DRN-3134056

The complaint

Mr H complains that Clydesdale Bank Plc has not treated him fairly in relation to claims he raised in relation to a series of credit card transactions he made, under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mr H's dispute is about four payments said to have been made on his Clydesdale credit card:

- £667.28 to "S", said to have been for a holiday club membership, in May 2007.
- An unidentified amount said to have been paid to another company, "R", some time in 2009. Clydesdale were unable to find this payment on Mr H's account.
- £2,479.41 to "IS", said to have been for the purchase of a product from another company "CC", in January 2012.
- £1,397 to "HFI", said to have been for the purchase of timeshare resale services from another company, "STH", in November 2012.

At the time the complaint was referred to me to make a decision, all parties had agreed that Mr H didn't have valid section 75 claims relating to the transactions to S, R and IS.

This was because there was not enough information in respect of the transaction with S to be able to draw any conclusions; the transaction with R didn't appear to have taken place on Mr H's Clydesdale card; and there was no debtor-creditor-supplier agreement linking Mr H, Clydesdale and CC, due to a lack of an association between IS and CC.

Disagreement remained however, in respect of the transaction to HFI. I issued my provisional decision on the complaint on 29 October 2021. I've reproduced the findings from that provisional decision in italics below. My provisional decision forms a part of this final decision:

"It appears there is no longer any disagreement on whether Clydesdale has any section 75 liability to Mr H in relation to the purchases from S, R and CC, so I do not propose to consider those in any detail in my decision. I will say only that I agree with the most recent view reached by our investigator in relation to those purchases, and for the same reasons I summarised above.

Unfortunately, I find myself disagreeing with the outcome our investigator reached in relation to the purchase from STH. I'll explain why.

Without getting overly technical, in order for a person to be able to bring a claim against their credit card issuer under section 75, the credit card needs to have financed a transaction between them and a supplier. There also need to have been "pre-existing arrangements" between the creditor and the supplier. Finally, the person needs to have a claim against the supplier in respect of a misrepresentation or a breach of contract.

The problem with having a credit card payment go to someone other than the supplier, is that the creditor will not have "pre-existing arrangements" with the supplier. It will have such arrangements with the payee who accepted the card. But the lack of pre-existing arrangements with the supplier means that there is no DCS agreement in place and a valid section 75 claim cannot be made.

There are however some exceptions. If the payee and the supplier are "associates" as defined in section 184 of the CCA (and mentioned above), then they are interchangeable for the purpose of "pre-existing arrangements". In other words, it doesn't matter who the creditor has these arrangements with, so long as it has arrangements with one of them.

There is another exception that can apply, which was outlined by our investigator in his assessments. This is the exception identified in the case of Bank of Scotland vs. Alfred Truman [2005] EWHC 583 (QB). The case concerned a firm of solicitors which had a motor trader as one of its clients. The motor trader did not have the facilities to take credit card payments from customers, so the solicitors took the payments instead, as deposits for cars which customers of the motor trader had ordered. The court found that the contractual arrangements between the motor trader and the solicitors were "adequate" to link the motor trader to the card scheme through the transactions processed via the solicitors' credit card facilities, and therefore mean there were "pre-existing arrangements" between them and the creditor, and a DCS agreement in place.

The judge in the Alfred Truman case observed that there were "problems" with applying this conclusion as a general principle, and there were difficulties in establishing where the line should be drawn between scenarios where pre-existing arrangements (and therefore DCS) should be considered to exist, and where things were "too tenuous" to be able to draw such a conclusion. The judge went on to say that the problem would need to be resolved on a case by case basis, and the "precise contractual arrangements" between the parties would determine whether the creditor had any liability under section 75.

In a later County Court case, Marshall v. Retail Installation Services Ltd [2016], the judge considered the Alfred Truman case in the context of a company which had contracted with a

consumer to supply and install solar panels. This company ("Company A") hadn't taken the consumer's credit card payment. It had been taken instead by another company, Company B. The precise nature of the arrangement between the companies was not known, but Company A had invoiced Company B after the latter had taken payment from the consumer. It was also established that Company B was the actual supplier of the solar panels. The judge found Company B had an interest in the supply and installation of the solar panels and that this was enough to draw a conclusion that "pre-existing arrangements" existed between the supplier and the creditor and a DCS agreement was therefore in place.

Taken together, the conclusions I draw from the two cases above is that, firstly, knowing the precise contractual arrangements between a supplier and a payee is important in determining whether pre-existing arrangements exist between the supplier and the creditor. Secondly, if there is an absence of precise knowledge of the contractual arrangements between the supplier and the entity which received a credit card payment, the involvement of that payee in the provision of the goods or services under the contract between the debtor and the supplier, should be enough for me to be able to conclude there were pre-existing arrangements between the supplier and the creditor and therefore a valid DCS agreement under which a debtor could bring a section 75 claim.

<u>Analysis with respect to Mr H's case</u>

I turn now to the application of the above concepts to Mr H's case and in particular his purchase from STH. I will say firstly that there is very little information available about either STH or HFI. I have found no evidence of the companies being registered in the UK, or of the identities of any individuals involved with them.

I've seen a partial copy of a contract between Mr H and STH. This appears to be an agreement that STH would dispose of a timeshare or holiday club product he owned by finding a buyer who would make him an offer. Mr H's credit card payment shows on his statement as having gone to "Hfi" on 15 November 2012. I have seen an agreement dated 15 November 2012 but which Mr H signed on 17 November 2012 which is headed "HFI". The agreement Mr H signed with HFI says:

"We have been invited by STH to act for you in the processing of a payment, if necessary by credit or debit card. We have been asked to verify your identity, obtain a signed copy of the agreement you have entered into with them and also hold copies of those documents.

Making the payment of deposits or other monies and obtaining the documents is the full extent of our contractual obligation to you and no contract or relationship exists or shall be created between the owner/s/ card owner and us other than is necessary to carry out these services and enable such payment to take place.

With reference to this we require you to understand the following points:

- You should satisfy yourself as to the nature of the agreement being entered into by you with STH and be aware of the specific service or product being paid for.
- You should be aware that you are using a third party service provider to make the payment directed by STH to accommodate the smooth and efficient payent for the product or service you have contracted for.
- All matters concerning the products and services are a matter for STH and that there is no recourse against us. We are neither an agent nor a partner of STH.
- You warrant that all funds paid to us are legally held and of non-criminal origin.
- STH has invited us to act for you in making payment."

Later, under Mr H's signature, the document went on:

"I, hereby authorise you to forward the signed contract to STH and the Payment to the third party holding account minus 27.5% for our fee."

Based on this, it seems Mr H entered into two contracts: one with STH for the disposal of his timeshare or club membership, and one with HFI for payment and document processing services. HFI took a fee of 27.5% of the payment amount for these services, and presumably passed the rest on to STH.

Given how little is known about the companies, I'm unable to conclude they are "associates", and I have no detailed information about the contractual arrangements between the two of them. HFI claimed not to have been "an agent or a partner" of STH, and said instead it was an agent of Mr H. Given STH had "invited" HFI to participate in the overall agreement, I think like our investigator that there was likely an established business arrangement between the two companies. I think that HFI may have been acting as an agent for STH as well, in the sense it was processing documents and payments on its behalf. This doesn't seem too dissimilar to the situation in Alfred Truman, but in that case the court had a lot more information about the arrangements between the companies involved, and there was not a separate contract between the consumers and the solicitors. So I don't think the situations are so alike that I can say pre-existing arrangements existed between STH and Clydesdale, via HFI.

I also note HFI was at pains to distance itself from Mr H's contract with STH and the services the latter was supposed to supply to him. Indeed, Mr H specifically signed to say that he understood HFI were not involved with those services at all. This would appear to show that the situation here was also unlike that in Marshall v. Retail Installation Services Ltd. So I don't think the judgment in that case helps establish that there were pre-existing arrangements between STH and Clydesdale either.

The conclusion I am left with is that there is insufficient evidence to show that there were pre-existing arrangements between STH and Clydesdale which would allow Mr H to hold Clydesdale liable, under section 75, for the failure of STH to follow through on its contract with him.

I know Mr H will find my conclusions disappointing, especially after having waited so long for an answer from us. However, my view is that Clydesdale does not need to take any action in respect of the purchases he has disputed."

Clydesdale didn't reply to the provisional decision. Mr H replied to say that he was very disappointed with the outcome. The case has now been returned to me to review once again.

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.

Because neither party to the complaint has put forward any new evidence or arguments for me to consider, I see no reason to depart from my provisional findings quoted above. It follows that I do not think Clydesdale was wrong to decline Mr H's section 75 claims.

My final decision

For the reasons explained above, I do not uphold Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 26 November 2021.

Will Culley
Ombudsman