest. This fits with GE Money not being able to find a record of the

loan agreement when it searched its records in January 2021, as it's said it doesn't keep records for more than six years after an agreement ends.

The LA applies to a claim under s.140A CCA too. It was held in Patel v. Patel [2009] EWHC 3264 (QB) that when considering s.140A CCA, the time for limitation purposes ran from the date that the credit agreement ended if it was not still running at the time the claim was made. As with an action under s.75 CCA, the limitation period is six years, so Mrs B and Mr B would have to bring an action within six years of May 2014, that being the latest date I think the loan was likely to be open. As they didn't do that, I think they brought their claim too late.

Mrs B and Mr B's representatives have argued that as the agreement with Company A is still ongoing, the relationship with GE Money is also still ongoing and unfair. In other words, they are still in time to bring a s.140A CCA claim. But here the repayment of the balance of the loan ended the agreement between GE Money and Mrs B and Mr B. It was that agreement that was capable of being unfair and giving rise to a s.140A CCA claim. So it was on the date of repayment that limitation started to run (following the case of Patel v Patel [2009]), as it was on that date that the relevant relationship came to an end.

Mrs B and Mr B's arguments on limitation

I appreciate Mrs B and Mr B may say they didn't know about the time limits I've explained above in the LA, but I'm afraid that's not generally accepted as a ground for extending the limitation period. Mrs B and Mr B's representative has made a number of arguments why they don't think our investigators view is correct about limitation. I'll deal with each in turn.

Mrs B and Mr B's representative has said that as the claim was made within three years from date of their knowledge that they could bring a claim, it was brought in time. This relates to when Mrs and Mr B realised the timeshare agreement is, in their representatives' opinion, 'null and void'. I don't think this would be a claim that could be made under s.75 CCA as there is no allegation that there was a misrepresentation or breach of contract, but it would be something a court could consider under s.140A CCA.

It may also be the 'rules' and 'three years' the representatives are referring to are part of the time limits within which a consumer needs to complain to a business about a regulated financial activity. Those rules apply to Financial Conduct Authority ("FCA") governed complaint handling, which in the current context, is a complaint that GE Money unfairly turned down their claim. But the reason it decided to turn down the claim was because it didn't think it was legally liable due to the operation of the LA, so that is why I have considered that legislation.

Was the timeshare agreement 'null and void'?

Mrs B and Mr B's representatives have argued that the agreement with Company A is 'null and void'. They have said the agreement is still running, so it's possible that if that agreement is voidable that could in turn mean the original loan with GE Money was also voidable. So I've thought about that claim, which would be separate to a claim under s.75 or s.140A CCA.

Mrs B and Mr B have relied on a Spanish Court judgment and directed me to Spanish legislation. I have read both of these things, but that judgment relates to a different product than the one supplied by Company A. We have limited information provided by Mrs B and Mr B which sets out the details of their agreement with Company A. They've provided certificates for the timeshare but we don't have anything else to detail the product. But the

certificate provided indicates the agreement with Company A is governed by English law. I say this as these relate to companies registered in England with company house registration and filing history, so I fail to see how Spanish legislation or caselaw is relevant to their claim (I note that Mrs B and Mr B's representatives have not explained this point further).

I have been asked to consider an EU Directive that they say gave rise to the ability to void the agreement with Company A. Again, I've not been directed to any specific part of the directive that Mrs B and Mr B's representatives say give them this power which relate to the product they've purchased. Nor have I been directed to any provision in English law, either enacting this EU Directive or otherwise, that would give them this power. So, based on what I've seen so far, I don't agree that Mrs B and Mr B are entitled to void or rescind the agreement with Company A and, by implication, any credit agreement they entered into with GE Money.

Duty of care under s.14A LA

Mrs and Mr B's representative have also said there is a duty of care aspect in this case and GE Money should not have provided the finance for a product that was in breach of the EU Directive. It's said this duty of care is applicable via s.14A LA.

I'm not persuaded that s.14A LA applies to Mrs B and Mr B's claim. That provision provides for a second period in which a claim for negligence can be made. Looking at what happened, when Mrs B and Mr B purchased the timeshare and took out the finance, I think there was an obligation to give them sufficient, appropriate and timely information to enable them to make an informed choice about whether to take out the loan. But I'm not persuaded a duty of care arose or advice was provided that could give rise to a claim to which s.14A LA could apply.

Nor do I think it would be fair to say there was any knowledge that the product sold by Company A is in breach of the EU Directive, as I've explained above, I don't think this applies to Mrs B and Mr B's product.

The lending decision

Mrs B and Mr B also complain that GE Money was irresponsible to provide the loan as proper credit checks weren't completed at the time. The loan was taken out in May 2004, but our service didn't get jurisdiction to consider complaints about decisions to lend in these circumstances until April 2007. So I am not able to consider this part of the complaint as the decision to lend was made at a time which, falls outside of the time in which I can consider complaints about lending.

Overall, I don't think GE Money has acted unfairly when handling Mrs B and Mr B's claim under the CCA and I don't plan on asking it to do anything else in relation to this.

Both GE Money and Mrs and Mr B via their representative responded early. GE Money said it had nothing further to add.

Mrs and Mr B said they disagreed with the outcome. They highlighted the following points which they feel demonstrate the time limits under LA should be extended.

SL said that It believed Company A failed to comply with the Timeshare Act 1992 (the 1992 Act) later repealed and replaced by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 .

Specifically, it said Company A had failed to provide information about accommodation that was accurate. And it failed to provide information about the withdrawal/cancellation period. Under the 1992 Act, a failure to provide this information meant Company A couldn't request or accept any payment before the withdrawal period had ended. GE Money made payments to Company A during the withdrawal period, it felt this was in breach of the 1992 Act.

SL says GE Money owed Mrs B and Mr B a duty of care to ensure that it and Company A didn't breach the 1992 Act. When this was breached, it failed in its duty of care to them. It felt this could be considered negligence.

SL said Mrs B and Mr B had no knowledge of the breach or negligence until SL was engaged to represent them in August 2020. It feels this is the point in time the limitation period commenced under s.14A of the LA.

SL made no further comments on the agreement being 'voidable' or provided any further response on the lending decision taken by GE Money.

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.

I've reconsidered all information on this complaint as well as the new information provided by Mrs and Mr B and SL. Having done so, I see no reason to depart from my provisional decision above.

SL has made further submission about why it feels the limitation period set out within the LA should be extended. But I'm afraid this doesn't change the decision I reached on this point previously.

For s.14A to be applicable, it first needs to be established that GE Money owed Mrs and Mr B a duty of care. I said previously that I think there is an obligation on GE Money to make sure Mrs and Mr B were given sufficient and appropriate information to allow them to make an informed choice as to whether to take out the loan. But I don't think the obligation on GE Money extends to them needing to ensure that any products sold and financed by it are compliant with the 1992 Act. I've not been provided with anything which makes me now think that such a duty of care would exist, nor am I persuaded that such a duty could be established.

So in the absence of a duty of care between Mrs and Mr B and GE Money, I don't think s.14A LA is applicable. And I don't think it is relevant for me to make a finding on whether I feel Company A was compliant or not with the 1992 Act and the information it provided in relation to the timeshare product when it was sold.

My final decision

For the reasons set out above, I don't uphold Mrs B and Mr B's complaint against GE Money Home Lending Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 26 August 2022.

Thomas Brissenden
Ombudsman