DRN-5053616

The complaint

Mrs B complains that American Express Services Europe Limited treated her unfairly regarding a dispute about a transaction funding a property rental.

What happened

In July 2023 Mrs B was interested in a property rental on an introducer website (the 'Website' from hereon). So she booked through the Website for five nights at the property provided by the owner of the accommodation (the 'Supplier' from hereon) using her American Express Services Europe Limited ('Amex' hereon) credit card to pay for it. On arrival she says she found the accommodation to be dirty and to be substandard in many regards. It seems clear the Supplier accepted Mrs B's position, as they were moved on the second day to different nearby accommodation. Mrs B says that although this second accommodation wasn't as bad as the first accommodation, it was also dirty and substandard in many respects. Mrs B accepts her party stayed at the properties for the full duration of their booked stay.

Mrs B complained to the Supplier and Mrs B says she was offered the first night free through a refund although that refund has never materialised. So she took her complaint to Amex.

Amex considered the matter. In short, its overall stance is that a chargeback wasn't successful because the website defended the chargeback and as Mrs B and her party had stayed for the full period of the booking it felt pursuing the chargeback didn't have a reasonable prospect of success. It also felt that a claim under S75 of the Consumer Credit Act 1974 ("S75" and the "CCA" respectively) couldn't be successful because the pre-requisite requirements of a S75 claim hadn't been met. Feeling this to be unfair Mrs B brought her complaint to this service.

Our Investigator looked into the matter and concluded that the necessary relationship was in fact in place for Amex to be liable under the quoted legislation. She found that Mrs B's wealth of evidence relating to the state of the accommodation was persuasive and that meant there had been a breach of contract which Amex could be held liable for. And she concluded a 50% price reduction in the circumstances was fair. Mrs B accepted this solution.

Amex disagreed saying that the Debtor-Creditor-Supplier ('DCS') agreement pre-requisite requirement was clearly not in place so it couldn't be liable under the Consumer Credit Act. So this complaint came to me to decide.

I issued a provisional decision dated 23 September saying I was minded to uphold the complaint. Both parties have accepted my position.

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 accepted my provisional position without further significant argument I see no reason to deviate from that rationale. Accordingly I repeat the broad thinking of my

provisional decision below in this final decision albeit with slight amendments to recognise the final nature of this decision.

authorisation

Mrs B accepts she made the transaction for the property rental through the website. She doesn't dispute the amount charged on her 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 Mrs B did properly authorise the transaction at the time. And accordingly it was correctly allocated to her account by Amex.

could Amex challenge the transaction through a chargeback?

In certain circumstances, when a cardholder has a dispute about a transaction, as Mrs B 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 Mrs B didn't properly authorise the transaction, given the conclusions on this issue that I've already set out.

Amex has said that it didn't take a chargeback further because it didn't feel it had a reasonable prospect of success. It is of note that the website is the merchant of record and would be the party responding to the chargeback. I've considered the chargeback reason codes available and concur that the specifics of this dispute don't naturally fit any of the reason codes available. I can see the website responded to say that it had done what it was meant to do, namely introduce, and facilitate such a booking of this property. So I'm not persuaded Amex's position here is unfair or erroneous. Accordingly I don't think Mrs B has lost out here by Amex not pursuing the chargeback further here. I say this because ultimately the merchant of record defended the chargeback and had done would it agreed to do. So had Amex taken this chargeback to the final stage on balance I'm satisfied that Mrs B's chargeback would have been unsuccessful. So she hasn't lost out by it not being taken further.

Section 75

Here I must consider what Amex 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 "CCA" which says that, in certain circumstances, if Mrs B paid for goods or services on her credit card and there was a breach of contract or misrepresentation by the Supplier, Amex 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, she 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 (Mrs B) and the supplier; and,

iii) If, relating to that transaction, the debtor (Mrs B) has a claim against the supplier in respect of a misrepresentation or breach of contract. If so, then the creditor (Amex) 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 herself 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 she 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 herself 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 additional 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."

Since 2006, new technology and the growth of internet commerce exponentially has 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 indeed introducer websites such as that here) and, again card networks have changed their rules and practices in response. Having provided some important context to the circumstances in Mrs B'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 Mrs B's case. In order for s75 to apply there has to have been 'arrangements' between Amex and the property owner (the Supplier) to finance transactions between Amex's cardholders and the property owner. It's clear that there was no direct arrangement between them, but this isn't a requirement for the application of S75. Amex has made the point there isn't a direct arrangement in this case due to the presence of the Website, but for clarity and certainty I reiterate there is no requirement for the arrangement to be direct 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 in the four-party situation. She said that the use of the word showed a deliberate intention on the part of the drafter 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 her 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 here?

The question of whether Mrs B'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 Amex
and the supplier for the financing of transactions with property owner's customers; and second, if such arrangements existed, whether that was the case when Amex entered a credit agreement with Mrs B or, if the arrangements came into existence after that, whether Amex
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 Amex had given this service about the presence of a fourth party in the transaction namely the website introducer called Booking.com.

Booking.com is a well-known introducer website which introduces those wishing to rent properties to property owners as well as providing some associated financial transactional services. Online evidence suggests that the company generated between $6.7bn and $17.0bn every year between 2016 and 2022. So the card networks must have been supporting a significant volume of credit transactions for card issuers going to Booking.com's Service suppliers such as the on here for some years. As its of such scale it is unlikely, to my mind, that the purchases of such rentals made through the card networks are being done without their knowledge or consent. It seems clear to me that Booking.com, through its contracts with its parties, operates as a payment facilitator (amongst other services it

provides), and is recognized as such under the card networks. I say this because under Section B2 of Booking.com's terms the consumer's contract in relation to the booking is with the third-party Service Provider (the Supplier/property owner here) and not with Booking.com itself.
In essence it appears that property owners (suppliers) have in essence outsourced its payments processes to Booking.com. It 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 American Express and thus the network relevant here. And my understanding of American Express' network is that it includes need to comply with the network rules by its participants is mirrored within those one of which here is clearly Booking.com.

So the Property Owner (Supplier) has an agreement with Booking.com which includes the obligation of adhering to the card network rules. Booking.com is obliged to follow the same network rules also. And Amex, by using its related card scheme here, is bound to follow the same card scheme rules as well. And Mrs B's card use is governed by her obligations to Amex through her 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. Amex's complaint handler apparently didn't understand the Investigator's arguments here. The crux here is that all parties have different roles but are all obliged to act within the rules of the card scheme (run by American Express) and that fact means there are 'arrangements'.

I should add, at this juncture, that Amex has provided limited legal analysis to support its argument here on DCS other than to say it paid Booking.com only and Booking.com wasn't the supplier of the property. 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 Booking.com and in essence said that there is no relevant DCS relationship for the supply of the property due to that fact.

It may be that in this case there was a Merchant Acquirer present in the payment journey as well (although I think it unlikely bearing in mind the close relationship between Amex and the American Express network). But whether there was a four-party arrangement here or indeed a five-party arrangement present in Mrs B's case, either way I'm still satisfied that there are sufficient arrangements between Amex, as card issuer, and the Property owner, as supplier, for the purposes of establishing a DCS relationship, and I shall now explain why.

In Mrs B's case, I think there are indications of relevant arrangements even before looking at the contractual obligations undertaken by the parties, given that Booking.com was specifically, and publicly in the business of both introducing property owners to prospective property renters and processing or facilitating financial transactions such as the type of transaction in this case in unison with its property introducing and property rental facilitation service. It should also be noted that Booking.com 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 Booking.com is specifically and publicly in the business of providing financial transactional services to suppliers (such as the Property owner) as a significant part of its overall offering to its service providers. Amex would be able to know the parties within the arrangement here included Booking.com and that Booking.com' s business involved processing payments under the network for its customers, such as the Property owner/supplier. And the Property owner/supplier was obliged through its agreement with Booking.com to also be bound to follow the rules in the card network in this case.

Fundamentally, it follows that Amex financed the transaction between Mrs B and the property owner via Booking.com 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 Booking.com does not detract from that: it is Amex' agreement to provide credit to Mrs B that provides the financial basis for the transaction with the property owner. And all of this done with all parties being required to comply with the card network rules.

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

2) Contemplation

It is possible that Amex may argue that such arrangements as those present in Mrs B's case were outside of its contemplation at the time when it agreed with Mrs B to open her 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 Amex always understood that the American Express card network 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. Amex must have known that the American Express card scheme would adapt their 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 respective network. So, I think Amex must have contemplated, when agreeing to give Mrs B a credit card, that her 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 Property owner via Booking.com which are/were recognised participants in the same card scheme as Amex, 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 Amex's contemplation when the credit card agreement was entered into.

Accounts

It may be that Amex points to the fact that the transaction journey is from Mrs B's card through Booking.com' s payment processing and then onto the Property owner'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.

Amex's arguments

Amex has pointed to Booking.com's terms and conditions noting that it makes clear Booking.com are not a party to the contract between Mrs B and the supplier here. I agree that's the case. Amex's argument doesn't deal with the point the investigator in this case made nor that I've set out. Here it is clear the property owner is the supplier and Amex is the creditor and Mrs B is the debtor. The failing here was the untidy and dirty accommodation not the performance of Booking.com in its contractual obligations to any party but rather the failings between the property owner in its supply of the property and Mrs B. Just because Booking.com cannot be held responsible for the failings of the property owner doesn't mean Amex cannot be bearing in mind it financed the rental of the property. Amex's arguments are somewhat outdated considering the case law that I've mentioned. There is no requirement in S75 of the CCA for a direct link as Amex argues, so its argument about this is unpersuasive.

So all in all I've not seen any persuasive evidence that the additional services provided by Booking.com interrupts the DCS relationship. I'm also satisfied this transaction fits within the financial limits set out in relation to S75 claims as described in the CCA. 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 Amex to be liable under S75 a breach of contract or a material misrepresentation needs to be made out. Here Amex have made few arguments throughout this matter on the facts of what happened between Mrs B and the property owner (but rather focussed on DCS).

Mrs B has provided Amex a substantial amount of photographic evidence here as to the breach of contract with regard to the supply of the accommodation (both first and second locations). She has also provided substantial commentary with regard to the evident failings of the supply of the property. As I've described Amex hasn't commented on this to any degree and the supplier hasn't even been approached for their evidence. So it appears that Amex accept the evidence from Mrs B as it has not contested it. As the test I must apply here is the civil test of balance of probabilities I'm satisfied on balance that a breach has been made out here. I'm also satisfied that bearing in mind Mrs B stayed throughout that price reduction is the most appropriate remedy. Considering the significant cost here and the very well evidenced issues with the accommodations, I think a price reduction of 50% is fair. So under S75 it is my decision that there is a breach of contract here and Amex is liable for the reasons given.

Putting things right

It is my decision that Amex should pay £550 and pay 8% interest on this amount from when it rejected Mrs B's claim to it until it settles this matter. HMRC requires Amex to deduct tax from this interest. Amex must provide Mrs B with a breakdown of the tax taken if she asks for it.

My final decision

It is my decision that Mrs B's complaint about American Express Services Europe Limited is upheld and I direct it to remedy the matter as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 29 October 2024.

Rod Glyn-Thomas
Ombudsman