

The complaint

Mrs O has complained that Bank of Scotland Plc (“BoS”) unfairly turned down her complaint made about something bought using her credit card.

What happened

In 2012, Mrs O, alongside another, purchased holiday club membership from a business I’ll call “Business D”. This cost £5,950 and was paid in part by Mrs O using her BoS credit card.¹ But this credit card payment wasn’t made directly to Business D, rather it went to a different business I’ll call “Business F”.

In 2016, using a professional representative (“PR”), Mrs O made a claim to BoS under s.75 of the Consumer Credit Act 1974 (“CCA”). In short, Mrs O said Business D made misrepresentations at the time of the sale that, under s.75 CCA, BoS was jointly responsible to answer. She also said Business D breached its agreement it had with her.

BoS didn’t accept the claim made, saying there wasn’t enough to say there had been any misrepresentations made or any breach of contract. But it also considered a complaint that the claim hadn’t been investigated properly, but didn’t agree it should be upheld. Unhappy with the response, PR referred Mrs O’s complaint to our service.

One of our investigators considered the complaint, but didn’t think BoS needed to do anything further. He didn’t think there was enough to say the s.75 CCA claim should have been accepted. But he also considered whether the sale gave rise to an unfair debtor-creditor relationship under s.140A CCA, but didn’t think it had.

PR said that Mrs O didn’t agree with the view and asked for the matter to be looked at again by an ombudsman. In doing so it provided substantial submission as to why it thought the problems with Business D membership led to an unfair debtor-creditor relationship under s.140A CCA.

I issued a provisional decision as, although I agreed with our investigator that the complaint shouldn’t be upheld, I did so for different reasons.

I explained that when I decide complaints, 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.”

¹ Although the membership was in two names, as the card used was Mrs O’s, only she is able to make this complaint

PR brought a claim on Mrs O's behalf under s.75 CCA and I thought it was 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) as, 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 ("D-C-S") 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..."*

I thought that the upshot of this was that there needs to be a D-C-S agreement in place for the lender (here BoS) to be liable to the borrower (here Mrs O) for the misrepresentations or breaches of contract of the supplier (here Business D). But, on the face of it, there were no such arrangements in place at the relevant times as Business D wasn't paid directly using the credit card, rather the payments were taken by Business F.

There are ways in which there can be a D-C-S agreement in place, even if the supplier isn't paid directly using a credit card. I said that the law in this area had been clarified since our investigator's view by the judgment in Steiner v. National Westminster Bank plc [2022] EWHC 2519 (KB) ("Steiner"). Steiner considered whether there was a D-C-S agreement in circumstances where Business F took payment on a credit card in relation to the purchase of timeshare membership from a Business called "C". The court considered the arrangements between the parties and concluded that, as the payment to C was made outside of the credit card network, in that instance there wasn't a D-C-S agreement in place.

I said the circumstances of Mrs O's case are very similar. Here, the same business (Business F) took payment for Mrs O's purchase of Business D holiday club memberships. So, based on the judgment in Steiner, I thought a court would come to a similar conclusion and say that there was no D-C-S agreement in place and, in turn, no valid s.75 CCA claim.

PR argued that Business F and Business D were 'associates' as Business D controls Business F. 'Associates' is defined in s.184 CCA, in particular:

"(3) 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."

So here, I thought it would need to be shown that one (or more) people were 'controllers' of both Business D and Business F (defined further in s.189 CCA). PR pointed to parts of the Trust Deed that it showed Business F was effectively 'working for' Business D, for example Business F denied responsibility for any losses suffered and it was to be paid for its work by Business D. But I thought this shows the contractual relations between two parties – I couldn't see that any one person (or group of people) were controllers of the two businesses or that they were associated in any other way. So I didn't think there was enough here to say there was in fact a valid D-C-S agreement.

In the investigator's view and in PR's response to it, there was discussion on whether there was an unfair debtor-creditor relationship between Mrs O and BoS arising out of the purchases under s.140A CCA. This wasn't something ever put to BoS before, so it hadn't had the chance to consider it. However, I thought it was fair in the circumstances of Mrs O's case to go on to look at that claim and I didn't think BoS was prejudiced by me doing so.² I said that as I could only consider how the agreements between Mrs O and Business D affected the fairness of the debtor-creditor relationship if there was a valid D-C-S agreement in place. And, as already explained, I didn't think such an arrangement was in place, nor had Mrs O suggested there was an unfair relationship for any other reason.

² BoS responded to my provisional decision and it didn't object to me considering this part of the complaint.

I explained that 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 didn't think it would be fair to make BoS responsible for Business D's alleged failures when the law doesn't impose such a liability. I couldn't see that BoS and Business D were connected in any way nor was there any other reason to say BoS should be responsible for Business D's alleged failings.

It followed that I didn't think BoS needed to answer the claims made.

BoS responded to say it had nothing further to add to what I'd said. PR didn't respond on Mrs O's behalf.

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.

As I've been given nothing further to consider, I see no reason to depart from my provisional findings and decision.

My final decision

I don't uphold Mrs O's complaint against Bank of Scotland Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O to accept or reject my decision before 29 December 2023.

Mark Hutchings
Ombudsman