

The complaint

Ms C complains about the way Barclays Bank UK PLC trading as Barclaycard handled a claim she made to it.

What happened

Ms C purchased a package including a non-surgical weight loss device called a 'gastric balloon' and aftercare including 'nutritional, fitness, behavioural and medical support'. She paid for it using her Barclays credit card and another card from a third party.

Ms C was unhappy with her purchase. In summary, she says she did not achieve the results expected and requested to have the balloon removed (which took place shortly after).

Ms C approached Barclays to make a claim for a refund. It raised a chargeback for the amount paid on the card, but this was defended so it discontinued the dispute. It also considered Section 75 of the Consumer Credit Act 1974 ('Section 75') however, it would not uphold her claim.

Ms C was unhappy with the outcome of her claim to Barclays and the customer service she received from it on the way. In particular, she was unhappy with how Barclays spoke to her on the phone and what it told her about what she was able to claim for under Section 75.

Barclays accepted that it gave Ms C misleading information over the phone and credited her with £50 for the distress and inconvenience – but it would not uphold her Section 75 claim.

Our service looked into the complaint Ms C had made to Barclays about her claim. The investigator did not uphold the complaint. In summary, he said there was not persuasive evidence that the balloon was defective or inserted without reasonable skill and care. He thought a chargeback was unlikely to have succeeded had it been escalated – and that Barclays were not wrong in declining the Section 75 claim.

Ms C was unhappy with this and came back to emphasise that she didn't get the weight loss results the supplier promised her, and she believes it misled her with claims that convinced her to enter into the contract. Ms C also provided further evidence to support her claim that she was misled. She says she achieved 'zero weight loss' and that the product is marketed as a device that provides results unconditionally.

I issued a provisional decision on this matter. In this I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

While I have considered the parties submissions in full I will only comment on matters I consider central to this dispute. I do not wish either party to take this as a discourtesy, but it reflects my role resolving disputes informally. While I note Ms C has requested to speak to me I don't consider this is necessary for me to fully understand the basis of her complaint.

I am sorry to hear about the dissatisfaction Ms C has described with the product she bought. However, my starting point here is that Barclays is not a supplier of the goods and services. So I am considering its role in respect of the specific financial services it provides. In doing so I consider the card protections of chargeback and Section 75 to be particularly relevant here. It is these that I have focused on.

Section 75

Section 75 in certain circumstances allows Ms C to have a 'like claim' against Barclays for misrepresentation or breach of contract by a supplier of goods and services paid for using her credit card.

Section 75 has technical criteria that needs to be satisfied in order for there to be a valid claim in respect of the actions of a particular supplier. For example, relating to who was involved in the agreement, how it was paid for and what the goods or services cost. In this case I am satisfied the criteria is met for Ms C to have a valid claim against Barclays for a possible breach of contract or misrepresentation by the supplier.

Here Ms C purchased a '12 Month Intragastic Balloon' which according to the terms and conditions of the procedure appears to be inserted in a hospital under the care of a consultant physician or surgeon. Included in the purchase is an aftercare package with support from the supplier.

There has been discussion as to whether the service Ms C purchased and received is considered a medical treatment or not. I don't think this ultimately changes the outcome of the complaint here for reasons I go on to explain. However, for completeness, while the procedure to insert the device is non-surgical it does appear to be done under the care of medical professionals with the possibility of side effects and risks and complications. I also note there is nothing I have seen from the supplier that specifically says this is not a medical treatment or that the balloon is not a medical device of some kind. So overall I would say what Ms C purchased has the characteristics of a medical treatment.

However, regardless of whether the product is classified as a medical treatment or not– this does not exclude Ms C from having a valid Section 75 claim against Barclays. I say this because Ms C was apparently misled by Barclays to believe that buying a medical treatment would automatically exclude her from Section 75 protection. This is incorrect as Section 75 has no exclusions like this. I have dealt with compensation for the customer service Ms C received below, however, I wanted to clarify this matter from the outset.

I have now considered the evidence available in order to determine if there is a breach of contract or misrepresentation by the supplier for which Barclays is responsible for.

Breach of contract

In order to determine if there has been a breach of contract by the supplier I have considered the specific terms and conditions of the package Ms C bought along with any terms implied by consumer law.

In this case I consider the Consumer Rights Act 2015 is particularly relevant as it implies terms into consumer contracts in respect of goods and services as follows:

- that goods will be of 'satisfactory quality'*
- that services will be performed with 'reasonable care and skill'*

It is important to note that whether the product is characterised as a medical procedure or not, what Ms C purchased is a complex product. It is something which involves an invasive process and possible complications and side effects involving the human body. There also appear to be several variables as to whether a consumer will receive particular results. Therefore, my starting point is that it is extremely difficult for me to determine if the gastric balloon was faulty, or if the consultation and procedure was carried out without reasonable care and skill without the input of an appropriate expert (I note that in this case there is no expert evidence).

In the absence of an expert report I have considered if anything clearly points to a breach of contract here. I note the evidence shows that Ms C had the balloon removed early and the reasons she gives to the supplier for this are not losing weight, still feeling hungry and also suffering from 'various unpleasant clinical symptoms'. However, in itself this doesn't persuade me the balloon is clearly faulty or that the procedure was not carried out with reasonable care and skill.

In coming to this conclusion I note that although the supplier agreed to remove the balloon it doesn't appear to be an admission that the goods are defective or improperly inserted. Furthermore, considering the express terms and conditions of the contract I note these cover the risk of complications and side effects including a possible early removal of the balloon. Therefore, having the balloon removed early does not necessarily mean the balloon is faulty or inserted without reasonable care and skill – it appears accepted that certain individuals might not get on with the treatment and that a refund will not be paid in these circumstances.

Furthermore, even if I were to agree that Ms C did not receive the weight loss results she was expecting (and that isn't clear) this does not automatically lead to a conclusion that the balloon was faulty or that the procedure was not carried out with reasonable care and skill according to the standards in that particular industry. I note that along with the information about risks and complications there appear to be other variables which will influence the success of results including whether or not individuals have followed certain aftercare requirements. Furthermore, looking at the signed contract and promotional documents there are no express terms I can see which entitle Ms C to a refund if she is not happy with the results.

In summary and noting the complexity and possible variables here I am unable to fairly say there is a breach of contract by the supplier in respect of the implied terms regarding the quality of the product or the way the procedure was carried out. Nor do there appear to be any express terms of the contract which entitle Ms C to a refund here.

I understand this will come as a disappointment to Ms C and know how strongly she feels about the treatment, however, I am not an expert in these products, so it is difficult for me to conclude there has been a breach based on the information I have. It is also worth noting that even if Ms C were to obtain an expert report now it does not guarantee that I could say Barclays should refund her in any event. I note this being mindful of the passage of time since the treatment and the possible challenges around gathering evidence and cross examining witnesses about a complex treatment like this at this stage - something which is arguably better suited to a court than an informal dispute resolution service.

Misrepresentation / misdescription

I have considered whether the supplier told Ms C something that was false or made some kind of guarantee that would contractually entitle her to a refund.

Ms C says the supplier told her she would lose 80% of the weight in the first 3 months after insertion. She has essentially said what the supplier told her was a guarantee of results which turned out to be untrue.

I don't have recordings of the conversations Ms C had with the supplier. This does not mean I have discounted what she has said she was told, but I have factored this against the paperwork and correspondence she was provided in order to decide what is most likely to have occurred here.

In doing so I note that:

- the 'overview' document Ms C refers to provides illustrations of the different options for weight loss and includes wording stating that 'outcomes for patients vary just like the causes for being overweight or obese vary from person to person';*
- this document and other documentation Ms C has referred to regarding projected results uses terms like 'average' and 'estimated' to qualify matters; and*
- the signed contract has no guarantee of losing weight and details the risks and complications with the treatment including other variables for weight loss including following certain requirements of the plan.*

So overall, I am unable to conclude that Ms C was given some kind of unequivocal guarantee verbally or otherwise by the supplier when the paperwork points to results being variable and not guaranteed.

I also note that even if I were able to conclude (which I am not) that the supplier gave Ms C a guarantee of results or I accepted that the term 'average' meant more than 'zero weight loss' (as Ms C has claimed) it isn't clear what results Ms C did actually achieve or could have achieved in any event.

In conclusion, based on the evidence I have, I can't fairly conclude that the purchase was likely misrepresented by the supplier, or it made contractual promises that were not delivered on.

Overall, I don't think there is persuasive evidence of a breach of contract or misrepresentation by the supplier leading to a loss by Ms C. So I don't consider it is fair and reasonable to say that Barclays should have upheld her Section 75 claim.

Chargeback

Raising a chargeback is a way that Barclays can try to recover money that was paid on the card. However, it is not guaranteed to succeed and is governed by particular scheme rules. I have considered the circumstances of this case alongside the requirements of the chargeback scheme.

It isn't entirely clear what dispute reason code Barclays used here – but it seems likely it used that relevant to goods/services being not as described or defective. In this case it appears that Barclays did attempt a chargeback twice. But these were defended by the supplier on the basis that there was no guarantee of weight loss success in the contract.

I think it is debatable whether Barclays would be expected to do more here considering the defence raised and the overall nature of the dispute. Even if I were to accept that Barclays could have pushed the matter to the arbitration stage I think that considering the lack of

expert evidence, the terms and conditions and the nature of the product it is difficult for me to say that the card scheme would have likely ruled in Ms C's favour here.

Customer Service

I agree that Barclays's customer service could have been better during the handling of the claim. Ms C has explained that during calls with the claims team she was treated in a rude and unprofessional way. And that she was misled to believe that her claim was not covered under Section 75 when it is.

I have been sent two call recordings which I believe are from 27 April 2022 of Ms C speaking to one of the Barclays Section 75 team about her claim. In these Ms C is given somewhat misleading and unclear information by the agent about whether she is able to make a Section 75 claim. The agent, particularly in the first call could have handled things better in my opinion. Ms C has mentioned terms like 'hostile' and 'abusive' when discussing the calls she had with Barclays claims team. My perception is that these terms do not fit what is evident on these calls I have heard – however, I do think the patience and temperament shown by the call handler could have been better and I accept the way things were handled would have been upsetting for Ms C and could have been avoided. I also note from these calls that it appears Barclay's chargeback process and the nature of the temporary credit was not initially made clear to Ms C causing her additional confusion and frustration.

Ms C says that she had several calls with different people in the claims team where she was given misleading information and treated poorly. It isn't clear to me if this is the case as Barclays appears to have only two call recordings with the same handler – but I am prepared to accept that it is likely other members of the claim team would have given Ms C similarly misleading information about whether her claim is covered by Section 75 around the time particularly as the evidence suggests that colleagues in that department would be following the same line of reasoning to the agent on the calls I have heard.

Ms C also says that she had to resend a letter to Barclays when it didn't respond and then told her it didn't have it – it seems from what Barclays has told us that it went to a different department initially. However, it isn't clear the reason for this and if it was because Ms C addressed it to the wrong department. But on the face of it Barclays should have been aware it had received a letter from Ms C when she called in and having to post it again would no doubt have added to her frustration.

Ms C has explained the impact of the way things were handled and the distress it has caused. It appears that a lot of the distress Ms C had with the claims team naturally stems from it not upholding her claim– however, there are things that could have been explained more clearly and in a different way. I do note that Ms C has received an apology for the way things were handled and £50. However, looking at our scale of awards for distress and inconvenience I think that the impact of the avoidable distress particularly in relation to the phone conversations warrants increased compensation. I think it fair that Barclays add an additional £50 for distress and inconvenience to take the overall compensation figure up to £100.

My provisional decision

I partly uphold this complaint and direct Barclays Bank UK PLC trading as Barclaycard to pay Ms C £50 in additional compensation.

I asked the parties for their responses.

Barclays accepted the provisional decision.

Ms C did not accept the decision. In summary she says:

- The supplier was very persuasive during the sale, said several misleading things to her and provided testimonies to show the success it had for other customers – this is misleading and contrary to advertising standards around weight control and slimming and a breach of consumer protection law including the Consumer Rights Act 2015 and Consumer Protection from Unfair Trading Regulations 2008.
- The supplier told her she would lose 80% of her weight in the first 3 months and said the treatment compared more favourably to that available on the NHS.
- At the time she was nervous about the risk presented by the pandemic to those overweight and there was no vaccine available at the time – sharing her fears about this with the supplier led to it persuading her further.
- The supplier took a deposit a couple of days before it presented the terms and conditions.
- The balloon did not give any weight loss as claimed and there were some side effects like hunger. Despite co-operating with the supplier it failed to put things right contrary to her consumer rights. Her requests to speak with a doctor or dietitian were ignored.
- The supplier was aware that she wanted the balloon removed due to it not performing as claimed – which contradicts my provisional finding that the supplier agreeing to remove the balloon is not an admission it was defective or improperly inserted. Her balloon was not removed due to complications like intolerance and the supplier was aware of her request for a refund but did not dispute it until after the balloon was removed.
- The supplier failed to follow the manufacturer's instructions for the balloon which means it failed under its responsibilities in consumer law.
- She does not agree that this case is complex – any customer should expect the service or product to be as described whether it is a medical procedure or not.
- The supplier is a private company that makes money through selling this product while the NHS provide procedures for free that work – it is inconceivable that a consumer would agree to pay to have a balloon inserted which the supplier states might not provide results.

Ms C also provided some supporting information including an 'Early Removal Warranty' and what she says is information from the manufacturer about the balloon.

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.

Ms C has asked that I consider all the evidence and not just the terms and conditions of the supplier. For clarity I have taken into account all the evidence submitted. I might not comment on everything raised but that is not meant as a discourtesy here – it simply reflects my role in resolving complaints informally and as an alternative to the courts. I have focused

on what I consider central to this complaint.

I thank Ms C for her recent submissions. Overall, they have not persuaded me to depart from my provisional findings (as stated above). What Ms C has sent in I consider to largely be a repetition of her previous submissions which I have already addressed – so I don't consider it necessary to go into great detail here. However, I will deal with some of the key issues arising from Ms C's response as follows:

I note Ms C considers that this is not a complex case. However, I respectfully disagree. I am not a medical professional or expert on gastric balloons or the complications that can arise from their insertion. As I have said the process involves the insertion of a device into the body and the conduct of medical professionals, while the information which Ms C has recently submitted (which she says is from the manufacturer of the device) only goes to further underline the complexities and variables at play here.

Furthermore, there are accepted risks that apply in the healthcare industry. Which makes it more difficult to say in my role as an informal dispute resolution service that this product is faulty or the service was not provided with reasonable skill and care. This is compounded where there is no expert evidence.

While I appreciate Ms C's own view on why the balloon was removed I note there is no expert evidence supporting these claims. I don't see where the supplier has accepted that the balloon was faulty or badly installed or promised a refund. Ms C requested urgent removal of the balloon and this is what the supplier did – but I don't think Ms C expressing her opinion that the balloon was faulty prior to removal shows this is an accepted fact or contradicts my provisional findings.

I also note that the 'Early Removal Warranty' which Ms C has shown (but I understand she did not take out) states specifically that early removal doesn't occur because of any failure in care but it's a complication that can happen to anyone. Which goes to underline that early removal in itself is not a clear indicator of wrongdoing by the supplier.

Further uncertainty and complexity are added here because on face value it appears the balloon was removed due to the side effects Ms C described to the supplier as 'various unpleasant clinical symptoms' including severe discomfort, bowel problems and sickness.

So while I recognise Ms C's strength of feeling and have considered her testimony I am unable to fairly conclude Ms C did not get what was described, received a faulty product or a service that was carried out without reasonable care and skill. Nor is there persuasive evidence that particular aspects of the contract that Ms C was due were not provided to her.

I note Ms C has made claims about what the supplier told her at the point of sale and how misleading she considers this to be. It is important to note that while I have taken into account what she has said about misleading advertising my focus here is considering her Section 75 claim against Barclays for breach of contract or misrepresentation. In that respect, I consider it is difficult to conclude that the supplier made false claims based on the evidence I have. As I have previously explained - the claims about outcomes which I have seen appear to be qualified in some way.

Furthermore, and in any event, putting aside any qualification of claims – there is still the question of how to assess the truth of any particular claim made to Ms C considering the complexity and variables I have already described. As I have indicated, I don't know what results she actually achieved or were realistically achievable taking into account the intervening impact of side effects and early removal.

I know Ms C has pointed out that she paid the deposit before signing the contract terms and conditions. But it appears she did ultimately agree to these terms and the risks and variables of the treatment appear to be set out fairly clearly here. Ms C in her own testimony has also stated that the supplier offered her the optional early removal warranty – which appears related to the accepted risk that in some circumstances the balloon might fail.

I note Ms C questions why anyone would agree to a private procedure that might not work when the NHS can provide it for free (and which she says will work). However, I don't think medical procedures are guaranteed to work wherever they are provided. And I think there are various reasons that people fund treatments privately. So I don't think what Ms C has submitted in this respect persuades me there is clearly a breach of contract or misrepresentation by the supplier here.

In respect of its liability under Section 75 I don't consider Barclays should have done more here with Ms C's claim. Nor, as I have said before do I consider it should have done more in respect of chargeback. I do think it should pay more for its customer service – but I know that is significantly less than what Ms C was hoping to recover here.

I know Ms C feels extremely strongly about this matter and I have considered her case carefully. I am sorry to hear about her circumstances and her disappointment in the treatment. She does not have to agree with me and can reject my decision if she wishes. She is free, if she wishes to take legal advice as to any other avenues she might be able to pursue her claim against the supplier – such as court.

Putting things right

Barclays should pay the increased compensation for its customer service based on my provisional findings. However, based on my reasoning here including my provisional findings (as copied above) I don't consider it fair and reasonable to direct Barclays to refund Ms C for the treatment she purchased.

My final decision

I partly uphold this complaint and direct Barclays Bank UK PLC trading as Barclaycard to pay Ms C £50 in additional compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 25 July 2023.

Mark Lancod
Ombudsman