DRN-4438538

The complaint

Mrs B has complained that Marks & Spencer Financial Services Plc ("Marks & Spencer") didn't fairly or reasonably deal with claims under the Consumer Credit Act 1974 ("CCA") in relation to a holiday product bought using her credit card.

What happened

In November 2018, Mrs B purchased holiday club membership from a business I'll call "Business C". It cost £18,741 and it was paid for by Mrs B – in part – using her Marks & Spencer credit card[1].

The purchase agreement entered into by Mrs B was made between her and Business C. However, the credit card payment wasn't made directly to Business C, rather it went to a different business I'll call "Business F".

In March 2022, using a professional representative ("PR"), Mrs B made a claim to Marks & Spencer under section 75 of the CCA. The reasons for the claim are familiar to both sides so I don't intend to repeat them in detail here. But, in summary, Mrs B said Business C made misrepresentations at the time of sale and that, under section 75 CCA, Marks & Spencer was jointly responsible to answer for them.

Marks & Spencer responded to the claim by asking PR for further information to support it. Following an exchange of correspondence between both parties, Marks & Spencer concluded that it had not received evidence to suggest there has been a misrepresentation.

Unhappy with this, the complaint was referred to our service.

One of our investigators looked into matters and issued their findings in October 2023. In short, our investigator said there wasn't the right arrangement in place to make such a claim because Mrs B hadn't used her credit card to pay Business C directly.

PR disagreed with our investigator's findings. And, as an informal resolution couldn't be reached, the complaint was referred for an ombudsman's decision.

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.

When doing that, I'm required by DISP 3.6.4R of the Financial Conduct Authority's Handbook to take into account the:

"(1) relevant:

[1] Although the membership was in the names of Mr and Mrs B, as the credit card used was in Mrs B's name, only she can make this complaint.

(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."

Section 75(1) CCA states:

"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) CCA states that a debtor-creditor-supplier ("D-C-S") 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 is a s.11(1)(b) restricted-use credit agreement if it is a regulated CCA agreement used "*to finance a transaction between the debtor and a person (the "supplier") other than the creditor*".

The upshot of this is that there needs to be a D-C-S agreement in place for the lender (Marks & Spencer) to be liable to the borrower (Mrs B) for the alleged misrepresentations of the supplier (Business C). But, on the face of it, there was no such arrangement in place at the relevant time.

The law in this area was clarified by the High Court in Steiner v. National Westminster Bank plc [2022] EWHC 2519 (KB) ("Steiner").

The late Mr Steiner ("the Estate") paid for a timeshare provided by Club La Costa Vacation Club Ltd ("CLC") using his NatWest credit card. So, for the purposes of s.11(1)(b) of the CCA, NatWest was the creditor, the late Mr Steiner was the debtor and CLC was the supplier. But the payment of £14,000 was in fact taken by FNTC.

The Estate initially argued that the right arrangements were in place because there was a Deed of Trust between CLC and FNTC under which CLC would receive payment. But the High Court was not persuaded by this. On appeal, the Estate's claim sought to demonstrate that the credit agreement was made "under pre-existing arrangements", or in contemplation of "future arrangements" and extended to CLC under section 12(b) CCA.

But the High Court dismissed the appeal. And in doing so, the Court held that arrangements could not be "stretched so far as to mean that NatWest made its agreement with the late Mr Steiner under the Deed of Trust (of which it was presumably unaware) as well as under the Mastercard network." Therefore, the existence of the Trust Deed didn't help to create a valid D-C-S agreement for the purposes of the CCA.

The circumstances of Mrs B's case are very similar to the circumstances in Steiner. In this case, Business F took payment for Mrs B's purchase of Business C's holiday club memberships. So, based on the judgment in Steiner, I think a court would come to a similar conclusion and say that there was no D-C-S agreement in place and, in turn, no valid section

75 CCA claim.

I say this because it seems to me to be difficult to argue that Marks & Spencer entered into the credit agreement with Mrs B under, or in contemplation of, any arrangements other than the relevant card network. And while there may well have been arrangements between Marks & Spencer and Business C (the relevant card network) and arrangements between Business F and Business C (the Deed of Trust), as the High Court recognised in Steiner in "*the natural and ordinary meaning of the words used in section 12(b) of the Act does not extend to saying that NatWest made its agreement with Mr Steiner under both the Mastercard network and the Trust Deed (or under both the Mastercard network and any other arrangements which parties to the Mastercard network might have with third parties)*".

Under section 187 of the CCA, there are also ways in which there might exist a D-C-S agreement even if a supplier isn't paid directly using a credit card. For example, if Business F and Business C were 'associates' as defined by section 184 of the CCA, there might have been the right arrangement in place at the right time. I haven't seen anything to persuade me that's likely to have been the case here.

PR has said that the court in Steiner was unaware of the nature of any contractual relationship between CLC and FNTC and, therefore, for the purposes of this complaint, it would be reasonable for our service to assume that the relationship was identical to the relationship outlined in another decision made by our service. In other words, PR says it seems reasonable to assume Business F was acting solely as a payment processor for Business C and, therefore, there was a D-C-S agreement in place at the right time.

However, I do not agree with this assumption. I say this because traditional payment processors act as a way for a supplier to receive its money. In Steiner the court set out various clauses within the Deed of Trust that indicate FNTC provided more than a financial transaction service. For example, Clause 4.1 of the Deed of Trust provided as follows: "The Trustee shall hold the Property upon trust to secure for the Members the rights of occupation in the Scheme Accommodation under and in accordance with and subject to the provisions of the Articles."

Further, in Steiner the judge said:

"*There was no evidence before me as to the general practice as to the structure of time share arrangements, but it was not disputed that the use of a trustee in such an arrangement, while not required by law, is common in the United Kingdom and has as its purpose, as one would expect, the protection of consumers.*"

I recognise PR has cited another decision made by our service, but it is important to be clear that each case turns on its own facts. And, in this case, I haven't been provided with anything to suggest the services provided by Business F were any different to those set out in Steiner. With that being the case, I haven't seen anything to persuade me that Business F were acting solely as a payment processor. It follows that, for the reasons I've already explained, I do not think the right arrangements were in place to give rise to a valid section 75 claim.

Finally, in response to our investigator's findings, PR said the Financial Ombudsman Service is dealing with complaints, not legal causes of action. And PR went on to say that our service is free to depart from the relevant case law when doing so would result in a fair and reasonable answer being reached.

Under the rules set out above, I explained that I must take into account the law, but come to my own determination of what is fair and reasonable in any given complaint. Here, for the

reasons I've explained, I don't think it would be fair to make Marks & Spencer responsible for Business C's alleged failures when the law didn't impose such a liability.

It follows that I don't think Marks & Spencer needs to answer the claim made.

My final decision

My decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 24 May 2024.

Ross Phillips
Ombudsman