DRN-4428336

## The Complaint

Mrs F says that Marks and Spencer Financial Services Plc (the 'Business') didn't act fairly or reasonably under certain provisions of the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare she purchased on 18 November 2013 (the 'Time of Sale') using a credit card provided by the Business.

## Background to the Complaint

Mrs F purchased a timeshare from a timeshare provider (the 'Supplier') at the Time of Sale for £7,480. And she used a credit card provided by the Business (the 'Credit Agreement') to help pay for the purchase by making a payment (using her credit card) of £1,500 to a third party ('TP') on 3 December 2013.

Mrs F – using a professional representative ('PR') – wrote to the Business on 13 November 2019 to complain about the sale of the timeshare (the 'Letter of Complaint'). The reasons for the complaint at that time are familiar to both sides. So, I don't intend to repeat them in detail here. But, in summary, Mrs F argued that there had been misrepresentations and a number of regulatory breaches by the Supplier.

On 28 November 2019, PR chased the Business for a response to the Letter of Complaint. But as one doesn't appear to have been forthcoming, a complaint was referred to the Financial Ombudsman Service on 14 February 2020. It was then looked at by an investigator who didn't uphold the complaint. In light of *Steiner v National Westminster Bank plc* [2022] EWHC 2519 ('*Steiner*'), he wasn't persuaded that there was the right arrangement in place for the purposes of the CCA to hold the Business responsible for what had allegedly gone wrong.

PR disagreed with the investigator's view. In summary, it said that the Financial Ombudsman Service is free to depart from the law and suggested that a court might come to a different outcome to that reached in *Steiner* if the product involved was a timeshare like Mrs F's and there was a closer inspection of the Supplier's relationship with TP.

As an informal resolution couldn't be reached, the complaint was referred for an ombudsman's decision – which is why it was passed to me.

## My Findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I don't think this complaint should be upheld for the same reasons as the investigator.

The CCA introduced a regime of connected lender liability under Sections 56, 75 and 140A that afforded consumers ("debtors") a right of recourse against lenders ("creditors") that provide the finance for the acquisition of goods or services from a third-party merchant (the "supplier").

On my reading of this complaint, Mrs F made a claim under Section 75 of the CCA for alleged pre-contractual misrepresentations by the Supplier and a complaint about a credit relationship that was allegedly unfair to her under Section 140A of the CCA. I acknowledge that the main body of the Letter of Complaint doesn't expressly refer to Section 140A. But a number of the allegations made in that letter don't fall neatly (or at all) into a Section 75 claim. And if the Letter of Complaint is construed too narrowly, it's difficult to explain why the relevant allegations were included in it. So, given the nature of the relevant allegations, I think it was and is reasonable to consider them with Section 140A in mind.

However, in order to engage the connected lender liability under Sections 75 and 140A (to the extent that the allegations under Section 140A, in combination with Section 56(1)(c) of the CCA, relate to the acts and/or omissions of the Supplier rather than the Business), one of the pre-conditions is the existence of a relevant debtor-creditor-supplier agreement ('DCS Agreement').

Yet, in light of *Steiner*, I'm not persuaded there was a DCS Agreement between Mrs F, the Business and the Supplier. And that means I don't think the Business needs to do anything to put things right in this complaint. I'll explain why.

A DCS Agreement is defined by Section 12(b) of the CCA as *"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) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the "supplier") other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

In *Steiner*, the High Court looked at the application of Sections 56, 75 and 140A of the CCA and considered the circumstances in which the necessary arrangement can be said to exist. The late claimant purchased a timeshare from a timeshare provider for £14,000 using his Mastercard, which had been issued by Lender N.

So, in accordance with the CCA, Lender N was the "creditor", the late claimant was the "debtor", and the timeshare provider was the "supplier".

But rather than paying the timeshare provider directly, the £14,000 payment was made by the late claimant (using his Lender N Mastercard) to a trustee (that happens to have been the same third party as TP in this complaint) under a deed of trust to which the timeshare provider was a beneficiary.

As a result, the estate of the late claimant (the 'Estate') had to demonstrate that the credit agreement fell within the meaning of Section 12(b) of the CCA i.e., that it was made "under pre-existing arrangements, or in contemplation of future arrangements" between Lender N and the timeshare provider.

But the High Court wasn't persuaded the Estate had done that. And in reaching that conclusion, the Court held that "arrangements" could not be *"stretched so far as to mean that Lender N made its agreement with the late claimant under the Deed of Trust (of which it was presumably unaware) as well as under the Mastercard network."*

The central question in *Steiner* and in this complaint, therefore, is not whether "arrangements" existed between the Business and the Supplier when the timeshare in question was sold (i.e., at the Time of Sale). Instead, the question posed by Section 12(b) is whether the Credit Agreement was made by the Business under pre-existing arrangements, or in contemplation of future arrangements, between it and the Supplier.

In other words, the starting point for the purposes of Section 12(b) is the date the Business and Mrs F entered into the Credit Agreement – rather than the Time of Sale.

Yet, I can't see that the Business issued Mrs F with her credit card and entered into the Credit Agreement relating to that card under, or in contemplation of, any arrangements other than the relevant card network. And while there may well have been arrangements between the Business and TP (i.e., the relevant card network) and arrangements between TP and the Supplier (the 'TP-Supplier Arrangement'), as the High Court recognised in *Steiner*, the natural and ordinary meaning of Section 12(b) did not extend to saying that the Business entered into the Credit Agreement with Mrs F under both the relevant card network and the TP-Supplier Arrangement or in contemplation of the TP-Supplier Arrangement.

And as I can't see any other reason why there was a DCS Agreement given the facts and circumstances of this complaint, I don't think it would be fair or reasonable to find the Business responsible for the Supplier's alleged failings when the law doesn't impose such a liability on the Business in the absence of a relevant connection between it and the Supplier.

**My Final Decision**

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or reject my decision before 12 March 2024.

Morgan Rees
**Ombudsman**