

complaint

Miss J is unhappy that Barclays Bank Plc (trading as Barclaycard) has rejected a claim she made under section 75 of the Consumer Credit Act 1974, and hasn't pursued a chargeback claim. She's also unhappy it didn't stop her payment when she made it aware she was disputing the transaction.

background

Miss J used a third party website to reserve accommodation with a hotel for her and a number of friends on 17 April 2017. She told us she entered her Barclaycard details and proceeded with the reservation because the website said "*Reserve. Don't worry – you won't be charged yet!*" and it appeared clear to her no payment would be taken until she confirmed the reservation.

Miss J told us she'd made the reservation on the understanding it was an unconfirmed booking. She expected to receive terms and conditions after reserving so she'd know how long she'd have before confirming and paying for the reservation. And this time would allow her to decide whether the property was suitable.

Miss J said she noticed through her online banking facility that the full amount was showing as a "*provisional payment*" from her account. She also received an email to say the booking was confirmed and non-refundable – something Miss J says she wasn't aware would happen.

Miss J told us on receipt of this email she contacted the third party straight away. She then contacted Barclaycard and was told it had been noted she hadn't authorised the transaction. She said she was also told to try to resolve the matter with the hotel directly, but that the payment wouldn't go through until 21 April 2017. Miss J then cancelled the hotel booking. She told us that she did this so the accommodation could be resold so the hotel wouldn't suffer any financial loss.

The next day, on 18 April 2017, Miss J told us she contacted the hotel directly to try to resolve the issue. She told us she contacted it a number of times by phone and email between this date and 27 April 2017 but didn't receive calls or emails in response.

Miss J said on 20 April 2017, she found the money had been taken from her account. Following a conversation with Barclaycard, she believes it had done something wrong which allowed the hotel to take the money even though the transaction had been disputed. But she was sent forms to complete to allow Barclaycard to look into pursuing a Section 75 or chargeback claim.

Miss J said the hotel refused to return the funds – even though it managed to re-sell the room booking at a higher price. She also said it has shifted responsibility to the third party website. The third party website has said it's up to the hotel to decide whether to return the money or not.

Barclaycard investigated Miss J's dispute. It said it was unable to pursue Miss J's claim further. It said a prepayment of the full amount can be taken at any time after the booking. And once the payment has been taken and the booking is confirmed, the payment is non-refundable.

Miss J told us she held the reservation for less than 24 hours and the hotel hasn't made a loss because of this. She thinks Barclaycard has failed to protect her account after she notified them of this issue. She also thinks it has unfairly rejected her claim under Section 75 and should also have tried to make a chargeback claim. To resolve the complaint, Miss J would like a full refund of the money she paid for the hotel booking.

This complaint was considered by an investigator who didn't uphold the complaint. She didn't think Miss J could make a valid Section 75 claim because of the involvement of the third party website. But she said, even if the complaint could be considered under Section 75, she didn't think there'd been a misrepresentation. She also explained why Barclaycard didn't pursue a chargeback claim. Miss J disagreed so the complaint was passed to me.

provisional decision

I considered the case (in an initial provisional decision) and was also of the opinion that the involvement of a third party website meant the case couldn't be considered under Section 75. And because of this, I didn't consider whether there'd been a breach of contract or a misrepresentation. However, I did reference that the hotel was willing to fulfil the booking, so we *would've* been looking at whether Barclaycard should've pursued a claim for misrepresentation instead. And this misrepresentation would've been based on the way information was displayed on the third party website.

Barclaycard responded to accept my findings. Miss J responded with some further points:

- Miss J asked where in the Act there's mention of an extra person or entity invalidating the debtor-creditor-supplier ("d-c-s") chain. She referenced the Consumer Credit Act 1974 which 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."*
- Miss J doesn't think that I've considered the d-c-s chain correctly and says her understanding of Section 75 is that the questions to be answered are, in order; was there a valid d-c-s chain and then whether there was a breach of contract and/or misrepresentation? Miss J reiterated the meaning of misrepresentation *"an untrue statement of fact or law made by Party A (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to Party B which induces Party B to enter the contract thereby causing Party B loss"* and also said she is pleading breach of contract by the supplier.
- Miss J also provided information to suggest that the hotel involved in this case is no longer trading, since July 2017, because of non-payment of rent.

I put Miss J's final point above to Barclaycard for comment. It said that in the particular circumstances of Miss J's case, it didn't make a difference. This is because Miss J cancelled the booking within 24 hours, so there was no longer a contract to be fulfilled by the hotel.

I went on to consider the case in its entirety with these additional points in April 2018. I said:

"Before setting out my conclusions, I should make clear that it is my duty to resolve complaints on the basis of what I consider to be fair and reasonable. This means that whilst I have taken the relevant law into account I am not bound to follow it. My role is to decide what is fair and reasonable in each case based on the specific circumstances. This means I'm not deciding liability under section 75 of the Consumer Credit Act. I consider that the legislation is relevant law in this instance and I have taken it into account. But my decision and the outcome of this complaint are made by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case."

I appreciate Miss J has had a number of different reasons given for why her complaint hasn't been upheld so far, and I know this must be frustrating. But I'd like to assure Miss J that I've thought very carefully about the points she's raised and these have led me to reconsider my stance on whether there was a valid debtor-creditor-supplier (d-c-s) chain.

was there a valid debtor-creditor-supplier (DCS) chain?

Section 75 can apply where a borrower enters into a transaction financed by a loan as a result of arrangements between the supplier of goods and the lender. In that case, a borrower who has a claim for breach of contract or misrepresentation against the supplier has a "like claim" against the lender.

In this case Miss J is the debtor, Barclaycard is the creditor and the hotel is the supplier. But there's also a third party website which is involved. Where an extra person or entity is involved in the transaction, the chain may be invalidated. This might occur, for example, when payment is made to, or taken by, another party that isn't the supplier. The payment is taken from the creditor but not by the supplier. As such the chain can be broken or incomplete in these circumstances. Initially this appeared to be what happened in this case; however, after further consideration, I consider that Miss J's case is a little different.

The payment was taken via the third party website but, based on Miss J's bank statements, the payment appears to have gone directly to the supplier which neither party has disputed. Looking at the third party website's terms and conditions, it says "By making a reservation through [third party website], you enter into a direct (legally binding) contractual relationship with the Supplier with which you make a reservation or purchase a product or service... From the point at which you make your reservation, we act solely as an intermediary between you and the Supplier..." Therefore, the d-c-s chain appears to be intact.

Given what I've said above, and having reconsidered this, I no longer think the third party website should be considered an additional entity in the d-c-s chain.

was there a breach of contract?

The contract for consideration here is between the hotel and Miss J; and whether the hotel was willing to fulfil the contract it was paid for. The payment made was for accommodation. When contacted about this situation, the hotel said Miss J could make use of her booking or she could change the date and use the accommodation at an alternative time.

Miss J has now provided some information to suggest that the hotel is no longer trading, and hasn't been since July 2017, potentially prior to Miss J's booking. It would appear that Miss J therefore couldn't have proceeded with her booking had she wanted to, and definitely can't now.

But, despite the above, I don't think there's been a breach of contract. I say this because at the time of booking, the hotel was willing and seemingly able to fulfil the booking. Had Miss J kept her booking, gone to the hotel and found she was unable to stay there, I'd agree there had been a breach. But Miss J cancelled the booking within 24 hours. She was no longer expecting to be able to use the hotel (she was just expecting not to have to pay for use of it). The contract with the hotel ceased to exist when she cancelled it. If the hotel had already been repossessed at the time of booking, or prior to Miss J cancelling it, I would also say there'd been a breach of contract. But this doesn't appear to have been the case. So, because of this, I don't think the hotel has breached its contract with Miss J.

was there a misrepresentation?

So the next consideration is around whether there was a misrepresentation. The third party's terms and conditions state the information is the responsibility of the supplier. But the hotel disputed responsibility of the way the website is 'managed'. It says it gives the third party information about its policies; that all bookings are non-refundable and that payment can be taken by it at any time after booking. But, based on what I've seen, I think it's fair to say that the hotel should take responsibility for the information on the third party's website in this case, as its rooms are advertised by the website on its behalf. It is the information on the website that Miss J saw.

Miss J says she thought she was reserving accommodation she didn't have to pay for until she'd had an opportunity for further confirmation. I need to consider whether Miss J was induced to believe this because of untrue statements made to her during the booking process.

I can see Miss J tried to resolve the issue with the hotel and the third party as soon as there was an indication she was going to be charged for the accommodation. I've also seen the e-mails following the reservation to say the full price would be charged if the booking was cancelled. But these points are about what happened after the reservation/booking – after the potential misrepresentation – so I don't think they're relevant for me to consider when looking at whether there was a misrepresentation.

When looking into the accommodation, Miss J says her attention was drawn to where it says "Reserve. Don't worry – you won't be charged yet." But she said when she looked back at the booking page, she could see it said it was non-refundable in a much smaller font.

I've looked carefully at the information we've been given by Miss J, the information from Barclaycard which also attempted to make the booking, and the information we've obtained from going through the booking process ourselves. I can see from the screen shot Miss J gave us that it says "Non-refundable" quite prominently on the page. And, while I recognise it was some time later, I can see from our own attempt to go through the booking process this was also written in a number of other places. I can also see from our own booking attempt, there's a section called "Accommodation Policies" and under this it says the cancellation and prepayment policies vary according to room type so to check the room conditions. It also says under the heading 'Deposit' "The total price of the reservation may be charged any time after booking." So I think it's more likely than not that the wording we saw was similar to what Miss J would've seen and is sufficient to explain that the full price could be taken, at any time, after the booking was made.

Turning next to the part that says "Reserve. Don't worry – you won't be charged yet"; I think the key word here is 'yet'. I think this is in reference to whether Miss J would've been charged by simply clicking the reserve button there and then – and it's saying she wouldn't. So I don't think this is an "untrue statement of fact". However, after this point, she would've had to enter her credit card details. Barclaycard says "You are then requested to input your card details. Its state [sic] the charge will be taken later".

From our own attempts at going through the booking, I can see there are a series of options to 'continue' and proceed to the 'next step'. Barclaycard said that after clicking the initial 'Reserve. Don't worry...' button you were then presented with a next screen with the terms and conditions and more extensive details about the booking. I think it's likely that by the time Miss J entered her credit card details in, she would've been given sufficient opportunity to see the terms and conditions that applied to the booking. And I think she would've been given clear enough information by this point to understand that she was entering into a binding contract to pay for the accommodation.

Miss J says the webpage differs from when she used it, and that there weren't terms and conditions at that time. It's possible it does differ. But at the time we tried the booking process, it had only been a few months since the transaction – and even less time between the booking and Barclaycard attempting the booking. I've spoken to the third party website to see if they can show us how the page would've appeared at the time but was told it's unable to access this. So I have to rely on what's most likely to have happened and the evidence provided.

On balance, I'm not persuaded there was a misrepresentation. This is because Miss J has shown that the website said she wouldn't be charged yet and she's shown us a screen shot that clearly states the booking is non-refundable. The wording does not state that payment will be made on arrival or at check in, nor does it state that there will be another opportunity to consider the matter after a booking is made. From what I've seen, I think it's more likely than not there were further indications the booking would be 'confirmed' by proceeding to enter her credit card details. It seems to that Miss J made a mistake. I think she was provided with sufficiently clear information and payment could be taken at any time after the booking was made. So, based on the evidence I've seen and in connection with my reasoning above, I consider that I cannot safely conclude that there was a misrepresentation by the supplier. As the information provided was clear, I do not consider that it would be fair and reasonable to uphold the complaint and conclude that the information amounts to a misrepresentation.

should Barclaycard have pursued a chargeback for Miss J?

My findings for this question remain unchanged. I've thought about whether Barclaycard should've pursued a chargeback claim for Miss J. A bank doesn't have to raise a chargeback although we generally expect them to unless there's little chance of this being successful. And we would generally expect to see the cardholder has tried to sort things out with the supplier first.

In this instance, Barclaycard has said for the chargeback to be successful it would've needed to see terms and conditions which stated Miss J would've been entitled to a refund if she'd cancelled the booking. But there are no such terms in this instance as the booking was non-refundable. Therefore, the terms on which the booking was made meant that Miss J wouldn't have been entitled to a refund and do not support a chargeback claim. So I'm satisfied Barclaycard didn't act unreasonably by not pursuing a chargeback claim, and looking into a Section 75 claim instead.

should Barclaycard have stopped the payment?

My findings for this question also remain the same. I've listened to a recording of the call between Miss J and Barclaycard when she called to try to stop the payment. The Barclaycard representative explains the payment is pending because it hasn't yet been claimed by the merchant – the hotel - and if it hasn't been claimed by 21 April 2017, it would go back into Miss J's account. But he also says as she's paid by a guaranteed method of payment, Barclaycard can't stop the payment but it can dispute the charge. The representative suggests Miss J speak to the merchant and if she doesn't manage to resolve the issue, she could call back and a dispute would be raised.

The representative told Miss J not to worry because she's informed Barclaycard about the merchant and it can raise a dispute on the transaction for her. I recognise that telling Miss J not to worry may have contributed to her thinking she wouldn't be charged for this transaction. But I think, on balance, the representative was clear the payment wouldn't be stopped by Barclaycard.

Overall, I don't think Barclaycard should've stopped the payment – furthermore, it isn't able to once it's been authorised by the cardholder - and I haven't seen enough clear evidence to persuade me that it told Miss J it would stop the payment. I think Barclaycard made it clear a dispute would need to be raised. And from what I've heard, Barclaycard didn't guarantee the claim would be successful. I don't think Barclaycard said the payment wouldn't be taken before 21 April. And I think it's likely that cancelling the non-refundable booking prompted the payment to be taken immediately. So I don't think Barclaycard has done anything wrong and the evidence doesn't support that Miss J was told the payment would be stopped.

I remain of the opinion Miss J made a genuine mistake – and unfortunately the chain of events has led to her losing a large amount of money. But I am not persuaded that Barclaycard has been unreasonable in the way it has handled Miss J's complaint, or in saying it can't pursue a chargeback claim for her, or uphold her Section 75 complaint."

responses

Miss J disagreed with my provisional decision. In summary, she said:

- She didn't expect to have to pay for the booking as a result of cancelling the accommodation as she was adamant she was entitled to a refund.
- She wouldn't have been able to use the accommodation at another time as the company ceased trading.
- The booking process our investigator went through was different to the one she went through.
- The third party website gave her a refund in December 2017 which she says means that she wasn't provided with the relevant terms and condition and that the booking process was unsatisfactorily unclear. But she still wants to be compensated for the interest and fees imposed by Barclaycard as well as the upheaval.

In response to the last point, Miss J was asked to provide the reason given by the third party website for the refund but she didn't have anything further to add.

Barclaycard agreed with my provisional decision and had nothing further to add.

my findings

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

Having considered everything, alongside the points Miss J has raised most recently, I don't uphold this complaint.

In my provisional decision, I explained that by cancelling the booking, Miss J wasn't expecting to have use of it. But that she also wasn't expecting to have to pay for use of it. I remain of the opinion that the contract with the hotel ceased to exist when she cancelled it – so there wasn't a contract to breach.

There's debate around whether Miss J would've been able to use the accommodation at another time. If she'd arranged to use it on an earlier date – sometime between April and the date it ceased to trade – it's likely she would've been able to. But this was really a gesture of goodwill offered by the hotel and wasn't something she was entitled to. It was a non-refundable booking, and there's nothing to suggest she would've been allowed to change the date. So even if she couldn't have used the accommodation at another time, this doesn't change my decision.

Miss J says the booking process our investigator went through was different to the one she went through. I acknowledge that it's possible it did differ. But I've considered this carefully. For the reasons I gave in my provisional decision, I haven't seen enough to think it more likely than not that there was a misrepresentation. As I said previously, Miss J provided us with a screenshot which said "*Non-refundable*" quite prominently on the page. So this, alongside our attempts to reproduce the booking process, leads me to conclude that, on the balance of probabilities, there wasn't a misrepresentation.

I note that Miss J was made aware of the refund from the third party website back in December 2017; a substantial amount of time before my provisional decision was issued. I also note that she contacted us about her complaint in February 2018. So it's disappointing that this information wasn't provided earlier. I believe it to be a relevant consideration and neither Barclaycard nor I were made aware of this important development. It is particularly relevant it because it is a central issue to Miss J's complaint i.e. that the sum paid for the booking should be refunded to her. Miss J chose to not share this information until after I had issued my provisional decision. The only explanation provided has been that Miss J wanted all of her points to be dealt with.

In the course of considering a complaint, an ombudsman, adjudicator or investigator will request information from the parties and it is important that the parties respond to those requests in full, providing accurate up to date information. It is for the ombudsman to consider what is relevant, what weight to attach to the evidence and ultimately to determine the complaint. The information provided by the parties, or in some instances not provided, is crucial to the outcome of a complaint. An ombudsman may draw inferences from what is and what is not provided. If a party knowingly does not provide relevant information it can distort the reliability of any of the information that party has provided.

It is concerning that Miss J chosen not to inform us about this important information. This inconsistency in providing relevant information could have led to 'double recovery' of the sum in question if the complaint were upheld. Miss J has provided the third party website's email stating that the refund would be paid but this email does not provide any further reasoning for the refund. We have previously tried to contact the third party website for further information but they didn't wish to discuss Miss J's situation with us. So we haven't been given any further reasons for it giving Miss J a refund. Taking into account what I've seen, I haven't seen sufficient information to suggest there was any wrongdoing on the part of the supplier. It could, for example, have been its own commercial decision and/or a gesture of goodwill. So my decision remains the same and I don't think the sum in question or any compensation should be awarded.

In any event, I am satisfied on the evidence I have seen, and as set out in my provisional decision that the business has not acted unfairly or unreasonably in this instance. I don't think it was wrong to decline a Section 75 claim as I can't see that there's been a breach of contract or misrepresentation here. I don't think Barclaycard acted unreasonably by not pursuing a chargeback and I also don't think it should've stopped the payment to the hotel.

For the reasons already stated, I don't think Barclaycard has done anything wrong.

my final decision

For the reasons given above, I don't uphold Miss J's complaint against Barclays Bank Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss J to accept or reject my decision before 13 September 2018.

Melanie Roberts
ombudsman