DRN-3436275

The complaint

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

What happened

In January 2012, Mr and Mrs M purchased holiday club membership from a business called Club La Costa ("the Supplier"). This cost £8,099[1] and was paid by Mrs M paying £4,000 on a credit card provided by a different business and Mr M paying £4,099 on his Barclaycard. But this credit card payment wasn't made directly to the Supplier, rather it went to a different business, "FNTC".

In November 2019, using a professional representative ("PR"), Mr M made a claim to Barclaycard under ss.75 and 140A of the Consumer Credit Act 1974 ("CCA").[2] In short, PR said the Supplier made misrepresentations at the time of the sale that, under s.75 CCA, Barclaycard was jointly responsible to answer. PR also said there was an unfair debtor-creditor relationship arising out of the sale that, under s.140A CCA, Barclaycard were also responsible to answer.

Barclaycard didn't respond to the claim and so PR referred a complaint to our service that Mr M's claim hadn't been dealt with properly.

One of our investigators considered the complaint, but didn't think Barclaycard needed to do anything further. He thought the claim made under s.75 CCA had been made too late to Barclaycard under the provisions of the Limitation Act 1980 ("LA") as Mr M had six years from the date of sale to make a misrepresentation claim. He also considered the claim under s.140A CCA, but thought as Mr M had cleared his balance in full the month after he'd paid the Supplier, he had six years from then to make claim. So he concluded Barclaycard had a defence to all claims under the LA.

PR said that Mr M didn't agree with the view and asked for the matter to be looked at again by an ombudsman. In doing so it said Mr M had longer to bring a claim due to the operation of s.32 LA. Further, PR said the membership operated as a collective investment scheme ("CIS"), which was something it wished an ombudsman to take into consideration.

I considered the relevant information about this complaint and, having done so, I didn't think Mr M's complaint should be upheld, but for different reasons to our investigator. So I issued a provisional decision and invited both parties to respond before I issued a final decision.

I explained that, when deciding complaints, I'm required by DISP 3.6.4 R of the FCA

[1] The membership application form says the price was £8,099, but the pricing summary prepared on the same day says the cost was actually £43,599, but an allowance of £35,500 was given for the trade in of other memberships held with the Supplier. If the actual cost was above £30,000, this would mean Mr M wouldn't be able to make some of the claims that he has, but for the reasons set out in this decision, I've not needed to make a finding on the actual purchase cost.

[2] As the Barclaycard used was in Mr M's name, only he was able to make those claims and bring this complaint.

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."*

PR brought a claim on Mr M's behalf under ss.75 and 140A CCA. 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…"*

The upshot of this is that there needs 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 of the supplier (here the Supplier). But I said, on the face of it, there were no such arrangements in place at the relevant times as the Supplier wasn't paid directly using the credit card, rather the payments were taken by FNTC.

There are ways in which there can be a D-C-S agreement in place, even if the supplier isn't paid directly using a credit card. I noted that since our investigator issued his view, the law in this area had been 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 FNTC took payment on a credit card in relation to the purchase of timeshare membership from the Supplier. The court considered the arrangements between the parties and concluded that, as the payment to the Supplier was made outside of the credit card network, in that instance there wasn't a D-C-S agreement in place.

The circumstances of Mr M's case are very similar. Here, the same businesses were involved and payment was taken in the same way. 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 as the Supplier wasn't paid under an agreement involving Barclaycard.

I also thought about the claim made under s.140A CCA and whether a court would conclude the relationship was unfair. However, a court could only consider how the agreements between Mr M and the Supplier affected the fairness of the debtor-creditor relationship if there was a valid D-C-S agreement in place. And, as already explained, I didn't think such an arrangement was in place, nor had Mr M suggested there was an unfair relationship for any other reason.

It follows that I didn't think the CCA applied to the claims PR advanced on Mr M's behalf in the way PR suggested. Given that, I didn't need to make any findings on the LA or the time limits that apply to those claims, as I didn't think the claims could be made.

Under the rules set out above, I 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 the Supplier's alleged failures when the law doesn't impose such a liability – I couldn't see that Barclaycard and the Supplier were connected in any way nor was there any other reason to say Barclaycard should be responsible for the Supplier's alleged failings.

I also considered some of the other things said by PR. It alleged that the membership was a CIS and that was something to take into consideration. In so far as that might lead to an unfair debtor-creditor relationship, for the reasons already explained, I didn't think that was something Barclaycard needs to consider. Further, it had been recently held in a court

judgment that a very similar type of timeshare membership did not amount to a CIS.[3] I couldn't see why Mr M's membership could amount to a CIS, given the findings the court reached. So I didn't think this was something that Barclaycard needed to consider further.

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.

Barclaycard responded to say it agreed with my provisional decision. PR didn't respond. As I've not been provided anything further to consider, I see no reason to depart from my provisional findings.

My final decision

I don't uphold Mr M's complaint against Barclays Bank UK PLC, trading as Barclaycard.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 12 January 2024.

Mark Hutchings
Ombudsman

[3] See *R (on the application of Shawbrook Bank Limited and Clydesdale Financial Services Limited) v. Financial Ombudsman Service* [2023] EWHC 1069 (Admin)