DRN-4638663

The complaint

Mrs C complains Vanquis Bank Limited hasn't treated her fairly when considering a connected lender liability claim she brought against it relating to the purchase of a membership to a holiday club.

What happened

I issued a provisional decision on Mrs C's complaint on 1 February 2024. A copy of my provisional decision is appended to, and should be considered a part of, this final decision.

I don't intend to narrate the background to the complaint in detail again, but in very brief summary, Mrs C had used her Vanquis credit card to make part payments towards a points-based membership to a holiday club, which she'd bought in December 2015. Her credit card payments were made to a third party trustee company.

Mrs C wrote to Vanquis in December 2021 to make a claim under section 75 of the Consumer Credit Act 1974 ("CCA") in respect of the purchase of the holiday club membership. In essence, she considered this had been mis-sold. Vanquis rejected her claim, and subsequent complaint, on the grounds she had made it too long after the events complained of.

The matter was referred to the Financial Ombudsman Service to investigate. One of our investigators issued an assessment stating that Mrs C was unable to make a claim against Vanquis under section 75 because there was not a valid debtor-creditor-supplier ("DCS") agreement. He cited a case decided by the High Court from 2022 which mirrored Mrs C's set of circumstances, and where it had been found that a valid DCS agreement did not exist.

Mrs C disagreed and the case was passed to me to review. In my provisional decision I noted that I had to take into account the relevant law. This would include caselaw, and I considered the judgment in the High Court case referred to by our investigator, *Steiner v. National Westminster Bank plc [2022] EWHC 2519*, was clearly relevant to Mrs C's case as the circumstances were very similar and the same issues had been considered.

I outlined the key points from the judgment in the Steiner case, and noted that they led to a conclusion that where a third party trustee company had been paid by credit card instead of the actual supplier of the goods or services in question, there were not in place arrangements of the kind required under the CCA, for there to be a DCS agreement between the debtor, the creditor and the supplier. This was a key requirement for section 75 to apply to a purchase.

Because Mrs C's credit card payments were made to a third party trustee company, and there was no evidence this company and the actual supplier of the holiday club membership were "associates" as defined by section 184 of the CCA, I considered it was fair and reasonable to conclude that Mrs C's payments were not made under a DCS agreement with the supplier, that section 75 did not apply to her purchase and Vanquis had therefore not acted unfairly or unreasonably in declining her claim.

I considered further points made by Mrs C's claims management company, but did not find them persuasive for reasons I explained in the provisional decision.

I invited all parties to let me have any final evidence or arguments they wanted me to consider, by 15 February 2024. Vanquis responded to the provisional decision to say it had no further comments to make. Mrs C and her claims management company did not respond.

The case has now been returned to me to review once again.

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.

Because I have received no new evidence or arguments from any of the parties involved in this case, I see no reason to depart from the findings and conclusions I made in my provisional decision, summarised above and provided in more detail in the appended text below.

It follows that I conclude Vanquis did not act unfairly or unreasonably in declining the claim Mrs C brought under section 75 of the CCA.

My final decision

For the reasons explained above, and in the text of my provisional decision below, I do not uphold Mrs C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 25 March 2024.

Will Culley
Ombudsman

TEXT OF PROVISIONAL DECISION

The complaint

Mrs C complains Vanquis Bank Limited hasn't treated her fairly when considering a connected lender liability claim she brought against it relating to the purchase of a membership to a holiday club.

Mrs C is represented in her complaint by a claims management company ("CMC"). When I refer to things said or done by Mrs C in relation to her complaint, this should be taken to include things said or done by her CMC unless specified otherwise.

What happened

Mrs C purchased a membership to a holiday club I will call "RGC" in December 2015. The membership was sold by a marketing company I'll call "IVO". While the details of the purchase are limited, it seems Mrs C purchased 165 membership "points" which could first be used in 2017 and then in alternate years until 2031, and exchanged for holidays. According to the purchase agreement, Mrs C was expected to pay a £100 deposit followed by £500 on 20 December 2015 and then six instalments of £900 each between January and

June 2016, for a total of £6,900. The purchase agreement referred to the total price as being £6,000, but there has been no explanation for this discrepancy.

Mrs C made a series of payments on her Vanquis credit card in connection with the purchase. Vanquis was able to identify five payments of £900 each, between 2 March 2016 and 10 August 2016, for a total of £5,400. All of these payments were made to a trustee company I will call "FNTC". Mrs C says the remainder of the balance was paid in cash.

On 3 December 2021 Mrs C wrote to Vanquis to make a claim under section 75 of the Consumer Credit Act 1974 ("CCA") in relation to the purchase. In short, she said the following had happened:

- *She'd been pressurised by IVO at a sales meeting into buying the membership and made to feel she couldn't leave unless she made the purchase.*
- *There was a lack of availability of holidays around Christmas time which, along with Mrs C's failing health, meant she hadn't got much use out of the membership.*
- *The contract had been unfair because Mrs C was 53 at the time of purchase and the membership lasted until 2031 with no early release clause.*
- *Unspecified misrepresentations.*

Mrs C's representatives contacted the Financial Ombudsman Service in February 2023. There had been no response from Vanquis by this point. After we contacted Vanquis, it claimed never to have received any correspondence from or on behalf of Mrs C but said that it would now look into her claim.

Vanquis wrote to Mrs C rejecting her claim on 13 April 2023. It argued that because all of the credit card payments had been made more than six years before she had raised any concerns about them, she was too late to make a section 75 claim. Mrs C complained about this decision but Vanquis simply reiterated its position. Dissatisfied with this response, Mrs C returned to the Financial Ombudsman Service for an independent assessment.

One of our investigators looked into the complaint. He noted that the circumstances of Mrs C's purchase appeared to mirror those which had been the subject of a case in the High Court in which judgment had been handed down in October 2022.

The Court had ruled that where a trustee company had been paid by credit card instead of the timeshare or holiday club seller, there was not a valid debtor-creditor-supplier ("DCS") agreement in place for the purchase and therefore section 75 of the CCA did not apply to the purchase. Our investigator thought Mrs C's scenario was analogous to the one considered by the Court and said that it was his view that Mrs C didn't have a valid section 75 claim and therefore it had not been unreasonable of Vanquis not to honour it.

Mrs C asked to appeal the investigator's assessment and so the complaint has been passed to me to decide.

What I've provisionally 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 considering a complaint, I'm required by the FCA's rules to consider the:

"(1) relevant:
(a) law and regulations;
(b) regulators' rules, guidance and standards;
(c) codes of practice; and
(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

This is, ultimately, a complaint about whether Vanquis acted fairly and reasonably in not honouring a connected lender liability claim from Mrs C arising from the relevant provisions in the CCA.

The regime of connected lender liability is set out in sections 56, 75 and 140A of the CCA. In broad terms, the regime allows a borrower ("debtor") to claim against their lender ("creditor") where that lender has financed the purchase of goods or services from a third-party ("supplier").

There are certain criteria which need to be met before the connected lender liability provisions are engaged. One of these is that there must be a DCS agreement in place.

A DCS agreement is defined in section 12(b) of the CCA as follows:

"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, which is referred to in section 12, states that a restricted-use credit agreement is a regulated consumer credit agreement:

"to finance a transaction between the debtor and a person (the "supplier") other than the creditor"

The court case our investigator referred to is relevant to the question of the DCS agreement. This is the High Court case of Steiner v. National Westminster Bank plc [2022] EWHC 2519 ("the Steiner case"). Like our investigator, I think the judgment in the Steiner case leads to the conclusion that a DCS agreement is not in place in Mrs C's scenario.

In the Steiner case the High Court considered the application of sections 56, 75 and 140A of the CCA and the circumstances in which the necessary arrangements can be said to exist for a DCS agreement to be in place.

Mr Steiner had purchased a timeshare-like product from a company, "CLC", for £14,000 using his credit card, which had been issued to him by National Westminster Bank plc ("NatWest"). Mr Steiner had been the debtor, NatWest had been the creditor, and CLC had been the supplier. But Mr Steiner had not paid CLC directly. He had used his NatWest credit card to pay £14,000 to the same trustee company – FNTC – Mrs C made her payments to in the case I have been asked to consider. Indeed, the available evidence about Mrs C's interaction with IVO shows that the circumstances of her sale are very similar to those described in the Steiner case.

Because payment had not been made directly to the supplier, Mr Steiner's estate (for he had passed away by the time of the court case) needed to demonstrate that the credit agreement had been made "under pre-existing arrangements, or in contemplation of future arrangements" between NatWest and CLC, in line with section 12(b) of the CCA.

The Court concluded "arrangements" could encompass the arrangements in place between

participants in the card network to which the relevant credit card belonged, but that it could not be "stretched so far as to mean that NatWest made its agreement with the late Mr Steiner under the Deed of Trust (of which it was presumably unaware) as well as under the Mastercard network."

From the judge's reasoning it's apparent the key question in the Steiner case (and therefore in this case) was not whether "arrangements" existed between the creditor and the timeshare provider at the time of the sale of the timeshare, but rather whether the credit agreement was originally made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between it and the timeshare provider.

In light of the Steiner case, and in the absence of evidence to the contrary, it is difficult to argue that Vanquis issued Mrs C 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. While I think such arrangements could encompass suppliers who would join the card network after Mrs C entered her credit agreement with Vanquis, I do not see how it could include IVO, to whom no credit card payment was made, and which appears only to have received payment indirectly via the trustee company, FNTC.

I've considered if there is any other way that arrangements of the required kind could be said to have existed between Vanquis and IVO. Section 187 of the CCA provides that an agreement will be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is made between the creditor and an associate of the supplier. In other words, if the entity which received the credit card payment(s) was an associate of the supplier, then arrangements of the required kind, and therefore a DCS agreement, will be in place.

Associates are defined in section 184 of the CCA. Under these definitions, individuals are considered associates if they have certain spousal or familial relationships, and corporate entities are considered associates if they are controlled by the same people, or by different people who are themselves associates.

It would be for Mrs C or her representatives to show that IVO and FNTC are associates. To date, no evidence has been received to support such a contention.

I note Mrs C's representatives have however put forward various arguments to support the contention that there is a DCS agreement in this case which would cause connected lender liability to be engaged. I could summarise these as follows:

- *It was permissible for the ombudsman to depart from the law, and this was a situation where this was necessary as not to do so would result in an outcome which was not fair or reasonable.*

- *Mrs C would have been unaware, at the time of contracting and making her payments, that there was any reason to make a distinction between paying FNTC or IVO, or that the applicability of statutory connected lender liability provisions depended on who she paid.*

- *The Steiner case was not entirely analogous to Mrs C's case because in Steiner, the Court was considering a European points-based membership, as opposed to a fractional timeshare product. The Court may have reached different conclusions had the underlying product been different. Additionally, the Court in Steiner had not had a full awareness of the relevant relationships between the parties.*

- *It was reasonable to assume that the actual supplier, IVO, had been transferred the*

funds paid to FNTC. FNTC was simply acting as a payment processor. The ombudsman had determined in previous cases that the use of a payment processor did not mean that arrangements of the required kind, and therefore a DCS agreement, did not exist.

I will say first of all that Mrs C's representatives appear to be mistaken about the nature of the product Mrs C purchased from IVO. While the information provided has been limited, it does not seem to be a fractional timeshare product. Rather, it seems to be a points-based membership of the kind the Court had to consider in the Steiner case.

Next, I accept the point put forward on behalf of Mrs C that she wouldn't have seen a need to make any distinction between paying FNTC or IVO. However, this is neither here nor there as a lack of awareness of the importance of the payee's identity doesn't change whether or not arrangements of the required kind, and therefore a DCS agreement, are in place. While the ombudsman may depart from the law in certain circumstances and with appropriate reasoning, the ombudsman must also have regard for the law, and this would include any caselaw which speaks to the specific issues at hand within a given complaint. The judgment in the Steiner case is clearly very relevant to the issues in Mrs C's complaint given how closely the facts of that case mirror Mrs C's. Ultimately, I do not think it would be reasonable to depart from the position set out in it.

I think it's unclear if FNTC was acting only as a payment agent in the transaction between Mrs C and IVO. But even if its only function in the transaction was to receive funds for the purchase of the membership from Mrs C, and pass those on to IVO, I am still not convinced that arrangements of the required kind could be said to exist between IVO and Vanquis. I think the arrangements would need to have existed under or via the relevant card network, and FNTC did not, to my knowledge, have any standing among the card networks as a payment processor or intermediary of any kind.

In light of the above, I'm minded to conclude, like our investigator, that Mrs C's payments for her holiday club membership were not made under a DCS agreement with the supplier, IVO. It follows that I find Vanquis did not act unfairly or unreasonably in declining to honour her connected lender liability claim.

My provisional decision

I'm not intending to uphold Mrs C's complaint, for the reasons explained above. I now invite all parties to the complaint to let me have any final evidence or arguments they'd like me to consider, by 15 February 2024. I will then review the case once again.

Will Culley
Ombudsman