DRN-4529756

The complaint

Mr S complains that Barclays Bank UK PLC, trading as Barclaycard, has not met its obligations in regard to a transaction he made on his credit card for a Timeshare.

What happened

In November 2011 Mr S made a part payment for a timeshare agreement using his Barclays Bank UK PLC, trading as Barclaycard, credit card (Barclays for short) to do so. His contract for the Timeshare was with a company I shall call 'Firm C'. His credit card statement from the time shows he actually paid a different company, a trustee company, which I'll call 'Firm F'.

Later, unhappy with timeshare arrangement he had, Mr S took his dispute to Barclays, pointing to its obligations under the Consumer Credit Act 1974 (CCA for short) and seeking redress for the timeshare he'd paid for. But it chose not to refund him. So he brought his complaint to this service.

Our Investigator considered the matter and felt that Barclays hadn't treated Mr S unfairly. Our Investigator's rationale followed a hight court decision on similar circumstances. Mr S and his representatives didn't agree with the investigator's position. So this dispute came to me for 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.

I should make clear that this decision is not about Firm C or Firm F, or any other parties involved with Mr S' timeshare arrangements. This is because these companies aren't within the jurisdiction of this service for consideration of complaints regarding the considering of claims under the CCA. This decision is solely about what Barclays did or didn't do, in relation to its obligations in relation to Mr S in its capacity as his provider of credit through his credit card account.

Mr S doesn't contest that he made the transaction originally, or that it was applied incorrectly to his account. So I think Barclays treated the transaction correctly at the time. And he didn't take the dispute regarding his timeshare to Barclays for some time after the transaction happened. So I'm satisfied the only other way Barclays could have looked at this dispute regarding this Timeshare is under the CCA.

So I now consider the crux of this dispute, which is whether Barclays has treated Mr S fairly in regard to the issue of who Mr S paid and who his contract for the Timeshare was with. When doing so, I'm required by DISP 3.6.4R of the Financial Conduct Authority's Handbook to consider 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."

The CCA introduced a regime of connected lender liability under Sections 56, 75 and 140A that afforded consumers ("debtors") a right of recourse against lenders ("creditors") that provide the finance for the acquisition of goods or services from a third-party merchant (the "supplier").

However, in order to engage the connected lender liability under Sections 75 and 140A one of the pre-requisites is the existence of a relevant debtor-creditor-supplier agreement (often shortened to 'DCS Agreement'). And in light of the High Court case of Steiner v National Westminster Bank plc [2022] EWHC 2519 ('the Steiner case'), I'm not persuaded there was a DCS Agreement between Mr S, Barclays, and Firm C. And as that means that Barclays didn't and doesn't have any responsibility for the CCA claims in question, I have decided it doesn't need to do anything more than it has done here. I say so for these following reasons.

A DCS Agreement is defined by Section 12(b) of the CCA as "*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 […]".*
Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "*finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly*."

In the Steiner case, the High Court looked at the application of Sections 56, 75 and 140A of the CCA and considered the circumstances in which the necessary arrangement can be said to exist. I should note that not only are the legal issues in Steiner similar to those in Mr S' case, but I should add most of the parties are the same also. The late Mr Steiner purchased a timeshare from Firm C for £14,000 using his credit card, which had been issued by National Westminster Bank PLC ('NatWest'). So, in accordance with the CCA, NatWest was the "creditor", the late Mr Steiner was the "debtor" and Firm C was the "supplier".

But rather than paying Firm C directly, the £14,000 payment was made by the late Mr Steiner (using his NatWest Mastercard) to Firm F – the Trustee under a Deed of Trust to which Firm C was a beneficiary. As a result, the estate of the late Mr Steiner (the 'Estate') had to demonstrate that the Credit Agreement fell within the meaning of Section 12(b) of the CCA i.e., that it was made "*under pre-existing arrangements, or in contemplation of future arrangements*" between NatWest and Firm C. But the High Court wasn't persuaded the Estate had done that. And in reaching that conclusion, the 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*."

The central question in Steiner and here, therefore, is not whether "arrangements" existed between the creditor and the timeshare provider (Firm C) when the Timeshare was sold. Instead, the question posed by Section 12(b) is whether the relevant credit agreement was made by the creditor (Barclays) under pre-existing arrangements, or in contemplation of future arrangements, between it and the timeshare provider (Firm C).

In other words, the starting point for the purposes of Section 12(b) is the date that Barclays and Mr S entered into the Credit Agreement – rather than the Time of Sale of the Timeshare. Yet, in the absence of evidence to the contrary, it is difficult to argue that Barclays issued Mr S with his credit card and entered into the Credit Agreement relating to that card under, or in contemplation of, any arrangements other than the relevant card network here.

And while there may well have been arrangements between Barclays and Firm F (that is through membership of the card network here) and arrangements between Firm F and Firm C (the 'Trustee Supplier Arrangement'), as the High Court recognised in Steiner, the natural and ordinary meaning of Section 12(b) did not extend to saying that Barclays entered into the Credit Agreement with Mr S under both the relevant card network and the Trustee-Supplier Arrangement (or under both the relevant card network and any other arrangements which parties to that network might have had with third parties) – nor could Section 12(b) be interpreted as saying that Barclays had entered into the Credit Agreement with Mr S in contemplation of the Trustee-Supplier Arrangement (or in contemplation of any other arrangements which parties to the relevant card network might have had with third parties).

I recognise that the judgment in Office of Fair Trading v Lloyds TSB Bank Plc [2007] QB 1 ('OFT v Lloyds TSB') by the Court of Appeal is authority for the proposition that there can be arrangements between a creditor and a supplier without there being a direct contract between them. But a significant feature of the factual situation addressed in OFT v Lloyds TSB was that all parties to the card network in question in that case were party to the same network, whether or not they had direct contractual relations with one another. That network, which had rules, constituted 'arrangements' between all of its members. So, it was said by the High Court in Steiner that OFT v Lloyds TSB isn't authority for the proposition that, if there are arrangements between a creditor and X, and if there are also arrangements between X and a supplier, then it necessarily follows that there are arrangements between the creditor and the supplier.

Under Section 187 of the CCA, there are also ways in which there might exist a DCS Agreement even if a supplier isn't paid directly using a credit card. For example, if the Firm C and Firm F were 'associates' as defined by Section 184 of the CCA, there might have been the right arrangement in place at the right time. But I haven't seen anything sufficient to persuade me that's the case here. And although Mr S' representatives may have speculated about the relationship between Firm F and Firm C, they haven't demonstrated the definition of 'associates' as set out in section 184 is met here through any evidence that they've supplied to this service.

Overall, therefore, given the facts and circumstances of this complaint, I don't think I it would be fair or reasonable to find that Barclays was and is responsible for the Firm C's alleged failings at the Time of Sale, when the law doesn't impose such a liability on Barclays in the absence of a relevant connection between it and Firm C.

In response to our Investigator's assessment of the matter Mr S's representatives have made representations on the matter. In my view these boil down to the following arguments:

1) That this service can consider the law and is free to depart from it by giving reasons for doing so
2) Following the Steiner ruling is not fair or reasonable
3) That had this service decided the matter earlier (that is before the Steiner case) it would have upheld the case.
4) That the time taken in dealing with this complaint is due to 'bad faith' and contrary to their human rights.

My observations to these arguments (in order) are as follows.

I am well aware of my remit as an Ombudsman at the Financial Ombudsman Service and I'm well aware I am free not to follow the law where I feel it fair and reasonable to do so by giving reasons for doing that. Just because I can do so does not mean either that I should or that I must do so.

The test here is to consider how Barclays did (or should have) considered Mr S's claim to it under the CCA. In order for such a claim to be successful the prerequisites of the CCA need to be met before breach and misrepresentation can be considered. One such prerequisite is that a DCS arrangement is made out, as I've explained. Here I'm satisfied it isn't for the reasons I've already given. And although there is an obligation on Barclays to consider the claim fairly there is also an onus on the claimant (Mr S) to make out his claim to Barclays. And there isn't any persuasive arguments made by Mr S or his representatives about where Barclays has failed in its approach or indeed where the Investigator erred in theirs. It should also be remembered that Barclays asked Mr S for further evidence when he first raised the matter with them, and that evidence wasn't forthcoming.

And as a DCS arrangement hasn't been made out to Barclays, it isn't obliged to consider the claim further under the CCA. And as such Barclays hasn't treated Mr S unfairly in this regard. It does not necessarily follow that because a complainant has lost out that the business must have acted unfairly despite the numerous representations of Mr S' representatives.

Mr S' representatives argue that had this service decided the case earlier (pre-Steiner) it would have decided differently. I'm not persuaded by this, as previous case law in this area had received negative legal commentary and indeed in the Steiner case the judge made clear his concerns about that previous case law's helpfulness. So it is, at least, possible any decision by an ombudsman prior to Steiner on these facts could have used the same arguments as the judge in Steiner made to not to be bound by earlier case law (as allowed in our remit). And in any event, this argument by Mr S's representatives is not a persuasive reasoning to set aside the evolving case law now in place from my decision making now as that wouldn't be reasonable or fair.

Mr S representatives argue that this service's considerations of the issues around timeshare were in bad faith and contrary to Mr S' human rights. This service has a responsibility to both complainants and respondents and the industry more broadly to consider broad issues such as Timeshare carefully and to take into account the law in order to ensure the approaches it takes towards such thematic industry issues is fair and reasonable. As Mr S' representatives are aware time taken has been in relation to the consideration of this case and of relevant court cases and indeed judicial review on the subject of timeshare to ensure fairness. I note that no persuasive evidence to support these arguments has been provided by Mr S' representatives. I am not persuaded by these comments by Mr S' representatives by some margin, due to its lack of supporting evidence and that Mr S' representatives are likely to be aware of the relevant legal cases and considerations of these bearing in mind they represent themselves as working in the timeshare area and have (by the evidence they have themselves submitted here) been involved in lobbying some relevant parties on this very matter during the period concerned. I am not persuaded Mr S' case has taken the time it has due to bad faith nor am I persuaded it's a breach of his human rights.

In summary it is my decision that Mr S's complaint should not be successful for the reasons given. I do not consider Mr S' representatives' arguments here persuasive.

My final decision

I do not uphold this complaint against Barclays Bank UK PLC, trading as Barclaycard. It has nothing further to do in this regard.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 14 June 2024.

Rod Glyn-Thomas
Ombudsman