DRN-4337291

The complaint

Mr A has complained that Nationwide Building Society ("Nationwide") unfairly turned down his claim made about something bought using his credit card.

What happened

In 2010, Mr A, alongside his wife, purchased holiday club membership from a business I'll call "Business H". This was paid for by Mr and Mrs A making a payment of £300 using his Nationwide credit card and then transferring £3,650 from their joint bank account.[1] But this credit card payment wasn't made directly to Business H, rather it went to a different business I'll call "Business F".

Later that year, Mr and Mrs A upgraded their membership with Business H and paid a further £5,995 for this. Again, Mr A used his Nationwide credit card and the payment was made to Business F for £1,274.50 – it's not clear how the balance was paid, but I can see that in May 2011, Business H wrote to Mr and Mrs A saying the balance was paid.

In 2016, using a professional representative ("PR"), Mr A made a claim to Nationwide under s.75 of the Consumer Credit Act 1974 ("CCA"). In short, PR said Business H made misrepresentations at the times of the sales that, under s.75 CCA, Nationwide were jointly responsible to answer. It also said Business H had breached its agreements due to breaches in Spanish law. In the letter of complaint, it wasn't clear whether PR was complaining about the first or second sale, or both.[2]

Nationwide considered the claim, but didn't think there was enough to show either a misrepresentation or breach of contract. So it declined Mr A's claim.

Unhappy with what Nationwide said, Mr A referred a complaint about the declined claim to our service. When doing so, PR also said there was an unfair debtor-creditor relationship under s.140A CCA due to the way the memberships were sold. After that, Nationwide also said that Mr A was too late in bringing a s.75 CCA under the provisions of the Limitation Act 1980 ("LA").

One of our investigators considered the complaint, but didn't think Nationwide needed to do anything further. She thought that the claim for misrepresentation had been made too late under the provisions of the LA. She thought the allegations of breaches of Spanish law were better dealt with under s.140A CCA, rather than as a claim for breach of contract, but she concluded that there wasn't enough to say there was an unfair debtor-creditor relationship arising out of the purchases. So she concluded that Nationwide didn't need to do anything more to resolve the complaint.

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[1] Although the holiday club membership was in the joint names of Mr and Mrs A, as the credit card used was in Mr A's name only, the complaint is his alone to bring to our service.

[2] In this decision, I've considered the sale of both memberships. In my provisional decision, I explained that if Mr A disagreed and thought he was only claiming in respect of one of them, he could let me know. But he didn't respond to my provisional decision, and so I have considered the sale of both.

PR said that Mr A didn't agree with the view and asked for the matter to be looked at again by an ombudsman. It thought that Mr A had longer to bring the misrepresentation claim than our investigator found. So the matter was passed to me for a decision.

Having considered everything, I didn't think Mr A's complaint should be upheld, but for different reasons to our investigator. So I issued a provisional decision and invited both parties to provide me anything further they wanted me to consider before I issued a final decision.

In my provisional decision, I explained that I considered all the available evidence and arguments to decide what was fair and reasonable in the circumstances of this complaint. And when doing so, I was 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 brought a claim on Mr A's behalf under s.75 and s.140A CCA. So, I thought it was 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 ("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*".

s.140A CCA states:

> *"(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).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor."

Section 140C CCA says that the reference in s.140A CCA to a 'related agreement' includes a linked transaction in relation to the main agreement, which is defined in s.19 CCA as:

"(1) A transaction entered into by the debtor or hirer, or a relative of his, with any other person ("the other party"), except one for the provision of security, is a linked transaction in relation to an actual or prospective regulated agreement (the "principal agreement") of which it does not form part if -

…

(b) the principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement…"

I thought that the upshot of this was that there needed to be a D-C-S agreement in place for the lender (here Nationwide) to be liable to the borrower (here Mr A) for the misrepresentations or breaches of contract of the supplier (here Business H). And a D-C-S agreement was also needed if the Supplier's acts and/or omissions were to be assessed as part of an assessment of unfairness under s.140A CCA. But, on the face of it, there were no such arrangements in place at the relevant times as Business H wasn't paid directly using the credit card, rather the payments were taken by Business F.

I said there are ways in which there can be a D-C-S agreement in place, even if the supplier wasn't paid directly using a credit card. But since our investigator issued their view, the law in this area had been clarified by the judgment in *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner"). Steiner considered whether there was a D-C-S agreement in circumstances where Business F took payment on a credit card in relation to the purchase of timeshare membership from a business called "C". The court considered the arrangements between the parties and concluded that, as the payment to C was made outside of the credit card network, in that instance there wasn't a D-C-S agreement in place.

I thought the circumstances of Mr A's case were very similar. Here, the same business (Business F) took payment for Mr A's purchase of Business H holiday club memberships. So, based on the judgment in Steiner, I thought 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 s.75 CCA claim.

I also considered whether there might be an unfair debtor-creditor relationship between Mr A and Nationwide arising out of the purchases. But again, I could only consider how the agreements between Mr A and Business H affected the fairness of the debtor-creditor relationship if there was a valid D-C-S agreement in place. And, for the same reasons, I didn't think such an arrangement was in place, nor had Mr A suggested there was an unfair relationship for any other reason.

Under the rules set out above, I explained that 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 didn't think it would be fair to make Nationwide responsible for Business H's failures when the law didn't impose such a liability. Further, I couldn't see that Nationwide and Business H were connected in any way, nor was there any other reason to say Nationwide should be responsible for Business H's failings.

I follows, therefore, that I didn't think Nationwide needed to answer the claims made.

I didn't comment on whether the claim made under s.75 CCA had been made too late under the provisions of the LA as, even if it hadn't, I didn't think Nationwide needed to answer the claim as there was no D-C-S agreement in place.

Nationwide responded to say it had nothing further to add. Neither PR nor Mr A responded to 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 given me anything further to consider, I see no reason to depart from my provisional findings.

My final decision

For the reasons set out above, I don't uphold Mr A's complaint against Nationwide Building Society.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 5 October 2023.

Mark Hutchings
Ombudsman