DRN-4354206

The complaint

Mr D complains that American Express Services Europe Limited won't refund him for a phone purchase.

What happened

In May 2022 Mr D's American Express Services Europe Limited credit card (Amex for short) was used to part fund on a marketplace type website the purchase of a 'new' mobile phone from a seller and accompanying insurance. The phone was received and worked on receipt but by January 2023 it had broken down. Mr D complained to the seller but it said the purchase was outside of six months from purchase so it wouldn't do anything. Mr D contacted the phone manufacturer who confirmed the phone had been registered to someone else beforehand so wasn't 'new' and thus didn't have a warranty. Insurance had been also purchased but that didn't allow Mr D to recoup the cost of the phone either. So he had the phone fixed at his own cost. So still unhappy what had happened he complained to Amex.

Amex looked into the matter and has said it didn't consider Mr D's dispute should be successful through Section 75 of the Consumer Credit Act 1974 (CCA for short). So it didn't refund him.

Mr D didn't think this was fair, so he brought his complaint to our service. Our investigator looked into the matter. Overall, she didn't think Amex had acted unfairly by declining Mr D's request for a refund. Mr D didn't agree. So the complaint has been passed to me to decide.

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 should make very clear that this decision is not about the seller, or the website used here, which aren't financial services providers and don't fall within my remit regarding either chargeback or Section 75. Whatever the issues there maybe with the website or the seller and just because Mr D says he has lost out here, it doesn't necessarily follow that Amex has treated Mr D unfairly or that it should refund him. And this decision is solely about how Amex treated Mr D. I hope this point is clear.

There's no dispute that Mr D's Amex card was used to make the purchase. So I don't think Amex did anything wrong by charging this transaction to his account at the point of purchase.

In certain circumstances, when a cardholder has a dispute regarding a transaction, as Mr D does here, Amex (as the card issuer) can attempt to go through a chargeback process. I don't think Amex could've challenged the payment on the basis Mr D didn't properly authorise the transaction, given the conclusion on this issue that I've already set out.

The chargeback rules include a requirement of being within certain time limits. This includes raising a chargeback within 120 days of receipt of the goods or services. Here Mr D had the phone for well over that before the problems arose. Having considered the time limit rules and what Mr D has told us about what happened here, I don't think Mr D has lost out due to Amex not raising a chargeback here. This is because had it tried to do so it wouldn't have met the time limit rules so such a chargeback had no prospect of success. So Mr D hasn't lost out because Amex didn't raise a chargeback.

A business such as Amex can only be held responsible under S75 of the CCA if certain requirements are met *and* if there is breach of contract or misrepresentation of the contract and if there is that it means that Mr D has lost out. Our Investigator concluded that one of the requirements for a S75 claim wasn't in place, so Amex didn't have to consider the matter further. And even if breach or misrepresentation was made out (which Mr D argues) this doesn't make a difference because Mr D's claim under s75 didn't meet the qualifying criteria. In short the Investigator concluded that this S75 claim fails before getting to the point of whether the phone was of satisfactory quality or not (and the insurance).

The CCA

The CCA introduced a regime of connected lender liability under Section 75 that afforded consumers ("debtors") a right of recourse against lenders ("creditors") that provide the finance for the acquisition of goods or services from a third-party merchant (the "supplier").

However, in order to engage the connected lender liability under Sections 75 one of the pre-requisites is the existence of a relevant debtor-creditor-supplier agreement (often shortened to 'DCS Agreement').

And in light of the High Court case of Steiner v National Westminster Bank plc [2022] EWHC 2519 ('the Steiner case'), I'm not persuaded there was a DCS Agreement here between the parties of Mr D, Amex, and the Supplier. And as that means that Amex didn't and doesn't have any responsibility for the CCA claim in question, I don't think it needs to do anything to put things right in this complaint. I say so for these following reasons.

A DCS Agreement is defined by Section 12(b) of the CCA as "*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 […]".*
Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "*finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly*."

In the Steiner case, the High Court looked at the application of Sections 56, 75 and 140A of the CCA and considered the circumstances in which the necessary arrangement can be said to exist. The central question in Steiner is not whether "arrangements" existed between the creditor and the timeshare provider when the Timeshare was sold. Instead, the question posed by Section 12(b) is whether the relevant credit agreement was made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between it and the timeshare provider.

In other words, the starting point for the purposes of Section 12(b) is the date that Amex and Mr D entered into the Credit Agreement – rather than the Time of Sale of the phone. Yet, in the absence of evidence to the contrary, it is difficult to argue that Amex issued Mr D with his credit card and entered into the Credit Agreement relating to that card under, or in contemplation of, any arrangements other than the relevant card network here.

The key issue in this case is that although Mr D's card financed the transaction to purchase the phone it wasn't his account with the website which was used to make the purchase of the phone. Mr D has told us in his email that:

> "*my (then) partner's* (website) *account was used because she had the* (quick delivery) *facility."*

So it is clear here that despite Mr D's card funding the transaction he wasn't the contracting party. His (then) partner was. And the website in question's terms and conditions make clear that its users aren't allowed to allow other parties to use their accounts and that passwords and access must be kept confidential.

Mr D argues that the phone was for him. That may well be the case. But it doesn't mean he was the contracting party who purchased it. His own testimony makes clear it was purchased on his then partner's account. And so she made the purchase as contractor, or she was allowing Mr D to use the account contrary to the terms she'd agreed to in having the account with the website.

And while there may well have been arrangements between Amex and the website (that is through membership of the card network here) and arrangements between Mr D's then partner and the phone supplier, similar to that as the High Court recognised in Steiner, the natural and ordinary meaning of Section 12(b) does not extend to saying that Amex entered into the Credit Agreement with Mr L under both the relevant card network and the contract between Mr D's then partner and the supplier for the purchase of the phone. Nor can Section 12(b) be interpreted as saying that Amex had entered into the Credit Agreement with Mr D in contemplation of the contract for the purchase of the phone between Mr D's then partner and the phone supplier (or in contemplation of any other arrangements which parties to the relevant card network might have had with third parties).

I recognise that the judgment in Office of Fair Trading v Lloyds TSB Bank Plc [2007] QB 1 ('OFT v Lloyds TSB') by the Court of Appeal is authority for the proposition that there can be arrangements between a creditor and a supplier without there being a direct contract between them. But a significant feature of the factual situation addressed in OFT v Lloyds TSB was that all parties to the card network in question in that case were party to the same network, whether or not they had direct contractual relations with one another. That network, which had rules, constituted 'arrangements' between all of its members. So, it was said by the High Court in Steiner that OFT v Lloyds TSB isn't authority for the proposition that, if there are arrangements between a creditor and X, and if there are also arrangements between X and a supplier, then it necessarily follows that there are arrangements between the creditor and the supplier.

Here clearly Mr D had arrangements with his then partner for her to use his credit card. And although he may have been the intended recipient of the phone he wasn't the contracting party who entered the purchase contract of the phone with the website. And Amex couldn't have contemplated, nor do I think it fair for it be held responsible for a contract between Mr D's then partner and a supplier which it couldn't have contemplated or have considered to be pre-existing arrangements between Amex and the supplier via Mr D's ex-partner. Clearly Amex wouldn't contemplated or agreed to such a pre-existing arrangement which included

another party unknown to it who was acting contrary to the terms and conditions of the website facility they were using to make the purchase.

Overall, therefore, given the facts and circumstances of this complaint, I don't think I it would be fair or reasonable to find that Amex was and is responsible for the supplier's alleged failings at the Time of Sale when the law doesn't impose such a liability on Amex in the absence of a relevant connection between it and the supplier of the phone.

I'm satisfied that the requirement for a DCS agreement isn't met here due to the contractual inter-relationship of the various parties here. And accordingly whether or not the phone or insurance were of satisfactory quality becomes irrelevant as the pre-requisites for a successful s75 claim are not met.

And although some of Amex's arguments aren't valid here, it is correct and pointing to the evidence of Mr D's then partner being the contracting party. And for this and the reasoning I've given I'm not persuaded Mr D has lost out due to Amex's consideration of the matter. Because in any event his s75 claim couldn't be successful for the reasons given.

I do appreciate that this isn't the decision Mr D wants to read. And as I've said I'm sorry to hear about what happened. But I don't think Amex treated him unfairly. And just because Mr D has lost out doesn't mean it's fair for Amex to refund him. It would only be fair for it to refund him if it had done something wrong. And I'm satisfied Mr D hasn't lost out due to what Amex did. So it has nothing further to do here.

My final decision

For the reasons set out above, I do not uphold the complaint against American Express Services Europe Limited. It has nothing further to do here.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 11 March 2024.

Rod Glyn-Thomas
Ombudsman