DRN-4525072

The complaint

Mr L has complained that Barclays Bank UK Plc trading as Barclaycard didn't fairly or reasonably deal with a claim under the Consumer Credit Act 1974 ("CCA") in relation to a holiday product bought using his credit card.

What happened

In October 2015, Mr L and Mrs L purchased holiday club membership from a business I'll call "Business D". It cost £10,501 and it was paid for by Mr L – in part – using his Barclaycard credit card[1].

The purchase agreement entered into by Mr L was made between him and Business D. However, the credit card payment of £1,320.20 wasn't made directly to Business D, rather it went to a different business I'll call "Business F".

In August 2021, using a professional representative ("PR"), Mr L made a claim to Barclaycard under section 75 and section 140A of the CCA. The reasons for the claim are familiar to both sides so I don't intend to repeat them in detail here. But, in summary, Mr L said Business D made misrepresentations at the time of sale and that, under section, Barclaycard was jointly responsible to answer. He also said there was an unfair debtor-creditor relationship as set out in section 140A CCA.

In October 2021 Barclaycard rejected the claim on the basis that the terms and conditions of the holiday club membership are clear in saying that membership wasn't an investment, and it is also clear that there was no guarantee maintenance fees wouldn't increase.

As the two sides couldn't resolve things between them, a complaint was referred to the Financial Ombudsman Service.

One of our investigators looked into matters and issued their findings in December 2023. In short, our investigator said there wasn't the right arrangement in place to make such a claim because Mr L hadn't used his credit card to pay Business D directly.

PR disagreed with our investigator's findings. And, as an informal resolution couldn't be reached, the complaint was referred for an ombudsman's 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.

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[1] Although the holiday club membership was in the names of Mr and Mrs L, as the credit card used was in Mr L's name, only he can make this complaint. With that in mind, I'll refer to Mr L throughout the remainder of this decision.

When doing that, I'm required by DISP 3.6.4R of the Financial Conduct Authority's Handbook to take into account the:

"(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."

Section 75(1) CCA 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"

Section 12(b) CCA states that a debtor-creditor-supplier ("D-C-S") 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".*

The upshot of this is that there needs to be a D-C-S agreement in place for the lender (Barclaycard) to be liable to the borrower (Mr L) for the alleged misrepresentations of the supplier (Business D). But, on the face of it, there was no such arrangement in place at the relevant time as Business D wasn't paid directly using the credit card, rather the payments were taken by Business F.

The law in this area was clarified by the High Court in *Steiner v. National Westminster Bank plc* [2022] EWHC 2519 (KB) ("Steiner").

The late Mr Steiner ("the Estate") paid for a timeshare provided by Club La Costa Vacation Club Ltd ("CLC") using his NatWest credit card. So, for the purposes of s.11(1)(b) of the CCA, NatWest was the creditor, the late Mr Steiner was the debtor and CLC was the supplier. But the payment of £14,000 was in fact taken by FNTC.

The Estate initially argued that the right arrangements were in place because there was a Deed of Trust between CLC and FNTC under which CLC would receive payment. The Estate's claim sought to demonstrate that the credit agreement was made "under pre-existing arrangements", or in contemplation of "future arrangements" and extended to CLC under section 12(b) CCA.

But the High Court held that arrangements could not be "stretched so far as to mean that NatWest made its agreement with the late Mr Steiner under the Deed of Trust (of which it was presumably unaware) as well as under the Mastercard network." Therefore, the existence of the Trust Deed didn't help to create a valid D-C-S agreement for the purposes of the CCA.

The circumstances of Mr L's case are very similar to the circumstances in Steiner. In this case, Business F took payment for Mr L's purchase of Business D's holiday club memberships. So, based on the judgment in Steiner, I think a court would come to a similar conclusion and say that there was no D-C-S agreement in place and, in turn, no valid section 75 claim.

I say this because it seems to me to be difficult to argue that Barclaycard entered into the credit agreement with Mr L under, or in contemplation of, any arrangements other than the relevant card network. And while there may well have been arrangements between Barclaycard and Business F (the relevant card network) and arrangements between Business F and Business D (the Deed of Trust), as the High Court recognised in Steiner in "the natural and ordinary meaning of the words used in section 12(b) of the Act does not extend to saying that NatWest made its agreement with Mr Steiner under both the Mastercard network and the Trust Deed (or under both the Mastercard network and any other arrangements which parties to the Mastercard network might have with third parties)".

I've also thought about the claim made under section 140A CCA and whether a court would conclude the relationship was unfair. However, a court could only consider how the agreements between Mr L and Business D affected the fairness of the debtor-creditor relationship if there was a valid D-C-S agreement in place. And, as already explained, I don't think such an arrangement was in place.

Under section 187 of the CCA, there are also ways in which there might exist a D-C-S agreement even if a supplier isn't paid directly using a credit card. For example, if Business F and Business D were 'associates' as defined by section 184 of the CCA, there might have been the right arrangement in place at the right time. I haven't seen anything to persuade me that's likely to have been the case here.

With this in mind, I don't think the CCA applies to the claim PR advanced on Mr L's behalf.

In response to our investigator's findings, PR said that Mr L *was not present at the time of the transaction and in good faith had given his credit card details to Diamond Resorts on the assumption that the payment was being made directly to themselves*. PR also said that Steiner should not apply because Business D – who were regulated to arrange the payment and were therefore acting as Barclaycard's representative – misled Mr L.

I've seen the three-page purchase agreement signed by Mr L. On the first page it says the payment of £1,320.20 was due on the 3 November 2015 and it went on to say payments would be made to Business F.

I accept Mr L was not present at the time of the transaction. However, I think Mr L was told the payment would be taken by Business F, albeit that I accept he didn't know what this meant in terms of this rights under the CCA. But the issue here isn't about Mr L's knowledge, rather it's whether the technical legal arrangements are in place for Mr L to be able to make the claims he has done under the CCA. And, after the judgment in Steiner, I don't think the right arrangements were in place.

I've considered PR's argument that the holiday club membership was an unregulated investment scheme ('UCIS') as defined by section 235 FSMA and, therefore, Barclaycard (through its agent, Business D) have funded a UCIS by providing finance to Mr L. PR have gone on to say that, therefore, the *Barclaycard loan is illegal.*

I don't think this is right for two reasons. Firstly, it has been recently held in a court judgment that a very similar type of membership did not amount to a UCIS. I can't see why Mr L's membership could amount to a UCIS, given the findings the court reached.

Secondly, the credit agreement in question was for a credit card, not a loan. And I don't think that agreement be set aside just because an agreement that may have been funded by the card could be a UCIS.

Therefore, I don't think Barclaycard needs to answer the claims made.

Finally, I have considered what PR has said about the affordability of the lending. In its letter of claim, PR raised a number of concerns on this point. In summary, PR said:

1) Barclaycard failed to carry out a creditworthiness assessment to see if [Mr L] can afford the loan; and

2) Barclaycard used self-certified income and expenditure in carrying out the affordability assessment…[it] has not carried out sufficient due diligence in accordance with CONC 5.3.1G(4); and

3) Barclaycard did not check if [Mr L] could afford repayments from their pension income.

I am satisfied the scope and substance of this complaint centres around the purchase of the holiday club membership in October 2015. PR have referred to a loan, but Mr L used a credit card, the credit agreement for which was in place before the purchase. So, I don't think there was any need for Barclaycard to carry out the checks PR alleges it should have done at the time Mr L purchased the holiday club membership.

In summary, for the reasons I've explained, I won't be asking Barclaycard to do anything further.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 26 March 2024.

Ross Phillips
Ombudsman