DRN-4538833

The complaint

Mr G complains that American Express Services Europe Limited has not met its obligations in regard to a transaction he made on his credit card for a Timeshare.

What happened

In April 2013 Mr G paid for a timeshare agreement using his American Express Services Europe Limited credit card (Amex for short) to do so. His agreement for the Timeshare was with a company I shall call 'Firm C'. His credit card statement from the time shows he actually paid a different company, a trustee company, which I'll call 'Firm F'.

Later, unhappy with timeshare he had, Mr G took his dispute to Amex, pointing to its obligations under the Consumer Credit Act 1974 (CCA for short) and seeking redress for the timeshare he'd paid for. But it chose not to refund him. So he brought his complaint to this service.

Our Investigator considered the matter and felt that Amex hadn't treated Mr G unfairly. Our Investigator's rationale followed a hight court decision on similar circumstances. Mr G and his representatives didn't agree with the investigators position. So this dispute came to me for a decision.

I issued a provisional decision dated 06 December 2023 explaining my reasons for considering that Mr G hadn't lost out due to what Amex did. Amex acknowledged my provisional decision and said it had nothing further to add. Mr G's representatives acknowledged receipt of my provisional decision and said that Mr G didn't want to take the matter further and requested this dispute be closed at that point.

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 raised any arguments about my provisional decision I see no reason to diverge from my rationale therein. And accordingly Mr G's complaint is unsuccessful. I've given thought to Mr G's representatives request to close the case after my provisional decision. But I don't think it would be fair on Amex not to have a final decision on these important matters, particularly as it was Mr G and his representatives that didn't accept the investigator's position, which contained the key arguments as to those I set out in my provisional decision (albeit in significantly less detail). Accordingly I'm issuing this final decision to both parties and my rationale is as set out in that provisional decision and repeated from the next paragraph onwards.

I should make clear that this decision is not about Firm C or Firm F, or any other parties involved with Mr G's timeshare arrangements. This is because these companies aren't within the jurisdiction of this service for consideration of complaints regarding considering of claims under the CCA. This decision is solely about what Amex did or didn't do, in relation to its

obligations in relation to Mr G in its capacity as his provider of credit on his credit card account.

Mr G doesn't contest that he made the transaction originally, or that it was applied incorrectly to his account. So I think Amex treated the transaction correctly at the time. And he didn't take the dispute regarding his timeshare to Amex for some time after the transaction happened. So I'm satisfied the only other way Amex could have looked at this dispute regarding this Timeshare is under the CCA.

Accordingly I now consider the crux of this dispute, which is whether Amex has treated Mr G fairly in regard to the issue of who Mr G paid and who his contract for the Timeshare was with. When doing that, 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 ("suppliers").

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 ('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 Mr G, Amex and Firm C. And as that means that Amex 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 Mr G's case, but I should add some (not all) of the parties are the same also.

The late Mr Steiner purchased a timeshare from Firm C for £14,000 using his Mastercard, 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 Firm C was the "supplier".

But rather than paying Firm C directly, the £14,000 payment was made by the late Mr Steiner (using his NatWest Mastercard) to Firm F – the Trustee under a Deed of Trust to which Firm 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 Firm 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 complaint, therefore, is not whether "arrangements" existed between the creditor and the timeshare provider (Firm C) when the Timeshare was sold. Instead, the question posed by Section 12(b) is whether the relevant credit agreement was made by the creditor (Amex) under pre-existing arrangements, or in contemplation of future arrangements, between it and the timeshare provider (Firm C).

In other words, the starting point for the purposes of Section 12(b) is the date that Amex and Mr G 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 Amex issued Mr G with his 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 Amex and Firm F (that is through membership of the card network here) and arrangements between Firm F and Firm C (the 'Trustee Supplier Arrangement'), as the High Court recognised in Steiner, the natural and ordinary meaning of Section 12(b) did not extend to saying that Amex entered into the Credit Agreement with Mr G under both the relevant card network and the Trustee-Supplier Arrangement (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 Amex had entered into the Credit Agreement with Mr G 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 card 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 Firm C and Firm F 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 Mr G's representatives have speculated about the relationship between Firm F and Firm C at length, 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 Amex was and is responsible for the Firm C's alleged failings at the Time of Sale, when the law doesn't impose such a liability on Amex in the absence of a relevant connection between it and Firm C.

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

1) That this service can consider the law and 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 wouldn't know they didn't have such protection in such cases
4) That there may be more evidence relating to the relationship between Firm F and Firm C 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 Amex did (or should have) considered Mr G'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 Amex to consider the claim fairly there is also an onus on the claimant (Mr G) to make out his claim to Amex. And as a DCS arrangement hasn't been made out to Amex, it isn't obliged to consider the claim further under the CCA. And as such Amex hasn't treated Mr G unfairly in this regard. It does not necessarily follow that because a complainant has lost out that the business must have acted unfairly.

The CCA provides some protection to card holders in certain circumstances. There isn't a blanket guaranteed safety net. However it does provide more protection than some other forms of payment. Mr G used his card here, so those are the facts to consider and whether Amex considered his claim fairly. And I'm currently satisfied it did.

As to the question whether there is evidence out there which might make a difference, it is possible. But the test is whether Amex treated Mr G's claim fairly and I'm satisfied it did. And I've not seen persuasive evidence regarding Firm F and Firm C to show that I should depart fairly from the facts found by the judge in Steiner. It is clear to me that Mr G's representatives have fallen some way short of showing the facts found in Steiner regarding the relationship between Firm F and Firm C were wrong. And it hasn't demonstrated that they are 'associates' under section 184.

Mr G'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 Steiner/Mr G's case are clearly and obviously distinguishable on the facts.

Mr G'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 Mr G'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 Mr G's representatives have been at pains to point out.

So in summary I'm persuaded that Mr G's complaint should not be successful for the reasons given above (repeated from my provisional decision) and because neither party has chosen to contend those reasons after acknowledging receipt of the same.

My final decision

I do not uphold this complaint against American Express Services Europe Limited. It has nothing further to do in this dispute.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 1 February 2024.

Rod Glyn-Thomas
Ombudsman