DRN-4398883

The complaint

Mrs V has complained that MBNA Limited didn't act fairly or reasonably in respect of a complaint raised about how parts of the Consumer Credit Act 1974 ("CCA") related to something bought using her MBNA credit card.

What happened

In March 2013, Mrs V, alongside another, purchased holiday club membership from a timeshare supplier ("the Supplier"). This cost £4,700 and was paid in part by Mrs V using her MBNA credit card.[1] But this credit card payment wasn't made directly to the Supplier, rather it went to a different business, "FNTC".

In September 2017, using a professional representative ("PR"), Mrs V made a claim to MBNA under s.75 CCA. In short, PR said the Supplier made misrepresentations at the time of the sale that, under s.75 CCA, MBNA was jointly responsible to answer.

MBNA responded to the claim in December 2017 and said it wasn't responsible to answer the claim made as Mrs V hadn't paid the Supplier directly, rather the payment had gone to a third party, FNTC. MBNA said this meant the provisions of s.75 CCA didn't apply in the way PR argued it could. In response, PR said that it thought the Supplier and FNTC were associated as the Supplier was able to exercise a sufficient element of control over FNTC, and so s.75 CCA did in fact apply.

In March 2018, Mrs V referred a complaint to our service that MBNA hadn't properly considered the claim made under s.75 CCA. In doing so, PR also said there may have been an unfair debtor-creditor relationship between Mrs V and MBNA as defined in s.140A CCA. MBNA responded to this, stating that it didn't think it had caused an unfair relationship, nor was it responsible for anything the Supplier may have done as the Supplier hadn't been paid directly using the card.

One of our investigators considered the complaint, but didn't think MBNA needed to do anything further. She thought that MBNA wasn't likely to have to do anything under the relevant provisions of the CCA as the payment made using the card didn't go to the Supplier directly, rather it went to FNTC. That meant, following the judgment in *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner"), there weren't the right arrangements in place for MBNA to have to consider allegations about the Supplier's misconduct.

PR responded to say Mrs V disagreed with our investigator and wanted an ombudsman to review the complaint. PR argued that following the judgment in Steiner didn't lead to a fair or reasonable outcome for Mrs V, so the ombudsman should depart from the law. It said that one of the main reasons a consumer uses a credit card was to get the protection offered by the CCA and there was no reason for Mrs V to realise she was paying FNTC and not the Supplier, nor that she was losing her statutory protection.

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[1] Although the membership was bought by Mrs V and her husband, as the credit card was issued in Mrs V's name, only she is eligible to make this complaint and I'll refer to her throughout

PR also argued that Mrs V's case was different to that in Steiner as the type of membership purchased was different and a different analysis needed to be undertaken to consider how the Supplier was passed funds by FNTC. PR said that the amount paid using the card was the exact amount on the purchase agreement, so it was fair to assume that all funds were then passed directly to the Supplier. Further, PR argued that Mrs V had to pay annual maintenance fees to FNTC, so it was likely that the administration costs of the trust were taken from those payments rather than from the amount paid for membership. All of this pointed to FNTC being a 'payment processer' on behalf of the Supplier. Here PR suggested that payment was set up to be taken in this way for tax purposes and it pointed to a decision in which an ombudsman found there were the right arrangements in place for the relevant CCA provisions to apply in similar circumstances.

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.

When doing so, 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 practice at the relevant time."*

PR made a complaint on Mrs V's behalf, pointing to the operation of ss.75 and 140A CCA. I think it is 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 ("DCS") 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' include 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 any other 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…"

The upshot of this is that there needs to be a DCS agreement in place for the lender (here MBNA) to be liable to the borrower (here Mrs V) for the misrepresentations of the supplier (here the Supplier) under s.75 CCA. But, on the face of it, there were no such arrangement in place at the relevant times as the Supplier wasn't paid directly using the credit card, rather the payments were taken by FNTC.

There are ways in which there can be a DCS agreement in place, even if the supplier isn't paid directly using a credit card. Our investigator pointed to the judgment in Steiner, where it was considered whether there was a DCS agreement in circumstances where FNTC took payment on a credit card in relation to the purchase of timeshare membership from a different timeshare supplier. The court considered the arrangements between the parties and concluded that, as the payment to that supplier was made outside of the credit card network, in that instance there wasn't a DCS agreement in place.

The circumstances of Mrs V's case are very similar. So, based on the judgment in Steiner, I think a court would come to a similar conclusion and say that there was no DCS agreement in place as any payment made to the Supplier was outside of the card network and, in turn, no valid s.75 CCA claim. I'll explain further.

In Steiner, payment was taken for timeshare membership. But rather than the claimant's credit card being used to pay the timeshare supplier directly, payment was actually taken by a trustee (in that case also FNTC). There was a deed of trust between FNTC and that timeshare supplier, such that the timeshare supplier was a beneficiary under the trust.

The Court considered the meaning of the words in s.12 CCA "*pre-existing arrangements, or in contemplation of future arrangements"* and concluded that the central issue was whether the credit agreement (i.e. the credit card) was granted by the lender under pre-existing

arrangements or in contemplation of future arrangements between it and the supplier, not the nature of the arrangements at the time of the purchase. The Court concluded that it was not likely that the lender issued the credit card in contemplation of arrangements outside of, and in addition to, the credit card network, i.e. the trust deed between FNTC and the timeshare supplier as well as the card network involving FNTC.

In Mrs V's case, I find it unlikely that MBNA granted Mrs V a credit card in the knowledge of the trust deed between the Supplier and FNTC, nor in contemplation of the existence of any such trust deed. That is the important issue in this case and not the precise arrangement by which FNTC passed funds (if it did) to the Supplier when the card was used. It follows, I don't think there was a DCS arrangement in place involving MBNA, Mrs V and the Supplier.

I've also considered whether the Supplier and FNTC were 'associates' as defined by the CCA. But the matters pointed to by PR seem to me to describe the obligations and relations between the parties under the trust deed and not that the entire operations of each business were controlled by the same people. So I can't see that they were 'associates' under the CCA.

I've read the decision made by another ombudsman, but it doesn't change my view on the issue of the DCS arrangement. That decision was written before the judgment was issued in Steiner and was in relation to a different situation, so it isn't of assistance to me.

I've also thought about the claim made under s.140A CCA and whether a Court would conclude the relationship was unfair. However, a Court could only consider how the agreements between Mrs V and the Supplier affected the fairness of the debtor-creditor relationship if there was a valid DCS agreement in place. And, as already explained, I don't think such an arrangement was in place, nor has Mrs V suggested there was an unfair relationship for any other reason.

It follows that I don't think the provisions of the CCA apply to the complaints PR advanced on Mrs V's behalf in the way required to make MBNA responsible for the Supplier's actions.

I've also considered what PR said about Mrs V not knowing that she might have lost CCA protections by the way payment was taken. But the issue here isn't about Mrs V's knowledge, rather it's whether the technical legal arrangement was in place such that there was a DCS agreement. And, following the judgment in Steiner, I don't think the right arrangement was in place.

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 don't think it would be fair to make MBNA responsible for the Supplier's alleged failures when the law doesn't impose such a liability. Further, I can't see that MBNA and the Supplier were connected in any way nor is there any other reason to say MBNA should be responsible for, or be connected to, the Supplier's alleged failings.

It follows that I don't think MBNA needs to do anything further to answer Mrs V's complaint.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs V to accept or reject my decision before 8 February 2024.

Mark Hutchings
Ombudsman