

## The complaint

Mr C has complained that Clydesdale Bank PLC trading as Yorkshire Bank (Clydesdale) unfairly declined his claim under Section 75 (S.75) of the Consumer Credit Act 1974 (CCA).

## What happened

Mr and Mrs C paid for membership of a holiday club (which I'll call Club C) in August 2009. They paid another company (which I'll call Business G) who marketed the membership on behalf of Club C, to acquire the membership with Club C.

The total cost mentioned on the 'Membership Application' was £7,000. Mr C paid Business G £2,058.29 using his Yorkshire Bank credit card and then later £5,000 by bank transfer from his bank account.<sup>1</sup>

In November 2017, Mr C raised a claim with Clydesdale for breach of contract under S.75 CCA. Mr C is represented, but for ease I will refer to him throughout. Mr C said that Club C was wound up in 2012, resulting in him being unable to utilise the services and savings he'd agreed to purchase. And that, as Business G was also no longer trading, he had no choice but to hold Clydesdale jointly and severally liable for the breach of contract. He requested a full refund plus 8% interest.

Clydesdale turned down the claim. It said that in order for S.75 CCA to apply, certain conditions had to be met, in terms of the relationship between themselves, the debtor (Mr C) and the supplier of the goods or services. Clydesdale said that in this case Business G was the supplier. And that Mr C had paid Business G to arrange membership with Club C and this had been done. Clydesdale said that it had no liability under S.75 for Club C going out of business when it did.

Mr and Mrs C didn't agree and complained about Clydesdale's decision. Clydesdale maintained its position and Mr and Mrs C referred their complaint to this Service.

An investigator here issued an assessment on the case. She said, in summary, that:

- Whether or not the right sort of conditions for a S.75 CCA claim against Clydesdale existed in this case, came down to the extent of a link between the parties involved and the arrangements in place at the time.
- It seemed that Business G was arranging membership of Club C for Mr and Mrs C, on behalf of Club C.
- Alternatively, if Business G was supplying any membership in its own name, it was limited to one year's membership. The alleged breach happened after this.

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<sup>1</sup> Both Mr and Mrs C are mentioned on the holiday club membership application form. But, only Mr C is an eligible complainant as the credit card used was his. As Mr and Mrs C went through the purchase process together, I have referred to both of them in the decision, but it would be for Mr C to accept or reject this final decision.

- Business G and Club C weren't sufficiently connected such that they met the definition of 'associates' as defined in S.187 CCA.
- Since Business G was also doing more than just taking payment on behalf of Club C (it was marketing and arranging membership), the necessary DCS 'chain' relating to Club C didn't exist.
- So, whilst she empathised with Mr and Mrs C's situation, Clydesdale had fairly investigated the claim.

Mr and Mrs C disagreed. They said that, in summary, that:

- They didn't think Business G was the supplier – rather it was Club C, with Business G facilitating the payment.
- Relevant case law shows that in a scenario where there are more than three parties involved, the lender is still liable under S.75 CCA.

The investigator's opinion remained unchanged. She thought that Business G had done more than act as a payment processor – she thought it had marketed and sold the membership, making representations about its benefits. She attached a copy of a final decision which she said was relevant to the issues at hand in this case.

Mr and Mrs C said that the copy decision was a very different scenario and also that the Ombudsman had upheld that case in contrast to this one. They also said that the decision confirmed Business G was a marketer only and that Club C was providing the service. And that their case should follow the same principle.

As the matter remained unresolved, it has been passed to me to decide.

### **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.

Having done so, I've reached the same overall conclusion as the investigator and for similar reasons. I appreciate this will come as a disappointment to Mr and Mrs C, but hope that my explanation helps them to understand why I've reached the conclusion that I have.

To determine this complaint, it is necessary to first set out what I consider Mr and Mrs C agreed to, with which business and whether they have any cause of action against those businesses for a breach of contract or misrepresentation.

I'll then need to consider whether that is something Clydesdale needs to consider, given the relationships between the parties.

Finally, if I find Clydesdale does need to consider any claim, I'll think about whether it has properly considered that claim.

### **Mr and Mrs C's agreement with Business G**

Mr and Mrs C signed a document titled "**Membership Application**" on 10 August 2009 that reads:

*"This agreement is made by [Business G], whose registered address is [address], for*

*the purpose of purchasing membership to [Club C]. As follows:-*

Mr and Mrs C's details are recorded and there is a section titled "**To be completed by the marketer**". It sets out the "Registration Purchase Price" as £2,000, the deposit as the same amount – with the payment method showing as credit card. It also shows a 'balance' of £5,000 – presumably indicating the additional amount still to pay (and that was subsequently paid). At the bottom of the page Mr and Mrs C have signed just below where it reads:

*"I confirm the details provided are accurate and correct, and that I have fully read, understand and agree to the terms and conditions attached hereto."*

The terms and conditions have been supplied by Mr and Mrs C, so I think it likely they were provided with a copy. The terms and conditions are not particularly lengthy and so I also think it's likely Mr and Mrs C would've had the chance to read them before they signed the contract. I can see they also signed the terms separately to confirm they'd read them.

This document sets out some of what Club C did for its members. Business G's name doesn't appear in any of the terms. Some of the most relevant parts, read as follows:

### ***"Membership***

- 1. I/We understand that I/we have applied for membership to [Club C] and understand the associated benefits of the membership level I/we have applied for....*
- 2. I/we understand that Platinum membership levels are indefinite subject to the payment of an annual subscription fee (the current subscription fee is printed on the front side of this contract.)*
- 9. [Club C] endeavours to ensure that my/our membership benefits are available at all times and will continuously strive to provide new services.*
- 10. I/we understand that my/our membership documentation will be dispatched by [Club C], upon receipt of our completion details, directly to me/us.*

*...*

### ***Services***

[This section sets out some of the services offered by CC and its liability to members. There is again no mention of Business G]

- 14. I/we acknowledge that [Club C] reserves the right to withdraw an of the services at any time*

*...*

### ***Liability***

- 1. I/we understand that the company whose details appear on the front side of this application is an independent entity authorised to sell memberships to Club C.*
- 2. [Club C] warrants that it shall use its best endeavours to provide the services with reasonable care and attention and, as far as is possible, will accord to your request*

3. *Where [Club C] supplies you with any products or services provided by a third party, [Club C] will be acting as your agent in connection therewith and will use its utmost care in selecting the supplier and ensuring the products or services are provided in accordance with your request.*
6. *[Club C] shall not be liable to you or be deemed to be in breach of these Terms and Conditions by reason of any delay in performing, or any failure to perform, any of [Club C's] obligations in relation to the services, if the delay or failure was due to any cause beyond [Club C's] reasonable control.*
7. *[Club C] may vary these Terms and Conditions from time to time and will notify you of any changes in a timely manner...."*

Having seen Mr C's credit card receipts and the balance transfer, they paid slightly more than the price set out on the contract (£7,058.29 instead of £7,000). It's not entirely clear why they paid more, though it looks like it may be to do with exchange rates. Regardless, I don't think it makes a difference for the purpose of this decision.

#### Club C membership

I think the documents available show that Mr and Mrs C bought membership of Club C, and they suggest that was from Business G. The membership cost £7,058 and lasted indefinitely, subject to the payment of an annual subscription fee (£95 at the time they took out the agreement). Once Business G took payment it was for Club C to send to Mr and Mrs C their membership documentation. In addition, once the membership was started, there was some sort of relationship between Mr and Mrs C and Club C, who ran the membership and its benefits.

Although the application above says the agreement is with Business G, all of the services are described as being provided by Club C or its agents, but none by Business G. Similarly, Club C has attempted to limit its liability for any breach of the contract terms and says that it can vary the terms of the agreement, which implies there is a contractual relationship between Mr and Mrs C and Club C.

"Indefinite" isn't defined in the contract and there's no description of how this would work in practice. For example, whether Mr or Mrs C could pass their indefinite membership onto another person. This is important as Club C was wound up in 2012, so their membership didn't last forever.

I've thought about the general principles of construction and interpretation of contracts, thinking about the contract as a whole and how these types of contract operate in practice. I think the description of the membership being "*indefinite subject to an annual subscription fee*", implies that upon payment of an annual fee, Mr and Mrs C were able to access the benefits of Club C membership that year.

And, if that fee wasn't paid, they weren't able to access those benefits. I think this is different to a contract that can be renewed annually, such as a contract of insurance, as it means the decision on whether to continue lay solely with Mr and Mrs C rather than with Club C. Here, there was a large membership joining fee and a much smaller annual fee thereafter.

It isn't clear to whom Mr and Mrs C are supposed to pay the annual subscription fee, as it just says the membership to Club C is indefinite, subject to the annual

subscription fee. But, I'm satisfied that Club C felt there was an ongoing obligation on Mr and Mrs C to pay the fees. I can't see there were any ongoing contractual relations between Mr and Mrs C and Business G with respect to Club C membership after it was arranged and all of the benefits are provided by Club C.

On the front of the membership application form only Business G's logo appears and it says the agreement is made by Business G *"for the purpose of purchasing membership to"* Club C. And in the terms and conditions it says *"I/we understand that the company whose details appear on the front side of this application is an independent entity authorised to sell memberships to [Club C]."*

Mr and Mrs C have said they didn't have a contract with Business G and that Business G merely facilitated membership with Club C. However, it seems to me that there was a contract between Mr and Mrs C and Business G for Business G to procure membership to Club C. They paid for this partly using Mr C's Clydesdale credit card and partly using a bank transfer. And that membership was arranged as set out under the contract.

But I also think that at the same time Business G was entering into a contract in its own name, it was also acting as an agent for Club C. I think there was a contractual relationship between Club C and Mr and Mrs C – once they had paid for membership it was supplied by Club C (paragraph 10 of the section of the terms titled Membership) and Club C provided them all of the benefits of membership.

However, Mr and Mrs C didn't have any dealings with Club C directly, so I think the only way it could have entered into a contract with them was through the use of an agent.

To summarise, Business G approached Mr and Mrs C, marketed Club C membership, and took payment from them. But the actual Club C membership, and the associated benefits, appears to be supplied by Club C after Business G has sent the "completion details". So I think there were two contracts, one between Mr and Mrs C and Business G and one between Mr and Mrs C and Club C.

In 2011 the Secretary of State for Business, Innovation and Skills petitioned for Club C to be wound up ("the Petition"). I've seen a copy of the Petition that was presented to the Court. It names a number of companies that were linked with the principal activity of selling membership to Club C. The Petition alleged that the companies were linked by the involvement of the same individuals, but the overall structure of the group was difficult to penetrate and that meant the controlling parties had remained hidden.

The Petition was presented on the basis that Club C was involved in misleading customers, including making misleading representations about how it could help people out of existing timeshare obligations and presenting a complex and possibly insolvent cashback scheme. Club C was wound up by the Court in October 2012.

Mr and Mrs C say they didn't get what they'd been promised by taking out Club C Membership, because they were promised indefinite membership and Club C was wound up in 2012 - so their membership wasn't indefinite. However, I think it's clear that anything offered by Club C to its members was provided by Club C and not Business G. In other words, I can't see the Business G could be held responsible for a breach of contract due to Club C's failures. And I don't think Mr and Mrs C's contract with Business G was breached by Club C being wound up in 2012.

I think the agreement between Business G and Mr and Mrs C, so far as Club C membership was concerned, was to arrange membership. That

was done and I don't consider that Business G has breached that contract. It's possible Mr and Mrs C have a claim for breach of contract against Club C, but for the reasons I'll set out below, I don't think that is something Clydesdale has to answer.

Is Clydesdale jointly responsible for any misrepresentations or breaches of contract in relation to Club C?

S.75 CCA states that in certain circumstances, where a debtor has a claim against a supplier in respect of a misrepresentation or breach of contract, they will have a like claim against the creditor. So here, Mr C (the debtor) is asking Clydesdale (the creditor) to answer his claim (on his and his wife's behalf) for breach of contract over the problems I've set out above.

But this doesn't apply to every claim Mr C may have. Clydesdale is only responsible for claims where there is a debtor-creditor-supplier ("DCS") agreement in place. This is set out more fully in s.11(b) and s.12(b) CCA, but in short, there have to be arrangements in place so that the supplier of goods or services is paid using the credit card. In Mr and Mrs C's case, Mr C paid Business G directly, so it is not in dispute that Clydesdale could be held jointly responsible for any claim of a breach of the contract with Business G.

But I don't think Clydesdale has to answer any claim for breach of contract by Club C. That is because anything supplied by Club C was outside of the arrangements between Mr C, Business G and Clydesdale. Under the CCA, it's possible Clydesdale would have to answer a claim if it could be shown Club C and Business G were 'associates' (s.184 and s.187 CCA). But nothing I have seen makes me think they were associates under the Act, nor is Business G mentioned as a linked company in the Petition referred to above. It follows I don't think Clydesdale needs to answer any claim for breach of contract by Club C as there isn't a valid DCS agreement in place. And so I can't say that Clydesdale acted unfairly when it declined Mr C's S.75 CCA claim.

Mr and Mrs C argue that the right kind of arrangement does exist between Mr C, Clydesdale and Club C such that Clydesdale does need to consider the claim for breach of contract under S.75. CCA.

I've thought carefully about all of the things Mr and Mrs C have said about why they believe that Clydesdale does have liability for what they see as a breach of contract by Club C. But nothing they've said leads me to agree with them.

Some of what Mr and Mrs C have said over the course of the complaint is contradictory, in terms of who they believe the supplier was in the context of the transaction and what this means for Clydesdale's liability. But, focusing in on a significant point they've raised, they've argued that relevant caselaw (OFT vs LTSB 2006 and BoS vs Truman 2005) shows that a valid DCS link can be extended to scenarios where there are four or more parties involved in a transaction.

I agree that both cases do indeed cover this issue. However, neither are directly relevant to the facts of this case. The OFT vs LTSB case does provide authority for extending the DCS link beyond a three-party relationship. However, it focuses on the role of a merchant acquirer in the context of credit card transactions. The Truman case also provides authority for extending the DCS link beyond a three-party relationship. However, once again the facts are not the same in this instance. In the Truman case, the key difference was the party who accepted payment provided no other service, it merely facilitated payment. So the courts found this didn't break the DCS chain.

In this example, as I've explained above, Business G did more than simply facilitating payment. It acted as agent for Club C and marketed the membership in its own right. So, I don't agree that the reasoning of the Truman case applies in this case.

In conclusion, I don't think there were the right sort of arrangements in place for Clydesdale to be responsible to answer Mr and Mrs C's claim for breach of contract by Club C. Because of this, I don't need to consider whether Club C going out of business, represents a breach of contract.

It follows that I think Clydesdale has acted fairly in turning down the claim.

### **My final decision**

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 30 March 2022.

Ben Brewer  
**Ombudsman**