

## The complaint

Mr S complains that American Express Services Europe Limited (AESEL) (“Amex”) acted unfairly when it declined a claim he brought under section 75 of the Consumer Credit Act 1974 (“CCA”).

## What happened

On 20 September 2020 Mr S purchased a bike from a retailer that I’ll call H. The original price was nearly £1,400 and Mr S negotiated a discount of £400 (because the bike had been ordered by a third party who no longer wanted it). Mr S inspected the bike - which was assembled in store. And he agreed to make the purchase if H would disassemble the bike and pack it in a box with specific dimensions – because he wanted to ship it abroad. H agreed but Mr S found the box was too big when he went to collect it on 6 October 2020.

The bike was re-packaged in a smaller box and Mr S took it away. When he got home he decided to check the contents and discovered the bike was damaged in several places - the front and back mudguards were dented, the leather saddle was marked, the mudguard attachment was bent and the rim was scratched. Mr S thought this probably happened when the bike was re-packed - as too much force was applied - and he emailed H the following day asking for a partial refund.

H responded about a week later. It said the bike was in pristine condition when it left the shop, it wasn’t responsible if something happened after that and, given the bike had already been discounted over H’s maximum discount limit, no further discount was possible. Mr S paid for the bike using his Amex credit card so he got in touch with Amex the same month and raised a section 75 claim. He wanted a refund of £500 – which he estimated was the likely cost of replacement parts.

Amex responded the following June. It accepted the bike was damaged but didn’t think there was enough evidence to establish the cause and declined Mr S’s claim. Mr S was unhappy with this response and he referred the matter to our service.

One of our investigators looked into things and recommended the complaint should be upheld. She was satisfied that H agreed to re-package the bike. And, given how soon after collection Mr S reported the damage, it was probably caused by H. She thought it was fair that Mr S should receive a refund but he should only have 10% of the original price back – as the damage looked mainly cosmetic and didn’t affect use. She also thought Amex should pay Mr S £100 compensation for poor service and distress and inconvenience.

Mr S accepted the investigator’s recommendations but Amex disagreed. Amex made fairly detailed submissions over several items of correspondence. In summary, it said:-

- the burden of proof lies with Mr S and he didn’t provide enough documentation to validate his claim - he supplied photos of the bike, receipts for purchase and collection (with the date missing), confirmation of a flight booking and emails to and from H only;
- the receipts prove Mr S purchased a bike and collected it on an unknown date, Mr S hasn’t provided any documentation to show that H agreed to repackage the bike and,

- even if he did, this would not validate his claim;
- the second receipt is missing the date of collection and, even if it did contain a date that matched the date the email was sent, this doesn't prove the true condition of the bike when it left the shop - the photos verify damage was present but not when or how it occurred;
- emails confirm that H fully investigated and found the bike left the shop in good order so it's more likely the damage happened in transit to the destination abroad – and H's terms and conditions make it clear that H isn't responsible for events outside its control;
- documentation provided now was not supplied when the Section 75 claim was made to enable Amex to properly assess the claim, if this had been provided at the time, it's possible a different outcome would have been reached and it's not fair to require Amex to compensate Mr S for his own failings.

Amex acknowledged there was delay in concluding the matter but says it had a large influx of claims at the time due to the pandemic - and offered to pay Mr S £50 compensation.

Having considered the evidence available, I was minded to uphold this complaint but my reasons weren't quite the same as the investigator's. I issued a provisional decision on 1 February 2022 to let the parties see my provisional conclusions and make further submissions (if they wanted to) before I made my final decision. I've set out below what I decided provisionally – and why – and this forms part of my final decision.

### **My provisional decision**

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

Mr S brings this complaint to our service under section 75 because he paid H using his Amex card. Section 75 provides that a borrower may be able to bring an equal claim under an agreement with a supplier against a credit provider - where there's been a breach of contract or misrepresentation - in very specific circumstances. One of section 75's strict requirements is that a valid debtor-creditor-supplier (d-c-s) link must exist. There seems to be no dispute that the necessary relationship was in place between Amex, Mr S and H here. I don't apply the law but I am obliged to take relevant law into account when I make my decision. And my role here is to look into Amex's response to Mr S's complaint.

I'm satisfied that H was required (under the Consumer Rights Act 2015) to provide goods of satisfactory quality - and carry out any services provided with reasonable skill and care. Mr S says there was a breach of contract because the bike that H supplied was damaged. H doesn't dispute there's damage but H and Mr S disagree about how and/or when this occurred.

In cases like this, where evidence inconclusive or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

H hasn't disputed the circumstances around the sale of this bike and the collection arrangements, as far as I can see. So, I'm satisfied that Mr S agreed to the purchase on the basis that H would disassemble and then pack the bike in a box of dimensions that he specified. And H then agreed to re-pack the bike – because the original package wasn't the right size - when Mr S came to collect it.

I'm satisfied that Mr S emailed H on 7 October 2020 to say that he'd collected the bike the day before and he found it was damaged when he got it home. H takes no issue with the

timeline that Mr S has provided and, given the specific nature of the damage (which is not disputed to be present), I think this is unlikely to have occurred in the process of Mr S getting the package home.

I appreciate H says a thorough investigation was undertaken and it was satisfied that the bike left the shop in pristine condition. But, I haven't seen any evidence from that investigation - such as statements from staff involved at the time. I can see H suggested to Amex (in correspondence) that the bike could have been damaged in freight on the way to its ultimate destination abroad. But, I find that unlikely - because Mr S reported the damage on 7 October 2020 and he supplied evidence that the flight he was going to ship the bike on was not until 4 November 2020.

I think the damage present seems to be consistent with the sort of damage that might occur during the course of re-packing the bike into a smaller box. And, based on the evidence I have at the moment - taking into account the nature of the damage and the timeline of events, in particular - I think it's more likely than this is probably how the damage occurred.

For the avoidance of any doubt, I have considered H's terms and conditions (which I have no reason to think were not incorporated) and I don't think they assist H in these circumstances. As far as I can see, H agreed to provide the re-packing service as part of the sale transaction. On balance, I'm minded to find it's more likely than not this service wasn't carried out with due skill and care – the result of which is Mr S was supplied with a damaged bike. So, on the current information, I'm inclined to conclude that there was a breach of contract here. And I've gone on to consider what, if anything, Amex should do to put things right.

There seems to be no dispute about the nature of the damage that's present. I've considered photographs that Mr S supplied. Like the investigator, I think this looks fairly cosmetic and unlikely to interfere with the bike's overall function. I accept however this is not the bike that Mr S paid for – and I think he probably wouldn't have agreed to buy the bike with this damage present for the price he paid. Mr S has indicated that he would like to receive a refund. I think that sounds reasonable in the circumstances. And I'm minded to agree with the investigator that a refund of £140 seems fair overall.

It looks as if Mr S experienced some inconvenience and upset as a result of being supplied with this damaged bike. I think Amex accepts that – given it has offered already to pay him £50 compensation. I don't think that's quite enough in the circumstances, however. And I'm minded to find it is fair and reasonable for Amex to pay Mr S £100 compensation for all the distress and inconvenience he experienced as a result of being supplied with this damaged bike.

### **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 invited the parties to consider my provisional findings and let me have any new evidence or comments by 22 February 2022 and I'd consider all the evidence available after that and make my final decision.

Amex accepts my provisional decision and has nothing further to add. Mr S hasn't replied or raised any objection to my provisional findings. And I see no reasonable grounds to depart from my provisional conclusions.

For the reasons set out above, I remain of the view that Amex should pay Mr S £140 by way

of a refund and £100 for associated distress and inconvenience.

### **My final decision**

My decision is I uphold this complaint and find that American Express Services Europe Limited should provide a refund of £140 and pay Mr S £100 for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 23 March 2022.

Claire Jackson  
**Ombudsman**