

The complaint

Mr B complains about MBNA Limited's response to a claim he made under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 ("section 75").

What happened

Mr B is a carer for his mother, Mrs B who is hard of hearing. In December 2019 Mr B arranged for a third party H to supply Mrs B with hearing aids. He paid £1,190 using his MBNA credit card. Mr B describes that as part of the arrangements H undertook to provide fitting and testing once the aids were supplied.

However, while the hearing aids were received the follow-up actions never took place, despite Mr B chasing up the service. H subsequently ceased trading. Mr B says he approached other providers and audiologists to see if they could recalibrate the aids and provide aftercare service, without success. He says as a result the hearing aids were rendered effectively useless. He eventually bought alternative aids from a different supplier.

Mr B raised a section 75 breach of contract claim against MBNA, seeking to hold his credit provider liable for H's failure to meet its contractual obligations. But MBNA declined to meet his claim. It told Mr B it was unable to use the chargeback process to recover payment as the claim was brought outside the applicable time limit. And MBNA said that section 75 liability didn't apply because Mrs B and not Mr B was the beneficiary of the contract with H. Mr B complained to MBNA but it maintained its stance and he referred matters to us.

Our investigator approached MBNA to see whether in the circumstances of this case it would be willing to change its position. MBNA declined to do so, and our investigator told Mr B she didn't think the necessary section 75 relationship was in place between the parties to enable her to uphold the complaint. Mr B disagreed and asked for this review.

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought it should be resolved. I've reproduced my provisional decision below, and it forms part of this final decision.

My provisional decision

I don't think there's anything wrong with MBNA's stance in respect of chargeback, which is a process card providers are sometimes able to use to assist cardholders to resolve disputes with suppliers. The chargeback rules are set out by the relevant card scheme and require (among other things) that a claim is made within a given time limit. I find that MBNA has set out the position correctly in this respect and that the rules support its position that it was unable to raise a chargeback claim.

On the question of whether Mr B is able to bring a claim under section 75 (which is the basis of MBNA's reason for declining to meet his claim), I consider the position to rather less clear-cut than MBNA's response suggests.

Under section 75 there are several criteria that must be met for a successful claim against the creditor (or lender), which include that:

- the agreement with the lender is a debtor-creditor-supplier agreement falling within section 12(b) or (c) of the Consumer Credit Act 1975 (“CCA”)
- the agreement with the lender is not a non-commercial agreement
- the debtor has, in relation to a transaction financed by the agreement, a claim against the supplier in respect of a misrepresentation or breach of contract
- that claim relates to any single item to which the supplier has attached a cash price of more than £100 but not more than £30,000

Here, there’s no question that the financial limits apply to the transaction. Mr B paid the full cost of £1,190 for hearing aids for both ears. I consider this was an overall package rather than the purchase of two individual aids, but even if that isn’t right, no individual item within that total was £100 or less. And Mr B’s credit agreement with MBNA is not a non-commercial agreement; that is, it’s not a consumer credit agreement not made by MBNA in the course of its business.

So the remaining questions here are a) whether the agreement with MBNA meets the definition of a debtor-creditor-supplier agreement falling within section 12(b) or (c) of the CCA, and b) whether Mr B has, in relation to the arrangements with H, a claim against H in respect of a misrepresentation or breach of contract.

Section 12(b) of the CCA says that a debtor-creditor-supplier agreement is a regulated consumer credit agreement being *“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”*. And section 11(1)(b) says that *“a restricted-use credit agreement is a regulated consumer credit agreement to finance a transaction between the debtor and a person (the “supplier”) other than the creditor”*.

As I understand it, Mr B’s agreement with MBNA is a regulated consumer credit agreement. It was used to fund the transaction with H. But was that a transaction between H and Mr B as required by section 11(1)(b), or between H and Mrs B?

The document relating to the supply of the hearing aids and associated services is itself silent as to the identities of the contracting parties. It doesn’t offer much in the way of conclusive evidence in this respect, and as such I don’t think was entirely right for MBNA to place the level of reliance on that document as its response to the claim suggests it did. I’d expect MBNA also to have taken into consideration Mr B’s first-hand evidence of the way in which the contract was formed.

On the one hand, Mrs B is clearly intended to be the beneficiary of the arrangements made with H. She was the person needing the hearing aids and the person to whom the aftercare service was to be provided. And Mr B doesn’t seek to argue that he himself was a benefiting party. He says his mother wasn’t physically capable of making such arrangements. Mr B was undoubtedly the person who set up the arrangements with H. He sought and obtained the services of H, to be directed towards his mother. It is Mr B’s signature on the document that has been supplied. So there is also an argument that this was a transaction between H and Mr B. He was certainly rather more than the mere provider of consideration under the contract with H. Mr B was, in essence, contracting with H to provide goods and services directed towards his mother Mrs B.

With this in mind I'm currently minded to find that the necessary elements of section 75 are met, such that Mr B can bring a breach of contract claim against MBNA. The extent to which that claim might be successful wasn't addressed by MBNA in its responses, presumably because it had concluded that section 75 didn't apply. Rather than direct MBNA to reconsider the claim as if section 75 applied, I think at this stage it would be more helpful to suggest the way in which I think matters are best resolved.

I've thought about the basis of Mr B's claim. The hearing aids themselves don't appear to have been defective; there's no suggestion that they didn't work. Rather, the claim is that any use Mrs B was able to make of the hearing aids was impaired because H failed to provide the fitting and aftercare services that were part of the contract arrangements. The contract reads:

"After the purchase of your hearing aid system [H] will arrange an additional appointment to fit the system and give you advice and guidelines on its use, how to look after it, what to expect during the early and later stages of hearing rehabilitation, together with information regarding the supply of batteries and additional ongoing services that are available from [H]. Shortly after delivery of your hearing system we shall contact you to assess your progress and ensure that you achieve the very best from the product and [H]."; and

"After your initial familiarisation with your hearing system, [H] will contact you periodically to offer free of charge checkups on your hearing and hearing aids to maximise long term benefit."

I think it's reasonable to infer from this that the arrangements extended beyond just the supply of the hearing aids. From Mr B's submissions it appears that none of the additional services set out above went ahead, and that the expected benefit of the hearing aids was impaired as a result.

Based on this, I think there's a reasonable possibility that MBNA might be liable to Mr B in respect of his claim. I don't think that means MBNA is responsible for paying the full sum Mr B paid for the hearing aids; rather that it should recognise the impairment to their value. Having carefully considered what Mr B has said in this respect, I'm currently inclined to propose a payment of £700 as a fair way of settling matters to avoid the need for any further action.

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 both parties to let me have any further comments they wished to make in response to my provisional conclusions.

Both MBNA and Mr B accepted my findings and proposed resolution. With this in mind, I see no reason to depart from what I said in my provisional decision. I'm conscious MBNA has asked for details of where to send Mr B's payment. Mr B can provide that information to us along with his acceptance of this decision, assuming he's comfortable doing so.

My final decision

My final decision is that to settle this complaint, MBNA Limited must pay Mr B £700.

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

Niall Taylor
Ombudsman