Neutral Citation Number: [2022] EWHC 2519 (KB)

Appeal No. QB/2021/019
Claim No. F56YM2310

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
on appeal from the
NEWCASTLE-UPON-TYNE COUNTY COURT
(HHJ FREEDMAN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2022

Before :

MR JUSTICE LAVENDER

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Between:

Ms GAIL STEINER (on her own behalf and as Executor and Personal Representative of the Estate of Mr PAUL STEINER)	**Claimant/ Appellant**
- and –	
NATIONAL WESTMINSTER BANK PLC	**Defendant/ Respondent**

- -
- -

Steven McGarry (instructed by **New South Law Ltd**) for the **Appellant**
Lee Finch (instructed by **DMH Stallard LLP**) for the **Respondent**

Hearing date: 26 May 2022

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. This is an appeal against the decision of HHJ Freedman on 14 September 2021 on a preliminary issue of law, namely whether there was a debtor-creditor-supplier agreement between, on the one hand, Paul Steiner, the late husband of the Appellant, Gail Steiner, and, on the other hand, the Respondent, National Westminster Bank PLC ("NatWest"), and the judge's consequential order dismissing Ms Steiner's claim.

2. It is acknowledged that the existence of such an agreement is an essential element of Ms Steiner's claim against NatWest, which she brings as executor and personal representative of the estate of the late Mr Steiner. That is because Ms Steiner relies on the provisions of subsections 56(1)(c) and (2) of the Consumer Credit Act 1974 ("the Act"), by which negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c) of the Act are deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.

(2) Background

3. The negotiations in question are those which led to Mr & Ms Steiner entering into an agreement dated 27 April 2004 with Club La Costa Vacation Club Ltd ("CLC"), a company incorporated under the laws of Scotland, to purchase from CLC the right to participate in a timeshare scheme for the price of £14,000. That price was paid by Mr Steiner using his Mastercard, which had been issued by NatWest pursuant to an agreement between NatWest and Mr Steiner.

4. At the heart of the dispute in this case is the fact that Mr Steiner did not pay the sum of £14,000 to CLC, but paid it instead to First National Trustee Company Limited ("FNTC"), a company incorporated under the laws of the Isle of Man. There is some confusion in the payment documents which I have seen, but it was not in dispute that Mr Steiner used his NatWest Mastercard to pay first £9,000 and then £5,000 to FNTC. As to the documents:

   (1) Mr Steiner completed a Credit Card Authorisation form for each payment. This form was headed with CLC's logo, which included the words "Club La Costa". It then gave a merchant number, which I assume was FNTC's merchant number. It then said, "FNTC/Consolidated Resorts Ltd", although there was no evidence that this was a name of a legal entity. At the bottom of each form was a statement that "I/We hereby authorise CLC Consolidated Resorts Ltd to claim the above amount on my/our credit card as stated." Again, there was no evidence that CLC Consolidated Resorts Ltd was a legal entity.

   (2) Mr Steiner's credit card statement gave the following description for each of the payments: "FNTC/CONSOLIDATED RESO DOUGLAS IRL"

   (3) A receipt for an earlier payment made by Mr Steiner was headed, "First National Trustee Company Ltd." It gave FNTC's address in Douglas and its

website and email addresses, but also stated, "Club La Costa – Choice Points – Spain".

5. FNTC was the Trustee under a Deed of Trust. The other parties to the Deed of Trust were:

(1) CLC, referred to as "the Association"; and

(2) CLC Resort Developments Limited, referred to as "the Founder Member".

6. The recitals to the Deed of Trust stated as follows:

> "A. The Founder Member has established the Association to secure for the Members of the Association exclusive rights of occupation of holiday resort accommodation in the properties detailed in the Scheme Accommodation Tables (as defined in the Articles) for specific periods of time as set forth and in accordance with the Memorandum and Articles from time to time of the Association ("The Articles"), the Scheme Rules and the Scheme Regulations made pursuant to the Articles.
>
> B. The Ownership and control of the Owning Companies (as defined in the Articles) has been or shall be transferred to the Trustee or as the Trustee may direct (all of such Owning Companies together with their assets including, without limitation, all Scheme Accommodation and all other property which may from time to time be transferred to the Trustee or otherwise to be held for the benefit of the Association upon the trusts of this Deed shall be hereinafter called "the Property") and the Trustee has agreed to hold the same upon the trusts and terms set out in this Deed."

7. Clause 3 of the Deed of Trust provided as follows:

> "The Founder Member and the Association hereby appoint the Trustee and the Trustee hereby agrees to act as Trustee on behalf of the Association on the terms set out in this Deed."

8. Clause 4.1 of the Deed of Trust provided as follows:

> "The Trustee shall hold the Property upon trust to secure for the Members the rights of occupation in the Scheme Accommodation under and in accordance with and subject to the provisions of the Articles."

9. Clauses 10.1 to 10.6 of the Deed of Trust provided as follows:

> "10.1 The Trustee shall hold or procure that the Owning Companies hold the Property on trust to secure the use and enjoyment of the Scheme Accommodation by the Members in accordance with the Articles and the Scheme Rules.
>
> 10.2 The Trustee shall preserve the Property and notwithstanding anything contained in this Deed, shall not allow the Owning Companies to trade in or otherwise carry on business and, subject to clause 15, the Trustee shall not have the power to alienate, dispose of, mortgage or otherwise encumber or in

any manner whatsoever deal with the Property except as expressly provided herein or as specifically authorised by the Association.

10.3 The Trustee shall not be responsible for the repair, maintenance or management of the Scheme Accommodation or the contents thereof and shall not be liable for any damage or loss or depreciation which may arise as a result of the repairs, maintenance or management of the Scheme Accommodation, or the lack thereof. The Trustee shall furthermore not be responsible for the replacement or renewal of any of the furniture, fixtures or fittings of the Scheme Accommodation.

10.4 The Trustee shall not be bound to concern itself in any way with the management of the Association, its assets or finances nor with the rights, duties or obligations of the Members inter se.

10.5 The Association shall issue Point Rights Certificates to Members in accordance with the Articles and the provisions of clause 8.1 which Certificates shall also be signed by the Trustee.

10.6 The Trustee shall be entitled to obtain legal advice from Solicitors and/or the opinion of counsel and/or any other legal advice on any matter relating to the Property or in relation to the trust hereby constituted or the exercise of the Trustee's powers, rights and discretions hereunder, or the performance of its duties hereunder."

10. Clauses 12.4 to 12.6 of the Deed of Trust provided as follows:

> "12.4 The Trustee shall not be required to take any legal or other action whatever in relation to any matter concerning the Property, unless fully indemnified by the Association to the reasonable satisfaction of the Trustee for all costs and liabilities likely to be incurred or suffered by the Trustee.
>
> 12.5 The Association hereby indemnifies and holds harmless the Trustee against losses, claims, demands, taxes, actions, damages, costs and expenses made or incurred by the Trustee in connection with the exercise by the Trustee of its powers and the performance of its duties under this Deed.
>
> 12.6 The Association hereby covenants with the Trustee to pay on demand as the Trustee may direct all outgoings whatsoever (including management fees, rates, service charge, interest, costs, expenses and damages) covenanted or agreed to be paid (whether contingently or otherwise) in respect of the Property, and at all times to observe and perform all the covenants and terms and conditions to which the Scheme Accommodation may from time to time be subject."

11. Clause 22 of the Deed of Trust provided that the Deed should be governed by and construed in accordance with the laws of Scotland. However, neither party has contended that the relevant laws of Scotland are different in any material respect from English law.

12. There was no evidence before me as to the general practice as to the structure of time share arrangements, but it was not disputed that the use of a trustee in such an arrangement, while not required by law, is common in the United Kingdom and has as its purpose, as one would expect, the protection of consumers.

13. Equally, there was no evidence before me as to the rules of the Mastercard network, but it was not suggested that they prohibited a merchant who was a member of the scheme from receiving payment under the scheme as trustee or agent for another.

(3) The Law

14. Against that background:

(1) In the terms of the Act, Mr Steiner was the debtor, NatWest was the creditor and CLC was the supplier.

(2) Ms Steiner contended that, insofar as NatWest provided credit to Mr Steiner for the payments totalling £14,000, there was a debtor-creditor-supplier agreement between them.

(3) NatWest conceded that, if the payment had been made direct to CLC, there would have been a debtor-creditor-supplier agreement. However, because the payment was made to FNTC rather than to CLC, NatWest contended, and the judge decided, that there was no debtor-creditor-supplier agreement.

(3)(a) The Act

15. A full exposition of the relevant provisions of the Act is to be found in paragraphs 15 to 48 of the Court of Appeal's judgment in *Office of Fair Trading v Lloyds TSB Bank Plc* [2007] QB 1 (*"OFT v Lloyd's TSB"*). I will not repeat everything which is there set out. It is relevant to note that the protection of consumers is mentioned in the preamble to Act as the purpose of the new system established by the Act.

16. The Act defines various categories of agreement, but section 18 of the Act recognises that "multiple agreements" (such as credit card agreements between a customer and a credit card issuer) may fall within more than one category of agreement: see paragraphs 39 to 41 of the Court of Appeal's judgment in *OFT v Lloyds TSB*.

17. As explained in paragraph 20 of the Court of Appeal's judgment, the starting point under the Act is a "personal credit agreement", which is defined as follows in section 8(1) of the Act:

> "A personal credit agreement is an agreement between an individual ('the debtor') and any other person ('the creditor') by which the creditor provides the debtor with credit of any amount."

18. The agreement between Mr Steiner and NatWest was undoubtedly a personal credit agreement. Also, it was not disputed that the agreement between Mr Steiner and NatWest, insofar as it related to the credit provided when he used his Mastercard to pay the sums totalling £14,000, was a consumer credit agreement (as defined in section 8(2)), a regulated consumer credit agreement (as defined in section 8(3)) and a restricted-use credit agreement which fell within section 11(1)(b) of the Act. Section 11(1)(b) provides as follows:

> "A restricted-use credit agreement is a regulated consumer credit agreement—
>
> …

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

19. It is also relevant to note that subsections 11(3) & (4) provide as follows:

> "(3) An agreement does not fall within subsection (1) if the credit is in fact provided in such a way as to leave the debtor free to use it as he chooses, even though certain uses would contravene that or any other agreement.
>
> (4) An agreement may fall within subsection (1)(b) although the identity of the supplier is unknown at the time the agreement is made."

20. The central provision of the Act for the purposes of this case is section 12(b), which provides as follows:

> "A debtor-creditor-supplier agreement is a regulated consumer credit agreement being—
>
> …
>
> (b) 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, …"

21. NatWest contended that the agreement was not made by NatWest "under pre-existing arrangements, or in contemplation of future arrangements, between [NatWest] and the supplier", i.e. CLC. NatWest accepted that, at least by the time of the transactions in question, it had arrangements with FNTC, given their common membership of the Mastercard network. However, FNTC was not the supplier for the purposes of section 12(1)(b).

22. Some assistance as to what constitute "arrangements" is to be found in section 187 of the Act, which provides as follows:

> "(1) A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between persons mentioned in subsection (4)(a), (b) or (c).
>
> (2) A consumer credit agreement shall be treated as entered into in contemplation of future arrangements between a creditor and a supplier if it is entered into in the expectation that arrangements will subsequently be made between persons mentioned in subsection (4)(a), (b) or (c) for the supply of cash, goods and services (or any of them) to be financed by the consumer credit agreement.
>
> (3) Arrangements shall be disregarded for the purposes of subsection (1) or (2) if—
>
> (a) they are arrangements for the making, in specified circumstances, of payments to the supplier by the creditor, and

(b) the creditor holds himself out as willing to make, in such circumstances, payments of the kind to suppliers generally.

(4) The persons referred to in subsections (1) and (2) are—

(a) the creditor and the supplier;

(b) one of them and an associate of the other's;

(c) an associate of one and an associate of the other's."

23. The term "associate" is defined in section 184 of the Act, but it is not suggested that FNTC was an associate of CLC.

24. That is not an end to the matter, however, since section 187 does not contain an exclusive definition of what it means for an agreement to be made "under pre-existing arrangements, or in contemplation of future arrangements, between [the creditor] and the supplier": see paragraph 65 of the Court of Appeal's judgment in *OFT v Lloyds TSB*.

25. As to the meaning of the word "arrangements" in a different context, namely section 235 of the Financial Services and Markets Act 2000, Lord Sumption, with whom Lords Mance and Clarke agreed, said in paragraph 91 of his judgment in *Asset Land Investment Plc v The Financial Conduct Authority* [2016] UKSC 17; [2016] 3 All E.R. 93 (*"Asset Land v FCA"*) that "arrangements" is a "broad and untechnical word".

(3)(b) OFT v Lloyds TSB

26. *OFT v Lloyds TSB* was the case in which it was decided that there did not have to be a contract directly between the creditor and the supplier for there to be "arrangements … between [the creditor] and the supplier". That case concerned restricted-use credit agreements made in the context of credit card networks where, for the reasons set out in paragraphs 5 to 8 of the judgment, the creditor and the supplier were both members of the credit card network, but there was no direct contractual relationship between them. Such networks were described as "four-party structures", in contrast with the simpler "three-party structures" which had preceded them. The four parties to a four-party structure are the cardholder, the card issuer, the "merchant acquirer" and the party whom the Court of Appeal called the supplier, but whom I will call the merchant, i.e. the person who, by joining the credit card network, agrees to accept payments made by the cardholder using the credit card.

27. Paragraph 8 of the Court of Appeal's judgment provides a helpful description of the Mastercard and similar networks:

> "The third development has been the creation of large international credit card operating networks. At least two of these, Visa and MasterCard, are established as independent organisations operating under what are in substance four-party structures with the addition of a sophisticated clearing house system. Under the rules of the network the card issuer enters into an agreement with its customer to extend credit in connection with the purchase of goods or services from any supplier who has agreed to honour the network card. The merchant acquirers recruit suppliers to the network rather than to

> any individual card issuer and the supplier undertakes to honour the network card regardless of the identity of the issuer and in most cases without having any clear idea who the issuer may be. The card issuer undertakes to reimburse the merchant acquirer, though he may previously have been unaware of his identity or existence and is likely to have been wholly unaware of the existence or identity of the supplier. The arrangements are all underpinned by a complex agreement between the card issuers and the merchant acquirers, all of whom are members of the network."

28. It is worth noting two points about this passage:

(1) The Court of Appeal noted that the Mastercard network has rules and appeared to attached importance to common membership of the network.

(2) The Court of Appeal was not envisaging a situation in which the supplier would be anyone other than the merchant, i.e. someone who had agreed to honour the network card. (See also paragraph 60 of the Court of Appeal's judgement, quoted below.)

(3)(b)(i) The High Court Judgment

29. Gloster J was the judge at first instance. Her judgment is cited as [2004] EWHC 2600 (Comm) and is reported at [2005] 1 All E.R. 843. The only passage from her judgment to which I was referred was paragraph 26, in which she said as follows about the meaning of "arrangements" in the context of that case:

> "In my judgment, in the natural ordinary sense of the word, there are clearly arrangements in place made between the card issuers and the suppliers, notwithstanding the absence of any direct communication between them, or any direct contractual relationship, or even of knowledge on the part of the issuer of the identity of the particular supplier. The fact that there are a number of different arrangements, reflecting the various roles, contractual or otherwise, played by different participants in the network, does not mean that there is not an arrangement in place between the issuer and the supplier. I consider that it is unrealistic to look merely at the individual links in the chain; rather one should stand back and look at the whole network of arrangements that are involved in the operation of the schemes. If one does so, one can, in my judgment, properly conclude that, by virtue of the supplier and the issuer being subject to the rules and settlement processes common to all participants in the card network, there is indeed an arrangement (albeit indirect) between them."

(3)(b)(ii) The Court of Appeal Judgment: Construction Generally

30. In paragraphs 51 to 55 of its judgment in *OFT v Lloyds TSB*, the Court of Appeal considered submissions as to how the court should approach the construction of the Act in the circumstances which had arisen. Those submissions concerned, in

particular, the principles set out in Lord Wilberforce's dissenting speech in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822, which were later adopted by the House of Lords in *R. (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687. Those principles concerned the approach to construction when a new state of affairs arose.

31. In paragraphs 54 and 55 of its judgment in *OFT v Lloyds TSB*, the Court of Appeal said as follows:

> "54. A great many paragraphs in the skeleton arguments were taken up by both sides in dealing with this principle of construction and its bearing on the question whether transactions under a four-party structure are covered by the Act. We hope we may be forgiven for dealing with this aspect quite shortly, first, because the judge's conclusion in paragraph 33 of her judgment that "… while so called four-party transactions were not common at the time of the report as regards United Kingdom consumers, they did exist. In the United States they were already standard" was not challenged on the appeal by either side, and second, because it seems to us that the view that the Crowther Committee would have taken of the four-party structure, if that is relevant to the question of construction, is quite clear.
>
> 55. The impression we have gained from reading those parts of the Crowther Report to which we were referred is that the Committee did not have the four-party structure very much in mind, if it had it in mind at all. However, we have little doubt that it would not have considered a four-party structure as completely different from a three-party structure for these purposes, or, in Lord Wilberforce's terms, as a different "genus". Moreover, (if it be relevant to construction) we are equally clear that the authors of the report would have thought that consumers were just as deserving of protection in relation to transactions entered into under a four-party structure as those entered into under a three-party structure. In most cases they will have no way of knowing whether a merchant acquirer is involved or not and it is not suggested that the transaction between the customer and the supplier is affected whichever is the case. From the customer's point of view, therefore, it is difficult to see any justification for drawing a distinction between the different situations. Indeed, in the case of those card issuers such as Lloyds TSB, who operate under both three- and four-party structures, the customer has no means of knowing whether any given transaction is conducted under one or other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same: each benefits from the involvement of the other in a way that makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure. In these circumstances it seems to us overwhelmingly likely that the Crowther Committee would have recommended that legislation protecting the consumer in the three-party context should apply in the four-party context as well. However, the important point for present purposes is that, despite the change in structure, there has been no significant change in the state of affairs to which the legislation was originally directed. The fact that the volume of business has increased dramatically has no bearing on the matter. In our view, therefore, Mr Hapgood

> can derive no support from the principles enunciated by Lord Wilberforce. On the contrary, we think they support the case of the OFT."

32. Neither party referred me to any part of the report of the Crowther Committee, but Mr Finch drew attention to the fact that in paragraph 55 of its judgment the Court of Appeal considered the four-party structure both from the point of view of the consumer/debtor and from the point of view of the creditor.

(3)(b)(iii) The Court of Appeal Judgment: Section 11(3)

33. The Court of Appeal made a related, but different, point in the following sentence from paragraph 56 of its judgment (which was not relied on before me):

> "In our view, however, the Act requires one to look at the position not simply from the point of view of the customer but by reference to the function of the credit agreement itself."

34. Paragraphs 56 to 60 of the judgment set out the Court of Appeal's reasons for rejecting an argument advanced by counsel for the banks that section 11(3) of the Act prevented the credit agreement from being a restricted-use credit agreement under section 11(1)(b) and therefore prevented it from being a debtor-creditor supplier agreement.

35. Although these passages were not relied on in the hearing before me, I note that in paragraphs 59 and 60 the Court of Appeal said as follows:

> "59. The difficulty for Mr Hapgood is that if the card can only be used to purchase goods or services from those suppliers who have agreed to accept the card, it cannot make any difference who has made the arrangements with them. …
>
> 60. Looked at from the point of view of the cardholder, a similar restriction exists in the case of both the four-party and three-party structures. The card can only be used to buy goods or services from suppliers who have agreed to accept cards carrying the mark or logo in question, however their agreement is obtained. Mr. Hapgood submitted that the number of suppliers willing to accept major credit cards such as Visa and MasterCard is so vast that in practical terms cardholders can use them wherever they like, but the fact that the number of places at which these (and no doubt other) cards can be presented is very extensive cannot disguise the fact that, in contrast to cash, they can only be used at places where the relevant sign is displayed."

36. It will be noted that in these paragraphs the Court of Appeal assumed that credit cards could only be used to pay suppliers who were merchants and, indeed, that was the reason which the Court of Appeal gave for rejecting the argument that the credit card agreements were, by virtue of section 11(3) of the Act, unrestricted-use credit agreements rather than restricted-use credit agreements. This is a further demonstration that the Court of Appeal was not addressing the issue which arises in the present case, where payment was made to a supplier who was not the merchant.

(3)(b)(iv) The Court of Appeal Judgment: Section 12(b)

37. Then in paragraphs 61 to 66 the Court of Appeal dismissed the argument of counsel for the banks that in a credit card network with a four-party structure there were no arrangements between the creditor and the supplier/merchant. The Court of Appeal said as follows in paragraphs 64 and 65:

> "64. The word "arrangements" is capable of carrying a broad meaning and in a statute which elsewhere displays a high degree of precision in its choice of language must have been deliberately chosen by Parliament with a view to embracing a wide range of different commercial structures having substantially the same effect. The judge relied on *Re British Slag Ltd's Application* [1963] 1 WLR 727, particularly the comment of Wilmer L.J. at 739 that, "Everybody knows what is meant by an arrangement". As she recognised, that case was concerned with very different circumstances under different legislation, so one must be careful not to place too much reliance on it. Nonetheless, as we said earlier, Mr Hapgood had difficulty in resisting the conclusion that even where merchant acquirers are involved there are arrangements in existence between the credit card issuer and suppliers who have agreed to accept its card. Moreover, we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct.
>
> 65. In the end Mr. Hapgood's argument had to be that by enacting section 187(1) Parliament had cut down what would otherwise be encompassed by the broad wording of section 12(b). However, we are satisfied that the expression "treated as" was used to extend, rather than restrict, the scope of that section; in other words, we accept that it was part of a provision intended to prevent avoidance of its provisions. We think that the natural meaning of those words is to bring within the scope of section 12(b) arrangements that might otherwise fall outside it. If sections 187(1) and (2) had been intended to define the only kind of arrangements that were capable of falling within section 12(b) we think that the draftsman would have used the word "is" rather than the expression "shall be treated as". Our conclusion is reinforced by the evidence elsewhere in the Act that the draftsman has been careful and precise in his choice of language: for example, where "means" is intended the statute says "means", and where "includes" is meant it says "includes" (see the definitions in section 189). We therefore reject Mr. Hapgood's argument and, like the judge, take comfort from the fact that many distinguished commentators on the Act support that view: see, for example, *Goode, Consumer Credit Law and Practice* at IC 25.63(a) and IC 33.148; *Guest and Lloyd, Encyclopaedia of Consumer Credit Law* pages 2074/2; 2074/6; *Brindle and Cox, Law of Bank Payments* 3rd ed: paragraphs 4–066, 5–027 and 5–029."

38. I note that:

(1) As matter of the natural and ordinary meaning of the words used, even counsel for the banks, Mr Hapgood, had difficulty in resisting the conclusion that in a credit card network with a four-party structure, there are arrangements in place between the credit card issuer and suppliers who have agreed to accept its card.

(2) The expression "suppliers who have agreed to accept its card" in paragraph 64 once again demonstrates that the Court of Appeal was assuming that, in any transaction where a credit card was used to pay for goods or services, the supplier would be the merchant, and not some third party.

(3) The final sentence of paragraph 64 illustrates what was before me an uncontentious proposition, namely that it is legitimate when construing the Act to have regard to the fact that the purpose of the Act is the protection of consumers.

(4) Mr Hapgood relied on an argument that section 187 of the Act restricted the natural and ordinary meaning of the words used in section 12(b), but the Court of Appeal rejected that argument.

(3)(b)(v) OFT v Lloyds TSB: The House of Lords

39. There was an unsuccessful appeal to the House of Lords, whose judgment is reported at [2008] 1 A.C. 316, but that was solely concerned with a different aspect of the case, namely the territorial scope of the Act.

(3)(c) Bank of Scotland v Alfred Truman

40. The only authority of which counsel or I are aware in which consideration has been given to the question whether "arrangements … between [the creditor] and the supplier" exist in a situation where a credit card payment is made to a person who was neither the supplier nor an associate of the supplier is the decision of HHJ Hughes QC, sitting as a judge of the High Court, in *Bank of Scotland v Alfred Truman* [2005] EWHC 583 QB. That case was decided after Gloster J's judgment, but before the Court of Appeal's judgment, in *OFT v Lloyd's TSB*.

41. The case concerned a situation in which the defendant firm of solicitors was, on the one hand, a merchant member of two credit card networks and, on the other hand, as the judge found, agent for its client company, Topkarz Ltd ("Topkarz"), which sold cars. Eleven individuals had agreed to buy cars from Topkarz and had used their credit cards to make payments to the defendant. Topkarz became insolvent and did not provide the cars. The individuals were reimbursed by their card issuers, who were in turn reimbursed by the claimant, who, as "merchant acquirer", had a contractual relationship with the defendant.

42. It is relevant to note that, as the judge observed in paragraph 18 of his judgment, there was no suggestion that the defendant had at any time been guilty of sharp practice or unconscionable dealing in its relations with the claimant.

43. HHJ Hughes QC had to decide 11 issues. One of them, the sixth, was whether there were debtor-creditor-supplier agreements between the individuals and the issuers of their credit cards. The judge dealt with that issue in paragraphs 89 to 101 of his judgment. In particular, the judge cited paragraph 26 of Gloster J's judgment in *OFT v Lloyd's TSB*.

44. HHJ Hughes QC then said as follows in paragraphs 94 to 96 of his judgment:

> "94. In the present case the merchant (the firm) and the supplier (Topkarz) are different. This is not a four-party transaction but a five-party transaction and the fifth party, Topkarz, has no contractual or other direct relationship with either the Visa or MasterCard scheme. Instead Topkarz has a contractual arrangement with the firm, as described above. Is that indirect relationship sufficient for the purposes of section 12(b)?
>
> 95. Apart from the decision of Gloster J. neither counsel nor I were able to discover another case directly on the point. In my view it does not matter that the card issuers had no direct contractual or other relationship with Topkarz or that the card issuers had no idea of the existence of Topkarz. The firm as merchant was plainly within the scheme and the contractual arrangements between Topkarz and the firm were adequate, in my judgment, to link Topkarz by a spur to the same scheme. As Gloster J. commented (at para 23) the word "arrangements" should be understood and construed in its ordinary and popular sense and there is evidence of a deliberate intention on the part of the draftsman to use broad loose language. It follows that a restricted construction would be contrary to the scheme of this part of the 1974 Act.
>
> 96. I am conscious that it ought not to be too easy for a merchant to avoid the chargeback system. If a scheme with a third party supplier allows a merchant to argue that there are no "arrangements" between the card issuer and the supplier, then the card holder has no rights under section 75 because there would be no debtor-creditor-supplier agreement. An important element of consumer protection would be at risk."

45. HHJ Hughes QC identified, but did not seek to resolve, the question of where the line was to be drawn between arrangements which did, and those which did not, come within the scope of section 12(b). He said as follows in paragraphs 97 and 98 of his judgment:

> "97. However, I recognise that there are a number of problems with my conclusion. Where is the line to be drawn? At what point does the nexus evaporate and a relationship become too tenuous even for the "broad, loose" language of this part of the 1974 Act?
>
> 98. In my view this is a problem that will have to be resolved on a case by case basis and is not really susceptible to solution by the application of a statement of general principle. …"

(4) HHJ Freedman's Judgment

46. Having set out the background, the judge recorded in his judgment, inter alia, that:

(1) Counsel for Ms Steiner:

(a) accepted that, in order to prove her claim, Ms Steiner had to prove that there existed a debtor-creditor-supplier agreement;

(b) did not suggest that this was a case in which it was anticipated that there would be arrangements in the future; and

(c) accepted that CLC and FNTC were two separate entities and that FNTC was not CLC's agent.

(2) Counsel for NatWest accepted that when the payments were made to FNTC, FNTC was obliged to pass them on to CLC.

47. In paragraph 27 of his judgment, the judge said as follows:

> "Unquestionably they are separate entities. If one talks in terms of a chain, as between debtor, creditor and supplier, the payment to the trustees breaks the chain, or renders the chain non-existent. It does not matter how one describes it. However, I am entirely satisfied that Mr Finch is correct in his submissions to the effect that there is no proper basis to extend the notion of arrangements to a party who is not directly in receipt of monies paid over by the debtor. I say again, payments here were received by the trustee. What the trustee chose to do with that money, pursuant to private arrangements with CLC, is matter for them. However, as far as the creditor is concerned, the monies were being received by the trustee company and not by CLC and, objectively, on the evidence that was the position. So it was not just the understanding of the bank but, in reality, that is what was happening."

(5) Submissions

48. I am grateful to both counsel for their careful, considered and realistic submissions.

49. For Ms Steiner, Mr McGarry submitted in his skeleton argument that:

> "The definition of "arrangements" was broad enough to include an arrangement whereby there was a clear inference that the "beneficiary" of a trust (CLC) would in due course receive the relevant transaction monies (ie when it was paid over by the trustee)."

50. Although there was no direct authority in support of this proposition, he relied in particular on:

(1) paragraph 91 of Lord Sumption's judgment in *Asset Land v FCA*;

(2) paragraph 65 of the Court of Appeal's judgment in *OFT v Lloyd's TSB*; and

(3) paragraphs 94 to 96 of HHJ Hughes QC's judgment in *Bank of Scotland v Alfred Truman*.

51. He also stressed that:

(1) the context was that of consumer protection;

(2) there was no suggestion that the use by CLC of a structure involving a trustee connoted any impropriety, since it was done for the purposes of consumer protection; and

(3) it was not suggested that the rules of the Mastercard network prohibited payment being made to a merchant member of the network as trustee or agent for another.

52. For NatWest, Mr Finch submitted that it was appropriate to view this case as one in which there were two separate "arrangements", the Mastercard network and the Trust Deed, and that those two could not be seen as jointly forming "arrangements" between NatWest and CLC. In support of this proposition, he advanced the following submissions:

(1) Paragraph 55 of the Court of Appeal's judgment in *OFT v Lloyd's TSB* is authority for the proposition that it is appropriate to consider the position from the creditor's perspective, as well as the consumer's. By joining a credit card network, banks place their trust in other members of the network, but not in third parties such as CLC. In the present case, NatWest did not know of the involvement, or even existence, of CLC, whereas Mr Steiner had at least the opportunity to see that he was paying FNTC rather than CLC.

(2) *Bank of Scotland v Alfred Truman* was irrelevant, because it was decided on the basis that the relationship between the defendant and Topkarz was an agency relationship rather than, as in the present case, a trust relationship and those two relationships are materially different, since trustees deal as principals.

(3) Alternatively, *Bank of Scotland v Alfred Truman* was wrongly decided, because the defendant did not join the credit card network as agent (or trustee) for Topkarz.

53. Mr Finch also submitted that, if Ms Steiner's case were correct, that would potentially engage section 187(3) of the Act.

(6) Decision

54. The question which arises in this case is, of course, one of construction of section 12(b) of the Act, but I have found it helpful to consider that question in the context of both the Act as a whole and what has been said about section 12(b) in the authorities to which I have been referred.

55. Section 12(b) refers to arrangements between the creditor and the supplier. In the present case, there were undoubtedly arrangements between NatWest and FNTC (i.e. the Mastercard network) and arrangements between FNTC and CLC (i.e. the Trust Deed), but it was disputed whether that meant that there were arrangements between NatWest and CLC.

56. *OFT v Lloyds TSB* is authority for the proposition that there can be arrangements between a creditor and a supplier without there being a direct contract between them, but it is not authority for the proposition that, if there are arrangements between a creditor and X, and if there are also arrangements between X and a supplier, then it necessarily follows that there are arrangements between the creditor and the supplier. On the contrary, it is clear that 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.

57. With the greatest respect to HHJ Hughes QC, I do not derive much assistance from his judgment in *Bank of Scotland v Alfred Truman*. As HHJ Hughes QC himself recognised, his decision in that case left open the question where the line was to be drawn in individual cases.

58. In my judgment, it is important to bear in mind that the central question in this case is not whether there could be said in some sense to have existed "arrangements" between NatWest and CLC at the time when Mr & Ms Steiner entered into their agreement with CLC and Mr Steiner used his NatWest Mastercard to pay £14,000 to FNTC. Rather, the question posed by section 12(b) of the Act is whether Mr Steiner's credit card agreement with NatWest was "made by the creditor [i.e. NatWest] under pre-existing arrangements, or in contemplation of future arrangements, between the creditor [i.e. NatWest] and the supplier [i.e. CLC]".

59. There was no evidence before me as to the date on which NatWest made its agreement with Mr Steiner, nor the date on which FNTC joined the Mastercard network, nor even the date of the Trust Deed. However, as I have already said, the judge noted that Mr McGarry did not suggest that this was a case where it was anticipated that there would be arrangements in the future, so I treat this as a case where the alleged arrangements were pre-existing when NatWest made the credit card agreement with Mr Steiner. However, I do not consider that it matters whether the arrangements were pre-existing arrangements or were future arrangements. What is significant is that the starting point for the purposes of section 12(b) is the making of the agreement between NatWest and Mr Steiner.

60. When a bank such as NatWest makes an agreement with a customer such as Mr Steiner in relation to a Mastercard issued by the bank to the customer, then:

(1) The agreement is made "under" the Mastercard network, which undoubtedly constitutes "arrangements" between the bank and the other members of the network.

(2) If a supplier is already a member of the Mastercard network, then the agreement is made "under pre-existing arrangements, … , between the [bank] and the supplier". (It appears that this is so even if the bank is unaware of the identity of the supplier. I note in this context that section 11(4) of the Act provides that an agreement can be a restricted-use credit agreement although the identity of the supplier is unknown (which appears to mean unknown to the creditor) at the time the agreement is made. There was no evidence before me as to NatWest's actual state of knowledge, but a large bank such as NatWest may or may not be aware of the identity of all of the members of a large network such as the Mastercard network at any particular time.)

(3) The bank is well aware that other merchants are likely to join the Mastercard network in the future, so in that respect the agreement is made "in contemplation of future arrangements, between [the bank] and [a merchant who subsequently joins the Mastercard network]". (Again, this is so even

though the bank does not know when it makes its agreement with its customer the identity of future members of the Mastercard network.)

61. I find it difficult, however, to envisage, in the absence of specific factual evidence as to the bank's state of mind, that a bank which issues a Mastercard to its customer and makes a credit card agreement in relation that card makes that agreement under, or in contemplation of, any arrangements other than the Mastercard network. Suppose, for instance, that (as appears to have been the case) FNTC was a Mastercard merchant and that the Trust Deed was in place when NatWest made its agreement with Mr Steiner, was that agreement made under not only to the Mastercard network, but also to the Trust Deed? It seems clear to me that the answer to that question must be "No". The natural and ordinary meaning of the words used in section 12(b) of the Act does not extend to saying that NatWest made its agreement with Mr Steiner under both the Mastercard network and the Trust Deed (or under both the Mastercard network and any other arrangements which parties to the Mastercard network might have with third parties).

62. Alternatively, suppose that FNTC became a Mastercard merchant after NatWest made its agreement with Mr Steiner. In that case, NatWest made its agreement with Mr Steiner in contemplation of arrangements (i.e. the Mastercard network) between itself and FNTC, but I do not consider that the natural and ordinary meaning of the words used in section 12(b) extends to saying that NatWest made its agreement with Mr Steiner in contemplation of the Trust Deed (or in contemplation of any other arrangements which parties to the Mastercard scheme might have with third parties).

63. I have carefully considered all of the arguments advanced by Mr McGarry. His strongest points were perhaps that the rule of the Mastercard network did not preclude merchants using the network to collect payments on behalf of third parties (a fact which was presumably known to NatWest, so that the existence of arrangements of some kind between some merchants and third parties could therefore be said to have been in its contemplation) and that, since the purpose of the Act was to promote consumer protection, that purpose could be used as an aid to construing the Act, at least in cases of ambiguity. For my part, however, I do not consider that the words of the section can properly be stretched so far as to mean that NatWest made its agreement with Mr Steiner under the Trust Deed (of which it was presumably unaware) as well as under the Mastercard network.

64. Finally, I mention two points for the sake of completeness:

(1) I have set out the provisions of the Trust Deed at some length to illustrate the point that it may not necessarily be the case that money received by FNTC would be paid to CLC. It might, for instance, be used to pay for legal advice obtained pursuant to clause 10.6 or to meet any of the other outgoings referred to in clause 12.6. However, the case was argued before the judge on the basis that FNTC was obliged to pass on to CLC any payments which it received. I do not consider that it would be appropriate for me to decide this appeal on a different basis.

(2) Although Mr Finch relied on section 187(3), that provision is inapplicable, since it only serves to limit the scope of sections 187(1) and (2), which concern associates, whereas this is not a case about associates. Section 11(3)

might have been more pertinent, especially given the basis on which the Court of Appeal dismissed the submission made on the basis of section 11(3) in *OFT v Lloyds TSB*, but Mr Finch did not rely on section 11(3).

(7) Conclusion

65. For all of these reasons, I dismiss this appeal.