DRN-4611236

The Complaint

Mr R says that Barclays Bank UK PLC (trading as Barclaycard) (the 'Business') didn't act fairly or reasonably under certain provisions of the Consumer Credit Act 1974 (the 'CCA') in relation to a timeshare he purchased on 18 August 2013 (the 'Time of Sale') using a credit card provided by the Business.

Background to the Complaint

Mr R purchased a timeshare from a timeshare provider (the 'Supplier') at the Time of Sale for £8,689. And he used a credit card provided by the Business (the 'Credit Agreement') to help pay for the purchase by making a payment (using his credit card) of £8,689 to a third party ('TP') on 7 October 2013 (according to Mr R's credit card statement dated 1 November 2013).

Mr R – using a professional representative ('PR') – wrote to the Business on 25 July 2018 to make complaints under Sections 75 and 140A of the CCA (the 'Letter of Claim'). The reasons for the complaints at that time are familiar to both sides. So, I don't intend to repeat them in detail here. But, in summary, Mr R argued for the purposes of his Section 75 claim that there had been misrepresentations by the Supplier. And, for the purposes of his Section 140A complaint, he also suggested that there had been a number of regulatory breaches by the Supplier and a lack of any sort of creditworthiness assessment by the Business when he made his payment using his credit card.

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 that there was the right arrangement in place at the right time to enable Mr R to make claims for misrepresentation and a breach of contract under Section 75, nor a complaint about an unfair credit relationship under Section 140A.

Mr R wasn't happy with the outcome reached by the investigator. And PR said, amongst other things, the following in response to the assessment:

"It is clear that the law relating to the debtor-creditor-supplier ("DCS") relationship has changed following the decision in 2022 in Steiner. On the basis of that matter, we agree that the decision is manifestly correct."

As a result, the complaint was referred for an ombudsman's decision – which is why it was passed to me.

I issued a Provisional Decision ('PD') on 10 January 2024 rejecting Mr R's complaint on the basis that there wasn't the right arrangement in place at the right time to make a claim for misrepresentation under Section 75 of the CCA nor a complaint about an unfair credit relationship under Section 140A.

In response to my PD, neither side had any new arguments and/or evidence that was specific to this complaint. And as the deadline for responses has now been and gone, the complaint was passed back to me to consider 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.

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, I thought Mr R had only made a Section 75 claim for misrepresentation rather than a claim for breach of contract as well. And as neither he nor PR has disputed my reading of his complaint, that remains my view.

However, in order to engage the connected lender liability under Sections 75 and 140A (to the extent that the allegations under Section 140A, in combination with Section 56(1)(c) of the CCA, 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 not persuaded there was a DCS Agreement between Mr R, the Business and the Supplier. And that means I don't think the Business needs to do anything to put things right in this complaint. I'll explain why.

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 a timeshare provider for £14,000 using his Mastercard, which had been issued by Lender N.

So, in accordance with the CCA, Lender N was the "creditor", the late claimant was the "debtor", and the timeshare provider was the "supplier".

But rather than paying the timeshare provider directly, the £14,000 payment was made by the late claimant (using his Lender N Mastercard) to a trustee (that happens to have been the same third party as TP in this complaint) under a deed of trust to which the timeshare provider 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 Lender N and the timeshare provider.

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 Lender 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 Business and the Supplier when the timeshare in question was sold (i.e., at the Time of Sale). Instead, the question posed by Section 12(b) is whether the Credit Agreement was made by the Business under pre-existing arrangements, or in contemplation of future arrangements, between it and the Supplier.

In other words, the starting point for the purposes of Section 12(b) is the date the Business and Mr R entered into the Credit Agreement – rather than the Time of Sale.

Yet, I still can't see that the Business issued Mr R with his 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. And while there may well have been arrangements between the Business and TP (i.e., the relevant card network) and arrangements between TP and the Supplier (the 'TP-Supplier Arrangement'), 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 Mr R under both the relevant card network and the TP-Supplier Arrangement or in contemplation of the TP-Supplier Arrangement.

And as I can't see any other reason why there was a DCS Agreement given the facts and circumstances of this complaint, I don't think it would be fair or reasonable to find that the Business bore responsibility for the Supplier's failings 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 Creditworthiness Assessment

It was said in the Letter of Claim that there wasn't any sort of creditworthiness assessment when Mr R paid for his timeshare using his credit card. That seems to have been framed as part of the Section 140A complaint rather than as a freestanding complaint about the Business. But, in any event, as I said in my PD, it seems to me that Mr R simply used an existing line of credit to make his purchase. And with that being the case, I don't think this complaint should succeed on this basis either.

Conclusion

Overall, therefore, given the facts and circumstances of this complaint, I don't think the Business needs to do anything to put things right.

My Final Decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 11 March 2024.

Morgan Rees
Ombudsman