DRN-3933466

The complaint

Mr O complains that MBNA Limited rejected his claim under section 75 of the Consumer Credit Act 1974 for a refund of his purchase of an alleged title of nobility, after it turned out to be a scam.

What happened

In January 2021 Mr O found a website which claimed to sell titles of nobility. He paid around £2,700 for a barony, using his MBNA credit card (in two instalments). A year and a half later, he realised it was a scam, and asked MBNA for his money back.

MBNA declined to refund Mr O. It said that it was too late to raise a chargeback claim, and section 75 didn't apply, on technical grounds. It also argued that there had been no breach of contract or misrepresentation. Both of the points about section 75 were based on the terms and conditions on the website.

Mr O referred this complaint to our service, but our investigator didn't uphold it. He agreed that Mr O had contacted MBNA after the deadline under the chargeback scheme rules had expired. He did not consider the technical reason why MBNA said section 75 didn't apply, because he agreed with it that there had been no breach of contract.

Mr O did not accept that opinion. He asked for an ombudsman's decision. In support of his case, he provided a letter written by a solicitor explaining why there had been a breach of contract by the retailer.

I wrote a provisional decision which read as follows.

What I've provisionally 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 am minded to uphold this complaint. I will explain why.

I agree that Mr O was far too late for MBNA to raise a chargeback claim on his behalf. I do not need to elaborate on that further, because it has been explained to him before.

Turning to section 75, that section – where it applies – makes MBNA liable for any breach of contract or misrepresentation by any third party from whom MBNA's customers purchase goods or services with their MBNA credit cards.

There very clearly has been both a breach of contract and a misrepresentation by the retailer in this instance. The website is very clearly a scam. It is not possible to purchase real titles online, whether they are titles of nobility (as Mr O thought he was buying) or manorial titles. I have looked at the website and it makes numerous dishonest and preposterous claims. Since these lies induced Mr O to enter into a contract to buy something, I am satisfied that they were misrepresentations. And since that contract was to buy something which the

retailer did not possess and could not legally sell, I am satisfied that this was a breach of contract as well.

Before I move on to why I think section 75 applies to Mr O's purchase, I will quickly deal with MBNA's argument about why there was no breach of contract and no misrepresentation. MBNA relied on a clause in the retailer's terms and conditions which says:

> "Noble Titles acts as Agents for the Principal with regards to 'Titles of Nobility', where Titles require further legal work after transfer of rights Noble Titles are not responsible for any legal adoption or further legal work once the transfer of rights have been completed as this is not under our control. Our contractual obligation is to transfer the title rights only, once completed all future legal work are the responsibility of the Principal and the purchaser."

MBNA did not elaborate, but if it meant that the retailer had transferred the title rights and so it had fulfilled its contract, then this was misconceived. The retailer had not transferred any title rights, because it had none; it was a scam.

MBNA relied on the same clause to argue that section 75 did not apply at all. It said, correctly, that for the section to apply there has to be a "debtor-creditor-supplier" relationship (hereafter "DCS relationship") in which Mr O is the debtor, MBNA is the creditor, and the retailer is the supplier. Section 75 only makes the creditor liable for a breach of contract or misrepresentation by the supplier. MBNA said that the retailer was not the supplier but a fourth party, for whose actions MBNA was therefore not liable. It based this argument on the retailer's own claim that it is acting as an agent for some other party, "the Principal" (see the opening words of the clause quoted above).

What all this means is that under section 75, MBNA is only liable for what the retailer did if Mr O made his credit card payments directly to the retailer. If he made his payments to someone else, who then passed on his money to the retailer, then MBNA will not be liable.

That is usually true, but there are some difficulties with this defence on the facts of Mr O's case.

Firstly, it takes at face value and unquestioningly the word of fraudsters about how their own scam operates.

Secondly, nothing on the website suggests that the payments were going to be made to the Principal, rather than to the retailer. The terms and conditions do not indicate who the Principal is, and Mr O's credit card statement says that the payments were made to "CJF Baron Nobilis Serv" which could easily be the retailer, or an associate of the retailer. (Other sections of the Consumer Credit Act make section 75 apply to the actions of an associate of the supplier as well as of the supplier.)

Thirdly, the retailer also accepts payments by cheque, but the website does not say that cheques should be made out to another party. So it's likely that card payments are also made directly to the retailer.

Fourthly and alternatively, even if I accepted that Mr O's card payments were made to the Principal, and that the Principal was not an associate of the retailer within the meaning of the Act, then MBNA would still be liable under section 75 for any breach of contract or misrepresentation by the Principal. That is because a principal is legally liable for what its agent does, and the Principal would be the supplier in the DCS relationship. And so if the retailer was acting as the Principal's agent – as MBNA argues – then the Principal would be liable for what the retailer did, and MBNA would be liable too.

For all of these reasons, I am satisfied that a DCS relationship existed between Mr O, MBNA, and a third party which was responsible for a breach of contract and also for making misrepresentations to Mr O. Accordingly, having regard to section 75, I am satisfied that it would be fair and reasonable to uphold Mr O's complaint about MBNA's decision to decline his claim.

So my provisional decision is that I intend to uphold this complaint. Subject to any further representations I receive from the parties … I intend to order MBNA Limited to pay Mr O £2,703.59.

Responses to my provisional decision

Both parties accepted my provisional findings, so there is no reason for me to depart from them, and I confirm them here.

My final decision

My decision is that I uphold this complaint. I order MBNA Limited to pay Mr O £2,703.59.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 25 May 2023.

Richard Wood
Ombudsman