DRN-3632401

The complaint

Mrs P has complained that Bank of Scotland plc, trading as Halifax, unfairly turned down her claim made about something bought using her credit card.

What happened

In 2012, Mrs P, alongside her husband, purchased holiday club membership from a business I'll call "Business D". This cost £4,800 and was paid in part by Mrs P making a payment of £990 using her Halifax 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 2018, using a professional representative ("PR"), Mrs P made a claim to Halifax under s.75 of the Consumer Credit Act 1974 ("CCA"). In short, Mrs P said Business D made misrepresentations at the time of the sale that, under s.75 CCA, Halifax was jointly responsible to answer. It also said that Business D had breached the terms of the membership, again something Halifax could be jointly liable for under s.75 CCA.

Halifax responded, but didn't think there was enough to say there had been a breach of contract or misrepresentation as alleged. But Mrs P didn't agree, so referred a complaint to our service that Halifax hadn't properly considered her claim.

One of our investigators considered the complaint, but didn't think Halifax needed to do anything further. He thought that the claim had been made too late, meaning Halifax had a defence to it. PR disagreed and thought it had been made in time. On reflection, our investigator agreed, but he thought there wasn't enough to say there had been a misrepresentation or breach of contract as alleged. So he concluded that Halifax didn't need to do anything more to resolve the complaint.

PR said that Mrs P didn't agree with the view and asked for the matter to be looked at again by an ombudsman. It provided substantial submissions detailing problems it said there were with Business D membership and argued that this led to a breach of contract. It also supplied submissions from counsel titled '*Generic submissions on behalf of complainants*', in which it was argued that problems with Business D membership could lead to an unfair debtor-creditor relationship under s.140A CCA.

I considered all the available evidence and arguments to decide what I thought was fair and reasonable in the circumstances of this complaint. Having done so, I didn't think Halifax needed to do anything further, but for different reasons to our investigator. So I issued a provisional decision and invited both parties to provide me anything further they'd like me to consider.

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:*

[1] Although the membership was in the names of Mr and Mrs P, as the credit card used was in Mrs P's name, only she is able to make this complaint

(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 brought a claim on Mrs P'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) 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 ("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 is that there needs to be a D-C-S agreement in place for the lender (here Halifax) to be liable to the borrower (here Mrs P) 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.

I said that 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. But since our investigator issued their view, the law in this area had been clarified by the judgment in *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner").[2] 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 thought the circumstances of Mrs P's case were very similar. Here, the same business (Business F) took payment for Mrs P'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.

In response to the investigator's view, PR sent submissions alleging that there might be an unfair debtor-creditor relationship between Mrs P and Halifax arising out of the purchases.

This wasn't a claim that had ever been raised with Halifax, so it hadn't had the chance to consider it. However, I thought it was fair in the circumstances of Mrs P's case to go on to look at that claim and I didn't think Halifax was prejudiced by me doing so. I said that as I could only consider how the agreements between Mrs P 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 P suggested there was an unfair relationship for any other reason. I invited Halifax to tell me in response to my provisional decision if it didn't think I should consider this part of the complaint.

Under the rules set out above, I noted that 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 Halifax responsible for Business D's alleged failures when the law didn't impose such a liability – I couldn't see that Halifax and Business D were connected in any way nor was there any other reason to say Halifax should be responsible for Business D's failings.

I followed, therefore, that I didn't think Halifax need to answer the claims made.

Halifax responded to say it had nothing further to add to my provisional decision. Neither Mrs P nor PR responded.

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[2] I had seen Counsel's opinion prepared in respect of some of PR's complaints on the subject of D-C-S agreements. But that opinion predated this judgment, so I didn't think it assisted me here

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 decision. So I still don't think Halifax needs to do anything further for the same reasons.

My final decision

I don't uphold Mrs P's complaint against Bank of Scotland plc, trading as Halifax.

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

Mark Hutchings
Ombudsman