DRN-4416697

The complaint

Mrs J has complained that MBNA Limited unfairly turned down her claim made about something bought using her credit card.

What happened

In 2011, Mrs J, alongside her husband, purchased holiday club membership from a business I'll call "Business D". This cost £5,000 and was paid by Mrs J using her MBNA credit card.[1] But this credit card payment wasn't made directly to Business D, rather it went to a different business I'll call "Business F".

In 2017, using a professional representative ("PR"), Mrs J made a claim to MBNA under s.75 of the Consumer Credit Act 1974 ("CCA"). In short, Mrs J said Business D made misrepresentations at the time of the sale that, under s.75 CCA, MBNA was jointly responsible to answer.

MBNA responded, but didn't think there were the right sort of arrangements in place for Mrs J to make a claim under s.75 CCA. But Mrs J didn't agree, so referred a complaint to our service that MBNA hadn't properly considered her claim. Alongside that, PR provided an opinion from counsel that explained why it thought there were the right sorts of arrangements in place.

One of our investigators considered the complaint, but didn't think MBNA needed to do anything further. He thought that there were the right sort of arrangements in place to make a claim, but that there wasn't enough to say there had been a misrepresentation as alleged. So he concluded that MBNA didn't need to do anything more to resolve the complaint.

PR said that Mrs J didn't agree with the view and asked for the matter to be looked at again by an ombudsman. It supplied submissions from counsel titled '*Generic submissions on behalf of complainants*', in which it was argued that problems with the Business D membership could lead to an unfair debtor-creditor relationship under s.140A CCA.

The complaint was passed to me and I issued a provisional decision, explaining that I didn't think Mrs J's complaint should be upheld, but for different reasons to our investigator.

I explained that when deciding a complaint, I'm 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*

[1] Although the membership was taken out in the names of Mr and Mrs J, as the card used was Mrs J's, only she is eligible to make this complaint

practice at the relevant time."

PR brought a claim on Mrs J's behalf under s.75 CCA. 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 another 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 needs to be a D-C-S agreement in place for the lender (here MBNA) to be liable to the borrower (here Mrs J) for the misrepresentations or breaches of contract of the supplier (here Business D). But, on the face of it, there were no such arrangements in place at the relevant times as Business D wasn't paid directly using the credit card, rather the payments were taken by Business F.

There are ways in which there can be a D-C-S agreement in place, even if the supplier isn't paid directly using a credit card. But since our investigator issued his view, the law in this area had been clarified by the judgment in *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner").[2] 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 that the circumstances of Mrs J's case are very similar. Here, the same business (Business F) took payment for Mrs J's purchase of Business D 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.

In response to the investigator's view, PR sent submissions alleging that there might be an unfair debtor-creditor relationship between Mrs J and MBNA arising out of the purchases. This was not something ever put to MBNA before, so it hadn't had the chance to consider it. However, I thought it was fair in the circumstances of Mrs J's case to go on to look at that claim and I didn't think MBNA was prejudiced by me doing so.[3] I said that as I can only consider how the agreements between Mrs J and Business D affected the fairness of the debtor-creditor relationship if there was a valid D-C-S agreement in place. And, as already explained, I didn't think such an arrangement was in place, nor had Mrs J suggested there was an unfair relationship for any other reason.

Under the rules set out above, 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 MBNA responsible for Business D's alleged failures when the law doesn't impose such a liability – I couldn't see that MBNA and Business D were connected in any way nor was there any other reason to say MBNA should be responsible for Business D's alleged failings.

It followed that I didn't think MBNA needed to answer the claims made.

MBNA responded to say it had nothing further to add to my provisional decision.

PR didn't respond on Mrs J's behalf.

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 I've not been asked to consider anything further, I see no reason to depart from my

[2] This judgment was handed down after PR had supplied counsel's opinion along with the complaint submitted to our service, so this judgment wasn't referred to in that opinion

[3] I invited MBNA to say if it disagreed with me considering this part of the complaint, but it didn't disagree

provisional findings.

My final decision

I don't uphold Mrs J's complaint against MBNA Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J to accept or reject my decision before 23 November 2023.

Mark Hutchings
Ombudsman