

complaint

Mrs W complains that American Express Services Europe Limited (“Amex”) won’t refund her for a Sat Nav she bought which she says was misrepresented. She made a claim under section 75 of the Consumer Credit Act 1974 (“S75”).

Mrs W is represented in this complaint by Mr W.

background

In 2015 Mr and Mrs W chose to purchase a Sat Nav online using Mrs W’s Amex credit card. In late 2017 they made a complaint to the retailer to say the traffic alert function wasn’t working whilst they were travelling in the USA. The retailer explained this feature was limited to Europe only. Mr W requested a refund as the website had suggested it would work worldwide. As Mr and Mrs W travelled outside of Europe for around 90 days a year, this was a function they needed and the Sat Nav was therefore misrepresented to them.

The retailer refused the request for a refund so Mrs W made a claim under S75 to Amex. Amex said a claim couldn’t be made because the required debtor-creditor-supplier agreement (“d-c-s”) didn’t exist for that particular purchase. It said the payment from the credit card had been made to a third party payment aggregator (who I’ll call A). Amex said that it didn’t have any relationship with the retailer who sold the Sat Nav, its relationship was with A and this is why a claim couldn’t be made.

I sent Mrs W and Amex my provisional decision on 30 September 2020. I explained why I thought there was a d-c-s agreement but why I didn’t think there had been a breach of contract or misrepresentation. I said:

The general effect of S75 is that if a consumer has paid for goods or services through an associated credit agreement and they have a claim against the supplier of those goods or services for misrepresentation or breach of contract they are given a like claim against the credit provider. The relevant condition in this case is that there needs to be a link between Mrs W, the retailer and Amex – this is the d-c-s agreement – which finances the purchase.

is there a d-c-s agreement?

A d-c-s agreement refers to the arrangements that need to exist between the relevant parties in order to be able to make a S75 claim. The formal wording is set out in section 12 of the Consumer Credit Act 1974.

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”

S11(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”

The issues for me to consider in this case are as follows:

- *Does the absence of a “direct contractual agreement” between Amex and the supplier mean that S75 doesn’t apply?*
- *If it doesn’t, whether the nature of A’s role and involvement meant that there were no relevant arrangements between Amex and the supplier under which Mrs W’s purchase was financed, and therefore there was no d-c-s agreement.*
- *If there was a d-c-s arrangement, whether there was a misrepresentation or breach of contract by the supplier, which Amex must remedy under S75. And if so, what is the amount of Amex’s liability.*

In determining the first two issues above, I’ve considered what the courts have said on matters relating to d-c-s agreements involving more than three parties in both Office of Fair Trading v Lloyds & ors [2006] EWCA Civ 268 and Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583 (QB).

Amex’s response to our investigator demonstrates that it accepts there are instances where a four (or more) party arrangement won’t interfere with there being a valid d-c-s agreement. This is where there are other parties involved in the transaction besides the credit provider, the consumer and the retailer. Amex refers to the involvement of a merchant acquirer or a payment portal as an example – and I agree their involvement wouldn’t generally interfere with the d-c-s agreement. The courts have also said this in the cases mentioned earlier.

Amex has described A’s involvement as a payment aggregator (although it has also referred to it as a payment processor). But that isn’t how A describes itself. A’s website explains that it offers payment processing and acquiring. I don’t think its relevant what ‘label’ is applied to the service(s) A provides, instead the issue I need to decide is whether it’s involvement in this particular transaction means Amex has, or does not have, a relevant arrangement with the retailer that Mrs W bought the SatNav from.

Amex has said they have no contractual link or direct link with the retailer and I agree. But section 12 of the Consumer Credit Act 1974 doesn’t say there has to be a contractual link between the parties or indeed a direct link. Instead it says there needs to be pre-existing arrangements or a contemplation of future arrangements between the creditor (here, Amex) and the supplier of the goods or services (here, the retailer).

Amex says A is its merchant - not the retailer. My understanding of what Amex means by this is that it is A, not the retailer that has signed up to Amex’s card scheme and is entitled to accept Amex cards as a form of payment. But clearly Amex is aware of what A’s business model is, in that it facilitates payments being taken by retailers. A doesn’t appear to store or hold onto its customers money in any way that might make me think it was doing more than just payment processing or acquiring. From what I’ve seen it provides a very similar service to what a traditional merchant acquirer and payment processor might provide. This, as I’ve said earlier in my provisional decision, wouldn’t generally interfere with the d-c-s arrangement.

I think Amex were aware that in entering into an arrangement with A, it wouldn’t just be A accepting Amex cards as a form of payment for goods or services. As I’ve described earlier A would facilitate other retailers in accepting Amex cards for payment for goods or services. And I think it knew this would include retailers that hadn’t otherwise signed up through its traditional merchant acquiring route.

Amex has also provided screenshots of its systems which show that it was aware of which retailer had actually taken the payment from Mrs W. And it was this retailer – not A – that Amex posted on Mrs W's monthly credit card statement. This makes me think it's even more likely A's role in the transaction was simply to facilitate the payment being made – be that as a processor or acquirer or both. So I think Amex did have an arrangement with the retailer (or contemplation of future arrangements) – albeit via the services of A. For this reason I think there was a d-c-s agreement.

So for these reasons I don't think Amex acted fairly in declining Mrs W's claim on the grounds that there was no d-c-s agreement. I've therefore gone on to consider whether there was a misrepresentation or breach of contract and whether it would be fair for Amex to give Mrs W a refund for that reason.

was there a misrepresentation?

For Mrs W to have a claim for misrepresentation she needs to satisfy two criteria. The first is that there was a false statement of fact by the retailer. The second is that the false statement caused Mrs W to buy the Sat Nav when she otherwise wouldn't have done.

If both those criteria are satisfied, it can be relevant when considering what claim or claims Mrs W might have against the retailer and Amex whether the retailer was innocent, negligent or worse in making the misrepresentation.

Mrs W bought the Sat Nav online. Unfortunately there isn't a record of what was advertised at that time. But I've seen what the website currently says (and an archived page from 2016) and Mr W has provided a picture of the packaging it came in. The crux of the issue is that Mr and Mrs W say the traffic function was misrepresented to them as being worldwide when it was actually only limited to Europe.

I've made the following observations which I think are relevant to deciding whether there was misrepresentation:

- Mr and Mrs W bought the Sat Nav online and from what they've explained this is the only information they saw prior to purchase. So any information on the packaging isn't relevant to a claim for misrepresentation. This is because the packaging information won't have influenced their decision as they didn't see it until after purchase.*
- The website doesn't say that the traffic function is available worldwide. It is just listed as "lifetime traffic". But it says the traffic service is available "even when driving abroad"*
- The website does however include the words "lifetime maps (world)". So where a specific function is available worldwide this appears to be explicitly mentioned.*

Given the information available on the website, I can see why Mr and Mrs W thought the traffic function would work worldwide. The particular Sat Nav they purchased was advertised as having worldwide maps, so they've assumed this meant the traffic function was also worldwide. The wording doesn't specify what areas it is limited to and I've been unable to find anywhere on the website where this is clarified. It appears contacting the customer services team first was the only way to have cleared this issue up.

The wording is open to interpretation but I don't think I could reasonably go so far as to say a false statement was made. After all, the website doesn't say the traffic function is available worldwide and where a function is available worldwide (such as the maps) this is made explicitly clear. And in any event, Mr and Mrs W have assumed the traffic function would be worldwide rather than being incorrectly told it was. As I don't think there's been a false statement of fact, there hasn't been a misrepresentation.

Even if I thought a false statement had been made (which I don't), I'd still need to be satisfied that Mr and Mrs W only bought this Sat Nav because of that false statement. So in other words, the traffic function being worldwide was so crucial to them that they wouldn't have bought the Sat Nav had they known the true position. But I'm not persuaded Mr and Mrs W would have done anything differently had they known.

I've reached this conclusion for the following reasons:

- If the traffic feature being worldwide was crucial to their buying decision, I would have expected Mr and Mrs W to check with the retailer before buying. This is because it wasn't clear to what areas (if any) the traffic updates were limited to.*
- Mr and Mrs W didn't realise for nearly two and a half years that the function didn't work worldwide despite using it outside of Europe for significant periods of time. Mr W says the reason they didn't notice sooner was because they knew the traffic function was 'patchy' in the UK and they assumed it was the same abroad. I think this shows the traffic function wasn't the most important function to them. If it was, I would have expected them to have complained about it as soon as they realised it didn't work well – even in the UK.*
- Mr and Mrs W haven't been able to demonstrate that there is any Sat Nav available that would have given them worldwide traffic updates. Instead the alternative would have been for Mr and Mrs W to purchase two separate Sat Nav systems (one for the USA and one for Australia) in order for it to work where they say they needed it. This would have cost them around 50% more. And presumably they would have also needed to buy a third Sat Nav system to cover their use when at home in the UK which would have increased the overall cost even further. I'm not persuaded they would have done this for the benefit of this one feature – particularly because they appear to have accepted it wasn't overly reliable and for the following reason:*
- Rather than buying the new systems when they realised they didn't have this function Mr and Mrs W have used traffic updates on their mobile phones while travelling – which they say works better than the traffic updates on the Sat Nav. I think this demonstrates this is more likely what they would always have done had they known they couldn't get worldwide traffic updates.*

So for all these reasons I don't think there has been a misrepresentation.

I've also considered whether there was likely to be a breach of contract for which Amex might be liable for. But from everything I've seen, I don't think there was a breach of contract either. I say this because it appears the SatNav worked as it was intended to and there's been no suggestion that it wasn't of satisfactory quality (taking into account all of the relevant considerations, including any implied terms about quality). While Mrs W has argued that the SatNav wasn't as described, for the reasons I've already set out earlier, I don't agree.

I therefore don't think it was unfair or unreasonable for Amex not to refund Mrs W's purchase – albeit the reason Amex gave was incorrect. While Amex could have explained the outcome better, Mrs W hasn't lost out as a result of anything Amex has done wrong. So I don't think Amex needs to do anything more to resolve the complaint.

Lastly, Mrs W has raised points regarding various consumer protection legislation and ambiguity in contracts. Whilst I've taken into consideration what Mrs W has said, my decision is focussed on whether Amex has dealt with her complaint fairly – not what the retailer has done. S75 claims are limited to a breach of contract or misrepresentation and some of the points Mrs W has raised aren't relevant to either of those considerations. If Mrs W feels she has a claim against the retailer she may wish to pursue that separately. I've only considered whether Amex has resolved the complaint in a fair and reasonable way, taking into account what S75 says. And whilst I think it could have done things better, I'm not planning on recommending it needs to do anything more to put things right.

Amex accepted my provisional decision and had nothing further to add. Mrs W didn't agree. In summary, she said:

- What was listed on the box was relevant as a few weeks earlier they had purchased an almost identical model which had an identical box and functionality. That previous model was returned to the retailer and they replaced it with the one that is part of this dispute, as it was an upgraded version of the one they had previously purchased.
- The website says the traffic function is available abroad, but this must be misrepresentation as it is limited to Europe only.
- The wording on the website isn't clear and unambiguous, the onus is on the retailer to be clear.
- They purchased the product in good faith and didn't clarify the functionality as they felt the information provided said it would do what they wanted it to.
- They Sat Nav gave false positive indications that the traffic function was working abroad as it would often redirect them to different routes.
- Using a mobile phone is a poor replacement for a Sat Nav with traffic functionality and uses up mobile data and battery. They didn't purchase two other Sat Navs to cover USA and Australia because they didn't want to give more money to the retailer. It is clear there was a false statement of fact. The remedy for putting that right is to pay the cost of buying two Sat Navs which would cover the USA and Australia.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I've reached the same conclusions I reached in my provisional decision and for the same reasons. I'll address the additional points Mrs W has made.

Mrs W strongly feels there has been a misrepresentation by the retailer. I understand why she says this, but I don't agree. I do however agree with her that the information the retailer displays isn't as clear as it could be and it is ambiguous, which as is the case here, could lead to misunderstandings. That isn't the same as saying the retailer made false representations however. Mrs W hasn't said that she attempted to clarify her understanding with the retailer in advance of the purchase, instead, she's said she assumed it had a particular functionality based on wording which didn't explicitly confirm that.

I still don't believe what was printed on the box is relevant as while the box may have been the same on the previous model, Mrs W wouldn't have known that in advance of her

purchase. And in any event, the information on the box isn't materially different to what was advertised on the website. The box doesn't for example explicitly specify the traffic function was available worldwide. So I'm not persuaded there was any false representations made.

To be satisfied there was a misrepresentation for which Amex ought to be liable for, there needs to have been a false statement of fact (which I'm not persuaded there was) and that this false statement caused Mrs W to act to her detriment. I'm not persuaded that even if Mrs W had known the traffic function wasn't available worldwide that she wouldn't have purchased the Sat Nav anyway. This is because of the reasons I set out in my provisional decision.

In addition to that, while I accept using mobile data might in some cases be expensive and drain their mobile phone battery unnecessarily, this is what Mrs W has continued to do since discovering the Sat Nav doesn't have the worldwide traffic function. She says she didn't want to purchase another Sat Nav from that retailer due to her experience, but they aren't the only retailer or manufacturer which makes Sat Nav devices. The fact Mrs W hasn't opted to find an alternative solution other than her phone, makes me think it's more likely than not she would have purchased the same Sat Nav even if she knew it didn't have worldwide traffic. Particularly because she hasn't demonstrated that a Sat Nav exists which provides the specific functionality she was looking for. It follows that I don't think there's been a misrepresentation and therefore Amex don't need to do anything more to put things right.

my final decision

For the reasons given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 28 November 2020.

Tero Hiltunen
ombudsman