DRN-4395095

The Complaint

Mr M says that Barclays Bank UK PLC (trading as Barclaycard) (the 'Business') didn't act fairly or reasonably under certain provisions of the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare he purchased on 13 November 2013 (the 'Time of Sale') using a credit card provided by the Business.

Background to the Complaint

Mr M purchased a timeshare from a timeshare provider (the 'Supplier') at the Time of Sale for £9,962. And he used a credit card provided by the Business (the 'Credit Agreement') to help pay for the purchase.

The purchase agreement entered into by Mr M was made between him (and his wife[1]) and the Supplier. But it stipulated that all payments had to be made in favour of a third party ('TP').

Mr M made a payment (using his credit card) of £1,992 to TP on 29 November 2013. The receipt for that payment was headed with TP's name. It also included TP's address, its website, and its email address. What's more, Mr M's credit card statement of 18 December 2013 described the transaction in question with reference to TP.

Unhappy with the purchase, Mr M – using a professional representative ('PR') – wrote to the Business on 22 February 2018 to make a claim under Section 75 of the CCA (the 'Letter of Claim'). The reasons for the claim at that time are familiar to both sides. So, I don't intend to repeat them in detail here. But, in summary, Mr M argued that there had been misrepresentations by the Supplier, and he also suggested that there had been regulatory breaches too.

The Business refused to pay the Section 75 claim on the basis that there wasn't the right arrangement in place to make such a claim because Mr M hadn't used his credit card to pay the Supplier directly.

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 that there was the right arrangement in place at the right time to enable Mr M to make claims for misrepresentation and a breach of contract under Section 75, nor a claim for an unfair relationship under Section 140A of the CCA.

PR disagreed with the investigator's assessment because, in summary, it thought it would be fair and reasonable to depart from the law given the facts and circumstances of this complaint.

As a result, the complaint was referred for an ombudsman's decision – which is why it was passed to me.

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[1] As the Credit Agreement was only in Mr M's name, the CCA claims it gave rise to were only his to make. And, as a result, it's only Mr M who's eligible to bring this complaint to the Financial Ombudsman Service.

My Findings

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

When doing that, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's Handbook to take into account 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 (the "supplier").

On my reading of this complaint, Mr M's Section 75 claim was only for misrepresentation rather than a breach of contract as well. And while the main body of the Letter of Claim doesn't expressly refer to Section 140A, a number of the allegations made in that letter don't fall neatly (or at all) into a Section 75 claim. With that being the case, if the Letter of Claim is construed too narrowly, it's difficult to explain why the relevant allegations were included in it. So, given the nature of the relevant allegations, I think it was and is reasonable to consider them with Section 140A in mind on this occasion.

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').

Yet, 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 M, 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 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 a timeshare provider for £14,000 using his Mastercard, which had been issued by Lender N.

So, in accordance with the CCA, Lender N was the “creditor”, the late claimant was the “debtor” and the timeshare provider was the “supplier”.

But rather than paying the timeshare provider directly, the £14,000 payment was made by the late claimant (using his Lender N Mastercard) to a trustee (that happens to have been the same third party as TP in this complaint) under a deed of trust to which the timeshare provider 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 Lender N and the timeshare provider.

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 Lender 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 Business and the Supplier when the timeshare in question was sold (i.e., at the Time of Sale). Instead, the question posed by Section 12(b) is whether the Credit Agreement was made by the Business under pre-existing arrangements, or in contemplation of future arrangements, between it and the Supplier.

In other words, the starting point for the purposes of Section 12(b) is the date the Business and Mr M 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 M 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 TP (i.e., the relevant card network) and arrangements between TP and the Supplier (the ‘TP-Supplier Arrangement’), 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 M under both the relevant card network and the TP-Supplier Arrangement or in contemplation of the TP-Supplier Arrangement.

I recognise that the Court of Appeal’s judgment in *Office of Fair Trading v Lloyds TSB Bank Plc* [2007] QB 1 (‘*OFT v Lloyds TSB*’) 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 Mastercard network 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.

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 TP 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 to persuade me that’s likely to have been the case here.

Overall, therefore, given the facts and circumstances of this complaint, I don't think it would be fair or reasonable to find that the Business was and is responsible for the Supplier's failings 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 for that reason, I don't think the Business needs to do anything to put things right here.

My Final Decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 31 January 2024.

Morgan Rees
Ombudsman