DRN-4534217

The complaint

Mrs M has complained that Marks & Spencer Financial Services Plc, trading as M&S Bank, acted unfairly and unreasonably by deciding against paying a claim made under s.75 of the Consumer Credit Act 1974 ("CCA").

What happened

In August 2015, Mrs M, alongside another, purchased holiday club membership from a timeshare provider ("the Supplier"). This cost $42,900 and was paid, in part, by Mrs M making a payment of £2,737.02 using her M&S Bank credit card. But the credit card payments were not made directly to the Supplier, rather they went to a different business, "FNTC".

In June 2021, using a professional representative ("PR"), Mrs M made a claim to M&S Bank under s.75 CCA. In short, PR said the Supplier misrepresented matters at the time of the sale that, under s.75 CCA, M&S Bank was jointly responsible to answer. Although the holiday club membership was in the name of Mrs M and another, as the credit card used was Mrs M's alone, the claim was made in her name.

Having not received a response, in September 2022, PR referred a complaint to the Financial Ombudsman Service that M&S Bank had not properly considered Mrs M's claim. After the complaint was referred to our service, M&S Bank said that it did not accept Mrs M's complaint. It explained that it did not accept the original claim as, in its view, PR had not provided the right authority to represent Mrs M. With respect to the actual claim, M&S Bank said that it did not have enough evidence to say whether it would accept it needed to pay anything under the claim.

One of our investigators considered everything, but did not think M&S Bank needed to do anything further. He thought that because Mrs M's card payment had been made in favour of FNTC, and not the Supplier, the provisions of the CCA to which PR referred could not operate to impose a liability on M&S Bank. In doing so, he referred to the judgment in the case of *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("*Steiner*").

PR responded to our investigator to say it disagreed with the outcome and asked for an ombudsman to review the complaint. In doing so, it said that relying on the judgment in *Steiner* did not lead to a result for Mrs M that was fair or reasonable. PR pointed to a court judgment that held an ombudsman could depart from the law, if necessary, to reach a fair outcome. Here, PR argued that Mrs M did not know to whom the payment was made and did not appreciate that she was losing the protections of the CCA, as the payment did not go to the Supplier directly. PR also said that the type of membership that Mrs M purchased was different to the type of membership purchased in the case of *Steiner* and the Financial Ombudsman Service had upheld similar complaints, finding there was an unfair debtor-creditor relationship as defined by s.140A CCA.

PR further argued that it appeared thar the funds taken by FNTC corresponded with the purchase price of the membership, and Mr H had to pay annual maintenance fees to FNTC, so it was likely that the administration costs of the trust were taken from those payments

rather than from the amount paid for membership. It followed, there must have been an arrangement between FNTC and the Supplier, such that FNTC was acting as a payment processor for the Supplier. PR pointed to a decision by another ombudsman from 2019 that found, in a similar situation, there were the right relationships in place for a successful claim.

As the parties did not agree with our investigator, the complaint was passed to me for a decision.

What I have 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' 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 brought a claim on Mrs M's behalf under 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 ("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*".

Although Mrs M did not originally say there was an unfair debtor-creditor relationship as defined by s.140A CCA, that was raised in response to our investigator's view and it is relevant law I must consider. 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, an 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 principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement…"

Finally, under s.56 CCA, any negotiations conducted by a supplier in relation to a transaction financed or proposed to be financed by a D-C-S 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 s.75 CCA, there needs to be a D-C-S agreement in place for the lender (here M&S Bank) to be liable to the borrower (here Mrs M) for the misrepresentations of the supplier (here 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 the credit card, rather the payments were taken by FNTC.

There are ways in which there can be a D-C-S agreement in place, even if the supplier is not paid directly using a credit card. The law in this area had been clarified by the judgment in *Steiner,* which considered whether there was a D-C-S 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 D-C-S 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 M's case are very similar. Here, payment was taken in the same way by FNTC to fund a membership agreement between Mrs M 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 D-C-S agreement in place and, in turn, no valid s.75 CCA claim as the Supplier was not paid under an agreement involving M&S Bank. It follows, I do not think M&S Bank acted unfairly in turning down the claim made. I will explain further.

[1] This was a different timeshare provider than the Supplier

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, 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 Mrs M's case, I find it unlikely that M&S Bank 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 the card was used. It follows, I do not think there was a D-C-S arrangement in place involving M&S Bank, Mrs M and the Supplier.

PR has asked me to consider a decision issued by another ombudsman, but it does not change my view on the issue of the D-C-S arrangement. That decision was written before the judgment was issued in *Steiner* and was in relation to a different situation, so it is not of assistance to me.

I have also thought about whether there could be any unfairness in the relationship between Mrs M and M&S Bank, arising out of the purchase, as defined by s,140A CCA. However, under that provision, an assessment of whether the agreements between Mrs M and the Supplier affected the fairness of the debtor-creditor relationship could only be done if there was a valid D-C-S agreement in place. And, as already explained, I do not think such an arrangement was in place, nor has Mrs M suggested there was an unfair relationship for any other reason.

It follows that I do not think the provisions of the CCA apply to the complaints PR advanced on Mrs M's behalf in the way required to make M&S Bank responsible for the Supplier's actions.

I have also considered what PR said about Mrs M not knowing that she might have lost CCA protections by the way payment was taken. But the issue here is not about Mrs M's knowledge, rather it is whether the technical legal arrangement was in place such that there was a D-C-S agreement. And, following the judgment 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 M&S Bank responsible for the Supplier's alleged failures when the law does not impose such a liability – I cannot see that M&S Bank and the Supplier were connected in any way. So I do not think M&S Bank needs to do anything further to settle this complaint.

My final decision

I do not uphold Mrs M's complaint against Marks & Spencer Financial Services Plc, trading as M&S Bank.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs M to accept or reject my decision before 1 January 2025.

Mark Hutchings
Ombudsman