DRN-4325539

## The Complaint

Mr T says that Bank of Scotland plc (trading as Halifax) (the 'Business') didn't fairly or reasonably deal with claims under the Consumer Credit Act 1974 (the 'CCA') in relation to the purchase of a holiday product in 2016 (the 'Time of Sale').

## Background to the Complaint

Mr T purchased a timeshare from a timeshare provider (the 'Supplier') at the Time of Sale using a credit card provided by the Business (the 'Credit Agreement').

The purchase agreement entered into by Mr T was made between him and the Supplier. But it stipulated that all payments had to be made in favour of another business that I'll call the Trustee.

Mr T made payments (using his credit card) of £2,400 and £7,200 on 20 April and 10 May 2016 to the Trustee.

Unhappy with the purchase, Mr T – using a professional representative ('PR') – wrote to the Business in late 2018 to complain (the 'Letter of Claim'). The reasons for the complaint at that time are familiar to both sides. So, I don't intend to repeat them in detail here. But, in summary, Mr T argued that there had been misrepresentations and a breach of contract by the Supplier.

The Business treated the Letter of Claim as a claim under Section 75 of the CCA and rejected it. But as the two sides couldn't resolve things between them, a complaint was referred to the Financial Ombudsman Service. It was then looked at by an investigator who wasn't persuaded to uphold the complaint.

PR disagreed with the investigator's view and referred to a number of regulatory breaches when doing so. And as an informal resolution couldn't be reached, the complaint was referred for an ombudsman's decision – which is why it was passed to me.

I issued a Provisional Decision ('PD') on 26 July 2023 rejecting the complaint on the basis that there wasn't the right arrangement between the Business and the Supplier to engage the protections afforded to consumers under Sections 75 and 140A of the CCA. And, given the facts and circumstances of this complaint, I didn't think it would be fair or reasonable to find that the Business was responsible for the Supplier's alleged failings at the Time of Sale, when the law doesn't impose such a liability on the Business in the absence of a relevant connection between it and the Supplier.

As the deadline for responses to my PD has been and gone, and as neither side had anything *new* to add, I've reconsidered the complaint for a Final Decision.

## My Findings

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

And having done that, I still don't think it should be upheld for the same reasons I gave in my PD.

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 (the 'supplier').

On the face of it, Mr T only made claims under Section 75 of the CCA when he first complained to the Business. But the Letter of Claim did include an allegation that the contract entered into between the Supplier and Mr T contained unfair contract terms – which, in my view, doesn't fall neatly under that provision. So, while I acknowledge that the Letter of Claim doesn't expressly refer to Section 140A, it's difficult to make sense of some of that letter if it's only construed with Section 75 in mind.

However, in order to engage the connected lender liability under Sections 75 and 140A (given the fact that the allegations relevant to a claim under Section 140A relate to the acts and/or omissions of the Supplier rather than the Business), one of the pre-conditions is the existence of a relevant debtor-creditor-supplier agreement ('DCS Agreement').

In light of the High Court case of *Steiner v National Westminster Bank plc* [2022] EWHC 2519 ('*Steiner*'), I'm not persuaded there was a DCS Agreement between Mr T, the Business and the Supplier. And as that means the Business didn't and doesn't have any responsibility for the CCA claims in question, I still don't think it needs to do anything to put things right in this complaint.

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 *Steiner*, 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.

The late claimant purchased a timeshare from Club La Costa ('CLC') for £14,000 using his Mastercard, which had been issued by a creditor I'll call Bank N.

So, in accordance with the CCA, Bank N was the "creditor", the late claimant was the "debtor" and CLC was the "supplier".

But rather than paying CLC directly, the £14,000 payment was made by the late claimant (using his Bank N Mastercard) to the same trustee (as the Trustee in this complaint) under a Deed of Trust to which CLC was a beneficiary.

As a result, the estate of the late claimant (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 Bank N and CLC.

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 [Bank N] made its agreement with the late [claimant] 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 (i.e., the Business) and the timeshare provider (i.e., the Supplier) when the holiday product was sold (i.e., at the Time of Sale). Instead, the question posed by Section 12(b) is whether the relevant credit agreement was made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between it and the timeshare provider.

In other words, the starting point for the purposes of Section 12(b) is the date the Business and Mr T entered into the Credit Agreement – rather than the Time of Sale.

Yet, in the absence of evidence to the contrary, it is difficult to argue that the Business issued Mr T 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. And while there may well have been arrangements between the Business and the Trustee (i.e., the relevant card network) and arrangements between the Trustee and the Supplier (the 'Trust'), as the High Court recognised in *Steiner*, the natural and ordinary meaning of Section 12(b) did not extend to saying that the Business entered into the Credit Agreement with Mr T under both the relevant card network and the Trust or in contemplation of the Trust.

I continue to 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 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.

As I said in my PD, 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 Supplier and the Trustee 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 still haven't seen anything to persuade me that's likely to have been the case here.

Overall, therefore, given the facts and circumstances of this complaint, I still don't think it would be fair or reasonable to find that the Business was and is responsible for the Supplier's alleged failings at the Time of Sale when the law doesn't impose such a liability on the Business in the absence of a relevant connection between it and the Supplier. And with that being the case, I don't think the Business needs to do anything to put things right in this complaint.

**My Final Decision**

For the reasons set out above, I don't think this complaint should be upheld.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 5 October 2023.

Morgan Rees
**Ombudsman**