

The complaint

Mr B complains that Barclays Bank UK Plc have unfairly refused to refund over £5,000 to his credit card that he lost as part of an investment scam.

What happened

The details of this complaint are well known to both parties, so I will not repeat everything again here. In summary, Mr B paid over £5,000 from his Barclays credit card to a scam investment broker “Jones Mutual”. This was spread over two transactions of £1037.74 and £4150.95 that were paid on 15 February 2019.

Barclays refused to refund the payments, however, as Mr B had authorised them. It also said that a section 75 claim under the Consumer Credit Act 1974 would not succeed as it didn't think there was a valid debtor – creditor – supplier (“DCS”) link.

Our investigator upheld the complaint. He didn't think Barclays had sufficiently demonstrated a break in the DCS link and thought Mr B would have a valid claim under section 75 for misrepresentation. As a result, he thought Barclays should refund the money. Barclays disagreed, so the matter has been escalated to me to determine.

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 agree with the conclusions reached by the investigator for the reasons set out below.

In order for a section 75 claim to succeed, there must be:

1. a debtor-creditor-supplier agreement falling under section 12(b) or 12(c); and
2. a transaction financed by the agreement; and
3. a claim for misrepresentation or breach of contract related to that transaction;
4. but not a claim which relates to any single item which the supplier has attached a cash price below £100 or in excess of £30,000

Debtor-creditor-supplier (DCS) agreement

Barclays says the charges on the account are listed as being paid to “538936739901, Accra” to a payee in Ghana, and says it questions whether this was to a money transfer service instead of being sent directly to the fraudulent merchant. It says it needs further evidence that a DCS link has been established.

However, I'm not persuaded the link has been broken. Mr B has provided evidence to show that Jones Mutual were able to confirm whether or not the payment had gone through when he was attempting to pay them, which would suggest the payments were being made

directly to the merchant. Barclays has also not been able to demonstrate that the payee was in fact a money transfer service as opposed to a payment processor, for example (which would not break the DCS link as the involvement of a payment processor simply creates a four-party agreement).

As such, based on what little Barclays have provided, I'm not persuaded there is anything here that breaks the debtor-creditor-supplier chain between Mr B (the debtor), Barclays (the creditor) and the merchant (Jones Mutual). It also doesn't appear to be in dispute that there was a transaction financed by the agreement in these circumstances. Indeed, if Mr B had not used his credit card he would've had to find the cash from his own resources to fund the transactions. So, I'm satisfied the transactions were 'financed' by the agreement as required by the Act – which were also over £100 but less than £30,000 – such that section 75 does apply to the credit card transactions. I've therefore considered whether Mr B has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider that Mr B has made a claim of misrepresentation by the merchant – that claim being that it represented to him it was a legitimate enterprise when this was not the case. For a claim of misrepresentation to be successful it's necessary to show not just a false statement of fact but also that the statement induced Mr B into entering into an agreement.

(i) A false statement of fact

Based on Mr B's account of events and the evidence he has provided – as well as the warnings issued by the FCA – there's a strong basis for concluding that the merchant was not operating with legitimate intentions. I'm satisfied that the merchant was not likely to be operating a legitimate enterprise, i.e. one in which Mr B could have ever received back more money than he deposited. It therefore follows that any statements made by the merchant to the contrary are likely to be a misrepresentation.

This includes being told that everything he invested would be matched by the broker. They also said that at the end of a trial period he would be able to "take every penny from his investment as well as any profits", which he was not able to do by the time he asked to withdraw his money.

The mere suggestion that Mr B could make or withdraw money from Jones Mutual's investment platform is likely to suffice as entailing, by necessary implication, a statement of fact by the merchant that it operated a legitimate business, i.e. a legitimate trading platform on which investors could profitably trade. And, I'm satisfied that based on Mr B's account of events (and emails sent between the two parties), the merchant did claim that he could have made money from the trading platform.

(ii) That induced him into entering the agreement

If Mr B had known that the trading platform he was using was essentially a scam designed to steal the investor's money, there's little doubt that he would not have proceeded with his investment with Jones Mutual, meaning he was therefore induced into the contract on the basis of these misrepresentations.

Therefore, I'm satisfied Jones Mutual has made a misrepresentation to Mr B, such that he would have a valid section 75 claim.

Consequential losses

I've also considered whether Mr B has a valid claim against Barclays for the loss he incurred through the international transaction fees that were charged as a result of the credit card transactions. Where a person has been fraudulently induced to enter into a transaction through misrepresentation, they are entitled to recover from the wrongdoer all the damage directly flowing from that transaction (so long as it was the direct consequence of said transaction).

In Mr B's case, if the transactions had not occurred, the transaction fees would not have occurred. The transaction fees can therefore be considered a direct consequence of the transactions. And given the payments were made outside of the UK, it's foreseeable that a bank used by Mr B to make the deposits would attach a fee for converting the payment. So, I'm satisfied Mr B's payment of the transaction fees were a consequential loss also caused by the misrepresentation.

In summary, I'm satisfied Mr B has a valid section 75 claim on the grounds that the merchant made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Mr B could access his money freely and earn a profit from his transactions. I'm also satisfied the transaction fees meet the test for consequential loss in misrepresentation, as they wouldn't have been incurred "but for" the transactions. It was also a direct and foreseeable loss as a result of the transactions.

Given that Mr B has a claim for misrepresentation, I don't consider it necessary to determine whether he would also have a claim for breach of contract (given the former also tends to provide the highest sum of redress with consequential losses). I also don't consider it necessary to determine whether the bank ought to have also prevented the transactions from being made as a result of suspecting fraud. Barclays should therefore put Mr B back into the position he would've been had the transactions not been entered into.

My final decision

For the reasons given above, I uphold this complaint and direct Barclays Bank UK Plc to:

- Refund the disputed transactions;
- Refund the associated transaction fees;
- Pay 8% interest on those sums from the date they were paid by Mr B to the date of settlement;
- If Barclays deducts tax in relation to the interest element of this award it should provide Mr B with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 28 November 2022.

Jack Ferris
Ombudsman