

The complaint

Mrs K, who is represented by a professional representative ("PR") complains that NewDay Ltd didn't fairly and reasonably handle her claim under the Consumer Credit Act 1974 ("CCA") in relation to a payment she made using her credit card for the purchase of a timeshare product.

What happened

In October 2013, while on holiday, Mrs K along with her husband attended a presentation held by a company I will call C. They already had a holiday product which had been purchased jointly. Mrs K says they were persuaded to upgrade their points based product to a fractional ownership one. The new one cost £29,483 and this was funded by a trade in value for the old one of £10,450 with £10,000 coming from Mrs K's NewDay credit card. I gather the payment was made to another company I will call F. I would add that it is not clear where the remaining funds came from.

In December 2019 PR submitted a letter of claim to NewDay on Mrs K's behalf. It claimed that the product had been mis-sold and sought redress. Initially NewDay rejected the claim as it said Mrs K had acquired an investment.

PR brought a complaint to this service where it was considered by one of our investigators who didn't recommend it be upheld. NewDay in its submission had noted that the agreement with C was in Mr K's name alone and so Mrs K was not entitled to make a claim.

Our investigator set out the relevant law as follows:

S.75 of the CCA.

(1) 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.75 only applies where there is a debtor-creditor-supplier ("DCS") agreement in place. A valid DCS agreement also needs to be in place if a consumer is arguing that the relationship between themselves and the finance provider was/is unfair under S.140A of the CCA because of something said or done by the Supplier.

He concluded there wasn't a DCS agreement since Mrs K didn't have a link with C as the contract was in her husband's name.

PR didn't agree and sent a statement of truth from Mrs K. She explained that they had both attended the sales presentation and they had bought the product together. She didn't know why the sales representative put the agreement in Mr K's name alone. She also said that the product was funded in part by the trade-in which was jointly owned. She also submitted a copy of a request for fees from C addressed to Mr and Mrs K.

I issued a provisional decision as follows:

"In the circumstances I have not considered the merits of the original complaint as I am not persuaded that Mrs K meets the criteria set down in the CCA in order for a claim under s.75 to be successful. As our investigator has pointed out there must be an intact DCS agreement and I believe Mrs K does not qualify since she has no legal relationship with C.

Relevant legislation

The Consumer Credit Act 1974

"8. — Consumer credit agreements.

(1) A [consumer] credit agreement is an agreement between an individual ("the debtor") and any other person ("the creditor") by which the creditor provides the debtor with credit of any amount....

9.— Meaning of credit.

(1) In this Act "credit" includes a cash loan, and any other form of financial accommodation.....

75.— Liability of creditor for breaches by supplier.

(1) 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.....

189.— Definitions.

(1) [...]1In this Act, unless the context otherwise requires—

"consumer credit agreement" has the meaning given by section 8, and includes a consumer credit agreement which is cancelled under section 69(1), or becomes subject to section 69(2), so far as the agreement remains in force;.....

"creditor" means [(except in relation to green deal plans: see instead section 189B (2))] the person providing credit under a consumer credit agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and in relation to a prospective consumer credit agreement, includes the prospective creditor;.....

"debtor" means [(except in relation to green deal plans: see instead section 189B (3))] the individual receiving credit under a consumer credit agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and in relation to a prospective consumer credit agreement includes the prospective debtor;..."

Analysis

The key to this issue is the wording of s.75 CCA. It allows a claim by a debtor (Mrs K) under a DCS agreement to have a like claim against the creditor as they would against the supplier. The supplier being C and the creditor being NewDay. The question is what claim does Mrs K have against C?

She is not a signatory to the agreement and she is not a party mentioned in it. The agreement is between Mr K and C and I cannot see that Mrs K has any rights in relation to the agreement. It may not be what Mr and Mrs K intended but it is what was agreed. Mr K does have the right to make a claim against C for misrepresentation or breach of contract, but since he is not the debtor that does not extend to being able to make a claim against

NewDay.

I assume Mrs K is able to obtain some benefits from the contract, such as use of the accommodation, but these will be due to her being connected with/married to Mr K. I cannot see that she has any rights under the contract since she is not party to it.

I have noted that the purchase was part funded by the trade-in of a previously purchased product which was jointly owned by Mr and Mrs K. This means that Mrs K has indirectly contributed the cost of the new product. However, that alone does not establish a relationship between Mrs K and C and I do not consider it makes her party to the DCS agreement which s.75 requires.

She has argued that the points owned in the traded in product were rolled into the new product and this makes her a party to the new agreement. While both products are timeshare product they are separate and distinct. The old one had some value and it was that value which was set against the cost of the new one.

I also note that C has issued a bill for membership fees and points rights dues dated 14 October 2013 in joint names. Assuming this relates to the October 2013 purchase it is at odds with the agreement. I cannot say why C issued the bill in joint names, but I do not believe that this overturns the plain meaning of the agreement. I do not consider it allows me to say that there is a DCS agreement in place.

Mrs K has suggested she has an equitable interest in the product which would give her an interest in the product, but no legal title. This is not true ownership and is usually overridden by legal title and I do not think it brings her into the DCS agreement. If C was seeking to take action against Mrs K for, say outstanding payments, I doubt it would succeed given she has no agreement with it.

*Finally, I have noted that a claim under s. 75 was considered recently by the Court of Appeal in the case of *Cooper v The Freedom Travel Group and Bank of Scotland Plc (trading as Halifax)* [2022] EWCA Civ 1557. The facts are somewhat different and the point at issue relates to the understanding of who was a debtor in the agreement, but the decision shows that the Courts are reluctant to widen the scope of s. 75.*

I believe that in considering Mrs K's claim I need to take due notice of the Courts' narrow interpretation of the relevant law. In summary Mrs K is the debtor and NewDay is the creditor and that relationship is not in question. However, she does not have an agreement with C and I consider that means she has no ability to make a claim against C. In order for her to be able to make a claim under s. 75 she needs first to have a claim against C. But she has no contractual relationship with C. That means I do not consider I can uphold her complaint."

Both parties said they had nothing to add.

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 given me cause to change my provisional decision the view I expressed stands.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 13 December 2023.

Ivor Graham
Ombudsman