DRN-4489265

The complaint

Mr C has complained that Marks & Spencer Financial Services Plc ("M&S") didn't fairly or reasonably deal with a claim for compensation made in relation to a timeshare membership he bought using his M&S credit card.

What happened

Mr C, alongside another, purchased a number of holiday club memberships from a timeshare supplier ("the Supplier"). These were in May 2013, June 2014, March 2015 and March 2017. When paying for some of these memberships, he used his M&S credit card.

In July 2019, using a professional representative ("PR"), Mr C asked M&S to pay a liability he said it had that arose out of the sales. That was because, due to the operation of s.75 of the Consumer Credit Act 1974 ("CCA"), M&S was jointly liable to answer his concerns about the way the memberships were sold as he'd paid for them, in part, by using a M&S credit card.

In August 2019, M&S responded to say the only evidence it had that an M&S card was used was in respect of the last, 2017 sale. M&S said that s.75 CCA meant that a lender could be jointly liable for any misrepresentation a supplier made during the sale or a breach of the agreement funded by the credit card. So it asked the Supplier to provide its position on the 2017 sale. But, in September 2010, M&S said the Supplier disputed it was liable for any of the allegations and, in November 2019, it said that if Mr C wished to bring a complaint to our service that M&S unfairly turned down the payment request he could do so. Following that, PR referred a complaint to our service on Mr C's behalf.[1]

One of our investigators considered the complaint, but didn't think M&S needed to pay anything to Mr C. He only looked at the 2017 sale and said he didn't think there was enough to show M&S was jointly liable for anything under s.75 CCA. PR, on Mr C's behalf, disagreed and asked for the matter to be looked again by an ombudsman.

Before that happened, a different investigator considered the complaint again. She said agreed that the evidence suggested only the 2017 purchase was paid for using the M&S card, and she also didn't think M&S needed to do anything further. She thought that M&S wasn't likely to have to do anything under the relevant provisions of the CCA as the payment made using the card didn't go to the Supplier directly, rather it went to a different business called "FNTC". That meant, following a judgment that was handed down after our first investigator's view (*Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner")), there weren't the right arrangements in place for M&S to have to consider allegations about the Supplier's misconduct. PR again asked for the complaint to be reconsidered by an ombudsman.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and

[1] Although Mr C bought membership with another, as the M&S credit card was in his name, only he is able to refer a complaint to our service

reasonable in the circumstances of this complaint.

When doing so, I'm required by DISP 3.6.4 R of the FCA Handbook to take into account:

> *"(1) relevant:*
>
> > *(a) law and regulations;*
> > *(b) regulators' rules, 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."*

I've looked at the evidence provided and I've not seen any payment being made by Mr C using his M&S credit card for any of the first three purchases. M&S accept that its card was used in relation to the 2017 purchase, so I've only considered that one in this decision.

PR made a complaint on Mr C's behalf, pointing to the operation of s.75 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*".

The upshot of this is that there needs to be a DCS agreement in place for the lender (here M&S) to be liable to the borrower (here Mr C) for the misrepresentations of the supplier (here the Supplier) under s.75 CCA. But, on the face of it, there were no such arrangement in place at the relevant times as the Supplier wasn't paid directly using the credit card, rather the payments were taken by FNTC.

There are ways in which there can be a DCS agreement in place, even if the supplier isn't paid directly using a credit card. Our investigator pointed to the judgment in Steiner, where it was 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 different timeshare supplier. The court considered the arrangements between the parties and concluded that, as any payment that went to that supplier was made outside of the credit card network, in that instance there wasn't a DCS agreement in place.

The circumstances of Mr C's case are very similar. In both cases payment was taken by FNTC, rather than the relevant timeshare supplier, and in both instances FNTC and the

supplier were linked by a deed of trust. 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 as any payment made to the Supplier was outside of the card network and pre-existing arrangements between M&S and the Supplier (or in contemplation of future arrangements). That meant, in turn, there was no valid s.75 CCA claim.

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 don't think it would be fair to make M&S responsible for the Supplier's alleged failures when the law doesn't impose such a liability. Further, I can't see that M&S and the Supplier were connected in any way nor is there any other reason to say M&S should be responsible for or be connected to, the Supplier's alleged failings.

It follows that I don't think M&S needs to do anything further to answer Mr C's complaint.

My final decision

I don't uphold Mr C's complaint against Marks & Spencer Financial Services Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 13 March 2024.

Mark Hutchings
Ombudsman