

The complaint

Miss O is unhappy with the outcome of a claim she made to Marks & Spencer Financial Services Plc ('MSF') in respect of a transaction on her credit card.

What happened

Miss O used her MSF credit card to part pay for a second hand car. However, she says that some serious structural damage was discovered shortly after purchase. Miss O says that an independent garage said the car was not safe to drive, the damage was likely historic, and it should never have been sold in that condition.

Miss O approached MSF to help with the dispute as it wasn't possible to resolve matters with the garage which sold the car ('the supplier').

MSF considered the matter under Section 75 of the Consumer Credit Act 1974 ('Section 75') but it said Miss O did not have a valid claim because of the lack of the correct 'debtor-creditor-supplier' agreement.

Miss O was not satisfied with this outcome – but MSF would not change it. So Miss O complained to this service about the way MSF looked at things.

Our investigator did not uphold the complaint. In summary, they thought that MSF did not act unreasonably in declining the Section 75 claim.

Miss O has asked for an ombudsman to review the case.

I looked at the case and initially had some questions for MSF. I explained that it looked as if it should and could have raised a chargeback - so I wondered why it hadn't done so. In summary, it responded to disagree and explain that:

- Miss O originally wanted to claim back all the funds via Section 75;
- The car had a valid MOT when it was sold confirming it was roadworthy; and
- If the problems had arisen on the forecourt there would have been a better chance to raise a claim because for a possible chargeback MSF would look at how long/how many miles the customer had used the car.

I issued a provisional decision on this case on 15 December 2021. In this I said:

Section 75

Section 75 allows Miss O to hold MSF responsible for breach of contract or misrepresentation in respect of goods or services purchased using her credit card. However, there are certain technical requirements that have to be met for a Section 75 claim to be valid. This might be in relation to the cost of the goods or services, the parties to the

transaction, or the way the payment was made.

In order to decide what is fair and reasonable I have considered the technical requirements that need to be satisfied in order for a Section 75 claim to be valid. These are set out in the Consumer Credit Act 1974. One of those requirements is for a 'debtor-creditor-supplier' agreement between the parties to the transaction.

Miss O is the account holder so she is the 'debtor', while the supplier for the purposes of the transaction is the car dealership taking the payment. In order for there to be a valid 'debtor-creditor-supplier' agreement I would need to be satisfied that Miss O contracted with the supplier of the car for the purchase.

From what I understand the car was for Miss O's partner ('Mr C'). It is Mr C who appears on the contractual paperwork with the supplier – and from what I understand he is the sole driver of the car, appearing on the insurance and registration. In addition, post-sale he appears to have been the one to have contacted the supplier regarding the dispute over the safety issue. From this information it appears that Mr C is the sole contracting party with the supplier. I understand that Miss O lives with Mr C and benefits from the car as a passenger – however, in the circumstances I don't consider this is enough to say she is actually a joint contracting party for the purposes of Section 75.

So, I would agree with our investigator and MFS that there isn't a valid 'debtor-creditor-supplier' agreement for Miss O to have a Section 75 claim against MFS in respect of the purchase of the car. However, I have also gone on to consider another avenue which I think MFS could have explored in order to help Miss O.

Chargeback

Chargeback is a way that a financial business might be able to recover funds for their card customer. There are various rules which govern a particular chargeback scheme. It isn't always right to raise one but where there are reasonable grounds to do so this will be good practice.

I have considered what MSF has said about Miss O asking for a Section 75 claim to be considered. However, I don't think this is a reason for MSF to completely discount chargeback. I note from call recordings that chargeback was discussed between the parties and that Miss O was keen to claim everything from MSF via Section 75. However, when it became clear to MSF there was no valid Section 75 claim it would have been reasonable for it to consider a chargeback as initially discussed. I can't see where it did this.

I have looked at whether there were grounds to raise a chargeback under the relevant card scheme and in doing so I have considered the rules I believe were in force at the time. The relevant reason code here appears to be 'Goods or Services Were Either Not as Described or Defective'.

I have considered whether Miss O had provided appropriate information to enable MSF to raise a chargeback. I note Miss O had provided evidence in the form of a signed dispute form explaining the issue and a third party expert report. She also provided correspondence indicating there were failed attempts to resolve the dispute with the supplier, and that the goods had been made available for pickup. It also seems that MSF still had time to raise a chargeback in accordance with the time limits in the scheme rules. Overall, it seems that MSF had enough information to reasonably raise a chargeback in accordance with the scheme rules applicable at the time.

MSF has indicated that it was prevented from raising a chargeback because the fault was not identified straight away, and the car had a valid MOT when sold. MSF has actually indicated that when the car was driven off the supplier's premises Miss O lost all chargeback rights. There is nothing I can find in the scheme rules to support the notion that driving the car away prevents a chargeback being raised. It would seem somewhat counter intuitive as in order to discover goods are defective the customer often needs to make some use of them.

I do understand that MSF might not think there was a reasonable chance of the chargeback succeeding. However, I think that MSF should have at least attempted a chargeback considering the presence of the compelling expert report carried out shortly after purchase, and the correspondence with the garage up to that point (where it appears not to have raised a defence regarding the MOT).

It is of course difficult to say exactly what would have happened had MSF attempted a chargeback on behalf of Miss O. I also note MSF's point that the car did have an MOT carried out around the time it was supplied. However, I also note that:

- a compelling expert report was carried out around 5 weeks after the sale strongly indicating the car was actually sold in an unsafe condition (rather than developing issues later down the line as a result of usually expected wear and tear);*
- said report appears to show that an inadequate welding repair was carried out to patch significant historic damage to the subframe of the car - indicating that the extent of the problem would potentially not have been clear at the time of sale / during an inspection;*
- the consumer has supplied correspondence indicating the garage had agreed to resolve the issue and issue a refund to the point that Mr C had provided bank details in anticipation of said refund (it seems the lingering issue in contention was who paid for recovery of the car); and*
- Miss O has told us Mr C's debit card from a third party bank was used to pay the balance of the purchase and that said chargeback against the supplier was successful.*

All things considered, I think MSF should have attempted a chargeback and by not doing so I think it deprived Miss O a reasonable of a chance of getting back the money. Although it is hard to say what would definitely have happened, on balance, considering the information above I believe the chargeback is more likely to have succeeded than not.

I have thought about a fair way to put things right in the particular circumstances. I note that a successful chargeback would have been for £440, the amount paid on the MSF card. I also note that if this is paid to Miss O there would have effectively been a full refund for the car which was never collected by the supplier. However, from what I understand the car has been kept off road since it was declared unsafe. Considering the current condition of the car it appears more likely to cost further money to have removed than be an asset with any value. Therefore, in the particular circumstances here I don't think it is reasonable to make a deduction from any refund due.

I also note that Miss O has claimed several consequential losses. However, a chargeback does not allow her to claim costs back beyond the amount paid on the card, so it isn't fair to ask MSF to pay these extra costs.

I have thought about whether Miss O has lost out in other ways because MSF didn't raise a chargeback when it should have. MSF appears to have rejected the Section 75 claim in early

November 2019, yet it could have raised a chargeback around that time. Had that succeeded (as I think it likely would have) the money would have been back with Miss O sooner. So any redress should reflect this out of pocket element. Taking into account some time for the trader to respond to the chargeback I think MSF should re-work the credit card account as if the £440 was refunded to Miss O's account on 1 December 2019 – paying out of pocket interest on any related credit balance from then.

My provisional decision

Marks & Spencer Financial Services Plc should re-work Miss O's card as if the £440 was refunded back to her card on 1 December 2019 refunding any interest and charges in respect of the transaction from said date and paying any related credit balance back to her with 8% simple yearly interest calculated from the date of said credit balance to the date of settlement.

I asked the parties for their comments.

MSF disagreed with my findings. In summary, it said that 'when goods are taken from the merchant it is deemed that the customer accepted the goods in the condition sold'. It added that the problem with the car was not reported for several weeks after collection which would indicate it was a developing fault – therefore there are no chargeback rights.

Miss O was happy with the provisional decision and had no further comments.

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 thank MSF for its response to my provisional decision. However, nothing it has added has given me cause to change my provisional findings (as set out above). I still think these are fair and reasonable.

MSF has raised a point which I believe is similar to what it has said previously. I believe I have already adequately explained my thoughts on this in the provisional decision. However, I will briefly deal with it again here for clarity.

MSF indicate there are no chargeback rights for Miss O here because the car was driven away from the premises and because the fault was identified a few weeks after the purchase. However, as I have already explained, there is nothing I can find in the chargeback scheme rules that would support the notion that chargeback rights are lost in these circumstances. MSF has not supported its conclusions with any extracts from the rules or guidance notes. As I have said it would seem somewhat counter intuitive that a chargeback could never be raised for goods which have been taken away from business premises and discovered to be faulty through use.

Overall I am satisfied that Miss O did have chargeback rights here. Which brings me back to the reasoning in my provisional decision (as detailed above) in respect of whether MSF should have raised a chargeback, and whether that likely would have succeeded.

I have explained in my provisional decision why I think it was fair and reasonable for MSF to have attempted a chargeback on her behalf. Particularly as Miss O had an expert report indicating the car had been sold in an unsafe condition.

I have also already explained in said provisional decision why I considered it more likely than not said chargeback would have succeeded. Although I have considered the MOT status of the car and its prior use, age and mileage I still stand by the reasoning I have already given in regard to the evidence supporting a potentially successful chargeback – particularly the compelling expert report and the correspondence with the supplier up to that point. As I have said previously, it appears that the chargeback with the other bank succeeded too.

All things considered, for the reasons already given here (and incorporating the reasoning in my provisional findings) I think MSF should have fairly attempted a chargeback and by not doing so it deprived Miss O a reasonable of a chance of getting back the money. Although it is hard to say what would definitely have happened had a chargeback been raised, on balance, I believe the chargeback is more likely to have succeeded than not. So I think it fair and reasonable that MSF do something to put things right.

Putting things right

MSF should re-work the card as set out below.

My final decision

Marks & Spencer Financial Services Plc should re-work Miss O's card as if the £440 was refunded back to her card on 1 December 2019 refunding any interest and charges in respect of the transaction from said date and paying any related credit balance back to her with 8% simple yearly interest calculated from the date of said credit balance to the date of settlement.

In relation to any tax deductions it makes from the interest award MSF should provide Miss O with the appropriate tax deduction certificate. This is so she can claim back any potential tax refund if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss O to accept or reject my decision before 2 March 2022.

Mark Lancod
Ombudsman