DRN-4358132

The Complaint

Mr B says that HSBC UK Bank Plc ('the Business') didn't fairly or reasonably deal with claims under the Consumer Credit Act 1974 (the 'CCA') in relation to the sale of a holiday product in June 2014 (the 'Time of Sale').

Background to the Complaint

Mr B purchased a holiday product from a timeshare provider (the 'Supplier') at the Time of Sale. The purchase price (including an administrative and contract fee) was £5,995 and he used a credit card provided by the Business (the 'Credit Agreement') to help pay for it.

The purchase application and membership agreement entered into by Mr B were made between him and the Supplier. But the membership agreement stipulated that all payments had to be made in favour of a different business to the Supplier – which I'll refer to as the Trustee.

So, Mr B made payments (using his credit card) of £2,500 and £3,495 to the Trustee on 15 and 24 June 2014 according to his relevant credit card statement.

Unhappy with the purchase, Mr B – using a professional representative ('PR') – wrote to the Business to complain (the 'Letter of Claim'). The reasons for that complaint at that time are familiar to both sides. So, I don't intend to repeat them in detail here. But, in summary, PR argued that there had been misrepresentations by the Supplier as well as a breach of contract that the Business was responsible for under Section 75 of the CCA.

PR recognised in the Letter of Claim that, in order to engage the connected lender liability under Section 75, one of the pre-conditions is the existence of a relevant debtor-creditor supplier agreement ('DCS Agreement'). PR acknowledged that Mr B hadn't paid the Supplier directly. But it went on to argue that there was still a DCS Agreement in place under Section 184 of the CCA. This is what it said:

"In this instance, the three entities are the [Supplier], with whom the contract has been signed, and a Trust created between the [Supplier, the Trustee] and ['Company R'] by way of a Deed of Trust dated 2011 (hereinafter referred to as the "Deed")).

[…]

You will note that the shareholders of both the [Supplier and Company R] are ['Mr JD'] and ['Company FN']. This establishes a degree of control for the purposes of s.184 between Company R and the Supplier.

Furthermore, we also attach hereto the last Annual Return for [Company FN]. You will note that the shareholder of [Company FN] is [the Trustee].

Accordingly, given that all 3 entities involved have the same group of shareholders who exert control over each other, we are content that the test set-out in s.184 of the Act is met and the

debtor-creditor-supplier relationship is maintained."

The Business disputed Mr B's Section 75 claims and, as a result, a complaint was referred to the Financial Ombudsman Service. It was then looked at by an investigator who, having considered everything, rejected it.

PR disagreed with the investigator's assessment and asked for an ombudsman's decision at which point it introduced a new complaint under Section 140A of the CCA. But as an informal resolution couldn't be reached, the complaint was referred to me for a decision.

I issued a Provisional Decision ('PD') on 21 August 2023 in which I concluded that there wasn't the evidence to persuade me that there was a relevant DCS Agreement to engage the CCA protections Mr B was trying to rely on.

Neither side had anything new to add in response to my PD. So, the complaint was returned to me 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 this complaint should be upheld.

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").

However, as I've said before, in order to engage the connected lender liability under the provisions above in this particular complaint, one of the pre-conditions is the existence of a relevant 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 B, 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 more 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 the same trustee (as the Trustee 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 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 the Business and the Supplier.

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

Yet, as I said in my PD, in the absence of evidence to the contrary, it is difficult to argue that the Business issued Mr B 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 as the Supplier wasn't paid directly using the credit card, but indirectly via a payment to the Trustee, on the face of it, there wasn't the right arrangement in place at the right time.

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.

This is what Section 184(3) says:

"A body corporate is an associate of another body corporate—

a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are controllers of the other ; or
b) if a group of two or more persons is a controller of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate."

PR argues that, under Section 184(3), there was a DCS Agreement because *"all 3 entities involved have the same group of shareholders who exert control over each other"*.

Based on what I've seen of limited paperwork from the Time of Sale, which still doesn't include the Deed of Trust PR referred to in the Letter of Claim, it isn't clear why Company R is relevant to this complaint.

Mr JD and Company FN may have been shareholders of the Supplier. But as I've said before, it isn't clear whether they were the only shareholders. And even if they were, it also isn't clear to what extent which of them exercised control over the Supplier as defined by Section 189(1) of the CCA.

I acknowledge that the Trustee does appear to have been linked to Company FN because the former was a shareholder of the latter. But I can't see that either Mr JD or Company FN were controlling shareholders of the Trustee.

So, in the ongoing absence of persuasive evidence that the Supplier and the Trustee were controlled by the same person or that a controller of one was an associate of a controller of the other, I'm not currently persuaded that there's a DCS Agreement here under Section 187 of the CCA.

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 evidence demonstrating that there was 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 uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 18 October 2023.

Morgan Rees
Ombudsman