DRN-3179650

The complaint

Mrs E complains Marks & Spencer Financial Services plc (M&S Bank) failed to honour a claim he brought under section 75 of the Consumer Credit Act 1974 ("CCA"). Mrs E is represented by her husband Mr E.

What happened

The background to the matter is well known to all parties so I will provide a brief summary:

- Mrs E and her husband had a membership with a holiday club which they wished to terminate. On 23 November 2016 Mr E entered into a contract with another company I will call R. It said it would arrange for him and his wife to be released from her membership with the club and claim compensation for the mis-selling of the membership.
- Mrs E paid R £2,375 on 4 December and £5,539 on 7 December towards the contract using her M&S Bank credit card to a company I will call MRL. The contract guaranteed that R would achieve the release of Mr and Mrs E from their membership within 12 months of 3 December 2016.
- R failed to arrange for Mrs E and her husband to be released from their membership with C, and subsequently went into liquidation in May 2018. Mr E wrote to R on 29 March 2018 to ask for a refund, but the letter was returned undelivered.
- Mrs E brought a claim against M&S Bank under s 75 of the CCA on 4 April 2018.
- M&S Bank investigated the matter and didn't agree Mrs E had a valid claim under s 75 of the CCA. It said that because she had paid MRL, and not R, the necessary "debtor-creditor-supplier" ("DCS") agreement wasn't in place for her to be able to make a claim. Mrs E was unhappy with this decision and complained, but M&S Bank rejected her complaint.
- Mrs E brought her complaint to this service, where it was considered by one of our investigators. It was upheld originally, but after further research our investigator concluded M&S Bank had been right to say Mrs E didn't have a valid claim under s 75 CCA, because MRL had taken the credit card payments instead of R and a chargeback was not possible due to the time limit having expired..
- Our investigator investigated whether there were any exceptions which meant this might not matter, but he couldn't find any. She also thought about whether M&S Bank should have charged back the credit card transactions but concluded the bank had been out of time to do so at the point it had been made aware of the issue.

Mrs E didn't agree with our investigator and asked for her complaint to be reviewed by an ombudsman. The case has now been passed to me to decide.

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 someone makes a purchase using the facilities offered by their bank or credit card company, and something goes wrong with that purchase, there's no general obligation for them to provide a refund. However, there are some mechanisms by which they can assist. If a credit card has been used, as in this case, s 75 CCA gives a legal right to the account holder to claim against their credit card issuer in respect of breaches of contract or misrepresentations by the supplier, so long as certain criteria have been met.

If any type of card has been used (debit, credit or pre-paid), the card issuer can use the dispute resolution service administered by the card schemes in order to claim back the money paid on the card. This can be done only in certain scenarios and only so long as the dispute fits within the rules set out by the card scheme. This includes scenarios where goods or services have not been received, and the process of disputing payments in this way is generally known as a "chargeback". Although a consumer cannot insist that their card issuer attempts a chargeback, I would expect the issuer to attempt one if there was a reasonable prospect of the process succeeding, and to conduct the chargeback process in a competent way, free of errors.

The Section 75 claim

I don't think Mrs E had a valid section 75 claim against M&S Bank for essentially the same reasons our investigator explained. I don't think her claim meets one of the key criteria I referred to above.

The criterion in question is the requirement for there to be a DCS agreement in place. The simplest explanation of this is, is that when someone makes a payment on their credit card, in order to be able to make a section 75 claim against their credit card provider they need to have used the credit card to pay the same company they say misrepresented something to them, or breached its contract with them. Mrs E didn't pay R, which is the company she has a problem with. Instead, her credit card payments went to MRL.

There are some exceptions to this general rule. The first exception occurs where the company which is responsible for the breach or misrepresentation ("the supplier") is an "associate" of the company which received the credit card payment ("the payee"), at the time the payment is made. This doesn't mean an associate in the everyday sense of being linked in some way or another; the companies have to be associates according to a very specific definition which is set out in section 184 of the CCA.

According to section 184 of the CCA, in order for companies to be associates they need to be controlled by the same people, or by people who are themselves associates of one another. People are associates of one another if they are relatives, or if they are "in partnership" (for example, being directors together at another company). A person would be in "control" of a company if they are a person whose instructions will normally be followed by the officers of the company, or if they are entitled to exercise a third or more of voting power at any general meeting of the company. In general, I would view a company director or majority shareholder to fall into these categories. Being based at the same or a similar business address, as Mrs E has claimed, would not be enough to make two companies associates.

I've carefully considered whether R and MRL were associates at the time of Mrs E's credit card payment, by checking publicly available information about the companies. A Mr K was a controller of R between 1 April 2016 and 1 December 2016, while an associate of his (a Mr U) controlled MRL. This means the companies themselves were associates during this time window. Mr K gave up his shareholding in R from 1 December 2016 and I cannot see that he was a controller of the company from that point on.

The agreement with R was made on 26 November 2016, but the DCS agreement didn't come into effect until 4 December when the first payment was made. M&S Bank wasn't party

to the agreement until payment from it was sought and so for the purposes of determining if MRL and R were associated I have to apply the rules to the facts as at 4 December 2016.

I have noted there is also an outstanding debenture in Mr K's favour, granted by R, dating back to January 2016. It has been suggested this means he controls the company. I don't agree. All this shows is that Mr K had agreed to lend money to R on a secured basis and this has not yet been repaid.

Because Mrs E's credit card payments were made outside of the window in which R and MRL were associates, this means the exception doesn't apply in her case.

There is another exception which was identified in the case of *Bank of Scotland v. Alfred Truman [2005] EWHC 583 (QB)*. The case concerned a firm of solicitors who had a motor trader as a client. The solicitors took credit card payments from customers of the motor trader, which had no facility to take such payments itself, as deposits for cars which the customers had ordered. The court found that the contractual arrangements between the motor trader and the solicitors were "adequate" to link the motor trader to the card scheme through the transactions processed via the solicitors' credit card facilities, and therefore mean there was a DCS agreement in place.

The judge observed in the *Alfred Truman* case that the above conclusion couldn't be applied in all cases as a general principle, and that there were problems with establishing where the line should be drawn between scenarios where the supplier could be linked to the card scheme, and where things were "too tenuous" to be able to draw this conclusion.

The judge noted that the problem would need to be resolved on a case by case basis, and that the "precise contractual arrangements" between the parties would determine whether the creditor had liability under section 75.

A later case in the County Court, *Marshall v. Retail Installation Services Ltd [2016]*, clarified that in the absence of knowledge of the precise contractual arrangements between the company which was meant to supply the services or goods under the contract, and the payee, that the involvement of the payee in the provision of the goods or services could be enough to link the supplier to the card scheme and for a DCS agreement to exist.

In Mrs E's case, not much is known about the precise contractual arrangements between R, which was the supplier of the services, and MRL, which was the payee. It's clear that MRL took payments for R's customers and that this was an established practice, as I've seen evidence that R required its salespeople to tell customers that the name of MRL or another company might appear on their statements.

There is some evidence that a company in the group to which MRL belonged, acted as R's accountants. We have tried to find out more from this group of companies, and the relevant liquidators. Unfortunately, we have not received information which helps to clarify what the arrangements were between the companies. In *Alfred Truman* the court had a much more complete picture of the nature of the arrangements between the parties and had the benefit of direct evidence from the payee. Here I don't have nearly as much information and I feel unable to conclude that R was linked to the card scheme via its arrangements with MRL, on the evidence available to me.

I've considered whether the case of *Marshall* might be applicable to Mrs E's case, but I've seen no evidence that it would be because it doesn't appear MRL was involved in the provision of the timeshare release or compensation claim services Mrs E had contracted with R for.

I have also noted the suggestion that there was link between MRL and another company I will call MRTP, but the payment was processed by MRL and I can only consider the link between R and MRL. Nor can I presume there was a link because the different companies operated from the same building or close by. The location of a business is not one of the criteria I can consider under s 184 CCA.

In light of the above, I conclude there was no valid DCS agreement in place to allow Mrs E to make a section 75 claim against M&S Bank. I therefore don't think the bank was wrong to reject her claim. I appreciate the frustration with the situation but I cannot require M&S Bank to pay out money where a claim falls outside the terms of s 75 CCA.

Chargeback

Chargeback is a process that is provided by the Card Scheme- in this case MasterCard. It allows customers to ask for a transaction to be reversed if there's a problem with the goods or services they've paid for. There's no automatic right to a chargeback. Nor is chargeback a guaranteed method of getting a refund. MasterCard checks the nature of the problem against the possible chargeback reasons to see whether the claim will be successful. If the bank feels that a claim won't be successful, they don't have to raise a chargeback.

Mastercard imposes time limits on claims and having reviewed these I find myself in agreement with our investigator that by the time Mr E contacted the back it was too late to raise a chargeback. Mastercard has the following relevant rules:

1. Credit Not Processed – the rules say a chargeback must be attempted "Between 15 and 120 calendar days from…the date the service was cancelled…" by the cardholder.
2. Goods or Services not Received (assuming the service had an end date) – if it's assumed the service was due to end at the end of the guarantee period then a chargeback was subject to the following timescale: *"within 120 calendar days of the latest anticipated delivery or performance date specified by the merchant"*

The agreement dated 23 November 2016 with R was as follows:

"*What we agree to do for you under this agreement*

"a) We have undertaken a detailed fact find with you as to the terms of your Timeshare Agreement and have advised you on the most cost-effective method of terminating the agreement and how to release yourself from any future obligations, charges or maintenance costs under your Timeshare Agreement We have also provided you with a written quotation of our charges for doing this and given an estimate of the likely timescale involved to obtain the release.
b) Upon receipt of the Deposit from you for the work required we will then put into effect recommendations and take all steps necessary to release you from your agreement
c) We will notify you in writing as soon as we have obtained your release from the Timeshare Agreement."

It goes on to say*: "[R] give a full money back guarantee that the relinquishment will be achieved within 12 months of this date."*

Mr E did not cancel the agreement, he asked for the refund as promised by R and so the rules set out at 1 above does not apply.

I consider rule 2 does apply in the that the service wasn't delivered by the end date which was 23 November 2017. That means that Mrs E had 120 days from that date in which to notify the bank in order for it to be able to raise a chargeback was 23 March 2018. Mr E contacted M&S Bank on behalf of his wife on 4 April 2018 which was outside the 120-day time limit.

Our investigator referenced a third rule, but this applies to open ended contracts. The contract between Mr E and R did have an end date in that it agreed to refund all monies paid if the service had not been delivered.

In short the bank had 120 days after the first anniversary of the agreement in which to raise chargeback and as it wasn't aware of the situation until after that date it could not.

I fully appreciate the frustration Mr and Mrs E have suffered as a result of the service not being delivered and the money not being returned, but I cannot say that M&S Bank is obliged to meet that shortfall.

My final decision

For the reasons explained above, I do not think M&S Bank treated Mrs E unfairly by refusing to reimburse him. My final decision is that I do not uphold her complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 1 February 2022.

Ivor Graham
Ombudsman