

The complaint

Mr E has complained that Barclays Bank UK PLC, trading as Barclaycard, unfairly turned down his claim made under the Consumer Credit Act 1974 ("CCA").

What happened

In April 2013, Mr E, along with his wife, took out a membership of a holiday and lifestyle club that I'll call "EG". Under the agreement they bought 'credits' that could be used to get discounts on holidays and other services. A deposit was paid using Mr E's Barclaycard and the balance was paid later by a bank transfer.¹

On 17 June 2019, Mr E, using a professional representative ("TM"), made a claim to Barclaycard under s.75 CCA. It was alleged that Mr and Mrs E had been misled by EG about the nature of the benefits available to members. In particular, it was said that they had been told they would be able to get 'five star' holidays at any time they wished with a 40% discount on the going market rate. In fact Mr and Mrs E found that the holidays offered were at the same price available on the open market and EG closed down, meaning they lost their credits without having taken any membership benefits. TM argued that applying s.75 CCA, Barclaycard were jointly liable to Mr E for EG's misrepresentations.

Barclaycard didn't reply to the claim and so, in November 2019, TM referred a complaint about Barclaycard to our service.

After that, Barclaycard responded to the claim. It said that in this case Mr E's Barclaycard wasn't used to pay EG directly, rather the payment went through a third party that I'll call "R". R first exchanged Mr E's payment from pounds to euros and then sent the payment to an account Mr E nominated. Because of that, Barclaycard said there wasn't the right sort of arrangement in place for s.75 CCA to apply.

One of our investigators considered the evidence and agreed with what Barclaycard said, but TM disagreed and asked for the matter to be considered again.

A second investigator considered things again and said she didn't need to make a finding on whether the right sort of arrangement was in place to make a s.75 CCA claim. That was because, even if she thought there was the right sort of arrangement in place, the claim for misrepresentation had been made too late under the provisions set out in the Limitation Act 1980 ("LA"). She also considered another provision of the CCA (s.140A), but didn't think this helped Mr E either.

TM responded to say it disagreed. It noted that Mr E didn't realise there was a problem with EG until July 2013 and he had made his claim within six years of that date, so he was within the periods set out in the LA. It was also said that, alongside a misrepresentation claim, there was also a claim for a breach of contract when EG closed. This claim could also be made under s.75 CCA.

¹ As the Barclaycard used was Mr E's, only he was able to make the claim that is the subject of this decision

As there was a disagreement about the outcome of this complaint, it was passed to me for a decision.

Having considered everything, I came to the same overall outcome as our investigators reached, but for different reasons. So I issued a provisional decision, setting out initial conclusions and asking for both sides to send in anything further they wanted me to think about.

I started by setting out the relevant parts of the CCA, as Mr E had made a claim under s.75 CCA.

That included s.75(1) CCA, which 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 ("DCS") 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)".*

Finally, under s.187(1) CCA:

"A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between [the creditor and the supplier, one of them and an associate of the other's or an associate of one and an associate of the other's]."

Considering those provisions together, I said for s.75 CCA to apply there had to be a DCS agreement in place as defined in s.11, 12 and 187 CCA.

In this case Mr E was the debtor, as he borrowed money from Barclaycard to pay for membership. Barclaycard was the creditor as it was the business that issued the credit card and provided the credit for Mr E to use. Finally, the supplier was EG, as it was the business that was going to provide the benefits of membership to Mr and Mrs E.

I noted that in actual fact the credit card payment was used to credit a bank account of a Spanish business I'll call "RS". It was also this business to which Mr E paid the balance of the membership cost. I didn't think it was in dispute that RS was part of EG and linked to British businesses that also formed part of EG. So it appeared that the money ended up with the supplier.

However, Mr E's payment went through a third party business, R, so I needed to consider whether its involvement meant a DCS agreement was in place due to the arrangements in place between the parties.

It has been held that the word 'arrangements' is "*capable of carrying a broad meaning*" and such arrangements can be found when there is no direct relationship between the supplier and card issuer, for example via the use of merchant acquirers in credit card schemes or when one business processes payment on behalf of another.²

Mr E said that he made an initial payment when on holiday using his credit card in an 'electronic point of sale' machine ("card machine"). He said he was given a receipt for the purchase, so he believed he paid the supplier directly.

However, Mr E's credit card statement shows he didn't pay the supplier, rather he paid a business R and he has provided a 'deal summary' from R along with the complaint. Our investigator contacted R and was told that Mr E had an account with it and that he would have logged in to make a payment using his email and password. It says payment was taken from his card in pounds and then transferred to the account number provided in euros. R said it had no relationship with RS, the EG entity that received the payment.

As the method of payment wasn't clear, our investigator asked Mr E to confirm whether he remembered using a card machine or whether he paid online. TM responded to say he remembers using a card machine.

Having considered all of the evidence, I thought it was more likely that Mr E made a payment online. I said that due to both what R had said, but also because of the 'deal summary' that Mr E provided to us. That document didn't look like a card machine receipt, but appeared to show that Mr E used R to exchange money and then transfer it to a nominated bank account. It also showed that he paid £4 in transfer fees and £23.70 in payment fees to R to undertake the transaction. It was noted at the top of the document that the account name with R was Mr E's name and he had a specific client number.

I thought the 'deal summary' was a record of the transfer that Mr E instructed R to make and, based on what R had said, I thought this was most likely done online. So I didn't think Mr E paid for EG membership by using his Barclaycard in a card machine. I said I understood this didn't fit with Mr E's recollections, but I also said I know that memories can and do fade with time. So I wasn't surprised if Mr E couldn't remember the precise way he made payment almost ten years ago.

R explained that once it received a client's funds it paid those into the nominated bank account. So I didn't think R would have been acting on behalf of RS when it took payment from Mr E's card, nor did I think there were any arrangements between R and RS. Rather, I thought the arrangement was between Mr E and R, such that it was acting on his behalf in making the payment. Having considered everything, I didn't think RS and R were sufficiently linked such that there was a DCS agreement in place. It followed, therefore, that I didn't think Barclaycard acted unfairly in turning down the s.75 CCA claim.

Our investigator also considered whether there was a potential claim under s.140A CCA. However, having considered the letters of claim sent by TM to Barclaycard, I couldn't see that any such claim was made. The letter of claim neither expressly referred to s.140A CCA, nor did it allege that the relationship between Mr E and Barclaycard was unfair. As no s.140A CCA claim was made to Barclaycard to consider, I didn't think it would be fair to consider it within my decision.

TM responded on Mr E's behalf. It was said that Mr E gave his Barclaycard to the RS salesman to deal with the payment on his behalf and he had no idea why the payment

² See *The Office of Fair Trading v. Lloyds TSB Bank Plc* [2006] EWCA Civ 268, at 64 and *Bank of Scotland v. Alfred Truman (A Firm)* [2005] EWHC 583 (QB), at 95-98

ended up on a 'R' receipt. But the money went to RS, which was part of EG, so it was established that a payment was made to EG. TM also argued that as RS was closed down due to fraudulent activities, it was no surprise that the payment was mishandled.

Barclaycard didn't respond to my provisional 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.

When doing so, I'm required by DISP 3.6.4R of the FCA 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."

Having considered everything again, I've not changed my mind from my provisional decision. I'll explain why.

As I noted in my provisional decision, there needs to be a DCS agreement in place for there to be a valid s.75 CCA claim. Without such agreement, any claim is bound to fail no matter how clear it was that the supplier misrepresented something or breached the associated contract. So how EG came to be paid is central to this decision.

I have thought about what Mr E now says – that he gave his card to someone to deal with the payment on his behalf and that he didn't know R was involved in the transaction. But I also note that is different to what he said before – that he remembered using a card machine. So I'm not sure I can place much weight on Mr E's memories of the sale as he's said two different things about how his card was used. And as I said in my provisional decision, I'm not surprised if his memories aren't clear as the sale took place some time ago and the way a payment is taken is not a memorable event.

Mr E provided us with a 'deal summary' from the time of sale that set out how money was transferred using R. I appreciate that Mr E may not have fully understood the manner in which money ended up in RS's bank account, however I think it is clear that something other than a card machine was used to make payment. So I think Mr E would have been aware that R was used to transfer the money at the time. And as I have seen no arrangements between R and RS, for the reasons set out in my provisional decision, I can't say there was a DCA arrangement in place. If follows I don't think Barclaycard acted unfairly in turning down the claim.

My final decision

For the reasons set out above, I don't uphold Mr E's complaint against Barclays Bank UK PLC.

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

Mark Hutchings
Ombudsman