DRN-3092553

The complaint

Mr B complains that Santander UK Plc has declined his claim under Section 75 of the Consumer Credit Act 1974.

What happened

In 2015 Mr B had a 'Timeshare' type agreement which he wanted to get out of. Around that time he came into contact with Company A who said it provided Timeshare Relinquishment services and it could get him out of the timeshare agreement for a fee. In October 2015 Mr B used his Santander credit card to pay Company A £700 as a deposit. Mr B subsequently made a bank transfer to Company A for £11000 in order to pay the balance for the service it was to provide him (to get him out of the timeshare).

The credit card transaction went through another party called Company B before reaching Company A. It is Company B which is named on Mr B's credit card statement under the description of the transaction. Mr B has provided receipts and various documents from his dealings with Company A from the time. Mr B was in liaison with Company A until well into 2017 when he discovered it had gone into liquidation having not got him out of the timeshare agreement or provided the service he paid for.

Unhappy with the situation Mr B complained to Santander in an attempt to recoup the money he'd paid Company A. Santander says Mr B brought his claim to it in late 2017 so was out of time to raise a chargeback.

Santander also considered whether Mr B could make a claim under Section 75 of the Consumer Credit Act 1974. It concluded that the money had been paid to Company B (not Company A -the supplier of the service of Timeshare Relinquishment service) and that as such the required relationship between the parties set out in the Consumer Credit Act 1974 wasn't in place (often referred to as the "DCS" relationship). And accordingly Santander said it wasn't liable for the £11700 and so wasn't going to refund it to Mr B.

Mr B feels this is unfair, so he brought his complaint to this service. Our Investigator agreed with Mr B that Santander should refund him the £11,700. Santander disagreed for similar reasons that it had done so earlier. Santander said that Company B was a payment processor and that the payment was "*received by the processor and held in an account or in an online wallet and then forwarded on to the supplier*" (Company A).

Mr B still hasn't had his money back and accordingly this complaint came to me for a decision. In September 2010 I issued a provisional decision with extensive additional arguments as to why I had provisionally agreed that Mr B should be refunded the £11,700. I thought he should also be paid 8% annual simple interest on any refunded amounts. I said the calculation of interest should be from the earliest opportunity that Santander had to refund Mr B – namely the date at which Mr B provided all necessary supporting information to support his claim to it, until it settled his claim.

Mr B accepted my provisional decision and provided details of the account he wanted the money to be paid into. Santander has said it had "*nothing further to add and agree to settle the complaint as outlined by the Ombudsman*."

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.

Bearing in mind that both parties have accepted my decision and Santander has agreed to refund Mr B for his losses plus interest I see no persuasive reason to deviate from the position I set out in my provisional decision. The salient elements of which are paraphrased indented, italicised and in smaller font below.

> *Section 75*
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> *Here I must consider what Santander should do. To do this, I have to decide what I think is fair and reasonable, having regard to, amongst other things, any relevant law. In this case, the relevant law is s75 of the Consumer Credit Act 1974 (the "Act") which says that, in certain circumstances, if Mr B paid for goods or services on his credit card and there was a breach of contract or misrepresentation by the supplier (Company A), Santander can be held equally responsible.*
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> *I think it worthwhile to explain that historically credit cards worked within a commonplace three-party structure. Specifically that there was:*
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> - *an agreement between the card issuer (the creditor-Santander here) and the cardholder (the debtor- Mr B here) to extend credit by paying for goods or services purchased by the cardholder from suppliers who had agreed to honour the card;*
> - *an agreement between the card issuer and the supplier (Company A here) under which the supplier agreed to accept the card in payment and the card issuer agreed to pay the supplier promptly;*
> - *an agreement between the cardholder and the supplier for the purchase of goods or services.*
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> *And accordingly this three-way relationship is often referred to as "DCS" as it represents the interrelationships between Debtor, Creditor and Supplier.*
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> *As time went by a new type of party entered the market and specifically these types of transactions, known as the 'Merchant Acquirer'. This led to the creation of four party relationships where instead of the agreement being between the card issuer and the supplier, there were two agreements:*
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> - *an agreement between the merchant acquirer and the supplier, under which the supplier undertook to honour the card and the merchant acquirer undertook to pay the supplier; and*
> - *an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agreed to pay the supplier and the card issuer undertook to reimburse the merchant acquirer.*
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> *The impact of this development on the application of s75 was considered by the Court of Appeal in the case of Office of Fair Trading v Lloyds & others [2006] ("the OFT case").*
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> *The Court of Appeal first considered whether the introduction of the four-party structure meant that the system had evolved significantly beyond the state of affairs to which s75 had been directed. They concluded that it had not, stating at paragraph 55 of their judgment:*
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> *"From the customer's point of view … it is difficult to see any justification for drawing a distinction between the different [three-party and four-party] situations. Indeed, in the case of those card issuers such as Lloyds, who operate under both three-party and four-party*

structures, the customer has no means of knowing whether any given transaction is conducted under one or other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same: each benefits from the involvement of the other in a way that makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure."

They went on to say;

"It is clear that, whether the transaction is entered into under a three-party or four-party structure, the purpose of the credit agreement is to provide the customer with the means to pay for goods or services. It follows that in both cases the card issuer finances the transaction between the customer and the supplier by making credit available at the point of purchase in accordance with the credit agreement. The fact that it does so through the medium of an agreement with the merchant acquirer does not detract from that because it is the card issuer's agreement to provide credit to the customer that provides the financial basis for the transaction with the supplier."

Bearing in mind some of Santander's arguments here in this case it's also important to note that in the OFT case the court saw evidence about the particular rules governing the activities of merchant acquirers. The Judge at first instance drew attention to the following features (paragraph 30) which I think have relevance here:

"The evidence showed that the rules of the four-party card schemes control which suppliers may participate in the schemes by, for example, (i) stipulating that merchant acquirers must only put transaction details into interchange for suppliers with whom they have valid and subsisting merchant acquirer agreements; (ii) requiring merchant acquirers to screen suppliers before entering into agreements with them, in order to establish that the suppliers are creditworthy and carrying on bona fide businesses; (iii) requiring merchant acquirers to monitor suppliers to deter wrongful activity; (iv) requiring merchant acquirers to forward information to the network merchant databases where, for example, a supplier is suspected of fraud or where a supplier's ratio of transactions "charged back" by the card issuer exceeds established criteria. Likewise card issuing creditors exert leverage over suppliers, through the networks [operated by MasterCard, Visa and American Express], in that the networks reserve rights to insist that suppliers' merchant acquirer agreements are terminated and to exclude suppliers from entering into merchant acquirer agreements. Thus some sort of leverage is available, at least in domestic four-party transactions, but even if it were not, that would not affect my conclusion."

Having provided some important context to the circumstances in Mr B's case, I need to now establish the exact nature of Company B's role and involvement. And whether or not that meant that there were the relevant arrangements between Santander and Company A under which Mr B's purchase was financed, and therefore whether or not there was the DCS link. This is the crux of this complaint. I say this because in many cases where there is a DCS link established the focus of the complaint is actually whether or not there was a misrepresentation or breach of contract by the supplier. But Santander hasn't made any persuasive arguments on whether or not there was a breach of contract or misrepresentation here by the supplier (Company A). Indeed Santander has argued entirely on the DCS point with this service. So it is clear that the crux of this dispute hangs on the DCS issue here.

The DCS issue

I have considered the particular facts of Mr B's case. In order for s75 to apply there has to have been arrangements between Santander and Company A to finance transactions between Santander's cardholders and Company A. It's clear that there was no direct arrangement between them, but this isn't necessarily fatal to the application of s75.

I say this because the Judge who heard the OFT case at first instance ([2005] 1 All ER 843) had also considered the meaning of the word "arrangements", as used in section 12, and whether there existed relevant arrangements between creditors and suppliers in the four-party

situation. She said that the use of the word showed a deliberate intention on the part of the draftsman to use broad, loose language, which was to be contrasted with the word "agreement". She went on to say at paragraph 26:

"In my judgment, in the natural ordinary sense of the word, there are clearly arrangements in place made between the card issuers and the suppliers, notwithstanding the absence of any direct communication between them, or any direct contractual relationship, or even of knowledge on the part of the issuer of the identity of the particular supplier. The fact that there are a number of different arrangements, reflecting the various roles, contractual or otherwise, played by different participants in the network, does not mean that there is not an arrangement in place between the issuer and the supplier. I consider that it is unrealistic to look merely at the individual links in the chain; rather one should stand back and look at the whole network of arrangements that are involved in the operation of the schemes. If one does so, one can, in my judgment, properly conclude that, by virtue of the supplier and the issuer being subject to the rules and settlement processes common to all participants in the card network, there is indeed an arrangement (albeit indirect) between them."

In the Court of Appeal, the creditors argued that arrangements should be given a narrower meaning that took the four-party structure outside the definition. But the Court of Appeal agreed with the Judge that "arrangements" had been used to embrace a wide range of commercial structures having substantially the same effect. They held it was difficult to resist the conclusion that such arrangements existed between credit card issuers and suppliers who agreed to accept their cards, and stated;

"Moreover, we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct."

Accordingly to arrive at a fair outcome I need to stand back and consider the whole network of arrangements that were involved in Mr B's transaction and, in particular, what Company B's role was within that network.

I've considered the Scheme's rules regarding the scheme it operates. I note from its rules from 2014 it recognises a number of different types of Service Providers including those described as Acquirers, Third Party Processors and Payment Facilitators and it then goes on to give examples of the types of services the different Service Providers provide and requirements that the scheme has of all of them. It is clear these rules are drafted in such a way that all such Service Providers (if they wish to participate in the card Scheme) must operate under the obligations placed upon them by the Scheme in order to continue to operate within the Scheme. And that there are consequences and liabilities if they do not, including no longer being in the Scheme.

And Santander has told this service it considered whether it could 'chargeback' the credit card transaction to Company A under the scheme rules. But concluded it couldn't because of the time between when the transaction was made and when Mr B brought his concerns to Santander. This was because the scheme rules have time limits on chargeback processes and Santander felt Mr B was out of time when he complained to it. So clearly it seems that Santander accepts it could have or indeed did have 'arrangements' with Company A when it considered this route to regaining some of Mr B's funds.

Our Investigator looked into Company B to try and get confirmation of its role in this transaction. Company B is also in liquidation and has been for some time, so our Investigator contacted the Liquidators of Company B who confirmed it did not have access Company B's books and records, including its historic financial data. It was therefore unable to provide any information in relation to this transaction or indeed any real detail of the services provided by Company B at all.

So I need to decide whether Company B's role and involvement interfered with what appears to have been the usual underlying three-party structure in a way that meant the relevant creditor-supplier arrangements didn't exist in this case. I don't think its role and

involvement caused an interference for the following reasons.

This Service has built up some knowledge around Company A and Company B from the complaints it has received on similar matters. I have seen an email dated January 2017 where the support team at Company B describes Company B as the "the preferred payment processor" of Company A and goes on to explain how the transaction paid to Company A will appear on the credit card statement of that particular complainant. Clearly this is after the transaction at the crux of this complaint. But it does confirm that a little over a year after Mr B's transaction Company B were acting as a Payment Processor for Company A. And Company B's description regarding how the transaction would appear on the statement is identical with regard to how Company B is shown on the transaction in Mr B's case.

Having considered the Scheme's rules it is clear that as part of the scheme rules any Service Provider can only act in such transactions under the scheme whilst it meets the scheme rules which include it being responsible for the activities of facilitators and sub-merchants. So clearly there is an arrangement between these parties in this part of the transaction. And although Company A maybe unknown to Santander, considering the relationships here it is clear there is an arrangement in this case. So I don't think it makes a difference whether they are known or unknown parties as clearly there is an arrangement in effect.

In short, it appears that Company B operated a formal and structured system which enabled parties, such as Company A in this case, to receive payments made by credit card to pay for the supply of goods and services to the cardholders such as Mr B. Further, both Santander and Company A were bound to the same network rules through the arrangements here and therefore subject to the rules and settlement processes of the network (albeit indirectly). These features are all consistent with the existence of the required arrangements, for the purposes of s.75, between Santander and Company A.

I would also note that both Santander and Company A undoubtedly benefit commercially from the involvement of the other, through the intermediation of Company B, in a way that makes it possible to regard them as in something akin to a joint venture. Specifically, by financing purchases from Company A Santander are able to lend money to their customer and make interest and/or other charges for that service, whilst Company A is able to obtain payments from Santander's credit card holders and so benefit from the credit Santander extended (albeit indirectly).

Furthermore, not every commercial entity accepts the cards of this particular Card Scheme. So where a supplier such as Company A does agree to accept cards from this Scheme that results in Santander providing restricted use credit, regardless of whether Santander has a direct agreement with the supplier or not.

Taking this into account, and looking at the principles outlined in the OFT case and what we know of the situation here, it seems to me that Santander provided finance to Mr B which enabled him, through the medium of the Company A's relationship with Company B, to pay for services from Company A. The purpose of the credit agreement between Santander and Mr B is to give him the means to pay for goods and services, which is what he did when he paid Company A. So, following the reasoning in the OFT case, Santander financed that transaction by making credit available to Mr B at the point of purchase in accordance with his credit agreement.

It could be argued that Mr B's relationship here is too tenuous for S75 to apply. The High Court considered s75 in the case of Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583, ('the Truman case') and the High Court held that it's the nature of the role that each party plays and the nexus between the supplier and creditor that's the relevant consideration. I do not propose to recount all the details of the case here. However I would note the following. In the Truman case it involved the court considering a five-party structure in which the fifth party had no contractual or other direct relationship with the relevant scheme. But it was held that it did not matter that the card issuers had no direct contractual or other relationship with the fifth party or that the card issuers had no idea of the

existence of the fifth party. There still existed "arrangements" sufficient for the requisite DCS link.

In Mr B's case, I think there are stronger indications of relevant arrangements than those in the Truman case given that Company B was specifically and publicly in the business of processing and/or facilitating payments.

So, in Mr B's case Santander, who are issuing cards within this Scheme's network, would seem in a stronger position both to know about the activities of Company B than the card issuers were in the Truman case, whilst the card Scheme network itself was well placed to decide whether it would permit Company B to carry on that business in relation to its cards and to influence the terms on which it could do so. I therefore don't consider the arrangements to be more tenuous than those examined by the court in the Truman case, but rather the opposite. And as I said it is clear that Company B were specifically and publicly in the commercial enterprise of processing and facilitating financial transactions of this nature.

I note that in its representations to this service Santander has said "The payment was received by the processor and held in an account or in an online wallet and then forwarded onto the supplier". However Santander hasn't provided any evidence from Company B or indeed any evidence of the exact nature of Company B's role in this particular transaction. There is no persuasive evidence to support that this transaction was either "held" or in an "online wallet".

It is my current position that Company B acted as a payment processor (because that's what it called itself) and that there is no evidence of Company B holding the funds in question on account or that this transaction featured an e-money element or other material intra-transaction (that is any internal transactions with the funds in question) which would break the DCS chain. On balance I think the transaction went straight through Company B to Company A as would be the case in any normal payment processor process.

It could be argued that creditors are entitled to only be held liable under section 75 for those transactions where the DCS chain is unbroken. But this service considers complaints to it on a fair and reasonable basis. And considering that I'm satisfied there are 'arrangements' here between Company A, Company B and Santander I think it fair that if Santander chooses to decline liability for the reason of the DCS chain being broken it should provide persuasive evidence or argument to demonstrate that. It is clear from the Courts that the mere presence of another party is insufficient to break the DCS chain. So merely pointing the presence of another party is insufficient to fairly demonstrate that the DCS chain is broken. And as Santander was in such arrangements with these parties I think it is fair that it should to be able to demonstrate the chain being broken (if it chooses to) rather than for this service to place the onus on Mr B to prove the chain intact. Clearly as such arrangements were in place it would be far easier for Santander to provide such evidence than Mr B to have to prove it from a more removed position in the overall arrangement than Santander.

Clearly there is nothing wrong with a commercial entity such as Santander wishing to fairly limit its liabilities. And considering the arrangements in place at the time Santander was well placed at the time of the transaction (or indeed when Mr B complained to it) to collect evidence to support its position that the DCS chain was broken. I've not seen any persuasive evidence from Santander to that effect. And if such evidence is now unavailable due to the turn of events since, considering Santander was in these arrangements and Mr B was its customer I don't think Santander not having such evidence is the fault of Mr B.

As it stands and for all of these reasons I've explained, my provisional conclusion is that there were arrangements between Santander and Company A under which Santander financed this transaction between Mr B through the intermediation of Company B to Company A. Meaning that DCS is intact and s75 applies.

The liability issue
As described previously Santander hasn't contended that Mr B was misrepresented to or that there was a breach of contract. From the evidence I've seen relating to the payment it is clear

that both the card transaction and the transfer were ultimately destined for and would have been received by Company A. It is also clear that the service Mr B bought was that of getting him out of his timeshare. Company A didn't provide this service. It is also likely that representations were made to Mr B about this service which he relied on to his detriment in entering the agreement. So considering the circumstances of this complaint I currently think Santander should refund Mr B the £11,700 he paid to Company A.

As I explained at the beginning of this decision both parties have chosen to accept my provisional decision without further comment or asking for supporting materials to the various issues or evidence I have commented upon or relied upon. And Santander has agreed to redress Mr B as I set out in my provisional decision and below. Accordingly Mr B's complaint succeeds and is upheld.

Putting things right

For all of these reasons, I direct Santander to refund Mr B £11,700. This will remedy the losses he has suffered. I also direct Santander to pay Mr B 8% annual simple interest on this amount. The calculation should be from the earliest opportunity that Santander had to refund Mr B – namely the date at which Mr B provided all necessary supporting information to support his claim to it, until it settles his claim.

My final decision

I uphold this complaint and direct Santander UK Plc to pay Mr B the amounts described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 5 November 2021.

Rod Glyn-Thomas
Ombudsman