DRN-5076841

The complaint

Mrs B has complained that NewDay Ltd didn't fairly or reasonably deal with claims under the Consumer Credit Act 1974 ("the CCA") in relation to a holiday product bought, in part, using her credit card.

What happened

In June 2016, Mrs B and Mr B purchased holiday club membership from a timeshare provider (the "Supplier"). It was paid for by Mrs B – in part – using her NewDay credit card[1]. The remainder of the purchase was funded by a loan taken out with another lender.

The purchase agreement entered into by Mrs B was made between her and the Supplier. However, the credit card payment wasn't made directly to the Supplier, rather it went to a different business I'll call "Business F".

In October 2019, Mrs B made a claim to NewDay under section 75 of the CCA. In doing so, Mrs B said that the Supplier made misrepresentations at the time of sale which she relied on when making her decision to purchase the holiday club membership.

In February 2020, NewDay declined the claim and, in doing so, said it had not received sufficient evidence to support the claim. Unhappy with this, Mrs B complained to NewDay about its decision in March 2020.

In April 2020, NewDay issued its final response ("FRL 1") to the complaint in which it said it declined the claim fairly.

In November 2022 Mrs B received a letter from Business F – who were acting as a debt administrator for the loan used to partly finance the purchase - in which it said that the loan company will no longer be collecting on this debt. The letter went on to say that the 'balance will be written off and [Mrs B] will not be pursued for any of the outstanding moneys owed'.

Following receipt of this letter Mrs B got back in touch with NewDay in March 2023 to raise a claim under section 75 of the CCA. In doing so, Mrs B pointed to the letter she had received from Business F as proof that there had been a breach of contract as the loan provider have now cancelled the loan used to part finance the holiday club membership.

In May 2023, NewDay responded to the claim but it rejected it. In doing so, NewDay said it was not party to that contract as [Mrs B has] only used the NewDay credit card for the deposit for a point-of-sale loan with [another lender] and therefore there has been a break in the chain. Mrs B raised a complaint to NewDay about its decision to decline her claim in June 2023.

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[1] Although the membership was in the names of Mrs and Mr B, it appears the credit card used was in Mrs B's name and, with that being the case, only she can make this complaint. Therefore, I'll refer solely to Mrs B throughout the rest of the decision.

In July 2023, NewDay issued another final response letter ("FRL 2") in which it said it has acted fairly when declining the claim.

Unhappy with this, Mrs B referred her complaint to our service in November 2023. In doing so, as well as raising the concerns she raised to NewDay in March 2023 concerning a breach of contract, she also reiterated some of the concerns about the holiday club membership which she raised when she initially contacted NewDay in October 2019.

One of our investigators looked into matters and issued their findings in March 2024. In short, our investigator said there wasn't the right arrangement in place to make such a claim because Mrs B hadn't used her credit card to pay the Supplier directly.

Mrs B disagreed with our investigator's findings. As a result, the investigator asked both parties to provide any further points and/or before the ombudsman makes a decision. After the deadline to do this lapsed, the complaint was passed to me to decide.

On 29 August 2024, I issued a Provisional Decision in which I said:

I'm satisfied that a complaint about the decision to decline Mrs B claim for breach of contract under section 75 of the CCA is one our service can consider because it was a separate, unrelated claim to the one she raised in October 2019. And, therefore, the six-month time limit does not start until NewDay issued FRL 2. Mrs B referred her complaint to our service within six months of FRL 2.

Further, I think some of the allegations Mrs B raised with NewDay in 2019 amounted to a claim that the debtor-creditor relationship was unfair under section 140A of the CCA. Customers may not always know what terminology to use when contacting their finance provider for help, so we would expect the business to consider the substance of what a consumer says and not just the narrow way in which a complaint or concern was framed. I think, in this case, it was clear from the concerns Mrs B raised that section 140A of the CCA was a relevant consideration and NewDay ought to have responded accordingly. I've set out what this means for Mrs B's complaint below.

Section 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".

Section 12(b) CCA states that a 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".

Section 140A says:

'(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).'*

Section 140C(4) says the reference to a 'related agreement' means a 'linked transaction in relation to the main agreement'. And section 19 says a 'linked transaction' is:

'A transaction entered into by the debtor…with any other person ("the other party")…in relation to an actual or prospective regulated agreement (the "principal agreement") of which it does not form part if—

> *(a) …*
> *(b) the principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement;*
> *(c) …'*

Put simply, for a claim under section 75 and/or a complaint (of the kind in question) under section 140A to get off the ground, there must be a D-C-S Agreement.

But, on the face of it, there was no such arrangement in place at the relevant time.
The law in this area was clarified by the High Court in Steiner v. National Westminster Bank plc [2022] EWHC 2519 (KB) ("Steiner").

The late Mr Steiner ("the Estate") paid for a timeshare provided by Club La Costa Vacation Club Ltd ("CLC") using his NatWest credit card. So, for the purposes of s.11(1)(b) of the CCA, NatWest was the creditor, the late Mr Steiner was the debtor and CLC was the supplier. But the payment was in fact taken by FNTC.

The Estate initially argued that the right arrangements were in place because there was a Deed of Trust between CLC and FNTC under which CLC would receive payment. But the High Court was not persuaded by this. On appeal, the Estate's claim sought to demonstrate that the credit agreement was made "under pre-existing arrangements", or in contemplation of "future arrangements" and extended to CLC under section 12(b) CCA.

But the High Court dismissed the appeal. And in doing so, 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." Therefore, the existence of the Trust Deed didn't help to create a valid D-C-S agreement for the purposes of the CCA.

The circumstances of Mrs B's case are very similar to the circumstances in Steiner. In this case, Business F took payment for Mrs B's purchase of the timeshare. 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 section 75 CCA claim. Likewise, as Mrs B hasn't alleged that there was an unfair credit relationship for reasons that relate directly to the acts and/or omissions of NewDay, a court could only consider whether the credit relationship between her and NewDay under the Credit Agreement was unfair to her under section 140A if there was a DCS Agreement, which there wasn't on this occasion.

I accept Mrs B didn't know what the payment being taken by Business F (rather than the

Supplier) meant in terms of her rights under the CCA. But the issue here isn't about Mrs B's knowledge, rather it's whether the technical legal arrangements are in place for Mrs B to be able to make the claims he has done under the CCA. And, following the judgment in Steiner, I don't think the right arrangements were in place.

I must take into account the law, but come to my own determination of what is fair and reasonable in any given complaint. And, although I understand Mrs B's concerns and I have some sympathy for the position in which she finds herself, for the reasons set out above, I don't think it would be fair or reasonable to find that NewDay bears responsibility for the Supplier's failings when the law doesn't impose such a liability on NewDay in the absence of a relevant connection between it and the Supplier.

I gave both parties an opportunity to respond to my provisional decision. The deadline for responses has now passed.

Mrs B contracted our investigator to discuss the provisional decision. During this call Mrs B requested a copy of the information she has sent to us so she can see if there is any further information she hasn't already sent. No further submissions or evidence has been provided.

NewDay did not respond.

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.

Having reconsidered the available evidence in this complaint, I see no reason to depart from the findings set out in my provisional decision.

This being that I don't think it would be fair or reasonable to find that NewDay bears responsibility for the Supplier's failings when the law doesn't impose such a liability on NewDay in the absence of a relevant connection between it and the Supplier. And, therefore, I don't uphold this complaint.

My final decision

For the reasons set out above, I don't uphold Mrs B's complaint about a claim for breach of contract made under Section 75 of the CCA and concerns about an alleged unfair relationship under section 140A.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 8 November 2024.

Ross Phillips
Ombudsman