DRN-3026019

The complaint

Mr A complains that Clydesdale Bank Plc (trading as Yorkshire Bank) unfairly declined his claim under section 75 of the Consumer Credit Act 1974 ("CCA") relating to a holiday product he purchased in 2016.

What happened

In 2016, a Spanish company ("Company A") sold Mr A and his wife a 10 year online membership to a holiday booking website provided by a different company ("Company B"), during a face-to-face meeting abroad. The total cost of the online membership was £4,950. Mr A paid a £1,000.50 deposit using his Yorkshire Bank credit card. Company A also promised them a number of holiday vouchers during the sale.

Mr A said Company A told them during the sale that they could get holidays, including flights, anywhere in the world via their online membership with Company B. However, Mr A said they were never able to use the product and Company B's website closed down in 2017. Mr A feels the package was badly mis-sold to them from start to finish.

In 2018 Mr A's representative raised a claim with Yorkshire Bank under section 75 of the CCA, because Mr A used his Yorkshire Bank credit card to pay the £1,000.50 deposit for the membership. He believes Yorkshire Bank should refund him the full amount he paid.

In response, Yorkshire Bank said Mr A didn't have a valid section 75 claim because the required debtor-creditor-supplier ("DCS") arrangement didn't exist. They considered Company A to be the relevant supplier in this case. And they said Mr A didn't pay Company A using his Yorkshire Bank credit card – he paid Company B directly instead. They said this breaks the required DCS chain unless there is a link between the two companies. So, they said unless Mr A could provide evidence to show that the two companies are "Associates" as defined by section 184 of the CCA, they wouldn't consider his section 75 claim.

Mr A's representative argued that Company A were agents of Company B and asked Yorkshire Bank to reconsider. But Yorkshire Bank didn't change their position. Unhappy with their response, Mr A brought his complaint to our service. His representative believes Mr A has a valid claim because Company B closed down and Mr A is unable to use their services to book holidays.

One of our investigators reviewed Mr A's complaint. Our investigator thought that there were two agreements in place at the time of sale: one with Company A to provide Mr A with a number of holiday vouchers – and one with Company B directly, to provide Mr A with a 10 year membership to its website. Overall, he said Mr A's claim is that he couldn't use the online membership because of issues with the website, which was Company B's responsibility. Given Mr A used his Yorkshire Bank credit to pay Company B directly, the investigator concluded that the necessary DCS link had been established between Mr A (the debtor), Company B (the supplier Mr A is complaining about) and Yorkshire Bank (the creditor). And he didn't think that Mr A's separate contract with Company A (the seller) in relation to the holiday vouchers negated that link.

Our investigator also found Mr A's version of events plausible, that he'd never been able to use Company B's website, based on archived information about the site. So, he concluded Company B breached the contract it had in place with Mr A. He therefore found that Yorkshire Bank should refund the total money Mr A paid for this membership under section 75 of the CCA, with interest.

Yorkshire Bank responded to say there's no evidence that a separate contract was entered into with Company B. They believed the only contract was between Mr A and Company A. So, it disagreed with the investigator's view and asked him to provide evidence of the contract with Company B. They reiterated that they consider the relevant supplier in this case to be Company A and the DCS chain is broken in the circumstances because Mr A didn't pay Company A directly with his credit card – he paid Company B, who is a third party, with no proven link to Company A.

Our investigator explained his view that the relevant contract describes Company A as the agent and is an agreement to provide an online membership to Company B's website. So, he thought a contract existed between Mr A and Company B for this online membership, which Company B entered into via Company A, as its agent. He said there were also letters from Company A regarding vouchers for holidays that Company A would provide directly (not via Company B). So, he believed there were two separate contracts: one with Company A to provide the holiday vouchers and one with Company B to provide the 10 year membership to its website.

Overall, he concluded that the relevant supplier Mr A is complaining about in this case is Company B, because he's unhappy he wasn't able to use its website for his online membership. He reiterated his view that Mr A paid the relevant supplier (Company B) directly using his credit card so the DCS chain was intact. And that Mr A had a valid section 75 claim for a breach of contract by Company B that Yorkshire Bank could be held equally liable for.

Yorkshire Bank still disagreed. They didn't think there was any evidence of a contract between Mr A and Company B because there is no offer, acceptance, consideration, or intention to create legal relations. They said Mr A had a relationship with Company A on paper and in conversation – not Company B. And if Company A was acting as an agent for Company B there would be no need for two contracts because Company A would be acting on behalf of Company B, as the principal. They said if there are two contracts, then clearly there is a break in the DCS chain, and they are not party to one of them.

The complaint was referred to me for a decision.

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.

Where evidence is incomplete, inconclusive or contradictory, I reach my decision about the merits of this complaint on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

I also have to take account of law and regulations, regulators' rules, guidance and standards, and codes of practice and good industry practice, when I make my decision.

In this case, section 75 of the CCA is relevant to the complaint, which says:

"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."

This means that, in certain circumstances, if Mr A paid for goods or services using certain types of credit (even in part), and there was a breach of contract or misrepresentation by the supplier of those goods or services, the creditor can also be held responsible.

The key issue I need to decide in Mr A's case is whether Yorkshire Bank's decision to decline his section 75 claim was fair. To decide this, I must first consider whether Mr A's claim meets the requirements of section 75, as set out by the CCA. These criteria include the following points, which are central to this particular case:

(a) There must be the required relationship between the debtor, creditor, and supplier; and
(b) There must be a misrepresentation or breach of contract on the part of the relevant supplier.

Unless the above criteria are met in the circumstances of this case, I wouldn't consider Yorkshire Bank to have acted unfairly when refusing Mr A's claim. I'll consider each of these points in turn.

Is the required relationship in place between the debtor, creditor, and supplier?

In order for section 75 of the CCA to apply, there must be the correct relationship between Mr A (the debtor), the relevant supplier of the product or service he is complaining about (the supplier), and Yorkshire Bank (the creditor). This is also known as the DCS chain.

In this case, Yorkshire Bank argues that the supplier Mr A is complaining about is Company A, who sold him the online membership – and because Mr A didn't use his Yorkshire Bank credit card to pay Company A directly, there is no DCS chain between Yorkshire Bank, Mr A, and Company A, as the relevant supplier. So, they can't be held equally liable.

However, from looking at the paperwork from the point of sale, there were two possible suppliers of goods and services involved in the transaction Mr A is complaining about, as our investigator explained. Firstly, Company A, who sold Mr A and his wife the online membership with Company B and provided a number of separate holiday and accommodation vouchers to be redeemed directly with Company A within 36 months. And, secondly, Company B, who is the supplier of the website and associated services, which Mr A needed to use for his 10 year online membership.

As Yorkshire Bank pointed out, there's no available evidence to show that Company A and Company B were linked in a way that would make them "Associates" under section 184 of the CCA. So, I have assumed they are separate entities for the purposes of this decision.

Given the two suppliers in this case, it is first important to establish which one Mr A is complaining about, before going on to consider whether there is a DCS link in place between Mr A, Yorkshire Bank, and the relevant supplier.

I've looked at the complaint letters sent to Yorkshire Bank in 2018 by Mr A's representative and I'm satisfied Mr A has been consistent with his complaint. As per those letters, Mr A said Company A sold him and his wife a product that was provided by Company B, and Mr A is unhappy that he's never been able to use Company B's product due to issues accessing the website, which eventually shut down in 2017. The paperwork confirms Company B was

responsible for the website and any issues with it. So, I'm satisfied the supplier he is complaining about is Company B, who was responsible for the product he said he couldn't use. This means I need to decide whether the necessary DCS chain existed between Mr A, Yorkshire Bank, and Company B – as the relevant supplier.

Yorkshire Bank says there was no contract in place between Mr A and Company B. They believe the relevant contract was between Mr A and Company A. Having looked at the Membership Agreement, I think this written contract has caused some confusion, as it's not clearly drafted. In the particular circumstances of this case, I think it's important to look at the evidence as a whole, to ascertain which parties had an agreement in place to provide goods or services to Mr A.

Having weighed up all of the available evidence, I'm persuaded Company A sold Mr A the online subscription to Company B's website on Company B's behalf, as their agent. And that Company B agreed to provide the necessary services for the ongoing membership to their website to Mr A, via Company A. I'll explain why.

The receipt document for Mr A's purchase from October 2016 shows Company A as the seller, Mr and Mrs A as the purchasers – and then lists the name of the membership they purchased for Company B's website under purchase details. It says an online subscription of 10 years would be activated upon receipt of the balance, and that the total purchase price for the membership was £4,950. It also says Mr and Mrs A were provided with a separate booklet, membership certificate and brochure for Company B's product, which were for the ongoing use of the membership. In my view, this suggests Company A, as the seller, only agreed to ensure Mr A's membership was activated.

The main Membership Agreement is on Company B headed paper. At the top of the first page it says: "[*Company B] Agency"* and *"Welcome to Advantage".* It also says the website was built by Company B. It then goes on to say: "*This agreement is between [Company A] whose office is registered at […] with the company registration number […] and is binding under European law."* It doesn't name another party to the agreement. It then again says: "*This agreement is valid between [Company A]"* and doesn't go on to say 'and…', to clearly name the other party. Although, it then lists Mr and Mrs A's details underneath this sentence. I can therefore appreciate why Yorkshire Bank concluded the written contract is between Company A and Mr and Mrs A. However, I don't think it's clear - especially in the context of the remainder of the document or when looking at the terms of the agreement they entered into.

The Membership Agreement clearly says that the website Mr A signed up to for holiday bookings is provided by Company B. It also says that from then onward, Mr and Mrs A will communicate with Company B directly. And they were given a separate document with the details of Company B's helpline for any queries about their membership or the website. So, in my view, it seems clear that Company A were only involved in the sale and were not responsible for providing the membership on an ongoing basis over the 10 year period – which was the responsibility of Company B and included the provision of a functional website.

The "*Terms and Conditions of the Agreement*" section makes clear that Mr A purchased a subscription for a period of 10 years and had unlimited access to Company B's website during that time (clause 1). It also confirms that Company B will provide all travel vouchers for holidays booked through the website (clause 8). And that payments for bookings made via the website were to be paid directly to Company B (clause 13), as well as any cancellation fees (clause 12). There is no mention of Company A having any involvement with the membership post sale. And given any further payments made after the sale were to

be paid directly to Company B, there is clearly an intention for a relationship between Mr A, as the member, and Company B, as the provider of the membership benefits.

The final page of the Membership Agreement then names Company A as "*the agent*". I think it's most likely this is evidence that Company A was acting as Company B's agent when selling the online membership to its website, on Company B's behalf. I think this is supported by the paperwork, which confirms Company B as the relevant supplier for the membership, website, and associated services under the terms of the membership with Company B. So, all things considered, I'm satisfied, on the balance of probabilities, that there is a valid agreement in place here for Company B to provide services to Mr A.

Ultimately, Mr A used his Yorkshire Bank credit card to pay Company B a deposit of £1,000.50 for an online membership to its website, which he was supposed to be able to use for 10 years under the terms of his Membership Agreement. I'm satisfied Company B is the supplier of that website and the associated services for members, based on the relevant paperwork. And Mr A only needed to pay part of the full membership price to the relevant supplier using his credit card for section 75 to apply. So, I'm satisfied that there is a DCS agreement in place between Mr A, Yorkshire Bank, and Company B (the relevant supplier).

Was there a breach of contract or misrepresentation on the part of the relevant supplier?

As I've already explained, Mr A's claim is that he wasn't able to use the online membership he purchased due to issues with Company B's website. So, I've considered whether this amounts to a breach of contract on the part of Company B; that is, generally speaking, whether Company B breached any terms of the agreement with Mr A, whether explicit or implied terms. And I'm satisfied it did.

As the investigator explained in his view and as referenced above, the Membership Agreement shows that Mr A purchased a 10 year membership to Company B's website and it clearly states that "*the purchaser has the right of use as many times as required for the said period*". However, Mr A said he was never able to access it and so he wasn't able to use the membership at all.

The investigator referred the parties to archived versions of Company B's website in his written view, which shows there were likely issues accessing the website around the time Mr A bought it in late 2016 and by 2017 the website was no longer working. I therefore consider Mr A's version of events to be plausible, in that it is most likely he was never able to use the online subscription for which he paid £4,950, due to issues with Company B's website. In my view, the paperwork makes clear that the website was Company B's responsibility. And, ultimately, Mr A wasn't provided with the 10 years unlimited access he paid for, in breach of the terms and conditions of the agreement I've set out above.

On balance, I am satisfied it is most likely Mr A would have a successful breach of contract claim against Company B, as the relevant supplier of the membership he purchased, based on the available evidence. It follows that I don't think Yorkshire Bank acted fairly when refusing to consider Mr A's section 75 claim. So, they need to put things right.

Putting things right

In the circumstances of this case, I think it's fair for Yorkshire Bank to meet Mr A's breach of contract claim against Company B (the relevant supplier) under section 75 of the CCA. I think the fair redress for the breach of contract in these circumstances is for Mr A to get back the price he paid for the membership, with interest, given he had no benefits from it.

Mr A paid the £1,000.50 deposit on his Yorkshire Bank credit card and may have paid associated interest on that amount under the terms of his credit card agreement. So, in line with the investigator's recommendation, I think Yorkshire Bank should rework Mr A's credit card account as if the transaction had never happened. Should this adjustment result in a credit balance at any point, Yorkshire Bank should refund the credit to Mr A and pay interest[1] on that amount at a rate of 8% simple per annum from the date he would have received that credit to the date of settlement, to compensate him for the loss of use of those funds.

Yorkshire Bank must also refund Mr A the remaining £3,950 he paid via bank transfer and pay interest[2] on that amount at a rate of 8% simple per annum from the date he paid it until the date he gets it back, to compensate him for the loss of use of those funds.

My final decision

For the reasons explained above, I uphold Mr A's complaint about Clydesdale Bank Plc trading as Yorkshire Bank and direct it to pay the redress I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 24 May 2022.

Joanna Brown
Ombudsman

[1] HM Revenue & Customs may require the business to take off tax from this interest. If that is the case, Yorkshire Bank must give Mr A a certificate showing how much tax it's taken off if he asks for one.
[2] As per footnote 1