DRN-4690860

The complaint

Mr C complains that MBNA Limited treated him unfairly regarding a dispute about a transaction to purchase music festival tickets.

What happened

In August 2020 Mr C paid just over £593 for music festival tickets through an introducer website called Eventbrite. The festival was scheduled for July 2021 and was to be delivered by a festival promoter ('the Promoter'). Mr C used his MBNA credit card to fund this purchase. In 2021 Mr C was told that due to the Pandemic the festival was postponed until 2022. In 2022 he was told it was again to be postponed to 2023. In 2023 Mr C found out that the festival wasn't booked at the location it was due to be at. He also discovered at that time that the Promoter had gone into liquidation in 2021. Other parties had looked into taking over the festival, but these attempts were unsuccessful. So he tried to contact the website but wasn't successful in getting his money back. So he took his dispute to MBNA.

MBNA considered the matter and noted that Mr C had raised the issue to it over 120 days after entering the contract. So it didn't think a Chargeback had a reasonable prospect of success. It also considered a claim under Section 75 of the Consumer Credit Act 1974. It decided that the necessary relationship set out in the Act was not in place for S75 to apply to the provision of the festival in this case. And it said Eventbrite had done what it was meant to do. So it said it couldn't be liable for any claim in this case.

Our Investigator looked into the matter and concluded that the necessary relationship was in fact in place for MBNA to be liable under the quoted legislation. And found that as the festival hadn't taken place it was clear there had been a breach of contract and therefore decided that MBNA should refund Mr C the cost of the ticket plus interest. Mr C accepted the assessment.

MBNA disagreed saying that the Debtor-Creditor-Supplier ('DCS') agreement required was clearly not in place so it couldn't be liable under the Consumer Credit Act. It also said that Eventbrite had done its job of booking the tickets and that was all it was responsible for. So this complaint came to me to decide.

I issued a provisional decision earlier this month saying that Mr C's complaint should be upheld and both parties have responded acknowledging receipt of my 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.

As both parties have acknowledged receipt of my provisional decision and both parties had nothing further to add, I see no persuasive reason to deviate from my rationale as set out in my provisional decision. Accordingly my final decision is that Mr C's complaint is upheld for the same reasons as those in my provisional decision as repeated below. And I direct MBNA to redress the matter as I've set out below.

authorisation

Mr C accepts he made the transaction for the tickets through the Eventbrite website. He doesn't dispute the amount charged on his statement or the date it was charged. And it hasn't been argued that it was double charged or applied to the wrong account. Considering what has happened here and what the parties have said, I'm satisfied on balance that Mr C did properly authorise the transaction at the time. And accordingly it was correctly allocated to his account by MBNA.

could MBNA challenge the transaction through a chargeback?

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

MBNA has said that it couldn't raise a chargeback request due to the time constraints within the card network rules and due to the time between when Mr C paid for the services and when he took his dispute to MBNA. I've looked into what happened here and considered the network rules around chargeback, and I agree it was out of time. Accordingly I don't think Mr C has lost out here by MBNA not raising a chargeback.

Section 75

Here I must consider what MBNA 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 "CCA") which says that, in certain circumstances, if Mr C paid for goods or services on his credit card and there was a breach of contract or misrepresentation by the Supplier, MBNA can be held equally 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 s75 only applies if:
i) There is a debtor-creditor-supplier agreement (or "DCS" agreement, for short) of the type that falls within s12(b) or (c);
ii) That agreement finances the transaction between the debtor (Mr C) and the supplier (the Promoter); and,
iii) If, relating to that transaction, the debtor (Mr C) has a claim against the supplier (the Promoter) in respect of a misrepresentation or breach of contract. If so, then the creditor (MBNA) is jointly and severally liable to the debtor.

S12(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.

Much has changed since the CCA came into force including the introduction of numerous types of addition parties into payment journeys. The first main new addition to the payments journey were Merchant Acquirers. The impact of this development on the application of s75 was considered by the Court of Appeal in the case of the Office of Fair Trading v Lloyds TSB & 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 C'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 C's case. In order for s75 to apply there has to have been 'arrangements' between MBNA and the Promoter (the Supplier) to finance transactions between MBNA's cardholders and the Promoter. 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 (the Promoter here) 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 s75 on the basis that the timeshare purchase was not made under a DCS arrangement. 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 s12(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?

The question of whether Mr C’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 MBNA and the Promoter for the financing of transactions with the Promoter’s customers; and second, if such arrangements existed, whether that was the case when MBNA entered a

credit agreement with Mr C or, if the arrangements came into existence after that, whether MBNA contemplated that they would do so. I'll examine those questions in turn.

1) Arrangements

Our Investigator looked into the transaction primarily based on the information MBNA had given this service about the presence of a fourth party in the transaction namely the website introducer called Eventbrite.

Eventbrite is a well-known introducer website which introduces event ticket sellers to event ticket purchasers as well as providing financial transactional services. It is significant in size and has said that it sold approximately 280 million tickets for over 5 million events during 2022 alone. As its of such scale it is unlikely, to my mind, that the purchases of such tickets made through the card networks are being done without the card network's knowledge or consent. It seems clear to me that Eventbrite, through the Eventbrite Payment Processing (EPP) mechanism it provides, operates as a payment facilitator, and is recognized as such under the card networks. I say this because of a number of key terms within its terms and conditions. These include:

Clause 14.3 says that all transactions are between the organiser (such as the Promoter here) and its attendees (such as Mr C). Thus, Eventbrite itself is unlikely to be a "supplier", in the relevant sense.

Clause 2.2 explains that the organiser of an event selects the payment processing method, either using a third party or Eventbrite, in which case Eventbrite acts as the organiser's agent "*for the purposes of using our third party payment service providers to collect payments made by Consumers on the Services and passing such payments to the Organiser*". Thus, Eventbrite offers formalised arrangements with organisers that are specifically aimed at collecting and passing on payments for suppliers. That activity is typical of payment facilitators.

The card statement entry used a format that specifically names the supplier and abbreviates Eventbrite to "EB", in the same way as it would a supply transaction effected through a payment facilitator. This is how the transaction appears on Mr C's statement regarding this transaction.

Under Eventbrite's terms a two-tier system is in operation, whereby smaller suppliers are allowed to take payments through EPP without signing up to card schemes, and without acquiring rights under the schemes; whereas once their transactions reach a certain level (typically $100,000) the card schemes may require the supplier to contract directly with the scheme, or with one of the scheme's payment processors (presumably a merchant acquirer). This mirrors the requirements that card schemes impose on payment facilitators.

And lastly organisers are required by Eventbrite to comply with any applicable card scheme rules. In essence it appears that Promoter had outsourced its payments processes to Eventbrite. Eventbrite has terms and conditions including that all applicable network rules must be complied with. And within those terms and conditions some networks are named including Mastercard, the network relevant here. And I've also considered the network rules applicable here and this need to comply with the network rules by its participants is mirrored within those.

So the Promoter has an agreement with Eventbrite which includes the obligation of adhering to the card network rules here. Eventbrite is obliged to follow the same network rules also. And MBNA, by using the card scheme here, is bound to follow the same card scheme rules as well. And Mr C's card use is governed by his obligations to MBNA through his contract

with it. In essence all parties here all have different roles but are all obliged to work within the rules of the card network to complete the same transaction. MBNA's complaint handler apparently didn't understand the Investigator's pointing to the card scheme rules in their assessment. The crux here is that all parties have different roles but are all obliged to act within the rules of the card scheme and that fact means there are 'arrangements'.

I should add at this juncture that MBNA has provided limited representations to support its argument here on DCS other than to say it paid Eventbrite only and Eventbrite wasn't the supplier of the event that the tickets were for. It has not explained why the arrangement in this case should be distinguished from the established legal principles set out in the cases such as in the OFT case or in the Steiner case. It has only pointed to presence of Eventbrite and in essence said that there is no relevant DCS relationship for the supply of the festival due to that fact.

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 C's case, either way I'm still satisfied that there are sufficient arrangements between MBNA, as card issuer, and the Promoter, as supplier, for the purposes of establishing a DCS relationship, and I shall now explain why.

In Mr C's case, I think there are indications of relevant arrangements even before looking at the contractual obligations undertaken by the parties, given that Eventbrite was specifically, and publicly in the business of both introducing ticket sellers to ticket purchasers and processing or facilitating financial transactions such as the type of transaction in this case in unison with its event ticket introducing and facilitation service. It should also be noted that Eventbrite is a large company generating vast numbers of transactions which go through all the card networks every day. And as I've said, clearly the network here (and 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 Eventbrite is specifically and publicly in the business of providing financial transactional services to suppliers (such as the Promoter) as a significant part of its overall offering. MBNA would be able to know the parties within the arrangement here included Eventbrite and that Eventbrite's business involved processing payments under the network for its customers, such as the Promoter. And the Promoter was obliged through its agreement with Eventbrite to also be bound to follow the rules in the card network in this case.

Fundamentally, it follows that MBNA financed the transaction between Mr C and the Promoter 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 Eventbrite does not detract from that: it is MBNA's agreement to provide credit to Mr C that provides the financial basis for the transaction with the Promoter. And all of this done with all parties being required to comply with the card network rules.

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

2) Contemplation

It is possible that MBNA may argue that such arrangements as those present in Mr C's case were outside of its contemplation at the time when it agreed with Mr C 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 MBNA always understood that the Mastercard scheme would be operated in accordance with evolving rules and commercial practices, and that this evolution was likely to bring in new groups of network participants. MBNA must have known Mastercard would try to adapt its network 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 Mastercard network. So, I think MBNA must have contemplated, when agreeing to give Mr C a credit card, that his card would be used to finance purchases from whatever suppliers the network's changing rules and practices accommodated at the time of the purchase.

In this case, the credit card payment went to the Promoter via Eventbrite which are/were recognised participants in the same card scheme as MBNA, and this transactional process between debtors and suppliers is commonplace within the rules of the scheme. It is a method of payment to a type of supplier that the network's rules and practices accommodate and, as such, I consider that it was within MBNA's contemplation when the credit card agreement was entered into.

Accounts

It may be that MBNA points to the fact that the transaction journey is from Mr C's card through Eventbrite's payment processing and then onto the Promoter's accounts 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.

So all in all I've not seen any persuasive evidence at this stage that the additional services provided by Eventbrite 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 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 MBNA to be liable under S75 a breach of contract or a material misrepresentation needs to be made out. Here MBNA have made few arguments throughout this matter on the facts of what happened between Mr C and the Promoter (but rather focussed on DCS). Mr C has made clear that the Promoter didn't provide him any services under the contract as the festival never took place, and he says the Promoter (a limited company) who provided the festival each year between 2016 up to and including 2019 went into liquidation in 2021. There was some evidence that other promoters looked to take over and run the festival (and thus provide the contracted service to Mr C) however no such enquiries has led to the festival being arranged nor has there been any contact made to Mr C by any such party saying the booking he made will be honoured. So I'm satisfied that a breach of contract has been demonstrated. And as the festival isn't to take place and thus

the contract cannot be performed then a fair resolution would seem to be for Mr C to receive a refund plus interest from when MBNA declined Mr C's claim to it until it settles the matter.

MBNA's arguments

MBNA has said "*Eventbrite have not just acted as the payment facilitator in this instance. They have marketed the tickets, sold them on their marketing platform, arranged the transfer of funds to the event organiser and provided the tickets*." This is true. However the provision of such services in unison with the relevant payment processing doesn't mean that the necessary arrangements aren't in place.

MBNA says that Eventbrite weren't responsible for the failure for the festival to take place. This is also true. Nevertheless for the reasons given MBNA can be held liable to a 'like claim' as to the Promoter for the Promoter's failure to provide the festival to which Mr C had bought tickets. Eventbrite's presence here doesn't mean that MBNA isn't liable to a like claim as to that which Mr C has against the Promoter for the reasons given.

So it is my final decision that there is a breach of contract here and MBNA is liable for the reasons given.

Putting things right

Mr C paid £593.62 for these tickets. So under the Consumer Credit Act 1974 MBNA should refund this amount in full. MBNA should also pay 8% interest on this amount from when it rejected Mr C's s75 claim to it until it settles this matter.

My final decision

It is my final decision that this complaint about MBNA Limited is upheld. I direct it to settle the matter as I've described.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 16 April 2024.

Rod Glyn-Thomas
Ombudsman