

## The complaint

Mr K complains about the outcome of a claim he made to American Express Services Europe Limited (AESEL) in respect of a holiday booking.

## What happened

In September 2021, Mr K arranged a group booking for a stay at a hotel. Initially, he booked 24 units of accommodation for dates between 10 August 2022 and 24 August 2022. The supplier said the total cost of the booking was £30,000. Mr K paid £10,000 towards the booking on 20 September 2021 using his AESEL credit card and then paid the outstanding balance of £20,000 on 25 November 2021 using a separate, AESEL charge card.

Around a month before Mr K and his party arrived, there were some changes made to the booking which meant that only 18 of the 24 units of accommodation would be used. Mr K and the supplier agreed that the booking would now cost £24,310.

Mr K says the supplier agreed to refund him the difference between what he'd paid and the revised amount of the booking. This equated to £5,690 (£30,000 - £24,310). However, the supplier didn't refund him this.

Mr K then asked AESEL for help in reclaiming the money. AESEL raised a chargeback, but this was defended by the merchant's bank (in effect, defended by the supplier after they gave their comments on the claim). The supplier said that Mr K's group had damaged the property and he had been invoiced for this accordingly, which in effect meant he wouldn't get any of the £5,690 back. And they said they'd already told Mr K that they would be holding the £5,690 as a security deposit against damages which might be incurred, and this was because Mr K's group had caused damage to the property on previous visits.

AESEL didn't take the chargeback any further. They then considered whether Mr K had a valid claim to recover the money under Section 75 of the Consumer Credit Act 1974 ("s.75"). However, AESEL said it wasn't possible to establish a breach of contract or a misrepresentation on the part of the supplier as Mr K hadn't received any terms and conditions from them. And AESEL said the supplier had said, when the chargeback was defended, that Mr K had accepted he would be invoiced for any damages caused by the group.

Mr K didn't accept AESEL's response and referred the matter to our service. Our investigator recommended that the complaint should be upheld. She said, in summary, that there was clearly a contract in place between Mr K and the supplier and the supplier had said that these terms 'were accepted' when they gave their comments on the chargeback.

Our investigator also said that the supplier hadn't sent any evidence that the property had been damaged as they had claimed. And she wasn't persuaded that the supplier had explained to Mr K that they would be keeping £5,690 as a security deposit. She also noted that the supplier had agreed to refund this amount after the invoice for damages had been sent to him.

Our investigator recommended that AESEL rework Mr K's credit card as if the payment of £5,690 had been refunded from when the s.75 claim was made, less £250 for a cleaning fee that Mr K had accepted was due. She also recommended that AESEL refund any interest, fees or charges incurred whilst the transaction remained on the account and to pay interest if appropriate.

AESEL didn't agree. They said that Mr K hadn't disputed that there were any terms in place in respect of the supplier taking a security deposit, but only disputed that the group had caused any damage. And they said that the supplier may have had justifiable commercial reasons why they didn't impose an upfront cost for any damages the group may cause during their stay, as the group had stayed at the property previously. So, the supplier may have chosen to take the risk of charging after the group had stayed instead of taking a security deposit from Mr K.

### **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 want to acknowledge that I've summarised the events of the complaint. I don't intend any discourtesy by this – it just reflects the informal nature of our service. I want to assure Mr K and AESEL that I've reviewed everything on file. And if I don't comment on something, it's not because I haven't considered it. It's because I've concentrated on what I think are the key issues. Our powers allow me to do this.

I note that AESEL initially raised a chargeback which was defended. I won't be considering in my decision whether AESEL dealt with the chargeback reasonably as this was considered by us under a separate complaint. However, in deciding what I think is fair and reasonable, I find that Mr K's complaint that his s.75 claim wasn't successful should be upheld. I'll explain why.

The effect of s.75 is such that, in certain circumstances, if Mr K paid for goods and services, in part or whole, on his AESEL credit card, and there was a breach of contract or misrepresentation by the supplier, AESEL can be held responsible. I'm satisfied that the necessary and relevant criteria for Mr K to make a s.75 claim was met.

I note that AESEL says there isn't sufficient evidence that the supplier either breached their contract with Mr K or misrepresented it. There seems to have been some discussion throughout the course of this complaint about whether a contract was in place between Mr K and the supplier. For the avoidance of doubt, I'm satisfied that a contract was in place, namely that Mr K would pay a cost to the supplier for a group booking and for the group to stay in accommodation provided by them.

AESEL has said there were no terms and conditions available in respect of how the contract would be performed. I'd be surprised if the supplier had no terms or conditions in place whatsoever, and perhaps AESEL should have asked them to provide this when they considered Mr K's s.75 claim. I've looked at the supplier's website and there isn't anything of note in respect of general terms and conditions on booking a stay with them. Rather, there is a FAQ section giving general information about the property and how to book with them.

I don't think this is particularly relevant however because this dispute turns on whether the supplier and Mr K agreed that the supplier would keep £5,690 as a security deposit, and whether that formed the basis on which the overall contract between them was agreed. The fact that there are no apparent terms and conditions setting out when security deposits are taken, or how refunds are considered where the cost of the booking has changed, doesn't

alter that.

The supplier has said that Mr K was clearly aware that the £5,690 would be withheld as a security deposit. Mr K disputes this so obviously both parties have a very different view on this. Having considered the available evidence, I don't find that the supplier has done enough to show that Mr K entered into the contract on that basis. There seems to be nothing other than the supplier's verbal evidence to corroborate their version of events. I've seen though a series of WhatsApp messages between the supplier and someone acting on behalf of Mr K in which the supplier said that a refund was 'being arranged'. And this message was after the supplier sent the invoice to Mr K outlining that he was liable for damage caused by the group.

I don't think it's clear that the supplier and Mr K agreed for a security deposit to be in place. Certainly, there's nothing from the time the booking was initially made and when it was then altered which says as much. And I note that the supplier didn't, from what I can see, appear to have asked for a security deposit when Mr K made the initial booking. So, while it's possible that such an agreement was made between the parties, I don't find overall there is enough evidence for me to be satisfied that this occurred, or that it's more likely than not that this occurred.

I think that the parties likely agreed to enter into the contract that was ultimately agreed (after the alterations) on the basis that the difference in cost between the initial booking and the revised booking was to be refunded. Even if I am wrong about that, at the very least, it wasn't made clear in my view that the money would be withheld as a security deposit. Nor can I discount the possibility that the supplier tried to change the contract after it had been agreed without agreement from Mr K.

So, even though the evidence doesn't present a clear picture of what was agreed between the parties, I find that the supplier did likely breach their contract with Mr K in that an agreed part of this (namely, the agreement to refund the cost difference) wasn't performed. If the supplier felt that Mr K and his group had caused damage to the property, then that is something that they should have considered billing him for separately. That is of course an option for the supplier, however I make no comment on whether damage was caused by Mr K and his group as that isn't, in my view, relevant to how the contract between the parties was breached by the supplier.

### **Putting things right**

Because there is a breach of contract here which AESEL is liable for via s.75, I consider it fair and reasonable that they remedy this by refunding Mr K the rest of the booking amount in dispute, namely £5,440. That represents the cost difference of £5,690 I've referred to above less a cleaning fee of £250, for which Mr K accepts was due and payable.

So, I consider it fair and reasonable for AESEL to re-work Mr K's credit card account so the amount of £5,440 is refunded from the time the revised booking was agreed (which appears to have been 10 July 2022 as the supplier said this happened a month before the group stayed at the property) – removing any associated interest and charges relating to this amount.

If the re-working results in a credit balance, then this should be refunded to Mr K with 8% simple yearly interest added from the date of said credit balance to the date of settlement.

Also, for the sake of completeness I consider that Mr K as lead booker and paying party is able to recover monies on behalf of the whole group.

### **My final decision**

I uphold this complaint and direct American Express Services Europe Limited (AESEL) to take the steps I've outlined above.

If AESEL considers it necessary to deduct tax from any interest award, they should provide Mr K with a certificate of tax deduction so he can claim a refund from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 17 July 2024.

Daniel Picken  
**Ombudsman**