

## The complaint

Mr S complains that Barclays Bank UK PLC trading as Barclaycard has reported a default on a debt that is deemed unenforceable.

## What happened

Both parties are aware of the circumstances of the complaint, so I won't repeat them in detail here. In summary, Mr S and Barclays agree that a credit card debt that Mr S defaulted on in October 2018 is unenforceable as Barclays could not produce an executed copy of the credit agreement. Mr S argued that the default should therefore be removed however Barclays did not agree.

Mr S referred the complaint to our service and our Investigator felt it was reasonable that Barclays had recorded a default and did not think it needed to be removed. Mr S disagreed and pointed to a judgment in the name of *Grace* which he felt evidenced it was not accurate to record him as a defaulter where the agreement was unenforceable under the Consumer Credit Act 1974.

Barclaycard also reached out to our service after the view and explained it would be willing to apply a Notice of Correction to Mr S' credit file that would explain the default relates to an irremediably unenforceable debt.

I issued a provisional decision in which I said:

### Incorrect balance recorded on credit file

*Mr S is unhappy that the outstanding balance appearing on his credit file decreased from £12,651 to £12,158 in November 2020. When he asked Barclaycard about this, they could not provide a reason, which he did not find acceptable.*

*Looking at the debt management notes provided by Barclaycard, I can see that the account balance at the time of registering the default was £12,651. There is a note from 15 October 2020 which says 'default fees CR' and it's possible this is an indication that default fees were reimbursed on the account at that time, which would coincide with the balance on the credit file being updated the following month. But I cannot say this with certainty as Barclaycard has expressed it is unaware of why the balance changed.*

*In any event, while I can consider the fact that the information on Mr S's credit file may have been incorrect for some time, I have to consider the impact this had on him as an individual. Mr S was unaware of this incorrect information for almost two years, and has not made us aware of any ways in which this information impacted his ability to obtain credit. As the possible discrepancy was on a defaulted balance, it's unlikely any adverse effects of this would be greater than the negative impact of the default itself. With this in mind, I don't direct Barclaycard to take any further action in relation to this complaint point.*

### Account was sold without notifying him

*Mr S has complained that the account was sold to a third-party debt collection agency without notification. Barclaycard has confirmed that as the account was sold as a 'non-payer' account, there was no pre-sale letter sent advising of the impending transfer. Instead, they have provided sample letters that they say would have been sent by the third-party up to 20 working days post-sale.*

*While I do not have a copy of the relevant terms and conditions of the account, as these are not available, it is not uncommon for it to form part of the agreement that the debt can be sold on when non-payment occurs. As this is a generally accepted practice, I therefore don't consider it to be unreasonable that Barclaycard sold the debt in November 2021 considering it had defaulted over three years previously. As no payment had been received since the date of default, and Mr S had declared the debt was unenforceable, I don't think it is unreasonable that he was advised post-sale of the transfer.*

#### *Default was recorded late*

*Mr S feels that default should have been recorded earlier than October 2018 and has pointed to the default notice sent in November 2015 as a reasonable starting point. This is because he made the additional payment after the deadline given.*

*Looking at the default notice sent in November 2015, I can see this requests payment of £774.23 by 16 December 2015 and warns that Barclaycard may take enforcement action if this is not received before the date shown. As they only warn they may act, I don't think Barclaycard has therefore made an error when it did not register the default at that time.*

*Ultimately, a default should be applied when the relationship between the debtor and creditor has broken down and there is no indication that the debt will be repaid. When Mr S made the payment of £1,200, which was significantly more than was requested, I think it was fair that Barclaycard decided not to apply the default as I think this was an indication of Mr S' willingness to work with them to repay the debt at that time.*

*I appreciate Mr S' comments that in some cases a default can be applied after three missed payments, and I do agree this is reasonable in some cases. However, looking at Mr S' account, I think the point at which Barclaycard applied the default, which is when he had reached six consecutive missed payments, was reasonable on the whole. I think that prior to that point, the relationship had not fully broken down and Mr S had shown willingness to repay the debt at times and it was only in October 2018 that he consistently showed he was not able or willing to repay it.*

#### *The default should be removed as the debt is unenforceable.*

*Mr S says that he has not been provided with a true copy of the credit agreement. This is because he says the application form provided does not meet the legal requirements of an executed credit agreement.*

*Barclaycard has stated that the debt is unenforceable because they have been unable to provide a copy of the historic terms and conditions of the credit card account which were relevant at the time of the sale. Because of this they cannot provide a copy of the executed credit agreement that includes all the relevant terms referred to.*

*It may help to remind the parties here that only a court can decide whether or not a debt is enforceable or otherwise. This service doesn't have equivalent powers, as a free-to-use alternative to the courts, set up to deal with complaints quickly and informally. It's my role to decide what's fair and reasonable in all of the circumstances of this individual case and, in doing so, I've taken account the relevant law, regulations, rules and guidance here.*

*In this case, however, Barclaycard accepts that the debt is unenforceable. What I need to decide is whether it's fair and reasonable in the circumstances here for Barclaycard to continue reporting the default in relation to this debt.*

*CONC 13.1.6(5) states: 'In the judgment of McGuffick -v- The Royal Bank of Scotland plc [2009] EWHC 2386 (Comm) Flaux J held in a case under section 77 of the CCA that passing details of a debt to a credit reference agency and related activities do not constitute enforcement under the CCA.'*

*Mr S has cited a separate judgment, which he feels correctly sets out that it was not fair to pass details of the debt to the credit referencing agencies because the debt was unenforceable. I've reviewed the judgment of Grace & ANR -v- Black Horse Limited [2014] in its entirety. In this case, the debt was irremediably unenforceable, whereas in the judgment of McGuffick the debt was temporarily unenforceable due to the information that was missing. Mr S's debt here is similar to the debt in the Grace judgment, in that Barclaycard does not hold historic terms and condition for the time of the sale so will never be able to produce the missing documents. This could make the debt 'irremediably unenforceable' – and it's on this basis that Barclaycard appears to have decided that the debt is, indeed, unenforceable.*

*But an important difference between Mr S' case and the circumstances in the Grace judgment is when the default was applied. In the Grace judgment, it sets out that the default was applied after a court had decided the debt was unenforceable. In Mr S' case, the default was applied in October 2018, whereas the earliest reference of the debt being recognised as unenforceable is 6 September 2019. Meaning that at the time the default was applied, there was no mutual agreement that the debt was unenforceable. I cannot therefore agree that Barclaycard made an error when it applied the default initially.*

*In the Grace judgment, it states 'I consider it very counter-intuitive to think that [an individual] can accurately be stigmatised as a defaulter in a semi-public register without, at least, the unenforceable nature of the debt being recorded in the same entry.'*

*Barclaycard has offered to apply a 'Notice of Correction' to Mr S' credit file that would state "Please note that this default relates to an agreement which is deemed to be irremediably unenforceable under the Consumer Credit Act". My understanding is that this notice of correction would appear on the same entry as the default and, on balance, I think this is a fair way to resolve the issue Mr S has raised. This will ensure there is an accurate reflection on his credit file showing what has happened in relation to the credit card debt. That it existed and the relationship between Mr S and Barclaycard broke down which led to the default being applied, but the debt was then deemed to be irremediably unenforceable.*

*I'm currently minded to agree that Barclaycard did not make an error in applying the default, but I agree that it should place a notice of correction onto Mr S' credit file to explain that the debt is not enforceable.*

*Barclays did not respond to my provisional decision with any additional comments for me to consider.*

*Mr S responded and provided an e-mail between himself and a credit referencing agency in which they confirmed it was not possible for a lender to add a notice of correction to his credit file. Because of this he did not think the proposed remedy was satisfactory. He therefore reiterated that he felt the only option was for Barclays to remove the default in its entirety from his credit file. He also felt that Barclays should have voluntarily told him that the debt was unenforceable sooner.*

## **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.

I've taken Mr S' comments on board and have spoken with both Experian and Barclaycard about a correction being added to the same entry as the default on Mr S' credit file. Both have stated that while it is not an everyday occurrence, it *is* possible. As explained in my provisional decision, I think this would be a reasonable outcome to the complaint.

Mr S has said that Barclaycard should have been more transparent from the outset about the debt being irremediably unenforceable. But I think it's more likely this came to light when Mr S requested a copy of the executed credit agreement, and Barclaycard could not produce the specific terms and conditions for when the account was taken out. So I am still of the opinion that Barclaycard were not acting unreasonably when they initially applied the default to Mr S' account.

## **My final decision**

Barclays Bank UK PLC trading as Barclaycard should apply a notice of correction to Mr S' credit file, in the same entry as the default, explaining that the debt is not enforceable.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 31 October 2023.

Rebecca Norris

**Ombudsman**