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Gough Square Chambers' consumer credit column: November 2022

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Ruth Bala, Lee Finch, Sabrina Goodchild and George Spence-Jones 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 November 2022 column, Ruth Bala considers the application of sections 56 and 75 of the Consumer Credit Act 1974 (CCA) to credit card transactions involving payment processers following the High Court judgment in *Steiner v National Westminster Bank plc [2022] EWHC 2519 (KB) (10 October 2022)*.

The application of sections 56 and 75 of the Consumer Credit Act 1974 (CCA) to credit card transactions involving payment processors is a vexed question. In such transactions the recipient of the credit card payment (the payment processor) differs from the supplier under the supply contract financed by the payment (the Supply Contract Supplier). Often payment processors are used because the Supply Contract Supplier is not a member of the Visa or Mastercard network and so lacks the facility to accept payments by credit card.

Where there is a breach of contract or misrepresentation by the Supply Contract Supplier, the card issuer may dispute liability to the consumer under sections 56 or 75 of the CCA by pointing to the interposition of a payment processor.

The recent judgment in *Steiner v National Westminster Bank plc [2022] EWHC 2519 (KB) (10 October 2022)*, in which fellow Practical Law contributor Lee Finch represented the card issuer, is the High Court's second ruling on this subject. Mr Justice Lavender accepted the card issuer's submission that it had no pre-existing "arrangements" with the Supply Contract Supplier, such that section 56 was not engaged.

Need for identity between DCS Supplier and Supply Contract Supplier

Credit card agreements are restricted-use debtor-creditor-supplier agreements within section 12(b) of the CCA, because they are made by the creditor "under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier".

The "supplier" for the purposes of deemed agency under section 56(1)(c) and connected lender liability under section 75(1) must be the Supply Contract Supplier: both sections refer to the misrepresentation, breach or negotiation being "in relation to a transaction financed by the agreement" (the Supply Contract).

As a matter of statutory construction, there must be an identity between the "supplier" responsible for the representation or breach (the Supply Contract Supplier) and the "supplier" for the purposes of the section 12(b) debtor-creditor-supplier agreement (the DCS Supplier). Sections 56(1)(c) and 75 refer to both the "supplier" responsible for the representation or breach and the "debtor-creditor-supplier agreement". It would be unnatural to construe these two uses of the word "supplier" as referring to different entities. See also the definition of "supplier" in CCA section 189: "supplier" has the meaning given by inter alia section 11(1)(b).

Therefore, in order for section 56(1)(c) or section 75 to bite, the requisite section 12(b) "arrangements" must exist between the card issuer and the Supply Contract Supplier.

OFT v Lloyds

Card issuers who use independent merchant acquirers to recruit new merchants willing to accept their card operate under what is known as a "four-party" structure. This structure was considered in *Office of Fair Trading v Lloyds*

TSB Bank plc [2007] QB 1. The Court of Appeal held that section 75 applied: there need not be a "direct contractual link" between the card issuer and the "supplier" with whom there are "arrangements" for the purposes of section 12(b). However, there must be some nexus: here it was that both the card issuer and the supplier were contractually linked to the merchant acquirers and both were subject to the common network rules.

In *Steiner*, Lavender J accepted that *OFT v Lloyds* was authority that the card issuer need not have a contract with the Supply Contract Supplier for the requisite "arrangements" to exist. However, he noted that it did not provide any direct guidance on situations involving a payment processor. The Court of Appeal did not envisage the recipient of the card payment as being anyone other than the Supply Contract Supplier.

BoS v Truman

The first occasion on which the High Court considered the application of the CCA to situations involving payment processors was *Bank of Scotland v Truman [2005] EWHC 583 (QB)*. The Supply Contract Supplier (Topkarz) lacked the facility to accept payments by credit card and appointed a payment processor (a firm of solicitors) as its agent to receive and transmit payment transactions.

HHJ Hughes QC (sitting as a High Court judge) concluded (at [95]) that the facts that (i) the payment processor (the solicitors' firm) was a member of the card network and (ii) Topkarz had appointed the payment processor as its agent, sufficed to form "arrangements" between Topkarz and the card issuer. This meant that Topkarz was both the Supply Contract Supplier and the DCS Supplier.

Truman is inconsistent with much of the reasoning in *OFT v Lloyds*, viz that a card issuer is effectively a "joint venturer" with merchants who are recruited to the network. The card issuer in *Truman* was not in any joint venture with Topkarz. It had not recruited Topkarz to the card network, nor had it relied on the payment processor's recruitment of Topkarz to some common trading platform.

Nonetheless, in *Steiner* Lavender J did not find *Truman* wrongly decided, preferring to say he did not derive much assistance from it (at [57]).

Steiner v NatWest

The Supply Contract Supplier, Club La Costa Vacation Club Ltd (CLC) sold Mr and Mrs Steiner the right to participate in a timeshare scheme. The purchase price was paid by Mr Steiner, using his NatWest credit card, to First National Trustee Company Ltd (FNTC). FNTC was not only a payment processor, but a trustee under the timeshare scheme.

Ms Steiner (as personal representative of her husband's estate) asserted that the requisite "arrangements" were in place between NatWest and CLC. At the time Mr Steiner's credit card agreement was executed, NatWest was on notice that some merchants in the Mastercard network (such as FNTC) would be collecting payments "on behalf of" third parties (such as CLC) (at [63]).

However, it was common ground that FNTC did not act as CLC's agent when collecting payments under the Supply Contract, but as trustee (and therefore as principal) (see [46(1)(c)] and [52(2)]).

Ms Steiner also relied on the fact that there were, firstly, "arrangements" between NatWest and FNTC (the latter being a member of the Mastercard network) and, secondly, "arrangements" between FNTC and CLC (a Trust Deed regarding the timeshare scheme). However, Lavender J did not consider that this sequence of arrangements necessarily combined to produce the requisite "arrangements" between NatWest and CLC (at [56]).

At [61] Lavender J concluded:

> "I find it difficult, however, to envisage ... that a bank which issues a Mastercard to its customer and makes a credit card agreement in relation to that card makes that agreement under, or in contemplation of, **any arrangements other than the Mastercard network.**"

[emphasis added]

In Lavender J's view, it was the Mastercard network itself which constituted the section 12(b) "arrangements". This accords with his interpretation of *OFT v Lloyds* (at [56]):

> "... a significant feature of the factual situation addressed in *OFT v Lloyds TSB* was that all parties to the Mastercard network were party to the same network, whether or not they had direct contractual relations with one another. That network, which had rules, constituted "arrangements" between all of its members."

Since the Supply Contract Supplier (CLC) was not a member of the Mastercard network, the requisite "arrangements" were not in place between NatWest and CLC.

Future development

Following *Steiner* a card issuer is unlikely to be liable under sections 56(1)(c) or 75 where the Supply Contract Supplier has used a payment processor and the card issuer is not on notice of the processor's involvement. However, it remains to be seen whether the reasoning in *Steiner* can be extended to cases where (i) the Supply Contract Supplier appoints a payment processor or

aggregator as its agent (rather than trustee) and (ii) the card issuer is on notice of this agency relationship.

Lavender J's reliance on the card network itself as constituting "arrangements" would be tested in the context of more modern payment aggregators (which provide bulk processing services to end-user merchants). Here, it is true that the merchants (the Supply Contract Suppliers) are not members of the network. However, the card issuer may well have contracts with the aggregators which provide that the aggregators will be submitting payments as agents for merchants. The card issuer would thereby be on notice of the agency relationship. It may even be possible for the card issuer to discover the identity of the merchants, if it so wishes.

Note on section 187

CCA subsection 187(3) requires that "arrangements" be disregarded where they concern creditors that hold themselves out as willing to make, in "specified circumstances", payments to "suppliers generally". This provision was originally designed to exclude cheque cards.

The wider the concept of "arrangements" is stretched in the caselaw, the closer the card issuers will approach the ambit of the section 187(3) exclusion. Where a structure involving a payment processor (or aggregator) places virtually no requirements on the eligibility of merchants and the sign-up process for merchants takes mere minutes, it is arguable there is no longer a "limited class" of suppliers who can accept credit cards. See Article, Gough Square Chambers' consumer credit column: June 2019.

Curiously, at [64(2)] Lavender stated that section 187(3) was inapplicable, since it only served to limit the scope of section 187(1) and (2) "which concern associates". Although not central to the decision in *Steiner*, it should be noted that this is incorrect: section 187(1) and (2) are not restricted to situations involving "associates".

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 column.