DRN-3495800

The complaint

Mr L complains Santander UK Plc has failed to honour a claim he brought under section 75 of the Consumer Credit Act 1974 ("CCA")

What happened

I issued a provisional decision on this complaint on 17 May 2022 and invited both parties to provide me with any further submissions they wanted me to consider by 31 May 2022.

Due to the detail to which I went into various topics in the provisional decision, I think it's appropriate to reproduce that decision more or less in full below:

> ***What happened***
>
> *Mr L had a timeshare-like product with a company I will call "C". In March 2017 he entered an agreement with another company, "R", under which he says R promised to release him from his timeshare obligations with C, and carry out a compensation claim for the alleged mis-sale of the timeshare to him by C, which would gain him tens of thousands of pounds. The agreement with R came with a guarantee that Mr L would be released from his timeshare obligations within 12 months, or he would be entitled to all his money back.*
>
> *The agreement itself was signed on 5 March 2017. Mr L was expected to pay £2,446 on the day, and then a further £5,708 within a week. He made a £2,446 payment on his Santander credit card, which was not taken by R, but by another company which I'll call "MRLL". Mr L then paid the balance using a credit card from another bank.*
>
> *Mr L says R didn't release him from his timeshare obligations, nor did it pursue a compensation claim for him or refund his money. R went into liquidation later in 2018.*
>
> *In January 2019 Mr L's CMC wrote to Santander setting out a claim on his behalf under section 75 of the CCA. The claim focused on alleged misrepresentation by R, specifically that it had told Mr L that it would pursue a compensation claim against C when it had no intention of doing so. Santander rejected the claim, noting that Mr L's credit card payment had been made to MRLL, not R, and this meant the necessary conditions for a section 75 claim to be made hadn't been fulfilled. Mr L complained about Santander's decision, but in a final response letter of April 2019, the bank maintained that its stance was correct.*
>
> *Mr L then referred his complaint to this service for an independent assessment. The most recent assessment by one of our investigators noted that R and MRLL had been "associates" at the time Mr L made his credit card payment, and this meant the technical conditions required for a section 75 claim to be made had been established. He further concluded that R had breached its contract with Mr L by not refunding his money under the 12 month money back guarantee. Santander disagreed with the investigator's conclusions regarding "associates", and asked that the complaint be*

reviewed by an ombudsman, so the case has now been passed to me to decide.

What I've provisionally 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.

There is no automatic obligation on a credit card issuer to provide redress where one of its customers uses its facilities to make a purchase, and something then goes wrong with that purchase. However, there are typically two avenues via which the credit card issuer can help, or may have a legal liability.

One such avenue is usually called "chargeback", and it involves the card issuer disputing payments made on the card through a dispute resolution scheme operated by the companies which run the card networks, such as Visa and Mastercard. Any such dispute is subject to the rules of the card scheme operators, and these rules say that disputes need to have been brought within a certain period of time. I would normally expect a credit card issuer to attempt a chargeback if there was a reasonable prospect of this achieving a successful outcome.

Our investigator concluded, and I agree, that by the time Mr L's situation was brought to Santander's attention, it was too late for the bank to raise a chargeback for the amount he had paid on the Santander card. This is because the relevant rules say that such a dispute must be made within 120 days of the last date the cardholder expected to receive the service in question. According to the contract with R, Mr L should have received the timeshare release service by 5 March 2018. If he didn't receive this service, he was then entitled to his money back, although there was no specific timescale mentioned regarding when such a refund would be paid. R went into liquidation on 11 June 2018. Regardless of whether one accepts 5 March 2018 or 11 June 2018 as the last date Mr L could have expected to receive a service from R, Santander was not made aware of the problem until January 2019, which would have been much too late for the bank to attempt a chargeback within the relevant scheme rules.

The other main avenue via which a card issuer may have a responsibility to a consumer is via section 75 of the CCA. This gives a consumer a legal right to claim against their credit card issuer in respect of any breach of contract or misrepresentation by the supplier of goods or services purchased using a credit card, so long as certain technical criteria have been met.

In Mr L's case, Santander argue that the technical criteria have not been met. This is because his credit card payment was made to MRLL, but he had entered a contract with R. This, the bank says, means the necessary debtor-creditor-supplier ("DCS") agreement is not in place for Mr L to make a claim.

The DCS agreement is one of the technical criteria which needs to be in place for a successful section 75 claim to be made. It is commonly explained in the following terms: that when someone makes a payment on their credit card, in order to make a section 75 claim against their credit card issuer they generally need to have used their credit card to pay the

same *company they say has misrepresented something to them, or breached its contract with them.*

It is not quite as simple as that however. And in this case the interaction between

various parts of the CCA, and the implications of this for a section 75 claim, are in dispute. I think it would be helpful therefore if I set out in some detail the relevant aspects of the CCA and exactly what the disputed technical criteria are.

Analysis of Section 75

Section 75 of the CCA is worded as follows:

"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."

This section refers back to sections 12(b) and (c) of the CCA, which define the DCS agreement. A payment on a credit card falls under section 12(b), and is described as follows:

"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier"

Section 11(1)(b), which is referred to, expands as follows:

"A restricted-use credit agreement is a regulated consumer credit agreement—

…

(b)to finance a transaction between the debtor and a person (the "supplier") other than the creditor"

Reading all of these relevant sections together, it can be seen that 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.[1] *Finally, the person needs to have a claim against the supplier in respect of a misrepresentation or a breach of contract.*

The problem therefore with having a credit card payment go to someone other than the supplier, is that the payment will not have been "made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier*". The payment will have been made instead under the pre-existing arrangements between the creditor and the actual payee. This means there would be no DCS agreement in place and therefore one of the necessary components for a section 75 claim to be made would be missing.*

Our investigator's view was that R and MRLL were "associates", as defined by section 184

[1] It is worth highlighting that the courts have found "pre-existing arrangements" do not necessarily have to be a direct agreement between the supplier and the creditor. In a series of cases which ended with *OFT v. Lloyds Bank PLC & Ors [2007] UKHL 48*, it was held that the fact that both the creditor and supplier have used the payment clearing and settlement services offered by the card scheme (e.g. Visa or Mastercard) and a merchant bank (acquirer) in order to facilitate a payment, was enough to say pre-existing arrangements were in place between them.

of the CCA. He concluded this meant it didn't matter that Mr L had entered an agreement with one but paid the other. Santander has argued, for reasons I'll outline later, that two companies being associates doesn't have any significance with respect to a section 75 claim. But Santander has also previously disputed that the companies were associates at the time Mr L made his credit card payment to MRLL. It's not clear if the bank still disputes this following further commentary by our investigator on this point on 5 January 2022. But I have proceeded on the basis that it does dispute that the companies were associates at the relevant time. I will return to the question of R and MRLL being (or not being) associates later, but first I will comment on the more fundamental points raised by Santander about the relevance of the concept of "associates" to the DCS agreement.

Santander's position on the significance of R and MRLL being associates

Santander argues that it isn't relevant, for the purposes of the DCS agreement and therefore a claim under section 75 of the CCA, if R and MRLL were associates. I've summarised its arguments below:

- *In order for a section 75 claim to be made, the debtor needs to have a claim for breach of contract or misrepresentation against the supplier.*
- *Section 189(1) of the CCA defines "supplier". This definition doesn't include or make reference to an associate of the supplier.*
- *It accepts section 187 of the CCA refers to associates when outlining scenarios in which "pre-existing arrangements" would be held to exist between a supplier and a creditor. But it doesn't follow from this that the definition of "supplier" includes "associates" of the supplier. This is legally wrong.*
- *Just because two companies are associates, doesn't mean that a payment to one will benefit the other. Receiving the benefit of a payment is a requirement for there to be a DCS agreement.*
- *Only the supplier itself, and not an associate, can commit a breach of contract or misrepresentation, and cause potential joint liability to fall on the creditor.*

I've considered these arguments carefully. Having done so, I think Santander has misunderstood how the relevant parts of the CCA work together to cause liability to fall, potentially, on a creditor under section 75 of the CCA. I will go on explain why, but in order to do so I think it would be helpful first to look at Mr L's scenario in a little more detail to identify the service he had paid for, and who was responsible for providing it.

Analysis of Mr L's contract

The agreement Mr L entered into is relatively straightforward. He signed a document headed "terms and conditions", under which R promised, on receipt of a deposit, to "…put into effect our recommendations and take all steps necessary to release you from your [timeshare] agreement." *R further promised that it would* "…notify you in writing as soon as we have obtained your release from the Timeshare Agreement." *The last clause of the agreement, clause 6, stated:* "R give a full money back guarantee that the relinquishment will be achieved within 12 months of this date". *It isn't disputed that "relinquishment" referred to the release of Mr L from his timeshare, and while "this date" was not defined, I think it most likely would be interpreted as the date Mr L signed the*

contract, or paid the deposit which meant R would begin work. In this case, both these dates are the same.

Referring back to section 11(1)(b) of the CCA, the transaction[2] financed by the Santander credit card was therefore an agreement between Mr L and R, that R would release him from his timeshare within a specific timeframe, and refund him in full if that timeframe was not achieved. R was the supplier of this service and was therefore the "supplier" for the purposes of section 11(1)(b) and the entity against which Mr L has a potential claim for breach of contract or misrepresentation.

Further analysis of Santander's liability

Referring back to my earlier analysis of section 75, the conditions which need to be in place for Santander to have potential liability to Mr L can be summarised as follows:

1) *Mr L's Santander credit card has financed a transaction between Mr L and the supplier (R).*

2) *The credit card payments were made under "pre-existing arrangements" between Santander and R (therefore meaning a DCS agreement was in place).*

3) *Mr L has a claim for breach of contract or misrepresentation against the supplier (R).*

My analysis above shows that the first condition has been met: the credit card financed a transaction between Mr L and R, it just so happened that R was not the payee of the credit card payment which financed that transaction. This calls into question whether there were pre-existing arrangements between R and Santander, and therefore whether condition 2) is satisfied. The concept of associates, which Santander has focused on, is relevant to this.

Section 187 of the CCA, which Santander has referred to, says the following:

"187 Arrangements between creditor and supplier.

(1) A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between persons mentioned in subsection (4)(a), (b) or (c).

…

(4) The persons referred to in subsections (1) and (2) are—

(a) the creditor and the supplier;

(b) one of them and an associate of the other's;

(c) an associate of one and an associate of the other's."

The significance of this section of the CCA for Mr L's case, is that if his credit card payments were made in accordance with pre-existing arrangements between Santander and an associate *of R, then the payments will be treated, under the CCA, as*

having been made under pre-existing arrangements between Santander and R, thus meaning condition 2) would be met. Santander has said section 187 doesn't bring an associate of the supplier into the definition of "supplier", which is correct. But the different sections of the CCA do not stand in isolation, they interact with one another. And I think the bank misses the point that it

[2] "Transaction" in this sense means an instance of buying or selling something. The term is often using in a banking context to mean a movement of money on an account, but here it has its everyday meaning.

is the "pre-existing arrangements" (or lack thereof) between the creditor and supplier which is the key issue where a credit card payment has been made to someone other than the supplier. Section 187's effect is that for the purposes of pre-existing arrangements only, the supplier and an associate of the supplier can be considered, in essence, one and the same.

MRLL was able to accept Mr L's Santander credit card due to it and the bank's mutual participation in the relevant card scheme. As I explained in footnote 1, the courts have found that such arrangements are sufficient to conclude pre-existing arrangements are in place between a creditor and a payee. It follows that Mr L's payment was made in accordance with pre-existing arrangements between Santander and MRLL and*, due to the operation of section 187 of the CCA, that I must deem the payment as having been made under pre- existing arrangements between Santander and R also. Condition 2) above has therefore been met.*

Were R and MRLL associates at the relevant time?

Unfortunately for Mr L, having carefully considered the available evidence I am not of the opinion that R and MRLL were associates at the time he made his credit card payment on 5 March 2017. This makes the arguments above rather academic in the context of Mr L's case but I think they are important to set out in any event given Santander's strong disagreement with the application of the concept of associates.

I'll now explain why I don't think R and MRLL were associates at the relevant time in Mr L's case.

Section 184 of the CCA states the following:

"(1) A person is an associate of an individual if that person is—

(a) the individual's husband or wife or civil partner,

(b) a relative of—

(i) the individual, or

(ii) the individual's husband or wife or civil partner, or

(c) the husband or wife or civil partner of a relative of—

(i) the individual, or

(ii) the individual's husband or wife or civil partner.

(2) A person is an associate of any person with whom he is in partnership, and of the

husband or wife or civil partner or a relative of any individual with whom he is in partnership.

(3) A body corporate is an associate of another body corporate—

(a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are controllers of the other; or

(b) if a group of two or more persons is a controller of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom
(c)
he is an associate.

…"

It can be seen that the definition of associates is broad and not without complexity. However, the following points are relevant to Mr L's case.

Firstly, I think it's important to define the concept of "controller". "Controller" is defined in section 189(1) of the CCA. A person will be said to control a company if they are a person in accordance with whose instructions the officers of a company would act, of if they control more than a third of the voting power at any general meeting of the company.

The company Mr L entered an agreement with was R. As of 5 March 2017, the sole director and shareholder of R was a "Mr W". I think his position as sole director and shareholder means he would qualify as a controller of R. The company Mr L paid using his Santander credit card was MRLL. As of March 2017, a man I will call "Mr K" owned more than 50% of the shares of MRLL, and was also its company secretary. According to MRLL's articles of association, each share would entitle its holder to one vote at a general meeting, meaning Mr K would meet the definition of a controller by virtue of his control of more than a third of the voting power at such a meeting.

Section 184(3) says that two companies can be associates if they are controlled by the same people, or by people who are themselves associates. On the face of it, because R and MRLL were controlled by different people, they were not associates at this time. There's no evidence of Mr W and Mr K having any kind of familial relationship of the types listed in section 184(1) which would make them associates, so I've gone on to think about whether the relationship in section 184(2) applies.

Section 184(2) says that if individuals are "in partnership", then they are treated as being associates of one another. The CCA doesn't define what being "in partnership" means, but as civil partnerships are explicitly mentioned elsewhere, I think it refers to a partnership in a business sense. This type of partnership is defined under the Partnership Act 1890 as follows:

"Definition of Partnership

(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2) But the relation between members of any company or association which

is— [(a) registered under the Companies Act 2006, or]

(b) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter. . .

(c) . . .:

is not a partnership within the meaning of this Act."

There is evidence available that Mr K and Mr W were, in some way, doing business together. But I do not think that this shows they were in partnership according to the statutory definition.

For example, I am aware that a third company, "RIG", continued to be controlled by Mr K

and Mr W together as of 5 March 2017. Mr K owned half of the shares jointly with his wife, while Mr W owned the other half and was additionally the sole director. Both had control of more than a third of the voting rights at a general meeting and would therefore meet the definition of controllers of RIG.

I have considered whether this joint control of a third company would mean that Mr K and Mr W were "in partnership" and therefore associates. But I note the Partnership Act 1890 specifically excludes the relation between members of a company registered under the Companies Act 2006. This means shareholders in a company, controlling or not, would not be considered in partnership with one another on this basis.

There is other evidence of Mr K and Mr W doing business together. R granted a debenture in favour of Mr K and his wife, for example. But all this appears to show is that R probably owed Mr K and his wife money. Another of Mr K's companies also appeared to provide accountancy services for R, but this also does not show that Mr K and Mr W were in partnership. It only shows that R was paying for accountancy services from one of Mr K's companies.

Overall, I have not seen enough evidence to show that Mr K and Mr W were "in partnership" in the sense meant in section 184 of the CCA. This means that, as of 5 March 2017 when Mr L made his credit card payment, R and MRLL were not associates.

Other potential routes to liability for Santander

The fact that R and MRLL were not associates is not necessarily fatal to Mr L's claim against the bank. A supplier and payee being associates is not the only way in which pre-existing arrangements can still be held to exist in a scenario where the supplier and payee are not the same.

Another way in which pre-existing arrangements could be held to exist was identified in the case of Bank of Scotland v. Alfred Truman [2005] EWHC 583 QB.

The case concerned a firm of solicitors who had a motor trader as a client. The solicitors took credit card payments from customers of the motor trader, which had no facility to take such payments itself, as deposits for cars which they 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 therefore a valid DCS

agreement.

The judge observed in the Alfred Truman case 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 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* Alfred Truman *in a slightly different context. In this case company A had contracted with a consumer to supply and install solar panels, but an unrelated company B had taken the credit card payments. The precise nature of the arrangements between the companies was not known, but company A had invoiced company B after the latter had taken payment. It was also established that company B was the supplier of the solar panels themselves. The judge found that company B had an interest in the supply and installation of*

the solar panels and this was sufficient for pre-existing arrangements to be in place between company A and the creditor.

The conclusion I draw from this is that, in the absence of precise *knowledge of the contractual arrangements between the supplier and the payee, the involvement of the payee in the provision of the services under the contract between the debtor and the supplier, should be sufficient for me to be able to conclude there were pre-existing arrangements between the supplier and the creditor.*

Applying this reasoning to Mr L's case, I've seen no evidence that MRLL was involved in the provision of the services Mr L had contracted with R for, so I don't think the case of Marshall *is of assistance to Mr L here. And my view is that we simply don't know enough about any agreements between R and MRLL to be able to say that pre-existing arrangements must be held to exist between R and Santander, in the same way as* Alfred Truman*.*

In the Alfred Truman *case the judge had the benefit of much more detailed information about the contractual arrangements between the solicitors and the motor trader. The information we have been able to obtain about R and MRLL has been inconclusive, despite attempts to contact the liquidators or R and MRLL, and individuals connected to the companies. It's clear there was a relationship between the companies. If there was not then I would not have expected MRLL to take payments for R's customers. But I don't have enough information to establish just what the precise contractual arrangements were between them, and so I can't fairly reach a conclusion that these arrangements were the same as, or similar to, those in the* Alfred Truman *case.*

This means I don't think the principles flowing from the cases of Alfred Truman *and* Marshall *would allow me to conclude pre-existing arrangements existed between R and Santander for the purposes of Mr L's claim.*

Overall conclusions

I appreciate this will come as a great disappointment to Mr L especially as he has been waiting for an answer for such a long time, but I don't think he had a valid claim against Santander under section 75 of the CCA. It follows that I don't think the bank treated him unfairly in declining his claim and so his complaint should not

be upheld.

I understand that R's liquidators have been able to recover a significant sum from an ex-director of the company, so it is possible Mr L would receive a dividend if he has made a claim in the liquidation. He may wish to explore this option if he has not already done so.

The responses to the provisional decision

Santander responded to the provisional decision to say it didn't have anything to add. Mr L's claims management company ("CMC") said it didn't agree with the provisional decision and made the following points:

- Mr L had actually paid R and not MRLL, it just so happened that MRLL appeared on his credit card statement.
- R and MRLL had a shared director, the Mr K I had mentioned in my provisional decision, meaning the companies were linked.
- The Financial Ombudsman Service had upheld cases with very similar, or the same, sets of facts.

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'm not persuaded by the arguments made by Mr L's CMC. I don't think it can be correct that Mr L actually paid R, and it just so happened that the name of a different limited company appeared on his credit card statement.

While it is sometimes the case that the name which appears on a credit card statement will just be a trading name of the entity *actually* taking the payment via the card, I don't think that's a reasonable conclusion to draw here. R and MRLL were different limited companies, so if MRLL appears on a credit card statement then it's reasonable to conclude the entity taking the payment was MRLL and not R.

I'm similarly not persuaded by the CMC's second point. I am aware Mr K was previously a controller of R (as well as being a controller of MRLL), but this was not the case, as far as I have been able to determine, as of the day Mr L made his credit card payment to MRLL. Had this been the case then it's likely I would have reached a different set of conclusions.

I gather from broader conversations that Mr L's CMC believes Mr K was a controller of R for longer than the official records on Companies House show. But I've not seen evidence to suggest the official records are inaccurate. Our own enquiries with the liquidators have not turned up any information which would support this contention.

Finally, while it may be the case that other similar cases have been successful, it doesn't follow that all of them will be. Different cases may have subtle differences in the facts or circumstances, and it is also true that as more general information on a topic becomes available over time, a similar set of facts and circumstances may lead to a different outcome.

Overall, I see no reason to depart from the conclusions I reached in my provisional decision, which is to say that unfortunately for Mr L I do not think Santander treated him unfairly in

declining his section 75 claim. This is because I don't think he had a valid claim for the technical reasons I expanded on in my provisional decision.

My final decision

For the reasons explained above, including the quoted extract from my provisional decision, I do not uphold Mr L's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 29 June 2022.

Will Culley
Ombudsman