

The complaint

Mr F complains PayPal (Europe) Sarl et Cie SCA ("PayPal") has dealt unfairly with a dispute he raised over an item purchased using his PayPal Credit account.

What happened

I sent a provisional decision on Mr F's case on 1 March 2024, a copy of which is appended to and forms a part of this final decision.

I outlined the background to the complaint, and my findings, in detail in that provisional decision. Because of this, it's not necessary to go into detail again, but in summary:

- Mr F bought a hot tub from a seller on an online marketplace ("E") for £1,184, in June 2020. He paid for the hot tub using PayPal Credit.
- The hot tub developed a fault within a few months, and Mr F was unable to register it with the manufacturer so he could benefit from the warranty, because he had not bought it from an authorised retailer. Mr F was also unsuccessful in his attempts to return the hot tub.
- Mr F raised a claim with PayPal under section 75 of the Consumer Credit Act 1974 ("CCA"), which was rejected early in 2022 on the basis the involvement of marketplace E meant the necessary debtor-creditor-supplier ("DCS") agreement was not in place for section 75 protection to apply. Mr F's subsequent complaint was also rejected.

In my provisional decision I made the following key findings:

- The PayPal Credit product was a type of credit agreement to which section 75 of the CCA could apply to purchases made using the credit agreement.
- The technical requirements for section 75 to apply were in place. This included the necessary DCS agreement, notwithstanding the involvement of marketplace E in the purchase process. This is because PayPal, at the very least, would have contemplated that its arrangements with E would mean its PayPal Credit product would be used to pay for purchases made by its customers from sellers on E's platform.
- Everyone had been operating on the assumption that the seller had been a "private seller", but the evidence indicated this was not the case and he was in fact a trader for the purposes of the Consumer Rights Act 2015 ("CRA"). This meant Mr F was entitled contractually to receive a hot tub which was of "satisfactory quality".
- The hot tub had been advertised as brand new and was priced at close to the manufacturer's retail price, so what constituted satisfactory quality would be a high level – as would be expected for brand new goods. There was evidence in the form of a video and accompanying explanation, and emails between Mr F and the seller,

which indicated the hot tub developed a fault within 2-4 months of purchase, and had not been satisfactory quality. There had therefore been a breach of contract by the seller and Mr F had been entitled to certain remedies under the CRA.

- Taking into account the provisions of the CRA and section 75 of the CCA, I thought it would be fair and reasonable for PayPal to refund Mr F the price he'd paid for the hot tub plus compensatory interest, and to pay any reasonable costs involved in disposing of the item.

I asked both parties to let me have any further submissions they wanted me to consider. Both parties said they would accept my provisional decision and had no further submissions, so the case has been returned to me once again 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.

Because both parties to the complaint have accepted the provisional decision, I see no reason to depart from the findings I reached, having reviewed all the evidence again.

It follows that I will be upholding Mr F's complaint for the same reasons as stated in the appended provisional decision, and making the same directions to PayPal.

My final decision

For the reasons summarised above, and explained in full in my appended provisional decision, I uphold Mr F's complaint and direct PayPal (Europe) Sarl et Cie, SCA, to take the following actions:

- A) Pay Mr F £1,184, this being a refund of the price of the hot tub and the cost of delivery.
- B) Pay Mr F 8% simple interest per year* on the refund outlined in A), calculated from the date it first wrote to him declining his section 75 claim, to the date the refund is paid to him.
- C) Make arrangements with Mr F for the disposal of the hot tub, paying any reasonable costs involved in doing so. If Mr F sells the hot tub then PayPal will be entitled to the proceeds of that sale.

*If PayPal considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr F how much it's taken off. It should also give Mr F a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 22 April 2024.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to arrive at a different set of conclusions to our investigator, and I want to give all parties to the complaint an opportunity to make further submissions before I make my decision final.

I'll look at any more comments and evidence that I get by 15 March 2024. But unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

Mr F complains PayPal (Europe) Sarl et Cie SCA ("PayPal") has dealt unfairly with a dispute he raised over an item he purchased using his PayPal Credit account.

What happened

Mr F bought a hot tub from a seller on a well-known online marketplace, "E", for £1,184 including delivery, in June 2020. He opted to pay for the hot tub using PayPal Credit.

Later in June 2020 Mr F attempted to register the hot tub with the manufacturer so he could benefit from the manufacturer's warranty. This proved to be a problematic process as the manufacturer considered Mr F's proof of purchase was insufficient. He initially considered returning the hot tub, but the seller said he could help register the warranty. Mr F obtained the original receipts for the hot tub from the seller, but the manufacturer was not satisfied with this either, eventually saying on 24 August 2020 that because Mr F had not bought the hot tub from an authorised retailer, it was not possible to register the warranty.

At some point in August 2020 Mr F also reported a fault with the hot tub to the seller. In October 2020 he contacted the seller to say the fault was persistent and he wanted to return the hot tub. It appears this was unsuccessful as Mr F raised a dispute with PayPal the same month, which was considered and rejected under their Buyer Protection policy.

Mr F also tried to raise a claim with PayPal under section 75 of the Consumer Credit Act 1974 ("CCA"). A complaint about PayPal's initial failure to look into the section 75 claim in a timely manner has already been considered by this service under another reference. No findings were made by us in relation to the outcome of the claim, which hadn't been provided at that point.

PayPal ultimately turned down the section 75 claim early in 2022, reasoning that because Mr F had purchased the hot tub via E, there was not the necessary debtor-creditor-supplier ("DCS") agreement in place for the purchase to be covered by section 75. Mr F complained about this decision but PayPal stood by its position. Dissatisfied with this response, Mr F referred his complaint to the Financial Ombudsman Service for an independent assessment.

One of our investigators began looking into the case. He contacted PayPal, noting that the involvement of E in the purchase didn't necessarily mean that there wasn't a valid DCS agreement in place, and asking PayPal to comment on the rest of Mr F's claim. PayPal responded that there was no evidence of breach of contract or misrepresentation by the seller.

Our investigator then went on to issue an assessment. In this assessment he came to the following conclusions:

- Section 75 of the CCA can allow a borrower to claim against their credit provider if there's been a breach of contract or misrepresentation by a supplier of goods or services, so long as certain conditions are met.
- While PayPal had said a valid DCS agreement did not exist due to the purchase being made via E, this was incorrect although it made no difference to the outcome.
- Mr F had bought the hot tub from a private seller, meaning he didn't benefit from the protections offered by the Consumer Rights Act 2015 ("CRA"). This meant there couldn't be a breach of contract in respect of the sale of the goods. And there had been no allegations that the hot tub was misrepresented, so Mr F didn't have a valid claim under section 75.

Mr F disagreed with this assessment and asked that his case be reviewed by an ombudsman. He said that he hadn't been aware at the time that the seller had been a private seller.

The case was then passed to me to decide. I felt some further investigation was necessary into two areas – whether or not the seller was in fact a private seller, and whether there was any evidence of the hot tub being faulty.

With the additional investigation completed, I decided it was necessary to issue a provisional decision.

What I've provisionally 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.

Section 75 of the CCA allows debtors who have paid for goods or services using certain types of credit, to hold their creditor liable for any breach of contract or misrepresentation by the supplier of the goods or services in question, so long as certain technical conditions are met.

Although it doesn't appear to be in dispute that section 75 can apply to Mr F's account with PayPal, based on my understanding of the PayPal Credit product, it is a type of credit to which section 75 can apply.

I say this because PayPal Credit is a running account credit agreement regulated by the CCA, which can be used to purchase goods or services from suppliers which accept PayPal Credit as a form of payment. PayPal pays the supplier and charges the corresponding amount to the debtor's PayPal Credit account. It operates in some respects in a way which is similar to a credit card, but without the physical card.

Before I go on to consider whether Mr F has a claim in respect of a breach of contract or misrepresentation against the supplier/seller, I think it's important first of all to outline the position I've reached on whether the technical conditions I've referred to have been met. This is because it is not clear whether PayPal is maintaining its position that the involvement of E means that there is not a valid DCS agreement. The existence of a DCS agreement is one of the conditions which needs to be in place for a valid section 75 claim to be made.

I think it would be useful first of all to set out the relevant parts of the CCA in full. Section 75(1) of the CCA states the following:

"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.”

Sections 12(b) and 12(c), referred to above, are set out as follows:

“(b) 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, or

(c) an unrestricted-use credit agreement which is made by the creditor under pre-existing arrangements between himself and another person (the “supplier”) other than the debtor in the knowledge that the credit is used to finance a transaction between the debtor and the supplier.”

PayPal Credit appears to operate as a restricted-use credit agreement. Section 11(1)(b) defines such an agreement as:

“A restricted-use credit agreement is a regulated consumer credit agreement-

...

(b) to finance a transaction between the debtor and a person (the “supplier”) other than the creditor...”

And section 11(4) says:

“An agreement may fall within subsection (1)(b) although the identity of the supplier is unknown at the time the agreement is made.”

Section 12(b) of the CCA refers to the concept of “pre-existing arrangements”. It makes it clear that for there to be a DCS agreement for a particular purchase, the payment needs to have been made under pre-existing arrangements or in contemplation of future arrangements with the supplier. I will generally refer to these together simply as “arrangements” except where it is necessary to distinguish between them.

PayPal has stated that because Mr F purchased the hot tub from a seller on E’s marketplace, there is not a DCS agreement. It hasn’t really expanded on why it has taken up this position, but it seems probable that PayPal does not consider itself to have any arrangements with the seller of the hot tub. Rather, it considers its arrangements to be with E, the marketplace, and that there is a four-party structure in place rather than the three-party structure that the words “debtor-creditor-supplier” indicate.

Since the case of *Office of Fair Trading v Lloyds TSB Bank & others* (“the OFT case”), which reached trial in 2004, was appealed to the Court of Appeal in 2006, and went to the House of Lords in 2007, it has been well-established that arrangements between the creditor and the supplier do not need to be direct and can be established via intermediaries.

While the case concerned the introduction of merchant acquirers in the context of purchases made with *credit cards*, the principles it set out are readily applicable to other types of credit to which section 75 could conceivably apply.

The Court of Appeal concluded that arrangements did not need to be direct between the creditor and the supplier, for them to be of the kind required to bring a section 75 claim against the creditor. The Court considered the word “arrangements” as used in section 12 of

the CCA was to be construed loosely, observing that not to do so would result in some consumers being disadvantaged:

“...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.”

The Court of Appeal also considered the objective purpose of the credit agreement was to provide the bank's customers with the means to pay for goods and services, dealing with an argument that the credit agreement had not “financed” any purchase from the supplier as follows:

“In order to be a restricted-use credit agreement the agreement must be one to “finance” a transaction. Before the judge Mr Hapgood argued that a supply transaction entered into under a four-party structure was not “financed” by the credit agreement because the finance needed to pay the supplier was provided by the merchant acquirer, not by the card issuer.

The judge rejected that argument, at paras 15-17, on the grounds that the purpose of the credit agreement in these cases is to provide the customer with credit to enable him to obtain goods or services from the supplier which amounts to financing the transaction. Before us Mr Hapgood abandoned that argument, recognising from the customer's point of view, at any rate, there really could not be any argument but that the transaction is financed by the card issuer. In our view, however, the Act requires one to look at the position not simply from the point of view of the customer, but by reference to the function of the credit agreement itself. It is clear that, whether the transaction is entered into under a three 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.”

I've considered how all of this fits in with Mr F's purchase of the hot tub, from the seller on E, using his PayPal Credit agreement.

PayPal has not provided details of the precise arrangements it has with E regarding the use of PayPal Credit on E's platform, or whether it has direct arrangements with any sellers on the platform itself. However, I think it's reasonable to conclude that PayPal would at least have contemplated that its arrangements with E mean its PayPal Credit product would be used to pay for purchases made by its customers from sellers on E's platform.

This is enough, in my view, to be able to conclude that arrangements of the required kind existed between PayPal and the seller in this case, for a valid DCS agreement to exist and for Mr F to be able to hold PayPal liable in the event of a breach of contract or misrepresentation by the seller.

There are other conditions which need to be in place for a section 75 claim to be valid. For example, the claim needs to relate to items which have a cash price within a certain range of values. Given it appears not to be in dispute whether these other conditions are in place, I don't intend to go into detail in relation to them. I will say only that, having considered the facts and circumstances of this case, I'm satisfied Mr F's claim met these conditions.

Does Mr F have a claim for breach of contract or misrepresentation against the seller?

Even if all the technical conditions for a valid claim to be made are in place, it doesn't necessarily follow that Mr F has a claim against the seller which he can bring against PayPal by virtue of section 75 of the CCA.

It's not been alleged that the seller misrepresented the hot tub to Mr F, so I've focused in this provisional decision on whether there was a breach of contract.

Our investigator pointed out that when a purchase is made from a private seller then the purchaser's rights are limited. He concluded that Mr F had no claim for breach of contract as a result of him purchasing from a private seller.

When I initially reviewed this case I noted that everyone involved, including Mr F himself, had been operating under the assumption that the seller was a "private seller". However, I considered that, even if it appeared that the seller was an individual, this did not necessarily mean that he would avoid falling under the definition of "trader" in the relevant legislation.

A trader, according to the CRA, is "*a person acting for purposes relating to that person's trade, business, craft or profession...*" If a consumer buys goods from a trader, then terms are treated as included in the contract of sale as to the quality of the goods provided. If goods are not "satisfactory quality" then the seller will be in breach of contract.

Having obtained the seller's listing history on E's platform, it was apparent that he regularly sold hot tubs and hot tub-related accessories. In fact, he appeared *only* to sell these sorts of items. It was also apparent from the seller's original purchase receipt for the hot tub he sold to Mr F, that he was selling the hot tubs on E's platform for a profit. In light of this, I think the seller would fall under the definition of a trader according to the CRA, as he was acting for purposes related to his business.

This means it was an implied term of the contract of sale between him and Mr F, that the hot tub would be satisfactory quality. What constitutes satisfactory quality is dependent on things such as the description of the goods and the price paid. In this case, the hot tub Mr F bought was described as "BRAND NEW In The Box" and the price he paid was close to the retail price for a new hot tub from the manufacturer. In the circumstances I think the standard for what would be considered satisfactory quality would be relatively high – as would be expected for brand new goods.

We've asked Mr F to provide evidence of the problems he says he encountered with the hot tub. He's provided an explanation and a short video. The evidence appears to show that the hot tub has a fault with the water pump. Mr F says the fault first occurred in August 2020, and there's evidence of him complaining to the seller about it in October 2020.

While the evidence is to some extent limited, on balance I think it's likely the hot tub developed a fault with the water pump within the first 2-4 months of purchase. In light of this, I don't think the hot tub could be said to be satisfactory quality, and the seller was therefore in breach of contract.

The CRA prescribes certain remedies for consumers where goods are not satisfactory quality. In general, consumers have a right to a repair or replacement for unsatisfactory quality goods. If those remedies cannot be achieved, or cannot be achieved in a reasonable time or without significant inconvenience to the consumer, they have the right to reject the goods and receive a refund, or to keep the goods at a reduced price. Any refund given on rejection of the goods can be reduced to take into account the use the consumer has had of them, if the rejection takes place more than six months after delivery. The trader is required to bear the reasonable costs of returning the goods.

It's unclear exactly what happened when Mr F initially reported the fault to the seller, and then asked to return the hot tub in October 2020. However, the evidence suggests the seller initially directed Mr F to claim under the manufacturer's warranty (which turned out not to be valid) and then refused Mr F's request to return the item. I say this because it's apparent Mr F still has the hot tub in his possession, and he first contacted PayPal in October 2020.

In the circumstances, having regard for the provisions of the CRA, I think Mr F was entitled to reject the hot tub and receive a full refund of what he paid for it, including delivery and the reasonable costs of returning or otherwise disposing of it. Due to the effect of section 75 of the CCA, I think he's entitled to an equivalent remedy from PayPal. Although the hot tub has been in Mr F's possession since mid-2020, it appears to have been faulty since either August or October 2020, so I don't think it would be reasonable to make a deduction for use.

The hot tub will need to be disposed of, unless it can be returned to the seller. Mr F and PayPal will need to arrange how best to achieve this. PayPal will need to cover any reasonable costs involved but will be entitled to any proceeds if, for example, Mr F disposes of the hot tub by selling it.

Putting things right

I'm currently minded that PayPal treated Mr F unfairly and unreasonably by failing to honour the claim he brought under section 75 of the CCA. To put things right, I intend to direct PayPal to take the following actions:

- D) Pay Mr F £1,184, this being a refund of the price of the hot tub and the cost of delivery.
- E) Pay Mr F 8% simple interest per year* on the refund outlined in A), calculated from the date it first wrote to him declining his section 75 claim, to the date the refund is paid to him.
- F) Make arrangements with Mr F for the disposal of the hot tub, paying any reasonable costs involved in doing so. If Mr F sells the hot tub then PayPal will be entitled to the proceeds of that sale.

*If PayPal considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr F how much it's taken off. It should also give Mr F a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My provisional decision

For the reasons explained above, my provisional decision is that Mr F's complaint should be upheld and PayPal (Europe) Sarl et Cie SCA should take the actions outlined in the lettered paragraphs in the "Putting things right" section of this provisional decision.

I now invite both parties to the complaint to provide any further submissions they would like me to consider, by 15 March 2024. I will then review everything again before making a final decision.

Will Culley
Ombudsman