complaint

Mr P complains that National Westminster Bank Plc declined his claim under Section 75 of the Consumer Credit Act 1974.

Background

In June I issued a provisional decision saying that I was minded to uphold Mr P's complaint. I then invited both parties to let me have any further submissions before I reached my final decision. Both parties have responded to my provisional decision.

Mr P has accepted my position articulated in my provisional decision without further comment.

NatWest has now said it is willing to settle this long-standing complaint by paying £15,080 (the transaction amount), £72 (Notary Fee), £500 (paid to Company C), plus 8% interest from 4 October 2017 until date of acceptance.

The key details of Mr P's complaint were set out in my provisional decision as follows.

> In 2016 Mr P had a fractional ownership agreement (which I will refer to as a 'Timeshare' for short) on a property abroad which he wanted to sell. Around that time he was contacted by Company A who said it provided Timeshare Relinquishment services and it could get him out of the timeshare agreement. In January 2017 Mr P used his NatWest Mastercard credit card to pay Company A £1000. This transaction went through another party called Company B before reaching Company A (both Company A and Company B are referred to on Mr P's credit card statement in this transaction). Mr P also transferred just over £15,000 directly from his bank account to Company A that day. At the same time Mr P paid a notary £72 for the notary's work in relation to these matters.
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> In September 2017 Mr P was told Company A had gone into liquidation, having not got him out of his Timeshare. He was later told the remains of Company A had been bought by yet another company (I'll call this Company C) which had not taken on any debts or liabilities of Company A when it bought it. Mr P paid Company C £500 using his NatWest credit card as a deposit in his quest to get out of the original Timeshare agreement. On further investigation Mr P decided to not pay Company C any more money to get him out of the Timeshare as he had concluded that they weren't reputable.
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> Unhappy with the situation Mr P complained to NatWest in an attempt to recoup the money he'd spent. In November 2017 NatWest raised a chargeback through Mastercard on the credit card transaction of £1000. This wasn't contested by Company A (the supplier of the timeshare relinquishment service) so Mr P got the £1000 refunded to his account. But Mr P wanted the £15,080 back as well.
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> NatWest considered this but said the money had been paid to Company B (not Company A -the supplier of the service of Timeshare Relinquishment) and that as such the required relationship between the parties set out in the Consumer Credit Act 1974 wasn't in place (often referred to as the "DCS" relationship). And accordingly NatWest said it wasn't liable for the £15080 and so wasn't going to refund it to Mr P.

Mr P felt that this was unfair, so he brought his complaint to this service. Our Investigator agreed with Mr P that NatWest should refund him the £15,080. NatWest disagreed for similar reasons that it had done so earlier. NatWest said that Company B was more than a simple gateway and that it actually takes the payment as a "master merchant" in a five-party transaction. It also said that the leading authority on the applicability of section 75 to a credit card transaction is OFT v Lloyds TSB plc 2007. Specifically NatWest said;

*"in that case it was held that a four-party structure (comprising the debtor, creditor, merchant acquirer and supplier) involved "pre-existing arrangements" between the creditor and the merchant as they were members of the same card scheme. In the present case, there are five parties (the debtor, creditor, merchant acquirer, master merchant [*Company B*] and sub-merchant [the supplier]) (*here Company A*) and there is no legal authority which establishes that section 75 applies in this situation. Further, we note that the merchant is not a direct member of the same card scheme as the Bank (*NatWest*) and therefore are unknown to us; in such circumstances, we do not agree that a pre-existing arrangement exist between the Bank and the (sub-merchant) supplier."*

So this complaint came to me and I issued a provisional decision which both parties have responded to.

my final findings

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

Considering my findings in my provisional decision and the responses from both parties described above this complaint is successful.

I appreciate both parties are now happy with the position and may not see the need for a final decision. But these are complex matters with regard to the application of the law in this area which I think needs publication through a final decision for public interest reasons. And I think it worthwhile for certainty reasons also. And hence this final decision. Accordingly now I will describe my key findings on these important matters. I've only addressed the key aspects of my rationale in this decision as both parties have the complete provisional decision already.

Section 75

As an Ombudsman I have to decide what I think is fair and reasonable, having regard to, amongst other things, any relevant law. In this case, the relevant law is s75 of the Consumer Credit Act 1974 (the "Act") which says that, in certain circumstances, if Mr P paid for goods or services on his credit card and there was a breach of contract or misrepresentation by the supplier (Company A), NatWest can be held responsible.

I think it worthwhile to explain that historically credit cards worked within a commonplace three-party structure. Specifically that there was:

- an agreement between the card issuer (the creditor) and the cardholder (the debtor) to extend credit by paying for goods or services purchased by the cardholder from suppliers who had agreed to honour the card;
- an agreement between the card issuer and the supplier under which the supplier

agreed to accept the card in payment and the card issuer agreed to pay the supplier promptly;
- an agreement between the cardholder and the supplier for the purchase of goods or services.

And accordingly this three-way relationship is often referred to as "DCS" as it represents the interrelationships between Debtor, Creditor and Supplier.

As time went by a new type of party entered the market and specifically these types of transactions, known as the 'Merchant Acquirer'. This led to the creation of four party relationships where instead of the agreement being between the card issuer and the supplier, there were two agreements:

- an agreement between the merchant acquirer and the supplier, under which the supplier undertook to honour the card and the merchant acquirer undertook to pay the supplier; and
- an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agreed to pay the supplier and the card issuer undertook to reimburse the merchant acquirer.

The impact of this development on the application of s75 was considered by the Court of Appeal in the case of Office of Fair Trading v Lloyds & others [2006] ("the OFT case").

The Court of Appeal first considered whether the introduction of the four-party structure meant that the system had evolved significantly beyond the state of affairs to which s75 had been directed. They concluded that it had not, stating at paragraph 55 of their judgment:

"*From the customer's point of view … it is difficult to see any justification for drawing a distinction between the different [three-party and four-party] situations. Indeed, in the case of those card issuers such as Lloyds TSB, who operate under both three-party and four-party structures, the customer has no means of knowing whether any given transaction is conducted under one or other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same: each benefits from the involvement of the other in a way that makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure."*

They went on to say;

"*It is clear that, whether the transaction is entered into under a three-party or four-party structure, the purpose of the credit agreement is to provide the customer with the means to pay for goods or services. It follows that in both cases the card issuer finances the transaction between the customer and the supplier by making credit available at the point of purchase in accordance with the credit agreement. The fact that it does so through the medium of an agreement with the merchant acquirer does not detract from that because it is the card issuer's agreement to provide credit to the customer that provides the financial basis for the transaction with the supplier*."

Bearing in mind some of NatWest's arguments made previously in this case it's also important to note that in the OFT case the court saw evidence about the particular rules governing the activities of merchant acquirers. The Judge at first instance drew attention to the following features (paragraph 30) which I think have relevance here:

"*The evidence showed that the rules of the four-party card schemes control which suppliers may participate in the schemes by, for example, (i) stipulating that merchant acquirers must only put transaction details into interchange for suppliers with whom they have valid and subsisting merchant acquirer agreements; (ii) requiring merchant acquirers to screen suppliers before entering into agreements with them, in order to establish that the suppliers are creditworthy and carrying on bona fide businesses; (iii) requiring merchant acquirers to monitor suppliers to deter wrongful activity; (iv) requiring merchant acquirers to forward information to the network merchant databases where, for example, a supplier is suspected of fraud or where a supplier's ratio of transactions "charged back" by the card issuer exceeds established criteria. Likewise card issuing creditors exert leverage over suppliers, through the networks [operated by MasterCard, Visa and American Express], in that the networks reserve rights to insist that suppliers' merchant acquirer agreements are terminated and to exclude suppliers from entering into merchant acquirer agreements. Thus some sort of leverage is available, at least in domestic four-party transactions, but even if it were not, that would not affect my conclusion."*

Having provided some important context to the circumstances in Mr P's case, I need to now establish the exact nature of Company B's role and involvement. And whether or not that meant that there were the relevant arrangements between NatWest and the supplier under which Mr P's purchase was financed, and therefore whether or not there was the DCS link. This is the crux of this complaint. I say this because in many cases where there is a DCS link established the focus of the complaint is actually whether or not there was a misrepresentation or breach of contract by the supplier. But NatWest hasn't made any persuasive arguments on whether or not there was a breach of contract or misrepresentation here by the supplier (Company A). Indeed NatWest has argued mainly on the DCS point with this service. So much so that back in February 2019 our Investigator wrote to NatWest and Mr P and explained from the start that;

"I don't think there's any dispute about the facts of Mr P's case. I feel that It's clear there's been a misrepresentation made by Company A (the supplier) which induced Mr P into the agreement. Ultimately, Mr P didn't receive the services promised by the supplier."

NatWest didn't contest this position in its response to this service and the amounts paid by Mr P are well known by the parties. I shall return to this point, but it is clear that the crux of this dispute hangs on the DCS issue.

The DCS issue

I have considered the particular facts of Mr P's case. In order for s75 to apply there has to have been arrangements between NatWest and the supplier to finance transactions between NatWest's cardholders and the supplier. It's clear that there was no direct arrangement between them, but this isn't necessarily fatal to the application of s75.

I say this because the Judge who heard the OFT case at first instance ([2005] 1 All ER 843) had also considered the meaning of the word "arrangements", as used in section 12, and whether there existed relevant arrangements between creditors and suppliers in the four-party situation. She said that the use of the word showed a deliberate intention on the part of the draftsman to use broad, loose language, which was to be contrasted with the word "agreement". She went on to say at paragraph 26:

"*In my judgment, in the natural ordinary sense of the word, there are clearly arrangements in place made between the card issuers and the suppliers, notwithstanding the absence of any*

direct communication between them, or any direct contractual relationship, or even of knowledge on the part of the issuer of the identity of the particular supplier. The fact that there are a number of different arrangements, reflecting the various roles, contractual or otherwise, played by different participants in the network, does not mean that there is not an arrangement in place between the issuer and the supplier. I consider that it is unrealistic to look merely at the individual links in the chain; rather one should stand back and look at the whole network of arrangements that are involved in the operation of the schemes. If one does so, one can, in my judgment, properly conclude that, by virtue of the supplier and the issuer being subject to the rules and settlement processes common to all participants in the card network, there is indeed an arrangement (albeit indirect) between them."

In the Court of Appeal, the creditors argued that arrangements should be given a narrower meaning that took the four-party structure outside the definition. But the Court of Appeal agreed with the Judge that "arrangements" had been used to embrace a wide range of commercial structures having substantially the same effect. They held it was difficult to resist the conclusion that such arrangements existed between credit card issuers and suppliers who agreed to accept their cards, and stated;

"Moreover, we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct."

Accordingly to arrive at a fair outcome I need to stand back and consider the whole network of arrangements that were involved in Mr P's transaction and, in particular, what Company B's role was within that network.

I've considered Mastercard's rules regarding the scheme it operates. I note from its rules from 2016 it recognises a number of different types of service providers including those described as 'Third Party Processors' and 'Payment Facilitators' and it then goes on to give examples of the types of services the different service providers provide and requirements the scheme has of them.

I see that in the email dated 19th January 2017 from Company B to Mr P which Mr P has provided Company B states that it "*is the preferred payment processor of* (Company A)". It goes on to explain the payment was made on a Mastercard, the amount paid and how it would appear on his statement. And I can see that under Mastercard's explanation of what Third Party Processors do it includes "*Chargeback processing for Acquirers or Issuers*" and "*Chargeback processing for Merchants or Sub merchants*". And as is already accepted NatWest raised a chargeback in this case in 2017 which wasn't defended, and Mr P got his £1000 back as a result. This is prior by some time to when Company B went into liquidation.

So our Investigator looked into Company B to try and get confirmation of its role in this transaction. Company B is in liquidation, so our Investigator contacted the Liquidators of Company B who confirmed it did not have access Company B's books and records, including its historic financial data. It was therefore unable to provide any information in relation to this transaction or indeed any real detail of the services provided by Company B at all. It is of note that Companies House lists Company B's nature of business as being "*Data processing, hosting and related activities*". So although the evidence here is incomplete it is clear that Company B described itself to Mr P in 2017 as a payment processor.

NatWest has said that Mr P's transaction was channelled through a merchant acquirer and has argued that this means that it's different to the situation in the OFT case as Mr P's situation was a five-party transaction rather than four. It says the merchant (Company A) is not a direct member of the same card scheme (Mastercard) as NatWest and therefore is unknown to it and in such circumstances, it does not agree that a pre-existing arrangement exists between NatWest and the sub-merchant/supplier (Company A).

So I needed to decide whether Company B's role and involvement interfered with what appears to have been the usual underlying four-party structure in a way that meant the relevant creditor-supplier arrangements didn't exist in this case. I don't think its role and involvement caused an interference for the following reasons.

Having considered Mastercard's rules I note that "*The Acquirer is responsible for all acts and omissions of a Payment Facilitator and of any Sub merchant*." Having seen this and considered the rules as a whole it seems clear that in the situation that NatWest describe Mr P's transaction to be, it seems clear that Company B act as an agent for the merchant acquirer. Plus it is clear that as part of the scheme rules the Merchant Acquirer can only act in such transactions under the scheme whilst it meets the scheme rules which include it being responsible for the activities of facilitators and sub-merchants. So clearly there is an arrangement between these parties in this part of the transaction. And although Company A maybe unknown to NatWest (as it argues) considering the relationships here it is clear there is an arrangement in this case. So I don't think it makes a difference whether they are known or unknown parties as clearly there is an arrangement in place.

In short, it appears that Company B operated a formal and structured system which enabled parties, such as Company A in this case, to receive payments made by credit and debit card to pay for the supply of goods and services to the cardholders such as Mr P. Further, both NatWest and the supplier were bound to the same network rules through the arrangements here and therefore subject to the rules and settlement processes of the network (albeit indirectly). These features are all consistent with the existence of the required arrangements, for the purposes of s.75, between NatWest and the supplier.

I would also note that both NatWest and Company A undoubtedly benefit commercially from the involvement of the other, through the intermediation of Company B, in a way that makes it possible to regard them as in something akin to a joint venture. Specifically, by financing purchases from the supplier NatWest are able to lend money to their customer and make interest and/or other charges for that service, whilst the supplier is able to obtain payments from NatWest's credit card holders and so benefit from the credit NatWest extended (albeit indirectly).

Furthermore, not every commercial entity accepts Mastercard. So where a supplier such as Company A does agree to accept Mastercard that results in NatWest providing restricted use credit, regardless of whether NatWest has a direct agreement with the supplier or not. Taking this into account, and looking at the principles outlined in the OFT case and what we know of the situation here, it seems to me that NatWest provided finance to Mr P which enabled him, through the medium of the supplier's account with Company B, to pay for goods from the supplier. The purpose of the credit agreement between NatWest and Mr P is to give him the means to pay for goods and services, which is what he did when he paid the supplier. So, following the reasoning in the OFT case, NatWest financed that transaction by making credit available to Mr P at the point of purchase in accordance with his credit agreement.

The Courts have considered tenuousness in relation to s75. NatWest didn't in the end argue that Mr P's relationship here is too tenuous for S75 to apply. But I think the issue of tenuousness in such DCS cases is important and accordingly I think it worth describing my position on the matter.

The High Court considered s75 in the case of Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583, ('the Truman case') the High Court held that it's the nature of the role that each party plays and the nexus between the supplier and creditor that's the relevant consideration. I do not propose to recount all the details of the case here. However I would note the following. In the Truman case it involved the court considering a five-party structure in which the fifth party (like Company A is in this case), had no contractual or other direct relationship with the relevant scheme. But it was held that it did not matter that the card issuers had no direct contractual or other relationship with the fifth party or that the card issuers had no idea of the existence of the fifth party. There still existed "arrangements" sufficient for the requisite DCS link.

In Mr P's case, I think there are stronger indications of relevant arrangements than those in the Truman case given that Company B was specifically and publicly in the business of processing or facilitating payments.

So, in Mr P's case the creditors issuing cards within the Mastercard network, (that is NatWest here) would seem in a stronger position both to know about the activities of the Company B than the card issuers were in the Truman case, whilst the Mastercard network itself was well placed to decide whether it would permit Company B to carry on that business in relation to its cards and to influence the terms on which it could do so. I therefore don't consider the arrangements to be more tenuous than those examined by the court in the Truman case, but rather the opposite.

For all of these reasons, my provisional and my now final conclusion is that there were arrangements between NatWest and Company B under which NatWest financed transactions between their card holders and Company A, including Mr P's purchase from Company A in this case. Meaning that DCS is intact and s75 applies.

The liability issue

As described previously NatWest hasn't contended that Mr P was misrepresented to or that there was a breach of contract. From the evidence I've seen relating to the payment it is clear that both the card transaction and the transfer were ultimately destined for and received by Company A. It is also clear that the service Mr P bought was that of getting him out of his timeshare. Company A didn't provide this service. It is also clear that representations were made to Mr P about this service which he relied on to his detriment in entering the agreement. And as I've stated NatWest has known for an extended period of time that this service was of the opinion that the facts regarding the merits of the claim were not in dispute. So I am glad to see that Natwest has decided to refund Mr P the £15080 he paid.

With regard to the £500 paid to Company C and the £72 he paid to the Notary I see NatWest has offered to pay these as well. I consider this a fair and reasonable position and in line with my findings in my provisional decision.

Putting things right

Further to my provisional decision I see NatWest has made an offer which replicates my position in that provisional decision. Namely:

To pay Mr P £15,080 (the transaction amount) plus £72 (Notary Fee) plus £500 (paid to Company C) plus 8% interest from 4 October 2017 until date of acceptance.

I therefore direct Natwest to pay Mr P this amount within 28 days of notification by this service of Mr P accepting this decision.

my final decision

For the above reasons and those described in my provisional decision I have decided to uphold this complaint National Westminster Bank Plc as I have described above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr P to accept or reject my decision before 7 October 2021.

Rod Glyn-Thomas
Ombudsman