Practical Law™

GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JUNE 2019

This document is published by Practical Law and can be found at: uk.practicallaw.com/**w-020-5632**
Get more information on Practical Law and request a free trial at: **www.practicallaw.com**

James Ross, Ruth Bala, Thomas Samuels and Lee Finch are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the June column, Lee Finch considers recent developments relating to section 75 of the Consumer Credit Act 1974 (CCA), which raise a number of questions regarding the scope and application of connected lender liability.

by *Lee Finch*, *Gough Square Chambers*

RESOURCE INFORMATION

RESOURCE ID

w-020-5632

RESOURCE TYPE

Article

PUBLISHED DATE

11 June 2019

JURISDICTION

United Kingdom

THE AMENDMENT, EXTENSION OR END OF SECTION 75 CCA FOR CREDIT CARD PAYMENTS?

Introduction

I last considered section 75 of the Consumer Credit Act 1974 (CCA) in my *column* in March 2016. Since then, there have been some interesting developments which raise a number of questions regarding the scope and application of connected lender liability under section 75 of the CCA.

The amendment of section 75?

At the time that section 75 was introduced, the credit card market looked very different to how it looks today. In 1976 there were only two types of credit card available in the UK and the issuers had a close relationship with the merchants who would accept their cards; it was this close relationship and effective "stamp of approval" which drove the introduction of connected lender liability, making the credit providers responsible for the merchants that they approve. On the other hand, today there are over 20 credit card providers and they largely have no direct relationship with or knowledge of the merchants that can accept their cards. Consequently, the rationale which led to the introduction of section 75 arguably no longer holds true. This has led to many and varied calls for reform of section 75 during the last two decades. Most recently, the FCA considered the suitability of section 75 to the modern credit market in its review of the retained provisions of the CCA (see *Practice note, FCA review of retained Consumer Credit Act 1974 (CCA) provisions*).

Whilst the FCA ultimately formed the view that section 75 should be retained to maintain an appropriate degree of consumer protection, it did acknowledge a number of concerns that had been raised in relation to its modern application. These include, but are not limited to:

- Confusion surrounding the impact of third-party payment processing firms.
- Consumers unfairly using section 75 as a form of insurance, paying a small sum on their credit card in order to be protected by section 75 for the entire purchase.
- The disproportionate burden imposed on creditors by the debtor's ability to bring claims for consequential loss under section 75.
- The fact that the cash value limits have not been increased since 1985.

Reproduced from Practical Law Financial Services with the permission of the publishers. For further information visit practicallaw.com or call 0345 600 9355. Copyright © 2019 Thomson Reuters (Professional) UK Limited. All Rights Reserved.

THOMSON REUTERS™

The FCA stopped short of recommending changes to address any of the above concerns, but concluded that *"there would be merit in considering further the issues that have been identified with the provision"*. Whether or not any further consideration takes place remains to be seen, after all no changes were forthcoming after the OFT made recommendations in 1995 (Connected lender liability: a second report by the Director General of Fair Trading on section 75 of the Consumer Credit Act 1974) and the government are busy with one or two other things at the moment.

Until the law is reconsidered, it is ill equipped to deal with the rapidly evolving and technologically advanced credit card market of today. As a result, there are a number of areas of confusion which has resulted in the boundaries of section 75 being quietly but significantly expanded.

The extension of section 75?

In the mid-70s it was very obvious when a creditor had arrangements with a supplier and, consequently, it was clear whether or not the necessary debtor-creditor-supplier relationship existed for the agreement to fall within sections 12(b) or 12(c) of the CCA and therefore the ambit of section 75. This may still be true for "linked loans", but the credit card market has developed to such a stage where the arrangements that now give rise to liability are far less distinct.

The paradigm shift came with the leading case *Office of Fair Trading v Lloyds TSB plc and others [2006] EWCA Civ 268*, where the Court of Appeal held that the necessary arrangements existed in a "four-party structure" even where there was no direct relationship between the creditor and the supplier because of the intervention of a merchant acquirer; in a four party structure, the creditor is a member of a card scheme and a merchant acquirer signs merchant suppliers up to be part of that scheme. Two factors were central to the Court of Appeal's reasoning: firstly, from a customer's point of view they would be unable to distinguish between a three party transaction and a four party transaction and there is no impact on their transaction with the supplier; and secondly, from the point of view of the creditor and supplier *"the commercial nature of the relationship is essentially the same: each benefits form the involvement in a way which makes it possible to regard them as involved in something akin to a joint venture".*

The other important case to consider when looking at the expansion of section 75 in the credit card sphere is *Bank of Scotland v Alfred Truman (A Firm) [2005] EWHC 583 (QB)*, which was decided after the first instance decision in OFT v Lloyds but before the appeal. In *Truman*, HHJ Iain Hughes QC, sitting as a judge of the High Court, considered a "five party structure" where the ultimate supplier was not a member of the relevant card scheme but the defendant firm, who was part of the scheme in a four-party structure, processed the payment on behalf of the supplier as its contractual agent. The judge held that the contractual arrangements were sufficient to link the supplier to the card scheme "by a spur", taking into account the broad language in the CCA. HHJ Iain Hughes QC did however, acknowledge that the line must be drawn somewhere and that at some point the nexus must evaporate and the relationship must become too tenuous even for the broad language of the CCA.

It is difficult to reconcile the decision in *Truman* with the Court of Appeal's rationale in *OFT v Lloyds*: from the customer's point of view, there is a clear distinction between the five-party and four-party arrangement: a party other than the supplier takes payment and is identified on the credit card statement; and there is a clear difference in the commercial nature of the relationship - it is impossible to regard the creditor as involved in something akin to a joint venture with a party that the creditor doesn't even know exists.

In light of the tension, *Truman* and the Court of Appeal's reasoning in *OFT v Lloyds* and HHJ Hughes QC's own warning that the relationship can become too tenuous and cases must be considered on their own facts, one might have expected *Truman* to be applied with some caution. However, firms bringing section 75 claims and the Financial Ombudsman Service (FOS) have been quick to rely on *Truman* to establish section 75 liability in cases far outside the contractual agency situation in *Truman*, including where a sixth party is involved and where the party taking the payment is contractually the debtor's fiduciary rather than the agent of the supplier. Whilst a similar approach has not yet been noted in the courts (or at least not in the courts of record), this shows a further expansion of section 75.

This expansion has taken on a greater relevance in recent years as the appetite for bringing financial mis-selling claims has increased, and the mechanism by which credit card payments are accepted has developed further.

Reproduced from Practical Law Financial Services with the permission of the publishers. For further information visit practicallaw.com or call 0345 600 9355. Copyright © 2019 Thomson Reuters (Professional) UK Limited. All Rights Reserved.

Until relatively recently, in order to take credit card payments, you had to be a member of the credit card schemes and that required meeting certain eligibility requirements; however, using the five or six party methodology, a number of companies have set themselves up as "master merchants" who provide an infrastructure which allows very small businesses and even individuals (sub-merchants) to take payments, which are then processed through the card scheme by the master merchant. These master merchants impose virtually no eligibility requirements on sub-merchants and advertise sign-up times of as little as three minutes with the ability to start taking credit card payments in under five minutes. It has yet to be determined by the courts, but some claimant firms and FOS adjudicators are already arguing that creditors have the necessary arrangements with the sub merchants. In my view, this stretches the admittedly wide ambit of "arrangements" too far, beyond the rationale of *OFT v Lloyds* and into the "too tenuous" category envisaged by HHJ Iain Hughes QC in *Truman*; nevertheless, if I am wrong and arrangements do cover these more tenuous relationships, it raises an interesting argument once more.

The end of section 75 for credit cards?

Section 187(3) of the CCA provides that arrangements shall be disregarded if they are arrangements for the creditor making payments to suppliers in specified circumstances and the creditor holds himself out as willing, in such circumstances, to make such payments to suppliers generally. In *OFT v Lloyds [2004] EWHC 2600 (Comm)*, the banks argued that arrangements through the four party (merchant acquirer) structure should be disregarded under section 187(3). However, this was rejected by Mrs Justice Gloster on the grounds that whilst a large number of suppliers could accept credit cards, they remained a limited class and, accordingly, the banks were not holding themselves out as willing to make such payments to suppliers generally.

As has been seen above, the market has evolved significantly since 2004 and, in the event that five and six party structures through sub-merchants are found to fall within the definition of arrangements, it is strongly arguable that there is no longer a limited class of suppliers who can accept credit cards (in fact, anyone who takes five minutes to sign up can accept credit cards) and creditors are willing to make credit card payments in specified circumstances to suppliers generally. Accordingly, those arrangements would be disregarded under section 187(3) CCA. Whether such an argument becomes necessary, whether it would be successful and, if successful, the extent of the arrangements that would be disregarded remains to be seen. Nevertheless, what is clear is that the expansion of section 75 in the credit card sphere could unintentionally result in the end of section 75 for credit card payments.

GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMNS

For previous consumer credit columns written by barristers at Gough Square Chambers, see *Practice note, Gough Square Chambers' consumer credit columns.*

Reproduced from Practical Law Financial Services with the permission of the publishers. For further information visit practicallaw.com or call 0345 600 9355. Copyright © 2019 Thomson Reuters (Professional) UK Limited. All Rights Reserved.