DRN-3543262

The complaint

The estate of Mr M has complained that Barclays Bank UK PLC, trading as Barclaycard, unfairly turned down his claim about something bought using his credit card.

What happened

In 2017, the late Mr M, alongside his wife, purchased holiday club membership from a business I'll call "Business H". This was paid for by Mr and Mrs H making a payment of £3,995 using his Barclaycard.[1] But this credit card payment wasn't made directly to Business H, rather it went to a different business I'll call "Business F".

The following year, Mr and Mrs M upgraded their membership with Business H and paid a further £5,995 for this. Again, Mr M used his Barclaycard and the payment was made to Business F.

In 2021, using a professional representative ("PR"), Mr M made a claim to Barclaycard under s.75 of the Consumer Credit Act 1974 ("CCA"). In short, Mr M said Business H made misrepresentations at the times of the sales that, under s.75 CCA, Barclaycard were jointly responsible to answer. It also said there was an unfair debtor-creditor relationship under s.140A CCA due to the way the memberships were sold and their terms.[2]

Barclaycard considered the claim, but didn't think it needed to answer it. It explained that, as Mr M paid Business F and not Business H in both transactions, there weren't the right arrangements in place for the CCA to apply to the claims being made.

Unhappy with what Barclaycard said, Mr M referred a complaint about the declined claim to our service. One of our investigators considered the complaint, but didn't think Barclaycard needed to do anything further. He didn't think there was enough to say there was a misrepresentation for which Barclaycard had to answer under s.75 CCA. He also looked at s.140A CCA, but didn't think there was enough to say there was an unfair debtor-creditor relationship arising out of the purchases. So he concluded that Barclaycard didn't need to do anything more to resolve the complaint.

PR said that Mr M didn't agree with the view and asked for the matter to be looked at again by an ombudsman. It provided substantial submissions over a number of months as to why, which, for reasons I'll come on to, I don't need to set out in detail. Very sadly, before the matter was passed to me for a decision, Mr M passed away. So the complaint is now being brought by his estate.

I considered all the available evidence and arguments to decide what I considered fair and reasonable in the circumstances of this complaint. Having done that, I explained that I didn't think the complaint should be upheld, but I thought that for different reasons to our

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[1] Although the holiday club membership was in the joint names of Mr and Mrs M, as the credit card used was in Mr M's name only, the complaint is his estate's alone to bring to our service

[2] PR also included other issues in the claim, but these weren't answered by Barclaycard. For example, the letter of claim says that affordability checks weren't carried out when granting Mr M's loan. But as he used a credit card and not a loan, I think this was included by mistake.

investigator. So I issued a provisional decision to give both parties the chance to let me have any further evidence or arguments before I issued a final decision.

I explained that when deciding complaints, I'm required by DISP 3.6.4 R of the FCA Handbook to take into account:

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

I noted that PR brought a claim on Mr M's behalf under s.75 and s.140A CCA. And I thought it was helpful to set out the relevant legal provisions.

s.75(1) CCA states:

> *"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor"*

s.12(b) CCA states that a debtor-creditor-supplier ("D-C-S") agreement is a regulated consumer credit agreement being:

> *"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"*

An agreement is a s.11(1)(b) restricted-use credit agreement if it is a regulated CCA agreement used "*to finance a transaction between the debtor and a person (the "supplier") other than the creditor*".

s.140A CCA states:

> "*(1)The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following –*
>
> > *(a) any of the terms of the agreement or of any related agreement;*
> > *(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
> > *(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*
>
> *(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).*
>
> *(3) For the purposes of this section the court shall (except to the extent that it is*

not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor."

Section 140C CCA says that the reference in s.140A CCA to a '*related agreement*' include a linked transaction in relation to the main agreement, which is defined in s.19 CCA as:

"(1) A transaction entered into by the debtor or hirer, or a relative of his, with any other person ("the other party"), except one for the provision of security, is a linked transaction in relation to an actual or prospective regulated agreement (the "principal agreement") of which it does not form part if -
…
(b) the principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement…"

Having considered the CCA, I said that the upshot of this is that there needed to be a D-C-S agreement in place for the lender (here Barclaycard) to be liable to the borrower (here Mr M) for the misrepresentations or breaches of contract of the supplier (here Business H). And a D-C-S agreement was also needed if the Supplier's acts and/or omissions were to be assessed as part of an assessment of unfairness under s.140A CCA. But, on the face of it, there were no such arrangements in place at the relevant times as Business H wasn't paid directly using the credit card, rather the payments were taken by Business F.

I noted that there are ways in which there could be a D-C-S agreement in place, even if the supplier wasn't paid directly using a credit card. But since our investigator issued their view, the law in this area was clarified by the judgment in *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner"). Steiner considered whether there was a D-C-S agreement in circumstances where Business F took payment on a credit card in relation to the purchase of timeshare membership from a business called "C". The court considered the arrangements between the parties and concluded that, as the payment to C was made outside of the credit card network, in that instance there wasn't a D-C-S agreement in place.

I thought that the circumstances of Mr M's case were very similar. Here, the same business (Business F) took payment for Mr M's purchase of Business H holiday club memberships. So, based on the judgment in Steiner, I thought a court would come to a similar conclusion and say that there was no D-C-S agreement in place and, in turn, no valid s.75 CCA claim.

I also considered whether there might be an unfair debtor-creditor relationship between Mr M and Barclaycard arising out of the purchases. But again, I could only consider how the agreements between Mr M and Business H affected the fairness of the debtor-creditor relationship, if there was a valid D-C-S agreement in place. And, for the same reasons, I didn't think such an arrangement was in place, nor had Mr M suggested there was an unfair relationship for any other reason.

Under the rules set out above, I said must take into account the law, but come to my own determination of what is fair and reasonable in any given complaint. Here, I didn't think it would be fair to make Barclaycard responsible for Business H's failures when the law doesn't impose such a liability – I couldn't see that Barclaycard and Business H were connected in any way nor was there any other reason to say Barclaycard should be responsible for Business H's failings.

Finally, I considered PR's argument that the agreements with Business H were 'null and void' due to breaches of EU law, taking into account a judgment of a Spanish court that it said was important. In short, PR said the Spanish judgment held that certain types of timeshares or holiday club memberships were held to be incompatible with Spanish law and

the agreements were declared nullified. PR said the Spanish legislation was implementing an EU Directive, which also had effect within the UK. It said this meant Mr M's memberships, as well as the related credit agreement, are also 'null and void'. I disagreed for two reasons. First, the credit agreement in question was for a credit card and I thought that entire agreement can't be set aside just because an agreement that may have been funded by the card could be rescinded. Secondly, Business H was a company incorporated in the British Virgin Islands and the agreement states that it is governed by the laws of the British Virgin Islands. I couldn't see why a Spanish court judgment would, or could, apply to the interpretation of these agreements.

It followed, therefore, that I didn't think Barclaycard need to answer the claims made.

Barclaycard responded to say it had nothing further to add.

PR responded on behalf of Mr M's estate. It pointed to parts of the CCA that it thought meant there was the right sort of D-C-S agreement in place.

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.

PR has said that there are some instances where there can be a D-C-S agreement, even where the supplier isn't paid directly using credit. PR points to s.184 and s.187 CCA and argues that there can still be a D-C-S agreement in place if the supplier is an 'associate' of the company that received a credit card payment.

For Business H and Business F to be 'associates' under the CCA, it would need to be shown that the same person is a 'controller' of both companies or that a controller of one is an associate of a controller of the other. The term 'controller' is itself defined in s.189 CCA. However, PR hasn't provided any evidence that such a person exists nor that Business H and Business F are associated in any other way. So I still don't think there was a D-C-S agreement in place for the reasons set out in my provisional decision. It follows, I still don't think Barclaycard needs to answer the claims made.

My final decision

I don't uphold the complaint brought by the estate of Mr M against Barclays Bank UK PLC, trading as Barclaycard.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr M to accept or reject my decision before 15 September 2023.

Mark Hutchings
Ombudsman