DRN-4741732

The complaint

Mrs F complains that HSBC UK Bank Plc has not met its obligations in regard to two transactions she made on her credit card to pay for a Timeshare type agreement.

What happened

In December 2013 Mr F and Mrs F entered into a timeshare type agreement and in January 2014 and May 2014 Mrs F paid for this agreement by using her HSBC Bank UK PLC credit card to do so. The contract for the Timeshare was with a company I shall call 'Firm D'. Her credit card statement from the time shows she actually paid a different company, a trustee company, which I'll call 'Firm F'.

Later, unhappy with timeshare type arrangement she had, Mrs F took her dispute to HSBC, pointing to its obligations under the Consumer Credit Act 1974 (CCA for short) and seeking redress for the timeshare she'd paid for. But it chose not to refund her. So she brought her complaint to this service.

Our Investigator considered the matter and felt that HSBC hadn't treated Mrs F unfairly. Our Investigator's rationale followed a hight court decision on similar circumstances. Mrs F and her representatives didn't agree with the investigator's position. So this dispute came to me for a decision.

I issued a provisional decision earlier this month saying HSBC's position on this hadn't led to Mrs F losing out. Both HSBC and Mrs F have acknowledged receipt of my provisional decision.

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.

As neither party has sought to make arguments contrary to my position on the matter as articulated in my provisional decision I see no persuasive reason to deviate from my provisional position on the matter. Accordingly Mrs F's complaint is unsuccessful and HSBC has nothing further to do regarding this dispute. I shall now recount the rationale in my provisional decision which is my rationale for this my final decision.

I should make clear that this decision is not about Firm D or Firm F, or any other parties involved with Mrs F's timeshare arrangements. This is because these companies aren't within the jurisdiction of this service regarding the considering of claims under the CCA by creditors. This decision is solely about what HSBC did or didn't do, in relation to its obligations in relation to Mrs F in its capacity as her provider of credit through her credit card.

I should add that although both Mr F and Mrs F entered the timeshare agreement, I'll be referring to Mrs F in this decision as it was her credit card used to fund the transactions. So its only she who can make a claim to HSBC regarding her account with it and her dispute with Firm D paid for through that account.

Mrs F doesn't contest that she made the transactions originally, or that they were applied incorrectly to her account. So I think HSBC treated the transaction correctly at the time. And she didn't take the dispute regarding her timeshare to HSBC for some significant time after the transactions happened. So I'm satisfied the only other way HSBC could have looked at this dispute regarding this Timeshare is under its obligations under the CCA.

So I now consider the crux of this dispute, which is whether HSBC has treated Mrs F fairly in regard to the issue of not refunding her, which to my mind rests on the issue of who Mrs F paid and who her contract for the Timeshare was with. When doing so, I'm required by DISP 3.6.4R of the Financial Conduct Authority's Handbook to consider the:
"(1) relevant:
(a) law and regulations;
(b) regulators' rules, guidance and standards;
(c) codes of practice; and
(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

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").

However, in order to engage the connected lender liability under Sections 75 and 140A one of the pre-requisites is the existence of a relevant debtor-creditor-supplier agreement (often shortened to 'DCS Agreement'). And in light of the High Court case of Steiner v National Westminster Bank plc [2022] EWHC 2519 ('the Steiner case'), I'm not persuaded there was a DCS Agreement between Mrs F, HSBC and Firm D. And as that means that HSBC didn't and doesn't have any responsibility for the CCA claims in question, I don't currently think it needs to do anything to put things right in this complaint. I say so for these following reasons.

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 the Steiner case, 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. I should note that not only are the legal issues in Steiner similar to those in Mrs F's case, but I should add some of the parties (not all) are the same also. In the Steiner case, the late Mr Steiner purchased a timeshare from a company I'll call "Company C" for £14,000 using his credit card, which had been issued by National Westminster Bank PLC ('NatWest'). So, in accordance with the CCA, NatWest was the "creditor", the late Mr Steiner was the "debtor" and Company C was the "supplier".

But rather than paying Company C directly, the £14,000 payment was made by the late Mr Steiner (using her NatWest Mastercard) to Firm F (the same company as Mrs F paid here) – the Trustee under a Deed of Trust to which Company C was a beneficiary. As a result, the estate of the late Mr Steiner (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 NatWest and Company

C. 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 NatWest made its agreement with the late Mr Steiner 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 case here, therefore, is not whether "arrangements" existed between the creditor and the timeshare provider when the Timeshare was sold. Instead, the question posed by Section 12(b) is whether the relevant credit agreement was made by the creditor (in this case HSBC) under pre-existing arrangements, or in contemplation of future arrangements, between it and the timeshare provider (in this case Firm D).

In other words, the starting point for the purposes of Section 12(b) is the date that HSBC and Mrs F entered into the Credit Agreement – rather than the Time of Sale of the Timeshare. Yet, in the absence of evidence to the contrary, it is difficult to argue that HSBC issued Mrs F 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 here.

And while there may well have been arrangements between HSBC and Firm F (that is through membership of the card network present here) and arrangements between Firm F and Firm D, similar to that as the High Court recognised in Steiner, the natural and ordinary meaning of Section 12(b) did not extend to saying that HSBC entered into the Credit Agreement with Mrs F under both the relevant card network and the Trustee-Supplier Arrangement between Firm F and Firm D (or under both the relevant card network and any other arrangements which parties to that network might have had with third parties) – nor could Section 12(b) be interpreted as saying that HSBC had entered into the Credit Agreement with Mrs F in contemplation of the Trustee-Supplier Arrangement (or in contemplation of any other arrangements which parties to the relevant card network might have had with third parties).

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 Firm F and Firm D were 'associates' as defined by Section 184 of the CCA, there might have been the right arrangement in place at the right time. But I haven't seen anything sufficient to persuade me that's the case here. And although Mrs F's representatives may have speculated about the relationship between Firm F and Firm D, they haven't demonstrated the definition of 'associates' as set out in section 184 is met here through any evidence that they've supplied to this service.

Overall, therefore, given the facts and circumstances of this complaint, I don't think I it would be fair or reasonable to find that HSBC was and is responsible for the Firm D's alleged failings at the Time of Sale, when the law doesn't impose such a liability on HSBC in the absence of a relevant connection between it and Firm D.

In response to our Investigator's assessment of the matter Mrs F's representatives have made significant representations on the matter. In my view these boil down to the following arguments:

1) That this service can consider the law and is free to depart from it by giving reasons for doing so
2) Following the Steiner ruling is not fair or reasonable
3) That consumers use credit cards to get protection and would not know they did not have such protection in such cases
4) That there may be more evidence relating to the relationship between Firm F and Firm D that might lead to a different conclusion
5) That this service has issued decisions where Ombudsmen have decided that Payment Processors have not broken DCS arrangements, and the same logic should be followed here.

My observations to these arguments (in order) are as follows. I am well aware of my remit as an Ombudsman at the Financial Ombudsman Service and I'm well aware I am free not to follow the law where I feel it fair and reasonable to do so.

The test here is to consider how HSBC did (or should have) considered Mrs F's claim to it under the CCA. In order for such a claim to be successful the prerequisites of the CCA need to be met before breach and misrepresentation can be considered. One such prerequisite is that a DCS arrangement is made out as I've explained. Here I'm satisfied it isn't for the reasons I've already given. And although there is an obligation on HSBC to consider the claim fairly there is also a focus on the claimant (Mrs F) to make out her claim to HSBC. And as a DCS arrangement hasn't been made out to HSBC, it isn't obliged to consider the claim any further under the CCA. And as such HSBC hasn't treated Mrs F unfairly in this regard. It simply does not follow that because a complainant is said to have lost out in a dispute with Firm D that HSBC must have acted unfairly in its consideration of that dispute. And it should be noted that although Mrs F's representatives have made a string of arguments about the law and this service's approach in such cases, it has made considerably less argument or been persuasive about any actual failings by HSBC in this particular case.

The CCA provides some protection to card holders in certain circumstances. However this isn't a guaranteed all-encompassing safety net for such transactions. However it does provide more protection than some other forms of payment. Mrs F used her card here, so those are the facts to consider and whether HSBC considered her claim fairly considering those protections under the CCA. And I'm currently satisfied that Mrs F hasn't lost out due to what HSBC did in considering her claim.

As to the question whether there is evidence out there which might make a difference, it is possible. But the test is whether HSBC treated Mrs F's claim to it fairly and I'm satisfied it did. And I've not seen persuasive evidence regarding Firm F and Firm D to show that I should depart/distinguish fairly from the approach taken by the judge in Steiner. It is clear to me that Mrs F's representatives have fallen someway short of showing the facts here and those found in Steiner are sufficiently different to be distinguishable. Similarly Mrs F's representatives haven't given persuasive reasoning why they should actually be distinguished. Nor have they demonstrated that the parties are 'associates' under section 184.

Mrs F's representatives point to decisions regarding payment processors that this service has issued and says the same logic should be followed. As those decisions explain Payment Processors are recognised and accepted parties within the card schemes and thus part of the necessary arrangements to find a DCS agreement. Clearly, the scenario of Payment

Processors and the circumstances in both Steiner and Mrs F's case are clearly and obviously distinguishable on the facts.

Mrs F's representatives also point to a decision by a colleague from some years ago. This case dealt with a third party which processed the payment. And that situation is also clearly distinguishable on the facts from Ms F's case, and I also note it was issued some years ago and the case law has moved on since then. And in any event I'm not bound by such a decision (or indeed the law) as Mrs F's representatives have been keen to point out.

So it is my decision that Mrs F's complaint should not be successful for the reasons given.

My final decision

I do not uphold this complaint about HSBC UK Bank PLC. It has nothing further to do in this dispute.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or reject my decision before 13 May 2024.

Rod Glyn-Thomas
Ombudsman