DRN-4495653

The complaint

Mr W has complained that Lloyds Bank PLC, trading as MBNA, didn't act fairly or reasonably in respect of a complaint raised about how parts of the Consumer Credit Act 1974 ("CCA") related to something bought using his MBNA credit card.

What happened

In 2003, Mr W, alongside another, purchased holiday club membership from a timeshare supplier ("the Supplier"). This cost £2,405 and was paid in part by Mr W using his MBNA credit card.[1] But this credit card payment wasn't made directly to the Supplier, rather it went to a different business, "FNTC".

In April 2022, using a professional representative ("PR"), Mr W made a claim to MBNA under s.75 CCA. In short, PR said the Supplier made misrepresentations at the time of the sale that, under s.75 CCA, MBNA was jointly responsible to answer.

MBNA responded to the claim in June 2022 and said it wasn't responsible to answer the claim made as Mr W hadn't paid the Supplier directly, rather the payment had gone to a third party, FNTC. MBNA said this meant s.75 CCA didn't apply in the way PR argued it could.

In November 2022, Mr W referred a complaint to our service that MBNA hadn't properly considered the claim made under s.75 CCA.

MBNA responded and provided evidence that Mr W had made two payments to FNTC, one in December 2003 and one in January 2004. It reiterated its position that as the payment went to FNTC and not the Supplier, it wasn't liable under s.75 CCA. It also said that the claim had been made too late under the relevant provisions of the Limitation Act 1980 ("LA").

One of our investigators considered the complaint, but didn't think MBNA needed to do anything further. He thought that MBNA 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 FNTC. That meant, following the judgment in *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner"), there weren't the right arrangements in place for MBNA to have to consider allegations about the Supplier's misconduct.

PR responded to say Mr W disagreed with our investigator and wanted an ombudsman to

review the complaint. PR argued that FNTC acted as an agent for the Supplier when processing the payment and referred to the judgment in *Bank of Scotland v. Alfred Truman (a firm) [2005]* EWHC 583 ("Truman"). PR said that as FNTC was a trustee of the Supplier it was also an agent and this fit with Mr W's understanding that he was making a payment to the Supplier and not FNTC. Further, part of FNTC's duties were to process payments for the benefit of the Supplier.

[1] Although the membership was bought in joint names, as the card used was Mr W's, only he is able to bring this complaint

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 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."*

PR made a complaint on Mr W's behalf, pointing to the operation of s.75 CCA. I think it's 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 MBNA) to be liable to the borrower (here Mr W) 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 the payment 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 W's case are very similar. 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, in turn,

no valid s.75 CCA claim. I'll explain further.

In Steiner, payment was taken for timeshare membership. But rather than the claimant's credit card being used to pay the timeshare supplier directly, payment was actually taken by a trustee (in that case also FNTC). There was a deed of trust between FNTC and that timeshare supplier, such that the timeshare supplier was a beneficiary under the trust.

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, not 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 Mr W's case, I find it unlikely that MBNA granted Mr W 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 the card was used. It follows, I don't think there was a DCS arrangement in place involving MBNA, Mr W and the Supplier.

I've also read the judgment in Truman and I note that the judge in Steiner considered the Truman judgment too, but didn't find it was of much assistance in deciding that case. I also don't find it of much assistance as it doesn't go to the central issue in this case, the arrangements between MBNA and the Supplier at the time the credit card agreement was entered into or whether it was entered into in contemplation of future arrangements. I don't think the question of whether FNTC was taking payments on the Supplier's behalf goes to that issue.

I also don't think the fact that Mr W thought he was paying the Supplier and not FNTC goes to the issue in the complaint either. But the issue here isn't about Mr W's knowledge, rather it's whether the technical legal arrangement was in place such that there was a DCS agreement. And, following the judgment in Steiner, I don't think the right arrangement was in place.

It follows that I don't think the s.75 CCA applies to the complaint PR advanced on Mr W's behalf in the way required to make MBNA responsible for the Supplier's actions. And as that is the case, I don't need to consider whether MBNA also had a defence under the LA.

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

It follows that I don't think MBNA needs to do anything further to answer Mr W's complaint.

My final decision

I don't uphold Mr W's complaint against Lloyds Bank PLC, trading as MBNA.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 25 March 2024.

Mark Hutchings
Ombudsman