DRN-3629918

The complaint

Mr S says John Lewis Financial Services Limited ('John Lewis') has unfairly declined a claim he made under section 75 of the Consumer Credit Act 1974 ('CCA').

What happened

In September 2015, Mr S paid £7,801 to purchase an additional 10,000 points for a holiday club, of which he was already a member. He purchased the points from a company I'll call 'Business 1' and he used his John Lewis credit card account. However, the credit card payment wasn't made to Business 1. Instead, it was made to a different business: 'FNTC'. (Although Mr S purchased the points with another person, the credit card account is in his name only. This means that he's the only eligible complainant.)

In January 2018, a professional representative ('PR') – acting on Mr S's behalf and instructions – wrote to John Lewis to make a claim under section 75 of the CCA. The letter of claim said Business 1 had misrepresented the membership benefits to Mr S. It said John Lewis was legally answerable for this misrepresentation – or, alternatively, a breach of contract by Business 1 – under section 75 of the CCA.

John Lewis declined the claim. It said PR hadn't provided sufficient evidence to show that there had been a breach of contract or misrepresentation by Business 1. It also said there wasn't a debtor-creditor-supplier agreement ('DCS Agreement') between Mr S, John Lewis and Business 1 because the payments had been made to FNTC. The existence of such an agreement is an essential element of any claim under section 75 of the CCA.

PR wrote to John Lewis to explain why, in the circumstances, it didn't think the payment to FNTC made a difference and maintained that there was a DCS Agreement between Mr S, John Lewis and Business 1. It also reiterated its claim that the membership benefits had been misrepresented.

When John Lewis didn't change its position, PR referred the complaint to our service.

One of our investigators didn't think it was unfair for John Lewis to decline the claim. She said that even if there was a DCS Agreement, PR hadn't provided sufficient evidence to show that there had been a breach of contract or misrepresentation by Business 1.

PR disagreed with our investigator and asked that an ombudsman make a final decision.

I issued a provisional decision on 23 February 2024, which included the following provisional findings:

When considering what is, in my opinion, fair and reasonable in all the circumstances of the case, I'm required by DISP 3.6.3 R of the Financial Conduct Authority ('FCA') Handbook to take into account:

> *'(1) relevant:*

(a) law and regulations;
(b) regulators' rules, guidance and standards;
(c) codes of practice; and

(2) ([when]) appropriate) what [I consider] to have been good industry practice at the relevant time.'

When PR referred this complaint to our service, it referred to section 140A of the CCA as well as section 75. Specifically, it said the relationship between Mr S and Business 1 was 'unfair pursuant to s[ection] 140A of the [CCA]' because John Lewis had paid Business 1 'an undisclosed commission'.

First, I've seen no evidence that John Lewis paid Business 1 any commission: as Mr S used his credit card account to finance the transaction, I think it's very unlikely. Second, section 140A of the CCA is concerned with the relationship between the debtor and the creditor, not the supplier. PR's point, as argued, is therefore misconceived. What's more, it hasn't made a claim under section 140A to John Lewis. I wouldn't ordinarily consider or comment on a matter that the respondent firm hasn't had a chance to investigate first. However, given the age of this case and the consequences of my provisional findings on any claim under section 140A, I've decided to address Mr S's claim under section 140A as well as his claim under section 75. I don't think this is unfair to either party.

Below, I've set out the relevant law.

<u>The law</u>

Section 75 protects consumers who buy goods and services on credit. It says:

'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.'

Section 12(b) says that a DCS Agreement is a regulated consumer credit agreement being:

'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…'

An agreement falls within section 11(1)(b) if it's a regulated consumer credit agreement that 'finance[s] a transaction between the debtor and a person (the "supplier") other than the creditor'.

Section 140A says:

'(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—

(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 his 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).'

Section 140C(4) says the reference to a 'related agreement' means a 'linked transaction in relation to the main agreement'. And section 19 says a 'linked transaction' is:

> *'A transaction entered into by the debtor…with any other person ("the other party")…in relation to an actual or prospective regulated agreement (the "principal agreement") of which it does not form part if—*
>
> *(a) …*
> *(b) the principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement;*
> *(c) …'*

Put simply, for a claim under section 75 and/or section 140A to get off the ground, the consumer must first show that there is a DCS Agreement.

Was there a DCS Agreement between Mr S, John Lewis and Business 1?

In a letter to John Lewis dated 13 March 2018, PR explained in some detail why it thinks there was a DCS Agreement between Mr S, John Lewis and Business 1. I disagree and I'll explain why.

On 10 October 2022, the High Court handed down its judgment in the appeal of Steiner v National Westminster Bank plc *[2022] EWHC 2519. The facts of that case are very similar to this complaint.*

In Steiner*, a husband and wife had entered into an agreement with a timeshare provider to purchase from it the right to participate in a timeshare scheme for £14,000. The husband, Mr Steiner, had used his NatWest credit card account to pay the full amount. However, the payments weren't made to the timeshare provider. Instead, they were made to FNTC. The estate of the late Mr Steiner brought a claim against NatWest under sections 56, 75 and 140A of the CCA. However, the claim was dismissed at first instance on the basis that the payment to FNTC meant there wasn't a DCS Agreement. The appeal to the High Court was dismissed for essentially the same reason.*

Given the obvious similarities between Steiner *and this complaint, I think a court would reach the same conclusion and say there wasn't a DCS Agreement in this case and, consequently, dismiss any claim under section 75 of the CCA. Likewise, a court could only consider whether the agreement between Mr S and Business 1 affected the fairness of the debtor-creditor relationship under section 140A if there was a DCS Agreement, which there wasn't in this case. PR hasn't alleged that there was an unfair relationship for any other reason.*

As I've explained above, I must determine this complaint by reference to what I think is fair and reasonable in all the circumstances of this case. Here, I don't think it would be fair to say John Lewis is answerable for any alleged wrongdoing by Business 1 when the law doesn't impose such a liability.

John Lewis says it had nothing to add.

Mr S's PR hasn't replied at all.

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.

As neither party has provided any further comments or evidence, I confirm my provisional findings. My reasons remain the same.

My final decision

For the reasons given, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 19 April 2024.

Christopher Reeves
Ombudsman