DRN-4466674

The complaint

Mrs C, who is represented by a professional representative ("PR") complains that Capital One (Europe) plc ("Capital One"), unfairly turned down her claim made under the Consumer Credit Act 1974 ("CCA") about a holiday product purchased using her Capital One credit card.

What happened

In December 2017 Mrs C, purchased a holiday club membership from a timeshare supplier ("the Supplier"). To help pay for this she used her Capital One credit card. However, she paid a different business, "FNTC" rather than paying the Supplier directly.

PR made a claim to Capital One under s.75 CCA. In short, it said the Supplier misrepresented things at the time of the sale and that, under s.75 CCA, Capital One was jointly liable.

Capital One noted the payment had been made to a third party and asked for further information. It subsequently concluded that as FNTC was paid using the card and not the Supplier directly, it wasn't responsible to answer the claim made under s.75 CCA.

PR brought a complaint to this service on behalf of Mrs C. It was considered by one of our investigators who didn't recommend it be upheld. She said that a recent court judgment, Steiner v. National Westminster Bank plc [2022] EWHC 2519 (KB) ("Steiner") considered whether the right arrangement was in place where payment is made by credit card to a third party. She concluded that as Mrs C's payment had gone to FNTC and not the Supplier, it meant there weren't the right arrangements in place and Capital One didn't need to answer the claims made.

PR didn't agree and said the remit of this service was to decide on the basis of what was fair and reasonable. Our role was to take into account the law and regulations etc. but we are free to depart from these and reach a conclusion a court may not reach. It said that Steiner was dealing with a different type of timeshare product and the judge may have reached a different conclusion had he been looking at the type of product purchased by Mrs C.

It said that had the court had a better understanding of the nature of the relationship it may have reached a different conclusion. It suggested this service should assume the relationship was identical to one in a case where the complaint had been upheld.

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."

Mrs C made a claim under s.75 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 ("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".

The upshot of this is that there needs to be a D-C-S agreement in place for the lender (here Capital One) to be liable to the borrower (here Mrs C) for the misrepresentations of the supplier (here the Supplier) under s.75 CCA. But, on the face of it, there were no such arrangements 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 D-C-S agreement in place, even if the supplier isn't paid directly using a credit card. Our investigator pointed to the judgment in Steiner, in which it was considered whether there was a D-C-S 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 and under the trust, in that instance there wasn't a D-C-S agreement in place.

The circumstances of Mrs C's case are very similar. Here, FNTC, acting as trustee, took payment on behalf of a timeshare supplier in the same way. So, based on the judgment in Steiner, I think a court would come to a similar conclusion and say that there was no D-C-S 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've also thought about whether the Supplier and FNTC could be associated under s.184 CCA. Under that provision, there might still be a D-C-S arrangement in place if FNTC was paid for the Supplier's services. But it would have to be shown that the same person (or group of people) effectively controlled both FNTC and the Supplier. PR has not supplied evidence that there was that connection and I can't see that was the case.

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 Capital One responsible for the Supplier's alleged failures when the law doesn't impose such a liability – I can't see that Capital One and the Supplier were connected in any way nor is there any other reason to say Capital One should be responsible for the Supplier's alleged failings.

It follows that I don't think Capital One needs to answer the claim made.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 10 April 2024.

Ivor Graham
Ombudsman