

The complaint

Miss M complains that MBNA Limited has treated her unfairly regarding a dispute about transactions for legal advice.

What happened

In late July 2023 Miss M approached a solicitor's firm I'll call 'B' for Legal Advice on matters where she felt she had been wronged by other parties. On 25 July 2023 B emailed Miss M after a preliminary call between it and Miss M and within that email B noted that "*applications to disapply the limitation period in libel claims rarely succeed.*" There followed significant emails between Miss M and B and work done and payments by Miss M to B to a total according to Miss M of £6000. By 03 August 2023 Miss M was emailing B to say "*I do not think I want to continue with your instruction. You have changed the way that we were working and I no longer trust you.*" Miss M then complained to B and B set out its formal response to Miss M's complaint in its complaint response dated 25 August 2023 rejecting Miss M's complaint in full. Unhappy Miss M took her dispute to MBNA.

MBNA considered the matter and issued its final response on 03 November 2023. In that it said it would pay her £75 for its own customer service failings. However in relation to Miss M's dispute with B which MBNA said it had considered under Section 75 of the Consumer Credit Act 1974 ('S75' and 'CCA' respectively) and it had concluded that in relation to B which it describes as the 'merchant' "*We haven't received sufficient evidence to support your claim, and the claim has been declined. No breach of contract or misrepresentation of the merchant's service had been proven.*" So Miss M brought her complaint here.

Our Investigator looked into the matter and concluded that MBNA hadn't treated Miss M unfairly. The investigator set out his position in regard to chargeback and S75 and felt on balance of probabilities that MBNA had acted fairly. Miss M remains unhappy. Accordingly this dispute comes 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.

Miss M accepts she paid for B's services using credit from MBNA. Considering what has happened here and what the parties have said, I am satisfied on balance that such payments were correctly allocated to her account by MBNA.

Chargeback is a straightforward dispute resolution process run by the relevant card network (not MBNA). It allows for disputes to be raised with merchants and them to either accept the dispute or provide its evidence on the matter. If an amicable conclusion cannot be reached ultimately it's the card network itself which decides the outcome of the dispute. So it's possible for a card issuer such as MBNA to take the chargeback throughout the whole process and still not be successful in obtaining a refund having done everything correctly and fairly.

Here it appears MBNA used its judgement not to raise a chargeback to B. It has this discretion and can use it as long as it does so fairly. As I've described chargeback is a straightforward process back and forth between card issuer and merchant. It uses straightforward coding system to inform the merchant of the issue. Chargeback is considered solely based on the rules of the particular network used. Here B had issued a strong rebuttal of Miss M's dispute with it. So I'm not persuaded it would have changed its position had MBNA raised a chargeback considering that and the facts here. Furthermore considering the nature of the chargeback scheme rules and the arguments made by both sides I'm not persuaded that MBNA has treated Miss M unfairly by using its discretion here in not pursuing a chargeback. Clearly both parties are entrenched on this matter. The chargeback scheme is not designed to include the interrogation of complex situations or require the card scheme to undertake further investigation to resolve the matter. I'm not persuaded Miss M has done enough in her submissions to MBNA to show that her position had a reasonable prospect of success based on B's position on the matter for the reasons of the nature of the chargeback process and some further reasoning on the merits of this matter which I'll explain under Section 75 which also applies to the likelihood of a chargeback being successful. Accordingly I don't think MBNA has treated Miss M unfairly by not pursuing the chargeback further.

The S75 claim under The CCA

The CCA introduced a regime of connected lender liability under S75 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 "merchant"). S75 says:

"If the debtor under a debtor-creditor-merchant agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the merchant in respect of a misrepresentation or breach of contract, she shall have a like claim against the creditor, who, with the merchant, shall accordingly be jointly and severally liable to the debtor."

So the test is here, did MBNA consider Miss M's S75 claim to it fairly, or in other words are the pre-requisites of the CCA in place (financial limits and Debtor Creditor Supplier arrangement) and is there a breach of contract or material misrepresentation made out against the supplier/merchant that MBNA should fairly be held responsible for. And if there is a remedy available whether that remedy is fair. I'm satisfied the financial limits test is made out here as well as the arrangement requirement. I should add that as this is a 'like claim' MBNA are required to consider the claim made to it fairly, but importantly there is also an onus on Miss M to make out her claim to MBNA as she would have to against the merchant (B) directly, for example if she were going to take the B to court. This doesn't mean she has to use solicitors to make a claim to MBNA or submit documents in a certain way or in formal legal pleadings. But it does mean she needs to show on balance of probabilities that there was a breach of contract or misrepresentation through the arguments she makes and the evidence she provides.

Broadly speaking Miss M has argued that B breached her contract with it and that it has misrepresented its services to her. However I note she has said very little about how MBNA has failed her here. MBNA is whom this complaint and this decision is about. And to be successful I need to be persuaded MBNA has treated Miss M unfairly in its consideration of the matter.

Helpfully Miss M has set out her key positions in response to the investigator's assessment in her email of the 03 April 2024. I've considered everything Miss M has argued and the matter wholly, but for the sake of clarity I shall now explain in relation to her key arguments why I disagree with her positions.

Miss M says *"The contract contains several provisions stating that work and objectives would be agreed in advance of each stage; that the vendor would provide a best estimate and request sufficient funds in advance to complete each stage; and that there will not be substantial renegotiation once the work commenced; and that the matter will be completed reasonably smoothly."* Miss M also says *"the Vendor (B) breached the contract in asking for additional fees to complete the work - what I requested is that I get my questions answered and to provide comments on the work which was not finalised."* The evidence available here simply does not support Miss M's characterisation of the matter. From the very start B explains its rates to Miss M both in its terms and its initial email. From the very start it tries to manage Miss M's expectations in that it makes clear her position is unlikely to succeed. I note that in its first email to Miss M it says:

"The cost of a preliminary consultation would be a fixed fee of £1,500 plus vat. This includes reviewing up to 20 pages of core documentation ahead of the meeting (please let me know if the core documentation exceeds 20 pages as this may incur an additional fee). If you instruct us to undertake any further work after the consultation this will be charged by the hour, at the below rates in accordance with our attached terms of business."

The email correspondence shows from the beginning B trying to explain to Miss M that it did not consider her case likely to succeed. The following day (26 July) it gives further reasoning why it doesn't feel her position can succeed. Miss M refuses to accept B's position and asks for barrister's advice and Kings Counsel advice. B sets out further costs for such advice. In these emails Miss M repeatedly refutes B's position and there is considerable back and forth about options Miss M can take until latterly Miss M makes clear she feels the working relationship has broken down. Miss M's argument is in essence that she was charged more than she agreed at the beginning but I'm satisfied further costs were explained throughout and she paid them as they were due. I am not persuaded MBNA has treated Miss M unfairly by considering that she'd not made out a breach of contract on the matter of costs.

Miss M says *"I complied with the contract terms and I sought clarification about the fees required to complete the work (which I did in advance of the next stage) and the Vendor did not respond that any further fees would be needed beyond what I already paid."* She points to an email of 28 July where she raises the question of costs. However as B explain in its response to Miss M about her complaint that day B had said:
"Lastly, I should mention that whilst this email has been Included within the fixed fee you paid for the consultation, any further work will be charged at our hourly rates In accordance with our terms of business."

Later that day (only a few minutes later) and in direct response to the above email Miss M says *"Thank you. I understand that instructing Counsel is further work."* Thereby making clear that further work would be outside of the original work and thus the original fee agreed and thus chargeable. So I'm not persuaded by Miss M's arguments here. I say this because the argument made latterly here isn't supported by the emails between the parties from the time to my mind.

Miss M says *"The contract clearly defines specific circumstances under which additional fees may be sought. The Vendor's request for further fees did not fall under any of those circumstances and was not justifiable under the terms of the contract."* Similar to my rationale above I don't think the email evidence between the parties supports this contention and I point to Miss M's acceptance of the work suggested. I'm satisfied MBNA hasn't treated Miss M unfairly by considering the charges were supported by the contract and the conversations between the parties as this matter progressed.

Miss M has said “*The contract terms do not allow the Vendor refuse work and to terminate the contract and keep any of the fees I paid. The Vendor was not entitled to any fees.*” I don’t think this characterisation of what happened is supported by the evidence. I see from the correspondence that B made clear from the start it felt Miss M’s position was unlikely to succeed. I see points in the correspondence between them where it makes clear pursuing the matter not to be worthwhile in its opinion and it also suggests that spending more money on the matter would be in vain. In essence B seems to be suggesting to Miss M not to be ‘*throwing good money after bad*’ to use a colloquialism and has done so pretty much from the start. And in the end it is Miss M who calls a halt to the work not B. So I don’t think MBNA has treated Miss M unfairly here either.

Miss M “*The vendor misrepresented its services.*” I’ve considered what Miss M says under this argument specifically her comments about B saying “*liaise with (a third party) and prepare instructions to Counsel*”. She goes on to say how she considered what that meant and then says that’s a service wasn’t carried out. To my mind Miss M’s argument doesn’t follow. She’s not shown there was a misrepresentation (an untrue statement of fact) or a breach here and similarly she’s not shown how MBNA treated her unfairly in this matter either.

I appreciate this is not the decision Miss M wishes to read. And I appreciate that Miss M feels wronged by the other parties prior to this relationship with B. But having considered the matter in the round I’m not persuaded by Miss M’s arguments about her dispute with B. Furthermore and crucially here I’m not persuaded Miss M has shown on balance that MBNA has treated Miss M unfairly in its consideration of the matter. I think MBNA has acted fairly in its consideration of the matter on the facts and in addition I think it has fairly pointed to B’s arguments on the matter as being persuasive also. Having considered the matter in the round and all the evidence and arguments here I’m not persuaded MBNA has treated Miss M unfairly and accordingly Miss M’s complaint is unsuccessful.

It maybe that Miss M wishes to continue this dispute with B. She’s already been informed of her option to go to the Legal Services Ombudsman some time ago. This final decision marks the conclusion of this service’s process for considering this dispute. And MBNA has nothing further to do in this matter.

My final decision

It is my final decision that Miss M’s complaint about MBNA Limited is not upheld. It has nothing further to do on the matter.

Under the rules of the Financial Ombudsman Service, I’m required to ask Miss M to accept or reject my decision before 2 December 2024.

Rod Glyn-Thomas
Ombudsman