DRN-4587232

The complaint

Mr E has complained that Bank of Scotland plc, trading as Halifax, didn't fairly or reasonably deal with a claim for compensation made in relation to a timeshare membership he bought using his Halifax credit card.

What happened

In February 2013, Mr E, alongside another, purchased holiday club membership from a timeshare supplier ("the Supplier"). This cost £9,200 and was paid in part by Mr E using his Halifax credit card.[1] But this credit card payment wasn't made directly to the Supplier, rather it went to a different business, "FNTC".

In January 2019, using a professional representative ("PR"), Mr E referred a complaint to our service saying that Halifax was liable to pay Mr E compensation due to the operation of s.75 of the Consumer Credit Act 1974 ("CCA"). In summary, PR said the Supplier made misrepresentations at the time of the sale that Halifax was jointly responsible to answer.

We notified Halifax about the complaint and initially it said it hadn't received anything from PR. But after we shared the information we'd been given, it sent PR an answer on Mr E's complaint. It said that it had asked for more information to consider the claim but, as it hadn't been received, it didn't take it further. But after then it said that there wasn't enough evidence for it to say it needed to pay anything to Mr E arising out of the purchase.

One of our investigators considered the complaint, but didn't think Halifax needed to do anything further. He thought that Halifax 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 Halifax to have to consider allegations about the Supplier's misconduct.

PR responded to say Mr E disagreed with our investigator and wanted an ombudsman to review the complaint. PR argued that following the judgment in Steiner didn't lead to a fair or reasonable outcome for Mr E, so the ombudsman should depart from the law. It said that one of the main reasons a consumer uses a credit card was to get the protection offered by the CCA and there was no reason for Mr E to realise he was paying FNTC and not the Supplier, nor that he was losing his statutory protection.

PR also argued that Mr E's case was different to that in Steiner as the type of membership purchased was different and a different analysis needed to be undertaken to consider how the Supplier was passed funds by FNTC. PR said that the amount paid using the card was the exact amount on the purchase agreement, so it was fair to assume that all funds were then passed directly to the Supplier.[2] Further, PR argued that Mr E had to pay annual maintenance fees to FNTC, so it was likely that the administration costs of the trust were

[1] As the card used was in Mr E's name, only he is eligible to complaint to Halifax, so I'll refer to him throughout

[2] As set out above, this wasn't in fact the case

taken from those payments rather than from the amount paid for membership. All of this pointed to FNTC being a 'payment processer' on behalf of the Supplier. Here PR suggested that payment was set up to be taken in this way for tax purposes and it pointed to a decision in which an ombudsman found there were the right arrangements in place for the relevant CCA provisions to apply in similar circumstances.

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 E'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 Halifax) to be liable to the borrower (here Mr E) 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 the Supplier. The court considered the arrangements between the parties and concluded that,

as any payment that went to the Supplier was made outside of the credit card network, in that instance there wasn't a DCS agreement in place.

The circumstances of Mr E'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 Supplier directly, payment was actually taken by a trustee (in that case also FNTC). There was a deed of trust between FNTC and 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 Supplier as well as the card network involving FNTC.

In Mr E's case, I also find it unlikely that Halifax granted Mr E 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 Halifax, Mr E and the Supplier.

I've read the decision made by another ombudsman, but it doesn't change my view on the issue of the DCS arrangement. That decision was written before the judgment was issued in Steiner and was in relation to a different situation, so it isn't of assistance to me.

I've also considered what PR said about Mr E not knowing that he might have lost CCA protections by the way payment was taken. But the issue here isn't about Mr E's knowledge, rather it's whether the technical legal arrangement was in place such that there was a DCS agreement. It follows that I don't think the provisions of the CCA apply to the complaints PR advanced on Mr E's behalf in the way required to make Halifax responsible for the Supplier's actions.

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

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

My final decision

I don't uphold Mr E's complaint against Bank of Scotland plc, trading as Halifax.

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

Mark Hutchings
Ombudsman