DRN-4511230

The complaint

Mr A complains about the way Clydesdale Bank Plc handled a claim he made to it.

What happened

The background facts of this case are well known to the parties so I will only cover these briefly here. Instead I will focus on giving reasons for my decision.

Mr A used his Clydesdale credit card to pay a training course provider ('the supplier') for an online training course. The course cost £20,000 in total and Mr A paid a deposit of £11,000. He says the supplier told him on the phone that he had a right to cancel and get a full refund if he did not like the program. However, when he requested a refund (because he did not like the program) the supplier then said the course was non-refundable.

Mr A raised a claim with Clydesdale but it did not agree to refund him under Section 75 of the Consumer Credit Act 1974 ('Section 75'), and it says it raised a chargeback that was successfully defended. Mr A made a complaint about the claim. Clydesdale did not agree that its claim outcome was incorrect but did accept aspects of its customer service could have been better and credited Mr A with £50.

The complaint was eventually referred to this service and not upheld. Mr A has asked for an ombudsman to consider it. In summary, he does not think the decision is fair as he cannot understand how the supplier can '*brazenly steal*' what he paid it and get away with it.

I issued a provisional decision as follows:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I won't be commenting on all the evidence submitted by the parties but focusing on what I consider central to deciding a fair outcome – this reflects the informal nature of this service.

Clydesdale is not the supplier of training courses here. So in deciding if Clydesdale has acted fairly I am focusing on its role as a provider of a financial services – and what it could have reasonably done for Mr A in respect of the relevant card protections (those being chargeback and Section 75 here).

I appreciate that Clydesdale initially focused on raising a chargeback for Mr A – and that it discontinued this due to the defence raised by the supplier. I don't consider this was necessarily an unfair thing to do in the circumstances. However, because I am intending on upholding this complaint in respect of Clydesdale's liability via Section 75 I do not consider it necessary to focus on chargeback any further.

Section 75

Section 75 in certain circumstances allows Mr A to hold Clydesdale responsible for a breach of contract or misrepresentation by the supplier here.

There are certain requirements in law that need to be met for a Section 75 claim to be valid – such as those relating to the cash price of the service and the relationship of the parties to the agreement. I believe the requirements are in place here for there to be a valid claim – nor do these appear to be in dispute by the parties. So I have gone on to consider the information that Clydesdale had to consider said Section 75 claim (or that was reasonably available to it at the time) and whether there was evidence of a breach of contract or misrepresentation by the supplier.

Clydesdale received information from the supplier to explain that Mr A had forgone his right to cancel as it had already sent him the passwords to the service (which he had used to access one webinar). It pointed to its general terms and conditions which Mr A had signed and accepted at the time he made the contract with the supplier, which explain that in these circumstances Mr A loses his right to cancellation.

Did Mr A have cancellation rights here?

The relevant regulations in this case appear to be the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("CCRs"). For the purposes of the guidance I refer to later it is worth noting that these implement EU Directive 2011/83/EU.

These only apply to "off-premises" sales, and "distance" sales. I will not set out the full definitions of these here, but to summarise briefly, an off-premises sale is a sale which takes place in person, but not at the supplier's business premises, whereas a distance sale is a sale which takes place via the exclusive use of distance communication. Further, in order to qualify as a distance sale, a sale must take place as part of an "organised…distance sales…scheme" operated by the supplier.

Mr A bought the course over the telephone, which is a type of distance communication. And based on the information on its website it appears that the supplier uses the internet and the telephone as the usual method of selling its courses. So I am satisfied it is fair to conclude that Mr A's purchase was made via an organised distance sales scheme.

Distance sales as defined under the CCRs come with certain rights, set out in Regulations 29 and 30, in relation to cancellation which are relevant to Mr A's case: namely that if a contract is for services or the supply of digital content which is not supplied on a tangible medium, the consumer has the right to cancel the contract starting from the day it begins and ending 14 days after it is entered into. Under the CCRs, failure by the supplier to provide a consumer with specified information about their cancellation rights can cause this cancellation period to end at a later date. However, in this case it appears the supplier did provide information about the 14 day right to cancel including a cancellation slip to use to effect said cancellation.

So, on the face of it I am satisfied that Mr A did have a 14 day cancellation right as set out in law and that it ran from when Mr A agreed to the contract.

Did Mr A validly exercise his right to cancel?

In order to benefit from the 14 day cancellation period in accordance with the CCRs Mr A would needed to have validly exercised his cancellation rights. He must have informed the supplier of his decision via a clear statement setting out his decision to cancel or using a cancellation form as specified by the CCRs.

I can see that Mr A signed up to the course on 29 July 2021 and then filled out and signed the supplier's cancellation form on 4 August 2021. So on the face of it in accordance with the CCRs Mr A had validly exercised his right to cancel the contract within the 14 day cancellation period granted in law.

Did Mr A withdraw his right to cancel prior to this?

There are provisions in the CCRs that allow a consumer effectively to waive their 14 day cancellation period specifically for contracts for the supply of services or digital content.

It is these which the supplier appears to be relying on here. In that it says Mr A lost his right to cancel under the terms in the contract because it sent him passwords to access the content (and he accessed said content). I note that the contract the supplier has produced does have a section that explains the following in fine print within the terms which it says appear on the back of the signature page:

e) The Client shall not be entitled to cancel its purchase of the goods or services pursuant in the event that the Package (or contents) provided by us has been used, unsealed and/or the passwords or any material has been sent to client or client attended a seminar, any coaching sessions or webinars.

Looking at the nature of the agreement here it appears to be for the delivery of password protected online learning materials and video content – so I think it is essentially a contract for the supply of digital content not on a tangible medium. In that respect Regulation 37 of the CCRs appears to be particularly relevant here which says:

(2) The consumer ceases to have the right to cancel such a contract under regulation 29(1) if, before the end of the cancellation period, supply of the digital content has begun ***after the consumer has given the consent and acknowledgement required by paragraph (1).***

So on the face of it I acknowledge from reading the first part of the extract above Mr A would lose his 14 day right to cancel if he is supplied the digital content before those 14 days elapse. However, the section highlighted in bold (my emphasis) needs to be satisfied in order for the right to cancel to cease. This refers to paragraph (1) of the Regulation 37 which says:

37.*—(1) Under a contract for the supply of digital content not on a tangible medium, the trader must not begin supply of the digital content before the end of the cancellation period provided for in regulation 30(1), unless—*

> *(a)the consumer has given express consent, and*
> *(b)the consumer has acknowledged that the right to cancel the contract under regulation 29(1) will be lost.*

I don't see in this example where Mr A has given express consent here for services to begin coupled with an acknowledgement that such consent would mean he loses his cancellation rights.

The supplier does explain in its general terms and conditions how the right to cancel will not apply in certain circumstances (such as receiving or using passwords to access content). However, it would appear the right to cancel a contract in the specified period set down in law is a key right, that cannot fairly be lost by a passive activity. Giving 'express' consent is something which indicates a positive action from the consumer. So I don't think the fact that Mr A signed up to the supplier's general terms and conditions would be considered express consent and acknowledgement for the purposes of Regulation 37.

I note that in support of my finding is the 'Official Journal of the European Union' Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (C 525/1) which refers to 'express consent' as follows (bold content as per original publication):

*'This means the consumer has to take **positive action**, such as ticking a box on the trader's website. Expression of consent and acknowledgment by means of a pre-ticked box or accepting the general terms and conditions would not satisfy the requirements'*

It follows that the general terms and conditions which Mr A signed would not fairly suffice as a means of him expressly agreeing to start services and forgo his cancellation rights in respect of the requirements of Regulation 37 of the CCRs.

Furthermore, I don't think the supplier sending Mr A log in details constitutes express consent and acknowledgement in accordance with Regulation 37(1) of the CCRs here either as it isn't something Mr A had any control over. In fact the details were sent to him hours after he signed up - rendering any cancellation period/form included in the contract redundant almost immediately.

Similarly, I don't think Mr A using the login details to access a webinar would satisfy the requirements of Regulation 37(1) either particularly as the email including those details does not explain that by using the login details he acknowledges that he would be losing his right to cancel under the CCRs.

I also note the following in determining whether Mr A is fairly deemed to have given his 'express consent' to start services along with acknowledgement to forgo his cancellation rights in the particular circumstances here:

A. *Mr A says that when signing up to the course over the phone he was not shown the term in the supplier's contract explaining how cancellation rights can be lost in any event; and*
B. *said term does not appear prominently on the contract in any event; and*
C. *Mr A has described how the supplier told him he would have a 14 day cancellation period to try out the course – which is in contradiction to the terms and conditions the supplier has produced in its defence.*

Where there is a dispute about what actually occurred/was said I decide matters on the balance of probabilities. I explain more below (when talking about misrepresentation) as to why on balance I accept what Mr A says he was told on the phone. But in summary the points above A-C add further weight here to my conclusion that Mr A can't be fairly taken to waived his 14 day cancellation right in line with the CCRs.

Because of my overall conclusions above, on the face of it I am not persuaded that Mr A's right to cancel ceased.

Was there a breach of contract here?

While the discussion has been in respect of cancellation 'rights' these are not in themselves contractual terms. So it wasn't a breach of contract when the supplier refused Mr A's cancellation. However, regulation 33 of the CCRs ("Effect of withdrawal or cancellation") says the following:

"(1) If a contract is cancelled under regulation 29(1)—
(a)the cancellation ends the obligations of the parties to perform the contract, and
(b)regulations 34 to 38 apply.
…"

Regulation 34 ("Reimbursement by trader in the event of withdrawal or cancellation") then goes on to say:

(1) The trader must reimburse all payments, other than payments for delivery, received from the consumer…

(13) Where the provisions of this regulation apply to cancellation of a contract, the contract is to be treated as including those provisions as terms.

Subsection 13 is especially relevant to Mr A's case because its effect is to make it a term of his contract with the supplier that if he validly exercises his cancellation rights, the supplier must give him a refund (subject to deductions which can be made in specific circumstances). Therefore by refusing to refund Mr A when he cancelled the contract in this instance, the supplier was in breach of contract.

In respect of whether the supplier is able to make any deductions here for the use Mr A had of the service before he cancelled I consider part of Regulation 37 (4) relevant as follows:

(4) The consumer bears no cost for supply of the digital content, in full or in part, in the cancellation period, if—
(a)the consumer has not given prior express consent to the beginning of the performance of the digital content before the end of the 14-day period referred to in regulation 30, (b)the consumer gave that consent but did not acknowledge when giving it that the right to cancel would be lost

As I have explained earlier in my decision, I don't consider Mr A waived his right to cancel in accordance with the CCRs here as he did not expressly consent to services to start with an acknowledgement that this would mean he loses said right to cancel. Therefore, I don't consider he should bear any cost for the supply of the digital content he used.

Misrepresentation

I also note here that aside from the breach of contract I have described above, Mr A has said the supplier misled him over the phone. He says:

> *The program was sold to me on the phone on the basis that I have a right to cancel it within 14 days trial period and get a full refund if I changed my mind or did not like the program.*

It turns out that this was not accurate information because under the supplier's policy in getting a password and/or logging in Mr A was not able to try out the program over 14 days.

I don't have a copy of the sales call here – neither the supplier nor Clydesdale have provided it. I'm satisfied Clydesdale has had a fair chance to request this. However, in deciding what Mr A was likely told I note the following:

- *Mr A has provided credible testimony about what the supplier told him on the call; and*
- *his actions in filling out the cancellation form are consistent with someone who was led to believe he could sample the content before committing long term; and*
- *the intended purchase was a lot of money – it is certainly feasible and in fact likely that before committing to such a purchase Mr A would have sought some assurances around the ability to change his mind if he decided the course was not for him.*

In determining whether a misrepresentation likely occurred here I think it is also important to note the supplier and Clydesdale have failed to provide a phone recording of the sales call as a defence to the allegations made of which it is equally liable for under Section 75 in respect of misrepresentation or breach of contract. The supplier is the professional party here in the strongest position to record and recover evidence and Mr A as the consumer is in a somewhat weaker position – so I don't think it unreasonable to make adverse inferences here as a result of the failure of the supplier (and Clydesdale) to provide a phone recording of the sales call. That in itself is not a reason for concluding misrepresentation has occurred – but it does inform the weight I have given to Mr A's recollection in determining what is more likely to have occurred.

After carefully considering the information here I am persuaded on balance that the supplier gave Mr A false information during the sales call – and that this induced him into making a purchase when he would not have otherwise done so. Therefore, even if I were mistaken on the point about breach of contract I consider there is a misrepresentation here in any event which gives rise to a remedy against Clydesdale via Section 75.

Customer service

I can see Mr A is unhappy with aspects of customer service during the claim although this has not been a focus of his complaint to this service (which has been about the outcome of the claim) so I will deal with these matters only briefly for completeness.

I can see that Mr A received some misleading correspondence from Clydesdale telling him to ignore the decline letter he received which would no doubt have been frustrating for him. It also appears that it took him a long time to get a response to his complaint about the outcome of the claim. Which I appreciate would have added to his frustration (although I note that by that point he would have known the outcome of his claim). Overall I think that the £50 compensation Clydesdale has paid him for this, while modest, is not unfair in the circumstances. So I won't be recommending any further compensation for distress and inconvenience here.

Putting things right

Because I consider there is a breach of contract and misrepresentation by the supplier Clydesdale is liable for fairly remedying this. In the circumstances here I don't consider Mr A has had any tangible benefit from the service – nor do I think the law requires me to make a deduction from any refund due. Therefore, I think Clydesdale need to refund Mr A for the course. I note here Mr A paid part of this on his card and the rest is owed to the supplier directly. It also appears that Mr A has not cleared the balance on his card. In the circumstances and considering the nature of the breach and/or misrepresentation I consider the following to be fair:

- *the card account should be re-worked as if the initial cost of the course was refunded to Mr A when he cancelled (on 4 August 2021);*
- *8% simple yearly interest on any credit balance as a result of the re-working from the date Clydesdale gave Mr A an outcome to his initial dispute claim on 14 October 2021 to the date of payment;*
- *Clydesdale to ensure Mr A is not liable for any additional balance he owes to the supplier up to the total purchase cost of £20,000 (either through settling this balance itself directly with the supplier or coming to an agreement with the supplier that it will not pursue Mr A for this).*

My provisional decision

I uphold this complaint and direct Clydesdale Bank Plc to:

- *Re-work Mr A's credit card account as if the £11,000 were refunded to the card on 4 August 2021 removing associated interest and charges – if this results in a credit balance this should be paid back to Mr A with 8% simple yearly interest calculated from 14 October 2021 to the date of settlement; and*
- *take steps to ensure Mr A will not be liable for the remaining balance of £9,000 either by settling this or coming to an agreement with the supplier that it will not pursue Mr A for this.*

If Clydesdale considers it should deduct tax from any interest award it should provide Mr A with a certificate of tax deduction for this.

Both parties agreed with my provisional findings.

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.

As both parties agree with my provisional findings I see no fair reason to depart from these here.

Putting things right

Clydesdale should put things right as set out below for the reasons given in my provisional findings (as copied above) which now form my final decision.

My final decision

I uphold this complaint and direct Clydesdale Bank Plc to:

- Re-work Mr A's credit card account as if the £11,000 were refunded to the card on 4 August 2021 removing associated interest and charges – if this results in a credit balance this should be paid back to Mr A with 8% simple yearly interest calculated from 14 October 2021 to the date of settlement; and
- take steps to ensure Mr A will not be liable for the remaining balance of £9,000 either by settling this or coming to an agreement with the supplier that it will not pursue Mr A for this.

If Clydesdale considers it should deduct tax from any interest award it should provide Mr A with a certificate of tax deduction for this.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 10 January 2024.

Mark Lancod
Ombudsman