DRN-3694535

The complaint

Mr S complains Allied Irish Banks Plc ("AIB") has declined a series of claims he brought under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

I issued a provisional decision on Mr S's case on 26 August 2022. In this I said I was minded to uphold Mr S's complaint in part. Both parties to the case have seen, read and accepted my provisional decision so I will only summarise as briefly as possible (given the large number of claims) what happened.

Mr S entered a series of agreements with entities claiming to be able to help him with timeshare or holiday club memberships he owns or previously owned. He made payments towards these agreements with his AIB credit card.

These agreements turned out to be scams of a common type which targets people who have owned timeshare or holiday club memberships. When Mr S appreciated he had been the victim of a series of scams, he attempted to recoup the money he had paid by making a series of section 75 claims to AIB. It seems AIB settled a number of claims but had refused to honour some others. These claims related to the following seven agreements:

Number	Date Paid	Amount	Contracting Entity	Payee	Uphold
1	June 2010	£1,247.82	AGV	AV	Y
2	Jan 2013	£1,175	GSS	HFI	N
3	Dec 2013	£1,895	GRGS	KP	Y
4	June 2013	£1,622.57	EXSM/BAD	EXSM	Y
5	Aug 2013	£1,224.70	FHC	DS/DW	Y
6	Nov 2013	£989.90	EXG	GEX	Y
7	April 2013	£1,496.52	HNC	SACDA/SLF	Y

I provided a key to the various abbreviations in covering letters to my provisional decision. It was necessary to use these abbreviations as I'm required to anonymise companies and individuals in my decisions.

The amounts in the table correspond only to any amounts paid on the AIB credit card towards the agreements in question. Mr S sometimes made additional payments by bank transfer or debit card. In my provisional decision I explained that I was minded to say AIB

should have honoured Mr S's section 75 claims in relation to the contracts with a "Y" in the "Uphold" column.

I should say here that AIB has not disputed that the agreements were scams or that misrepresentations were made to Mr S. However, in my provisional decision I outlined that contracts 1, 2 and 4 to 7, and Mr S's description of what had happened, all fit the pattern of a scam which had been warned about by authorities as far back as 2009. I described the scam as follows:

"In general, a consumer would receive an unsolicited call from a company which claimed to have a buyer in place for an unwanted timeshare or holiday club product. An upfront fee would be requested by the company which would be described as a security deposit or something similar. In reality, the buyer was entirely fictitious and the sale would fall through. Variations on the scam include persuading the consumer to pay over further funds in an attempt to pursue the lost sale, and/or part exchanging their unwanted timeshare along with more money, for another holiday product of dubious value."

The reason AIB had declined the claims was because Mr S had not used his credit card to pay the same company he had made an agreement with. This, it said, meant the debtor-creditor-supplier ("DCS") agreement which needed to be in place for a valid section 75 claim to be made, was broken with respect to those agreements.

In my provisional decision I agreed that there was not a valid DCS agreement in place for contract 2. However, I considered there was such an agreement in place for all of contracts 1, and 3 to 7.

I described the significance of the DCS agreement in the following terms:

"Section 75 says the following:

"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."

This section refers back to sections 12(b) and (c) of the CCA, which define the DCS agreement. A payment on a credit card falls under section 12(b), and is described as follows:

"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier"

Section 11(1)(b), which is referred to, expands as follows:

"A restricted-use credit agreement is a regulated consumer credit agreement—

…

(b)to finance a transaction between the debtor and a person (the "supplier") other than the creditor"

Reading all of these relevant sections together, it's apparent that in order for a person to be able to bring a claim against their credit card issuer under section 75, the credit card needs to have financed a transaction between them and a supplier. There also need to have been

"pre-existing arrangements" between the creditor and the supplier.[1] Finally, the person needs to have a claim against the supplier in respect of a misrepresentation or a breach of contract.

The problem therefore with having a credit card payment go to someone other than the supplier, is that the payment will not have been "made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier". The payment will have been made instead under the pre-existing arrangements between the creditor and the actual payee. This means there would be no debtor-creditor-supplier agreement in place and therefore one of the key ingredients for a section 75 claim to be made would be missing."

I went on to consider exceptions to the general rule, noting a relevant exception stemming from the High Court case of *Bank of Scotland v. Alfred Truman [2005] EWHC 583 QB*. This case had shown that it was possible for pre-existing arrangements to exist between a creditor and supplier, where a third party had collected card payments from a debtor on behalf of the supplier. I observed that it was quite a complicated area but that where one company acted simply as a payment agent for the supplier, pre-existing arrangements could be held to exist between the supplier and creditor, and a valid DCS agreement would also exist which would allow the debtor to make a claim under section 75.

For contracts 1 and 4 I didn't think the exception needed to be applied. This was because my analysis was that Mr S had in fact paid the companies he had entered agreements with and which had made misrepresentations to him. There was therefore obviously a valid DCS agreement for those contracts.

For contracts 5, 6 and 7 I noted the suppliers had used a third party solely for the purpose of collecting the card payment(s) from Mr S. There was documentation to show this. Indeed, for contracts 5 and 7 Mr S had even needed to sign a separate form to indicate his understanding that the payees were only taking payment and had no other role in the transaction. I thought the scenarios in these contracts were sufficiently similar to that in the *Alfred Truman* case to conclude that there should be taken to be pre-existing arrangements between the suppliers and AIB. So I concluded there were valid DCS agreements for those contracts as well.

Contract 2 was different. I found that Mr S had signed two contracts, one with the supplier and one with the payee. The contract he signed with the payee declared that the payee was not an agent or partner of the supplier, and that it was providing Mr S with an identity verification and document collection and storage service. I considered this was too far removed from the scenario in *Alfred Truman*, where the payee had not had any contract or agreement with the debtors. I therefore concluded there was not a valid DCS agreement for contract 2.

Contract 3 was the odd one out overall, because it was not the same kind of "fictitious buyer" scam as the other contracts. My analysis of contract 3 in my provisional decision was as follows:

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[1] The creditor and supplier do not need to have a specific agreement with one another for there to be "pre-existing arrangements" between them. The fact that both the creditor and the supplier have used the payment clearing and settlement services offered by the card scheme (e.g. Visa) and a merchant bank (acquirer) in order to facilitate the payment is enough to say pre-existing arrangements are in place (see *OFT v. Lloyds TSB Bank PLC & Ors [2007] UKHL 48*, along with related judgments in more junior courts).

"Mr S says he was contacted by GRGS in February 2013, who held themselves out to be a mediation company based in Spain who would investigate the mis-sale of the various holiday products and resale services Mr S had purchased, and pursue action through the courts. He made an initial payment to them via debit card, which is outside of the scope of the complaint against AIB. He also signed a contract which said the following about costs:

"The fees for the services are stipulated in this contractual agreement and will be satisfied under the following criteria: a payment of 2,750 Pound Sterling to start with the court proceedings as well as studying the CLIENT'S legal situation. On completion of the settlement the lawyer will take 15% plus 18% value added tax of the monetary value awarded on any given case managed by the lawyer plus additional costs such as procurator costs and court fees which may vary."

A number of months later representatives of GRGS contacted Mr S to say they intended to take his case to court but there would be a fee of £1,895 "for the prosecutor" but this was a "complete[ly] refundable fee once it has been resolved in the courts…" Mr S paid this amount by credit card. He was informed the payment would appear on his statement as having gone to "KP". KP appears to have been a payment facilitator working within the boundaries of the card scheme rules, so I don't think the fact their services were used to process Mr S's card payment means that there isn't a valid DCS agreement.

I think the main question in terms of contract 3 is whether there was a breach of contract or misrepresentation by GRGS. On balance, based on the limited evidence available, I think the contract was likely breached, or alternatively GRGS didn't intend to take Mr S's case to court and this was another scam, albeit a somewhat more sophisticated one.

I say this because Mr S says the only update he received after making the additional payment was that the case was awaiting a court date. This seems to have been eight or more years ago and my understanding is that Mr S hasn't heard anything from GRGS since, despite asking for evidence of the work they've done for him. In the absence of evidence of GRGS having taken the actions they said they would after receiving the £1,895 payment, I conclude the contract was breached and Mr S would be entitled to a full refund."

I went on to summarise that AIB, by virtue of section 75 of the CCA, could be held liable by Mr S for the various misrepresentations and breaches of contract which had occurred across all of the contracts apart from contract 2. I therefore considered the bank had been wrong to decline most of Mr S's claims.

To put things right, I said I was minded to direct AIB to take the following actions:

1. *Refund or reimburse all amounts Mr S has paid towards contracts 1, 4, 5, 6 and 7, including amounts paid on the AIB credit card, along with any debit card payments and bank transfers.*

2. *Refund the amount of £1,895 Mr S paid towards contract 3.*

3. *Pay 8% simple interest per year* on any refunds, calculated from the date the payments were originally made, to the date the refunds are paid to Mr S.*

I indicated that AIB could deduct income tax from compensatory interest as appropriate.

I asked Mr S and AIB to respond to my provisional decision by 9 September 2022. Both Mr S and AIB said they would accept my provisional decision. The case has now been returned to me to finalise matters.

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.

Both parties have accepted my provisional decision and have not put forward any new evidence, comments or arguments for me to consider. I therefore see no reason to depart from the findings I made in my provisional decision which I have summarised and quoted from above.

It follows that I will uphold Mr S's complaint in part and make the following directions:

Putting things right

To put things right, Allied Irish Banks Plc must take the following actions:

1. Refund or reimburse all amounts Mr S has paid towards contracts 1, 4, 5, 6 and 7, including amounts paid on the AIB credit card, along with any debit card payments and bank transfers.[2]

2. Refund the amount of £1,895 Mr S paid towards contract 3.

3. Pay 8% simple interest per year* on any refunds, calculated from the date the payments were originally made, to the date the refunds are paid to Mr S.

*If Allied Irish Banks Plc considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr S how much it's taken off. It should also give Mr S a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons explained in this final decision, I uphold Mr S's complaint in part and direct Allied Irish Banks Plc to take the actions outlined in the "putting things right" section of this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 7 October 2022.

Will Culley
Ombudsman

[2] AIB should have on its files the evidence of the other payments Mr S made towards the contracts. Mr S summarised the amounts he paid and provided various statements. However, if something is missing then AIB can contact this service and we will be able to provide this information.