DRN-4318657

The Complaint

Mrs M says that Santander UK Plc (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 2015 (the 'Time of Sale').

Background to the Complaint

Mrs M 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 Mrs M was made between her and the Supplier. But it stipulated that all payments had to be made in favour of a third party that I'll call the Trustee.

Mrs M made payments (using her credit card) of £680 and £2,721 to the Trustee on 5 and 20 February 2015 respectively. The receipts for each of those payments were headed with the Trustee's name, address, website and email address.

Unhappy with the purchase, Mrs M – using a professional representative ('PR') – wrote to the Business 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.

The Business treated the Letter of Claim as a claim under Section 75 of the CCA and rejected it on the ground that there wasn't the right arrangement in place to make such a claim because Mrs M hadn't used her credit card to pay the Supplier directly. 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 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 27 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.

The Business had nothing further to add in response to my PD while neither Mrs M nor PR responded. So, 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 this complaint 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').

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

However, as I've said before, 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 still not persuaded there was a DCS Agreement between Mrs 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 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 Mrs M 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 Mrs M with her 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. 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 'Trustee-Supplier Arrangement'). But 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 Mrs M under both the relevant card network and the Trustee-Supplier Arrangement – nor could Section 12(b) be interpreted as saying that the Business had entered into the Credit Agreement with Mrs M in contemplation of the Trustee-Supplier Arrangement.

I 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.

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 Mrs M to accept or reject my decision before 27 September 2023.

Morgan Rees
Ombudsman