DRN-4449339

The complaint

Mrs H complains that Marks & Spencer Financial Services Plc, trading as M&S Bank (the 'Lender') acted unfairly and unreasonable by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mrs H, alongside another, purchased membership of two timeshares (the 'Fractional Club' memberships') from a timeshare provider (the 'Supplier') in or around February 2013 and March 2015. The cost of each Fractional Club membership was paid for using a credit card provided by the lender (the 'Credit Agreement') in Mrs H's sole name.

Those payments appear on Mrs H's credit card statement as follows:

- 1 March 2013 – a payment £8,670 in relation to the purchase in 2013.
- 20 February 2015 – a payment of £2,200 in relation to the purchase in 2015.
- 22 March 2015 – a payment of £8,671, also in relation to the purchase in 2015.

However, those payment were not made directly to the Supplier. Rather, they went to a different business, ('FNTC').

Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 7 February 2019 (the 'Letter of Complaint') to complain about:

- Misrepresentations by the Supplier at the Time of each Sale giving Mrs H a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
- The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreements for the purposes of Section 140A of the CCA.

I don't propose to list all the various allegations included within Mrs H's complaint given that the parties are familiar with them. However, should I find it necessary, I may choose to make reference to them in my decision where I believe it's appropriate and helpful to do so.

Having not received a response from the Lender, Mrs H's complaint was referred to the Financial Ombudsman Service.

One of our investigators considered everything but did not think the Lender needed to do anything further. In particular, because Mrs H's card payments had been made in favour of FNTC, and not the Supplier. And because of that, the provisions of the CCA, to which the PR referred, could not operate to impose a liability on the Lender here in the way alleged. In doing so, our investigator referred to the judgement in the case of *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) – ('*Steiner*').

In response to our investigator, the PR explained why it disagreed with the outcome and asked for an ombudsman to review Mrs H's complaint. In doing so, the PR suggested that relying upon the judgment in *Steiner* did not lead to a result for Mrs H that was fair and

reasonable. The PR pointed to a court judgment that held that an ombudsman could depart from the law, if necessary, to reach a fair outcome.

The PR argued that Mrs H was entitled to regard the payment made, using her credit card, as payment being made to the Supplier. And added its view that there is no dispute that payment, once made, was credited against the entirety of the purchase consideration required to complete the purchase. It further suggests certain differences between Mrs H's complaint and the court's findings in *Steiner* pointing to part of the contractual paperwork which, in its view, demonstrate FNTC's *"integral"* role in the transaction and product purchased. It suggested that FNTC were acting as the Supplier's agent or as a merchant acquirer, and as such, *"Liability extends to the four-party structure where there is no contractual link between the credit card issuer and the supplier"*, making further reference to another court judgment.

As the PR (on Mrs H's behalf) didn't agree with our investigator's findings, the complaint was passed to me for a 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 deciding complaints, I am required by DISP 3.6.4 R of the FCA Handbook to take into account:

> *"(1) relevant:*
>
> *(a) Law and regulations;*
>
> *(b) Regulators' rule, guidance and standards;*
>
> *(c) Codes of practice; and*
>
> *(2) (where appropriate) what* [the ombudsman] *considers to have been good industry practice at the relevant time."*

The PR brought a claim on Mrs H's behalf under sections 75 and 140 CCA. I think it is helpful to set out the relevant legal provisions.

s.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".*

s.12(b) CCA states that a debtor-creditor-supplier ('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 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".*

Further, S.140A CCA states:

> *"(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).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, as associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to the creditor."

s.140C CCA says that the reference in s.140A CCA to a 'related agreement' include a linked transaction in relation to the main agreement, which is defined in s.19 CCA as:

"(1) A transaction entered into by the debtor or hirer, or a relative of his, with any other person ("the other party"), except one for the provision of security, is a linked transaction in relation to an actual or prospective regulated agreement (the "principal agreement") of which it does not form part if –

(b) The principle agreement is a debtor-creditor-supplier agreement, and the transaction is financed, or to be financed, by the principle agreement…"

Finally, under s.56 CCA, any negotiations conducted by a supplier in relation to a transaction financed or proposed to be finance by a DCS agreement amount to *"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)"* under s.140(1)(c) CCA.

The upshot of this is that for a claim under the various provisions of the CCA, there needs to be a DCS agreement in place for the Lender to be liable to the borrower (here that's Mrs H) for the misrepresentations of the Supplier. But, on the face of it, there were no such arrangements in place at the relevant times as the Supplier was not paid directly using Mrs H's credit card. Instead, the payments were taken by FNTC.

There are ways in which there can be a DCS agreement in place, even if the supplier is not paid directly using a credit card. The law in this area had been clarified in the judgment in *Steiner*, which considered whether there was a DCS agreement in circumstances where FNTC took payment on a credit card in relation to the purchase of timeshare membership from a timeshare provider[1]. The court considered the arrangements between the parties and concluded that, in that instance, there was no DCS agreement in place. That was because any payment made to that timeshare provider was made outside of the credit card network, and therefore not made under pre-existing arrangements, or in contemplation of future arrangements, between that timeshare provider and NatWest.

The circumstances of Mrs H's case are very similar. Here, payments were taken in the same way by FNTC to fund a membership agreement between Mrs H (with another) and the Supplier. So, based on the judgment in *Steiner*, I think a court would come to a similar conclusion and say that there was no DCS agreement in place and, in turn, no valid claim under s.75 CCA as the Supplier was not paid under an agreement involving the Lender here. It follows, I do not think the Lender ultimately acted unfairly by not accepting the claim(s) made. I will explain further.

[1] This was a different timeshare provider to the Supplier in this case

In *Steiner*, the Court considered the meaning of the words in s.12 CCA *"pre-existing arrangements, or in contemplation of future arrangements"* and concluded that the central issue was whether the credit agreement (i.e. the credit card) was granted by the lender under pre-existing arrangements or in contemplation of future arrangements between it and the supplier, rather than the nature of the arrangements at the time of the purchase. The Court concluded that it was not likely that the lender issued the credit card in contemplation of arrangements outside of, and in addition to, the credit card network, i.e. the trust deed between FNTC and the timeshare supplier as well as the card network involving FNTC.

In Mrs H's case, I find it unlikely that the Lender granted her a credit card in the knowledge of the trust deed between the Supplier and FNTC, nor in contemplation of the existence of any such trust deed. That is the important issue in this case and not the precise arrangement by which FNTC passed funds (if it did) to the Supplier when Mrs H used her credit card. It follows, I do not think there was a DCS arrangement in place involving the Lender, Mrs H and the Supplier.[2]

The PR has also pointed to another judgment, *Bank of Scotland v. Alfred Truman (A Firm)* [2005] EWHC 583 (QB), that it says would lead to there being a DCS in a situation similar to that in Mrs H's case. However that judgment was considered by the Court in *Steiner*, however it was held to have little assistance in determining a case such as the one being considered in *Steiner* and, therefore, Mrs H's too.

I have also considered whether it is relevant that the Supplier is, or was at the relevant time, able to take payments itself under the same credit card network under which FNTC took payment from Mrs H. But I do not think that makes a difference in this case as it is the specific arrangements between the parties to the transaction that matter and, quite simply, the Supplier was not a party to that transaction involving the Lender at the time of sale. Further, I do not think FNTC was a 'joint supplier' of the membership as it was the Supplier, and not FNTC, that granted the membership to Mrs H.

I have also thought about whether there could be any unfairness in the relationship between Mrs H and the Lender, arising out of the purchase, as defined by S.140A CCA. However, under that provision, an assessment of whether the agreements between Mrs H and the Supplier affected the fairness of the debtor-creditor relationship could only be done if there was a valid DCS agreement in place. And, as already explained, I do not think such an arrangement was in place.

It follows that I do not think the provisions of the CCA apply to the complaints the PR advanced on Mrs H's behalf in the way required to make the Lender responsible for the Supplier's actions. And while I acknowledge that Mrs H may not have been aware that she might have lost any CCA protection because of the way payment was taken, the issue here is not about Mrs H's knowledge. Rather it is whether the technical legal arrangement was in place such that there was a DCS agreement. And, following the judgement in *Steiner*, I do not think the right arrangement was in place.

Under the rules set out above, I must take into account the law, but come to my own determination of what is fair and reasonable in any given complaint. Here, I do not think it would be fair to make the Lender responsible for the Supplier's alleged failures when the law does not impose such a liability – I cannot see that the Lender and the Supplier were connected in any way. So, I do not think Marks & Spencer Financial Services Plc, trading as M&S Bank needs to do anything further to settle this complaint

[2] This also means that, as any arrangements between the Supplier and FNTC operated outside of the card network, FNTC would not have been operating as a merchant acquirer, signing merchants up to the card scheme

My final decision

For the reasons set out above, I do not uphold Mrs H's complaint against Marks & Spencer Financial Services Plc, trading as M&S Bank

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 8 January 2025.

Dave Morgan
Ombudsman