

## **The complaint**

Mr L complains that American Express Services Europe Limited (AESEL) said it was unable to consider a claim he made under section 75 of the Consumer Credit Act 1974.

## **What happened**

Mr L bought a wetsuit from an online supplier (M) for £139.99. He wasn't happy with the quality of the wetsuit and so he asked M for a refund, but they refused. Mr L made a claim to the county court and he was successful. Judgement was awarded against M for the sum of about £170, which included the cost of the wetsuit, interest and court costs. M didn't pay Mr L or reply to his emails.

At this point, Mr L made a section 75 claim to AESEL. It replied by saying it was unable to intervene in claims that had been resolved via the county courts. Mr L complained but AESEL maintained its position. So, Mr L approached this service.

Our investigator didn't think AESEL needed to take any further action. He said the breach of contract had already been decided by a court and he didn't think it would be fair to ask AESEL to pay for something when there were other ways to recover the money.

As Mr L disagreed with the investigator's view, his complaint has been passed to me to make a final decision. I came to a different conclusion to our investigator, so I sent a provisional decision to Mr L and AESEL to give them an opportunity to comment. Mr L said he had nothing further to add while AESEL didn't reply. So, my findings and my decision below are substantially the same as set out in my provisional decision.

## **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.

In certain circumstances, section 75 gives a consumer an equal right to claim against the supplier of goods or services or the provider of credit if there's been a breach of contract or misrepresentation by the supplier. In this case, AESEL has said it was unable to consider Mr L's claim under section 75 because he's pursued the matter through the courts. It thinks he should pursue the defendant for settlement.

Having carefully considered the evidence, I don't think AESEL's position is fair. Under section 75, AESEL is jointly and severally liable for any breach of contract or misrepresentation against the merchant. And I don't think that liability is discharged just by obtaining a county court judgement against the merchant. It would be different had Mr L received payment from the merchant but that's not the situation here.

So, I think AESEL should have considered Mr L's claim under section 75. And, had it done so, I think the claim would have been successful. Let me explain why.

Mr L used his credit card to pay for the wetsuit, which means that section 75 is relevant to

this case. Certain technical criteria need to have been met for a section 75 claim to be valid. The cash price of the goods must be more than £100 and up to £30,000. And there must be a debtor-credit-supplier agreement in place. I see no problem with either of those criteria so I can go on to consider whether I think there was a breach of contract or misrepresentation in this case.

The relevant law – in this case the Consumer Rights Act 2015 - says that goods must be of satisfactory quality when supplied. Mr L contacted M just over a month after he bought the wetsuit to say there were problems with it. He said his son had used it on two occasions in the sea for a total of about 45 minutes. And there were now a number of small tears and splits in two panels of the wetsuit (20 to 24 separate marks). Mr L sent photographs to support what he was saying. M said the damage looked to be caused by fingernail marks, commonly caused by pinching the material when taking the wetsuit on and off. M said the damage wouldn't be covered under warranty as it was caused by accidental damage after Mr L had bought the wetsuit. Mr L disputed this argument. He said his son only ever took the wetsuit off under supervision as he has ME and is physically weak. He said the position of the damage, in the groin area, isn't an area that would be natural to pinch. And 20 marks would not be caused, in just one area, by taking the wetsuit off once before the damage was noticed. He said it was more likely there was a fault with the material of the wetsuit.

The key issue here is whether there was a fault with the wetsuit at the point of sale or whether it was damaged accidentally after the sale. Neither Mr L nor M have provided any independent evidence to support their view on how the wetsuit was damaged. So, I've looked at the information that is available, including the photographs Mr L provided, and considered whether the wetsuit was of a quality that a reasonable person would consider satisfactory.

Wetsuits can be a struggle to put on and take off and I can understand how marks can be made by pinching or catching the surface with fingernails. But I have no reason to doubt what Mr L has said about the circumstances surrounding the damage. And he said the wetsuit was only used twice and under close supervision. Having carefully considered the evidence, I'm more persuaded by the evidence put forward by Mr L and I don't think it's likely the wetsuit was damaged in the way M have suggested.

There's an onus on M to show the wetsuit conformed to the contract when it was supplied. And as I don't think a reasonable person would consider a wetsuit to be of satisfactory quality if the surface starts breaking up after two uses, I don't think it's done that. So, in light of the above, I think there has been a breach of contract.

### **Putting things right**

In these circumstances, the consumer can ask the merchant to repair or replace the goods in a reasonable amount of time and without significant inconvenience. Mr L asked M to do that, but it refused. So, I think it was reasonable for Mr L to reject the goods and seek a full refund. As we know, M has not given Mr L a refund despite him obtaining a county court judgement. So, as AESEL has joint liability for the loss, I think it should provide Mr L with a full refund. In doing so, it has the right to take possession of the wetsuit if it wishes to do so.

Mr L also asked AESEL to refund him the legal costs he incurred in seeking a county court judgement. And interest on the amount he wanted refunded. I don't think it would be fair to ask AESEL to pay Mr L for the costs he incurred in seeking a county court judgement. It was his decision to pursue M through the courts and he could have made a claim under section 75 earlier and avoided those courts costs. But I do think AESEL should pay interest to Mr L for the loss of use of the money.

## **My final decision**

For the reasons given above, my final decision is that American Express Services Europe Limited should do the following:

- re-work Mr L's credit card account from the date it said it was unable to consider his claim, as if £139.99 had not been paid, refunding any payment made, interest and charges in respect of that amount;
- if this calculation results in a credit balance, it needs to refund this and pay interest on it at a rate of 8% simple per year calculated from the date of said credit balance to the date of settlement<sup>1</sup>; and
- take possession of the wetsuit if it chooses to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 7 February 2023.

Richard Walker  
**Ombudsman**

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<sup>1</sup> If American Express Services Europe Limited considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr L how much it's taken off. It should also give Mr L a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.