DRN-4087922

The complaint

Mr R feels that American Express Services Europe Limited has treated him unfairly about a transaction on his credit card to purchase interlocking flooring.

What happened

In June 2019 Mr R purchased interlocking flooring to be installed at his home using his American Express Services Europe Limited (Amex for short) credit card to pay for it. Mr R says there was trouble with the flooring from the start and he spoke to the company he purchased it from ('the Supplier') of the flooring but was unsuccessful. So he took his dispute to Amex in November 2019.

Amex said it considered the dispute and noted that it had considered S75 of the Consumer Credit Act 1974 but felt the necessary relationship for S75 to apply wasn't in place. So it didn't think it could do anything more for Mr R. (Chargeback has been dealt with separately and isn't part of this complaint). Unhappy with this Mr R brought his complaint to this service. Our Investigator issued an assessment on the matter which found that the required relationship for S75 wasn't in place. But Mr R doesn't agree. So this dispute came to me to decide.

In November 2022 I issued a provisional decision stating that the required relationship issue wasn't central to this case as I wasn't persuaded that there was a breach of contract or material misrepresentation which Amex could be held responsible for. Amex responded saying it agreed with my provisional decision. Mr R provided significant and substantial comments on the matter including further evidence, photographs, and review of the flooring by an independent expert.

In a further provisional decision I issued dated 04 April 2023 I reconsidered the matter afresh and concluded that the DCS arrangement was in place and that the S75 claim should be successful in large part due to the new evidence. Both parties have responded to this 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 response to my second provisional decision Amex has agreed to the settlement I put forward in terms of remedying the matter. Mr R has made some further arguments which I will deal with under the heading 'further arguments'. I shall now set out the broad rationale from my recent provisional decision, which is from the end of this sentence to the heading of 'further arguments'.

There is no debate that Mr R authorised the transaction and chargeback has been dealt with separately as I've described.

Section 75

Here I must consider what Amex should do. To do this, I have to decide what I think is fair and reasonable, having regard to, amongst other things, any relevant law including both legislation and case law. In this case, the relevant starting point is S75 of the Consumer Credit Act 1974 (the "Act") which says that, in certain circumstances, if Mr R paid for goods or services on his credit card and there was a breach of contract or misrepresentation by the Supplier, Amex can be held responsible.

For clarity's sake I shall explain the underpinning legislation concerning the DCS concept before explaining my thinking on this case. S75(1) states:

"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."

So s.75 only applies if:

i) There is a debtor-creditor-supplier agreement (or "DCS" agreement, for short) of the type that falls within s.12(b) or (c);
ii) That agreement finances the transaction between the debtor (Mr R) and the supplier; and,
iii) If, relating to that transaction, the debtor (Mr R) has a claim against the supplier in respect of a misrepresentation or breach of contract. If so, then the creditor (Amex) is jointly and severally liable to the debtor.

S.12(b) applies to:
"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"
S.11(1)(b) defines a restricted-use credit agreement as a regulated consumer credit agreement:
"to finance a transaction between the debtor and a person (the "supplier") other than the creditor"
Subsections 11(3) & (4) provide:
"(3) An agreement does not fall within subsection (1) if the credit is in fact provided in such a way as to leave the debtor free to use it as he chooses, even though certain uses would contravene that or any other agreement.
(4) An agreement may fall within subsection (1)(b) although the identity of the supplier is unknown at the time the agreement is made."

Section 187 provides:
"(1) A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between persons mentioned in subsection (4)(a), (b) or (c).
(2) A consumer credit agreement shall be treated as entered into in contemplation of future arrangements between a creditor and a supplier if it is entered into in the expectation that arrangements will subsequently be made between persons mentioned in subsection (4)(a), (b) or (c) for the supply of cash, goods and services (or any of them) to be financed by the consumer credit agreement.
(3) Arrangements shall be disregarded for the purposes of subsection (1) or (2) if—
(a) they are arrangements for the making, in specified circumstances, of payments to the supplier by the creditor, and
(b) the creditor holds himself out as willing to make, in such circumstances, payments of the kind to suppliers generally.

(4) The persons referred to in subsections (1) and (2) are—
(a) the creditor and the supplier;

And s.189 says *"finance"* means to wholly or partly finance, and that *"financed"* shall be construed accordingly.

Historically credit cards worked within a commonplace three-party structure. Specifically that there was:

- an agreement between the card issuer (the Creditor) and the cardholder (the Debtor) to extend credit by paying for goods or services purchased by the cardholder from suppliers who had agreed to honour the card;
- an agreement between the card issuer and the supplier under which the supplier agreed to accept the card in payment and the card issuer agreed to pay the supplier promptly;
- an agreement between the cardholder and the supplier for the purchase of goods or services.

As time went by a new type of party entered the market and specifically these types of transactions, known as the 'Merchant Acquirer'. This led to the creation of four party relationships where instead of the agreement being between the card issuer and the supplier, there were two agreements:

- an agreement between the merchant acquirer and the supplier, under which the supplier undertook to honour the card and the merchant acquirer undertook to pay the supplier; and
- an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agreed to pay the supplier and the card issuer undertook to reimburse the merchant acquirer.

The impact of this development on the application of S75 was considered by the Court of Appeal in the case of Office of Fair Trading v Lloyds & others [2006] ("the OFT case"). The Court of Appeal first considered whether the introduction of the four-party structure meant that the system had evolved significantly beyond the state of affairs to which S75 had been directed. They concluded that it had not, stating at paragraph 55 of their judgment:

"*From the customer's point of view … it is difficult to see any justification for drawing a distinction between the different [three-party and four-party] situations. Indeed, in the case of those card issuers such as Lloyds TSB, who operate under both three-party and four-party structures, the customer has no means of knowing whether any given transaction is conducted under one or other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same: each benefits from the involvement of the other in a way that makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure."*

They went on to say;

"*It is clear that, whether the transaction is entered into under a three-party or four-party structure, the purpose of the credit agreement is to provide the customer with the means to pay for goods or services. It follows that in both cases the card issuer finances the transaction between the customer and the supplier by making credit available at the point of purchase in accordance with the credit agreement. The fact that it does so through the medium of an agreement with the merchant acquirer does not detract from that because it is the card issuer's agreement to provide credit to the customer that provides the financial basis for the transaction with the supplier*."

In the House of Lords in the same case Lord Mance said, in relation to the recruitment of overseas suppliers to the network:

"30. That, in today's market, arrangements between card issuers and overseas suppliers under schemes such as VISA and MasterCard are indirect (rather than pursuant to a direct contract as is still the case with American Express and Diners Club) is a consequence of the way in which the VISA and MasterCard networks have developed and operate. Likewise, the fact that the rules of these networks give card issuers no direct choice as to the suppliers in relation to whom their cards will be used. The choice of suppliers is, in effect, delegated to the merchant acquirers in each country in which these networks operate, and provision is made, as one would expect, to ensure and monitor the reliability of such suppliers in the interests of all network members. That network rules may not provide all the protections that they might, e.g. by way of indemnity and/or jurisdiction agreements, is neither here nor there. They could in theory do so, and it is apparent that there are some differences in this respect between different networks. The Crowther Report and 1974 Act proceed on the basis of a relatively simple model which contemplated that card issuers would have direct control of such matters. A more sophisticated worldwide network, like VISA or MasterCard, offers both card issuers and card holders considerable countervailing benefits. Card issuers make a choice, commercially inevitable though it may have become, to join one of these networks, for better or worse."

Lord Mance was talking about the conditions that existed almost twenty years ago, because the case from which he was hearing an appeal went to trial in 2004. But, I think it is clear that even by then the commercial practices by which card networks recruited suppliers had evolved by developing a system that left supplier recruitment to intermediaries, and card issuers were faced with an essentially commercial decision as to whether to participate in network that included suppliers who had been recruited that way. Since 2004, new technology and the growth of internet commerce have opened up additional channels for recruiting suppliers and routing payment to them (for example, "payment facilitators", which are now an established part of the payments industry) and, again, card networks have changed their rules and practices in response.

Having provided some important context to the circumstances in Mr R's case, I need to now establish the exact nature of what happened as best I can and the relation between the parties involved.

The DCS issue

I have considered the particular facts of Mr R's case. In order for S75 to apply there has to have been 'arrangements' between Amex and the Supplier to finance transactions between Amex's cardholders and the Supplier. It's clear that there was no direct arrangement between them, but this isn't a requirement for the application of S75.

I say this because the Judge who heard the OFT case at first instance ([2005] 1 All ER 843) had also considered the meaning of the word "*arrangements*", as used in section 12, and whether there existed relevant arrangements between creditors and suppliers in the four-party situation. He said that the use of the word showed a deliberate intention on the part of the draftsman to use broad, loose language, which was to be contrasted with the word "agreement". In the Court of Appeal, the creditors argued that arrangements should be given a narrower meaning that took the four-party structure outside the definition. But the Court of Appeal agreed with the Judge that "*arrangements*" had been used to embrace a wide range of commercial structures having substantially the same effect. They held that it was not required for arrangements to be made directly by or between the creditor and supplier, merely that arrangements should exist between them, and it was difficult to resist the

conclusion that such arrangements existed between credit card issuers and suppliers who agreed to accept their cards, and stated:

“Moreover, we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct.”

I’ve also considered the recent High Court case of Steiner v National Westminster Bank (2022) EWHC 2519 (‘the Steiner case’). This case involved payments to a trust for the provision of a timeshare supplied by a timeshare provider. The High Court dismissed the claim under s.75 on the basis that the timeshare purchase was not made under a debtor-creditor-supplier agreement. This was because payment had been made in the first instance to the trust company, whereas the claim related to agreement to purchase a timeshare from the timeshare provider. Mr Steiner’s credit card was issued under the MasterCard scheme and the trust company was a member of the MasterCard network, but the timeshare provider was not.

The Judge (Lavender J) held that central question was not whether "*arrangements*" existed between the bank and the timeshare provider at the time when Mr and Mrs Steiner had entered into their agreement with the timeshare provider and Mr Steiner had used his card to pay the trust company. Rather, the question posed by s.12(b) CCA was whether Mr Steiner’s credit card agreement with the bank was made by the creditor (i.e. the bank) “*under pre-existing arrangements, or in contemplation of future arrangements*”, between the creditor (i.e. the bank) and the timeshare provider. When a bank made an agreement with one of its customers in relation to a card issued by the bank to the customer, then the agreement was made under the card network, which constituted "arrangements" between the bank and the other members of the network. So, if a supplier was already a member of the card network, the agreement was made "under pre-existing arrangements ... between the bank and the supplier". The bank was also aware that other merchants were likely to join the card network in the future, so in that respect the agreement was made "in contemplation of future arrangements”, between the bank and merchant who subsequently joins the card network.

However, in the absence of specific factual evidence as to the bank's state of mind, the Judge said it was difficult to envisage that a bank which issued a card to its customer and made a credit card agreement in relation to that card made that agreement under, or in contemplation of, any arrangements other than the card network. And, as the timeshare provider was outside the card network, it didn’t supply the timeshare under a debtor-creditor-supplier agreement.

Is there a DCS agreement here?

The question of whether Mr R’s transaction took place under a DCS agreement seems to me to turn in this case on two matters: first, whether there existed arrangements between Amex and the Supplier for the financing of transactions with the Supplier’s customers; and second, if such arrangements existed, whether that was the case when Amex entered a credit agreement with Mr R or, if the arrangements came into existence after that, whether Amex contemplated that they would do so. I’ll examine those questions in turn.

Arrangements

Our Investigator looked into the transaction primarily based on the information Amex had given this service about the presence of a fourth party in the transaction namely PayPal. Our investigator later contacted PayPal and asked it what its role was in the transaction. PayPal responded and has been forthcoming in its role within this transaction and more broadly about the services it provides.

PayPal is a well-known provider of a variety of financial transactional services. This includes both payment processing and E-Money provision amongst other services. In this particular transaction PayPal has provided evidence around this specific transaction including its internal report of the transaction in question. It shows two transactions for exactly the same amount of money at exactly the same date and time (to the second). One transaction is the amount (the cost of the flooring) being charged to Mr R's Amex credit card to fund Mr R's account with PayPal. The second transaction is from Mr R's PayPal account to the Supplier's account.

The transactional record PayPal has provided shows that Mr R's account with it was of a zero balance immediately before the transaction and returned to zero after the transaction completed (after a partial refund is made and then reversed). It also shows the status of the charge to the credit card being "completed" and both transactions being apparently instantaneous. It refers to the transaction paid to the Supplier as being "*express checkout payment*". Such dual transactions are sometimes referred to as 'back to back' transactions.

PayPal has explained that the Supplier also had an account with it. In essence it appears that the Supplier had outsourced its payments processes to PayPal in this instance. So the Supplier by dint of having a commercial entity agreement with PayPal is bound by its rules. Mr R by dint of having a PayPal account is also bound by its rules. And clearly Amex is aware it is funding Mr R's PayPal account, which it knows is funding transactions with suppliers of goods and services.

It is clear that this transaction from Mr R's credit card to the Supplier's account with PayPal is in essence instantaneous. The amount debited from Mr R's account is the same amount in Great British Pounds that is credited to the Supplier's account. It also seems likely here that there is a conversion to E-Money in the transaction from Mr R's card to his account with PayPal but I don't think it makes a difference here and doesn't prevent there from being a DCS agreement for reasons I shall give in this decision later.

I should add at this juncture that Amex has provided minimal representations to support its argument here on DCS. It hasn't provided detail about the exact journey of this transaction nor explained why it believes that there is no longer a relevant DCS relationship in regard to this transaction other than pointing to the presence of another party. It has not explained why the arrangement in this case should be distinguished from the established legal authorities. Nor has it chosen to provide supporting evidence about the agreements in place between the various parties. It has only pointed to PayPal and in essence said the mere presence of PayPal is proof that there is no relevant DCS relationship.

It may be that in this case there was a Merchant Acquirer as well. But whether there was a four-party arrangement here or indeed a five-party arrangement present in Mr R's case, either way I'm still satisfied that there are sufficient arrangements between Amex, as card issuer, and the Supplier, for the purposes of establishing a DCS relationship, I shall now explain why.

In Mr R's case, I think there are indications of relevant arrangements even before looking at the contractual obligations undertaken by the parties, given that PayPal was specifically, and publicly in the business of processing or facilitating financial transactions such as the transaction in this case. It should also be noted that PayPal is a very large company generating vast numbers of transactions which go through all the card networks and payment methods every day. So clearly Amex (and the other networks) have decided to allow such payments to go through their networks. And it would seem that, considering the commercial benefits of such volumes of transactions, this is entirely understandable.

Here PayPal *is* specifically and publicly in the business of providing financial transactional services to suppliers, such as to the Supplier here. Amex would be able to know the parties within the arrangement here included PayPal and that PayPal's business involved processing payments for its customers, such as the Supplier and Mr R. And the Supplier was obliged through its agreement with PayPal to also be bound to follow its rules. Fundamentally, it follows that Amex financed the transaction between Mr R and the Supplier by making credit available at the point of purchase in accordance with the credit agreement between them. The fact that it does so through the medium of PayPal does not detract from that: it is Amex's agreement to provide credit to Mr R that provides the financial basis for the transaction with the Supplier. And all of this done with both Mr R and the Supplier being required to comply with PayPal's rules.

I would also note that both Amex and the Supplier undoubtedly benefit commercially from the involvement of the other, through the intermediations of PayPal (and any Merchant Acquirer present), in a way that makes it possible to allow the transaction to happen. By financing purchases from the Supplier, Amex are able to lend money to their customer (Mr R) and make interest and/or other charges for that service, whilst the Supplier is able to obtain payments from Amex's credit card holders and so benefit from the credit Amex extended (albeit indirectly).

Contemplation

It is possible that Amex may argue that such arrangements as those present in Mr R's case were outside of its contemplation at the time when it agreed with Mr R to open his credit card account, and thus there is no DCS agreement for it to be liable under.

Given that payments systems and card networks have continuously changed and evolved over the past half century, I think it likely that Amex as lender always understood that card schemes and payment systems would be operated in accordance with evolving rules and commercial practices, and that this evolution was likely to bring in new groups of participants. Amex must have known it and other card schemes would try to adapt themselves to accommodate major changes in the payments industry; and it would certainly not have expected that each customer to whom it issued a credit card would only make purchases from the suppliers recruited under the rules and practices applicable at the date when the credit agreement was first entered into. Rather, it would have contemplated that all its credit card holders would (irrespective of when their credit agreement started) have access to the same suppliers, i.e. those suppliers allowed under the relevant network or payment system. So, I think Amex must have contemplated, when agreeing to give Mr R a credit card, that his card would be used to finance purchases from whatever suppliers it or PayPal's changing rules and practices accommodated at the time of the purchase.

In this case, the credit card payment went to the Supplier via PayPal and this transactional process between debtors and suppliers is commonplace. It is a method of payment to a type of supplier that Amex accommodates and, as such, I consider that it was within Amex's contemplation when the credit card agreement was entered into.

Conversion

Amex may point to the conversion from Sterling to E-money as a reason for why there might no longer be a DCS agreement. But I'm not persuaded by this either, because had there been a conversion of foreign currency in the transaction as is the case in huge numbers of credit card transactions used during holidays abroad the accepted position is DCS isn't broken. And usually in such foreign transactions there is a fee charged for providing the added service of the currency exchange. It is important to remember here that the entire sum here was funded by the Amex's credit card. This transaction wasn't funded by the

balance already held in the account with PayPal. This was a near instantaneous transaction from Mr R's credit card to the Supplier through the intermediation of the financial transactional service as provided by PayPal. And I cannot see a fee being directly charged for the exchange to E-money here. And even if there was such a fee whether directly applied to the transaction or as part of the overall service that PayPal provided, I don't think it would make this transaction distinguishable from the other types of currency exchanges I've described.

I should also note that PayPal in its evidence to this service previously has stated that its 'Guest Checkout' service converts to E-Money but doesn't disrupt the DCS relationship. So I'm not persuaded the conversion in itself should prevent there from being a DCS agreement here as, to my mind, this conversion does not negate the arrangements in place between the parties as I've described.

Accounts

It may be that Amex points to the fact that the transaction journey is from Mr R's card into Mr R's account with PayPal and then onto the Supplier's account with PayPal as a reason why to consider their might not be a DCS agreement. But I'm not persuaded by this. There are still the necessary arrangements to my mind. Merchant Acquirers, Payment Processors and those parties providing currency conversion services have accounts in which transactions pass through on their journey from debtor to supplier. I've not seen any persuasive reason to distinguish what happened here from the authorities mentioned before.

The other network's stance

Mastercard's public stance on this matter generally is unclear from my research. I do note however that one of the other major networks (Visa) has made clear on its website that it does, at least imply, that DCS isn't disrupted. It has said:

"*If your Visa card purchase was made using a digital wallet where the payment was made with a linked card, chargeback and Section 75 claims work in the same way as if you paid directly with your card*."

So all in all I've not seen any persuasive evidence at this stage that the additional services provided by PayPal interrupts the DCS agreement. I'm also satisfied this transaction fits within the financial limits set out in relation to S75 claims as described in the Act. Accordingly I'm satisfied at this time that there is the necessary DCS agreement and a S75 claim can be successful if the other requirements are made out.

liability

As I've explained, for Amex to be liable under S75 a breach of contract or a material misrepresentation needs to be made out. Mr R in response to my earlier provisional decision on the matter has provided further, and to my mind persuasive, evidence on the quality of the flooring provided. This has been provided to Amex which has responded by saying:

"*I appreciate that they have supplied photographs that show the faults with the product, but I feel these do not prove that the product was faulty from purchase and would not prove satisfactory in our investigation. The independent report that has been provided, however, does hold more weight as it states the reviewer's belief that the product has not been properly manufactured*."

I've considered the Independent report Mr R has provided. It is clear an independent company has visited and reviewed the flooring at Mr R's premises. The inspection has said

"*I would not expect this to have gapped to this extent if this had been properly manufactured*…"

I've also considered Mr R's substantial evidence with regard to the surrounding issues such as the underfloor that this flooring was installed upon (with photos), the comments of the manufacturer in its advertising that Mr R points towards, the further evidence Mr R has provided showing the scale of issues with the flooring, Mr R's new evidence including photographs showing where the flooring was stored prior to installation and Mr R's detailed response to my provisional decision.

I've also considered Amex's position on the flooring, which gives no persuasive reasoning as to why Amex feels "*these do not prove that the product was faulty from purchase..".* It just says that is its position. I also note its acceptance that the independent report carries weight before returning to its arguments about DCS.

All goods sold should be of satisfactory quality. Having considered the matter afresh and bearing in mind the test I must apply of balance of probabilities, it is evident now, to me, that this flooring wasn't of satisfactory quality when purchased. I say this because it is clearly insufficiently durable and clearly had defects from the start which have worsened over time. And I think the independent report here, plus further evidence since my provisional decision are more than sufficient to change my original position on the matter.

Further arguments

Amex has agreed to settle the matter as I'd previously set out. I am glad to see that it has accepted the weight of further evidence on the liability aspect of this case.

Mr R has asked for significant compensation to reflect the issues that this matter has had on his family including such things as "stress" and "impact". Under S75 Amex is only liable for breach of contract or misrepresentation. It isn't liable for distress or inconvenience like that which Mr R points to, so such an award is not applicable here. Bearing in mind the usage of the flooring Mr R has had (albeit sub-optimally) I'm not persuaded there should be any award for consequential loss.

Mr R asks why interest is at 8%. This has been our standard rate for an elongated period of time and reflects our and the courts approach to being deprived of money. It is not linked to any of the variety of measures of inflation. And I see no persuasive reason to deviate from it here.

Mr R has asked about the removal of the flooring. Amex has not indicated that it wishes to take possession of the flooring. If it does wish to do so it should do so at its own cost. And if it does do this it must pay the redress to Mr R before doing so, to enable him not to be without flooring.

Mr R has pointed to the changing cost of flooring since the transaction in question. I'm not persuaded Amex should be responsible for this considering what happened here, and the usage he's had (albeit sub-optimally) and in any event Mr R has made clear he doesn't intend to replace 'like for like'.

Having considered the matters again, and particularly the further arguments made I'm not persuaded to deviate from my previous position. Accordingly under S75 I have decided that that there is a DCS arrangement and that there is a breach of contract here and Amex is liable for the reasons given. It may be that Mr R remains unhappy with this final decision. He should be aware that if he chooses to not accept it then Amex is not bound by it.

Putting things right

Mr R has requested a full refund for the flooring. Taking into account all of the circumstances I think this is a fair remedy. I think such flooring should be expected to last many years, so I don't think a reduction for usage here is fair. Amex can take possession of the flooring at its own cost and after it has settled the matter so that Mr R is not left without flooring. Amex must pay 8% interest on this amount from when it rejected Mr R's S75 claim to it until it settles this matter.

My final decision

It is my decision that this complaint should be successful. I have decided that there is the required DCS agreement under s.75, and on balance, there is a breach of contract. So I direct that American Express Services Europe Limited must compensate Mr R for the loss suffered here as I have described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 17 May 2023.

Rod Glyn-Thomas
Ombudsman