

The complaint

Mr W says Barclays Bank UK PLC trading as Barclaycard ('Barclays') has unfairly declined a claim he made under section 75 of the Consumer Credit Act 1974 ('CCA').

What happened

In 2015, Mr W paid £5,101 to buy a holiday club membership from a company I'll call 'Business 1'. (Although Mr W purchased the membership with another person, the credit card account is in his name only. This means that he's the only eligible complainant.) He made two separate payments: he paid £1,021 on 6 November 2015 and he paid £4,080 on 23 November 2015. He used his Barclays credit card account to make both payments. However, the credit card payments weren't made to Business 1. Instead, they were made to a different business: 'FNTC'.

In 2021, a professional representative ('PR') – acting on Mr W's behalf and instructions – wrote to Barclays to make a claim under section 75 of the CCA. The letter of claim said Business 1 had misrepresented the membership to Mr W, and had sold the membership in a way that was in breach of certain regulations. It also said the terms and conditions were unfair. It said Barclays was legally answerable for the misrepresentations under section 75 of the CCA. It also said there was an unfair relationship between Barclays, as creditor, and Mr W, as debtor.

Barclays declined the claim. It said there wasn't a debtor-creditor-supplier agreement ('DCS Agreement') between Mr W, Barclays and Business 1 because the payments had been made to FNTC. The existence of such an agreement is an essential element of any claim under section 75 of the CCA.

PR wrote to Barclays to explain why, in the circumstances, it didn't think the payment to FNTC made a difference and maintained that there was a DCS Agreement between Mr W, Barclays and Business 1.

When Barclays didn't change its position, PR referred the complaint to our service.

One of our investigators didn't think it was unfair for Barclays to decline the claim. She didn't think there was a DCS Agreement in this case.

PR asked that an ombudsman make a final 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 considering what is, in my opinion, fair and reasonable in all the circumstances of the case, I'm required by DISP 3.6.3 R of the Financial Conduct Authority ('FCA') Handbook to take into account:

‘(1) relevant:

- (a) law and regulations;
- (b) regulators’ rules, guidance and standards;
- (c) codes of practice; and

(2) ([when]) appropriate) what [I consider] to have been good industry practice at the relevant time.’

When PR first wrote to Barclays, it specifically alleged – for various reasons – that there was an unfair relationship between Barclays, as creditor, and Mr W, as debtor. This is an indirect reference to section 140A of the CCA. I’ve therefore considered this complaint with section 140A in mind – as well as section 75.

Below, I’ve set out the relevant law.

The law

Section 75 protects consumers who buy goods and services on credit. It says:

‘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.’

Section 12(b) says that a 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 falls within section 11(1)(b) if it’s a regulated consumer credit agreement that ‘finance[s] a transaction between the debtor and a person (the “supplier”) other than the creditor’.

Section 140A says:

‘(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—

- (a) any of the terms of the agreement or of any related agreement;
- (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
- (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).’

Section 140C(4) says the reference to a ‘related agreement’ means a ‘linked transaction in relation to the main agreement’. And section 19 says a ‘linked transaction’ is:

‘A transaction entered into by the debtor...with any other person (“the other party”)...in relation to an actual or prospective regulated agreement (the “principal agreement”) of which it does not form part if—

- (a) ...
- (b) the principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement;
- (c) ...'

Put simply, for a claim under section 75 and/or section 140A to get off the ground, the consumer must first show that there is a DCS Agreement.

Was there a DCS Agreement between Mr W, Barclays and Business 1?

In a letter to Barclays dated 6 December 2021, PR explained in some detail why it thinks there was a DCS Agreement between Mr W, Barclays and Business 1. I disagree and I'll explain why.

On 10 October 2022, the High Court handed down its judgment in the appeal of *Steiner v National Westminster Bank plc* [2022] EWHC 2519. The facts of that case are very similar to this complaint.

In *Steiner*, a husband and wife had entered into an agreement with a timeshare provider to purchase from it the right to participate in a timeshare scheme for £14,000. The husband, Mr Steiner, had used his NatWest credit card account to pay the full amount. However, the payments weren't made to the timeshare provider. Instead, they were made to FNTC. The estate of the late Mr Steiner brought a claim against NatWest under sections 56, 75 and 140A of the CCA. However, the claim was dismissed at first instance on the basis that the payment to FNTC meant there wasn't a DCS Agreement. The appeal to the High Court was dismissed for essentially the same reason.

Given the obvious similarities between *Steiner* and this complaint, I think a court would reach the same conclusion and say there wasn't a DCS Agreement in this case and, consequently, dismiss any claim under section 75 of the CCA. Likewise, a court could only consider whether the agreement between Mr W and Business 1 affected the fairness of the debtor-creditor relationship under section 140A if there was a DCS Agreement, which there wasn't in this case. PR hasn't alleged that there was an unfair relationship for any other reason.

In response to our investigator's assessment, PR said it wasn't fair to strictly apply *Steiner* to this case. It said I should, as I can, depart from the relevant law, to avoid an unfair outcome. PR says there was no reason for Mr W to suspect that he wasn't paying Business 1 directly or that he wouldn't have the statutory protections afforded by the CCA. And, put simply, it says the *Steiner* judgment was wrong.

As I've explained above, I must determine this complaint by reference to what I think is fair and reasonable in all the circumstances of this case. PR may think that the High Court erred in *Steiner*, but unless and until another court agrees, the judgment must be construed as an accurate statement of the relevant law. And I don't think it's unfair to apply it in this case. On the contrary, I think it would be unfair to say Barclays is answerable for any alleged wrongdoing by Business 1 when the law doesn't impose such a liability.

My final decision

For the reasons given, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 19 April 2024.

Christopher Reeves
Ombudsman