DRN-4720276

The Complaint

Mrs K says that National Westminster Bank Plc (the 'Business') didn't act fairly or reasonably under the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a timeshare in February 2013 (the 'Time of Sale').

Background to the Complaint

Mrs K purchased a timeshare from a timeshare provider (the 'Supplier') at the Time of Sale. And she used a credit card provided by the Business (the 'Credit Agreement') to help pay for the purchase by making a payment (using her credit card) to a third party ('TP') not long after the Time of Sale.

Mrs K – using a professional representative ('PR') – wrote to the Business in February 2017 to make claims for misrepresentation and a breach of contract by the Supplier under Section 75 of the CCA (the 'Letter of Claim').

In March 2017, the Business wrote to PR to let it know that it was refusing to pay Mrs K's claims under Section 75 of the CCA on the basis that there wasn't the right arrangement in place to engage the protection afforded by that provision.

As a result, a complaint about the Business' decision to refuse Mrs K's Section 75 claims was referred to the Financial Ombudsman Service in May 2017. The Business was notified and on 25 May that year it issued a final response rejecting the complaint on the same basis that the claim was first refused. The Business also argued that there wasn't enough evidence to demonstrate that there had been misrepresentations or a breach of contract by the Supplier.

In August 2017, PR shared the opinion of a barrister that set out why he thought that there was the right arrangement in place to engage Section 75 of the CCA for the purposes of Mrs K's claims.

The complaint was then looked at by an Investigator who, without commenting on the underlying merits of Mrs K's allegations, issued an opinion finding that there was the right arrangement in place to engage Section 75 of the CCA because TP and one of the Supplier's wholly owned subsidiaries were connected via someone who was both a director of TP and counsel for and/or a secretary of the relevant subsidiary.

The complaint was then reviewed by another Investigator who, having also found that there was the right arrangement in place to engage Section 75 of the CCA (albeit for different reasons to the first investigator), rejected the complaint on the merits of Mrs K's allegations.

PR disagreed with the most recent investigator's assessment and asked him to consider the complaint with Section 140A of the CCA in mind. But as the complaint couldn't be resolved informally, it was referred for an ombudsman's decision – which is why it was passed to me.

I issued a Provisional Decision ('PD') on 27 February 2024 rejecting the complaint on the basis that there wasn't the right arrangement in place at the right time to engage the protections afforded to Mrs K by the CCA.

Neither side had anything to add to the complaint in response to my PD. So, it was passed back to me for a final decision.

My Findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I still don't think the complaint should be upheld.

As I said in my PD, the CCA introduced a regime of connected lender liability under Sections 56, 75 and 140A that afforded consumers ("debtors") a right of recourse against lenders ("creditors") that provide the finance for the acquisition of goods or services from a third-party merchant (the "supplier").

As I also said in my PD, this complaint was, at first, only concerned with the Business' decision to refuse Mrs K's Section 75 claims. PR then asked the Investigator to expand the scope of this complaint to include its consideration under Section 140A of the CCA. The Investigator wasn't persuaded to do that. But given the age of this complaint, I considered it for the purposes of my PD with both provisions in mind. And as the Business hasn't suggested that doing that was unfair to it, I remain of the view that it is in everyone's interests to draw a line under the complaint and consider it in the context of Sections 75 and 140A.

In order to engage the connected lender liability under Sections 75 and 140A of the CCA (to the extent that allegations under Section 140A, in combination with Section 56(1)(c) of the CCA, relate to the acts and/or omissions of the Supplier rather than the Business), one of the pre-conditions is the existence of a relevant debtor-creditor-supplier agreement ('DCS Agreement').

Yet, in light of the High Court case of *Steiner v National Westminster Bank plc* [2022] EWHC 2519 ('*Steiner*') (which postdates the barrister's opinion provided by PR in August 2017), I'm not persuaded there was a DCS Agreement between Mrs K, the Business and the Supplier. And as that means the Business didn't and doesn't bear any responsibility under Sections 75 and 140A of the CCA on this occasion given the facts of this complaint, I don't think it needs to do anything to put things right here.

A DCS Agreement is defined by Section 12(b) of the CCA as *"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 […]."*

Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the "supplier") other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

In *Steiner*, the High Court looked at the application of Sections 56, 75 and 140A of the CCA and considered the circumstances in which the necessary arrangement can be said to exist.

The late claimant purchased a timeshare from a timeshare provider for £14,000 using his

Mastercard, which had been issued by Lender N.

So, in accordance with the CCA, Lender N was the “creditor”, the late claimant was the “debtor”, and the timeshare provider was the “supplier”.

But rather than paying the timeshare provider directly, the £14,000 payment was made by the late claimant (using his Lender N Mastercard) to a trustee (that happens to have been the same third party as TP in this complaint) under a deed of trust to which the timeshare provider was a beneficiary.

As a result, the estate of the late claimant (the ‘Estate’) had to demonstrate that the credit agreement fell within the meaning of Section 12(b) of the CCA i.e., that it was made “under pre-existing arrangements, or in contemplation of future arrangements” between Lender N and the timeshare provider.

But the High Court wasn’t persuaded the Estate had done that. And in reaching that conclusion, the Court held that “arrangements” could not be *“stretched so far as to mean that [Lender N] made its agreement with the [late claimant] under the Deed of Trust (of which it was presumably unaware) as well as under the Mastercard network.”*

The central question in *Steiner* and in this complaint, therefore, is not whether "arrangements" existed between the creditor (i.e., the Business) and the timeshare provider (i.e., the Supplier) when the timeshare in question was sold (i.e., at the Time of Sale). Instead, the question posed by Section 12(b) is whether the Credit Agreement was made by the Business under pre-existing arrangements, or in contemplation of future arrangements, between it and the Supplier.

In other words, the starting point for the purposes of Section 12(b) is the date the Business and Mrs K entered into the Credit Agreement – rather than the Time of Sale.

Yet, based on what I’ve seen so far, I’m not persuaded that the Business issued Mrs K with her credit card and entered into the Credit Agreement relating to that card under, or in contemplation of, any arrangements other than the relevant card network. And while there may well have been arrangements between the Business and TP (i.e., the relevant card network) and arrangements between TP and the Supplier (the ‘TP-Supplier Arrangement’), as the High Court recognised in *Steiner*, the natural and ordinary meaning of Section 12(b) did not extend to saying that the Business entered into the Credit Agreement with Mrs K under both the relevant card network and the TP-Supplier Arrangement – nor could Section 12(b) be interpreted as saying that the Business had entered into the Credit Agreement with Mrs K in contemplation of the TP-Supplier Arrangement.

I recognise that the judgment in *Office of Fair Trading v Lloyds TSB Bank Plc* [2007] QB 1 (‘*OFT v Lloyds TSB*’) by the Court of Appeal is authority for the proposition that there can be arrangements between a creditor and a supplier without there being a direct contract between them. But a significant feature of the factual situation addressed in *OFT v Lloyds TSB* was that all parties to the card network in question in that case were party to the same network, whether or not they had direct contractual relations with one another. That network, which had rules, constituted ‘arrangements’ between all of its members. So, it was said by the High Court in *Steiner* that *OFT v Lloyds TSB* isn’t authority for the proposition that, if there are arrangements between a creditor and X, and if there are also arrangements between X and a supplier, then it necessarily follows that there are arrangements between the creditor and the supplier.

Under Section 187 of the CCA, there are also ways in which there might exist a DCS Agreement even if a supplier isn’t paid directly using a credit card. For example, if the

Supplier and TP were 'associates' as defined by Section 184 of the CCA, there might have been the right arrangement in place at the right time.

As I said in my PD, PR argues, in summary, that the Supplier and TP were associates as defined by Section 184 because TP was to be paid for the performance of its duties by the Supplier and it was the Supplier who was responsible for certain costs associated with the holiday product – putting the Supplier in control of the trust. PR also argues that the Supplier and TP were associates because the latter was conducting its affairs in accordance with the former's wishes as per Section 1124 of the Corporation Tax Act 2010.

However, PR's submissions on whether there was the right arrangement at the right time overlook the very definition of an 'associate' in Section 184(3) of the CCA – which, being the most relevant to this complaint, defines the term as follows:

"A body corporate is an associate of another body corporate—
(a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are controllers of the other ; or

(b) if a group of two or more persons is a controller of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate."

None of PR's submissions identify and demonstrate that anyone (whether individually or as a group) controlled both the Supplier and TP. I acknowledge that TP and one of the Supplier's wholly owned subsidiaries appeared to have been connected via someone who seems to have been both one of TP's directors and counsel for and/or a secretary of the relevant subsidiary. But I still haven't seen enough to persuade me that the individual in question had control over both entities. And as I still haven't seen anything else to persuade me that Section 187 is likely to matter here given the facts and circumstances of this complaint, I don't think it does.

Overall, therefore, I don't think it would be fair or reasonable to find that the Business was and is responsible for the Supplier's alleged failings on this occasion.

My Final Decision

For the reasons set out above, I don't 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 11 June 2024.

Morgan Rees
Ombudsman