complaint

Mr S complains that Santander UK Plc declined his claim under Section 75 of the Consumer Credit Act 1974 ("s.75"; "the CCA").

background

In 2018 Mr S contracted a third party ("the supplier") to supply and lay a resin floor in his kitchen. He says that the flooring he requested was a specific kind and the total agreed price was £10,500 – with an agreed payment schedule of a £1,500 deposit, £3,750 after day two of the work and the remainder upon completion. Mr S paid the deposit using his Santander credit card and the work commenced.

But Mr S says that the supplier subsequently ordered the wrong type of flooring. So Mr S had to buy the correct materials himself, which cost £6,480. And he paid the supplier an additional £1,000 in cash, as well as a few other expenses, despite the stage of works being behind where they should have been.

By this point, Mr S says that the supplier was refusing to come back and complete the job unless Mr S paid him more money. Mr S says that he refused to do this as the additional amount was going to mean that he would have paid more than the total agreed amount. So the work remained incomplete – Mr S says the supplier only completed the primer stage of the flooring. He also says that the work that was completed was substandard. So he raised a s.75 claim with Santander for breach of contract.

Santander told Mr S that s.75 didn't apply because Mr S's deposit payment to the supplier had been made through a payment processor ("business A"). So there was no direct link between Mr S and the supplier. Mr S brought his complaint to our service.
Our investigator disagreed with Santander and said that as business A was acting solely in their capacity as a payment processor this didn't affect the debtor-creditor-supplier link ("DCS link") for the purposes of s.75.

But Santander didn't accept this. They say that the requisite DCS link for s.75 is broken because:

- Business A operates by providing remittance services to suppliers, which allows suppliers to receive funds in connection with payment transactions undertaken by a customer.
- Business A's terms and conditions confirm that funds received into the supplier's account with business A are held for one business day before being paid to suppliers. And that payments can be withheld by business A upon the existence of certain criteria. So payment into a business A account isn't a payment to the supplier.
- So in this case, there are two separate transactions: firstly between Mr S, Santander and business A. Secondly, between business A and the supplier.
- It follows that the credit agreement between Santander and Mr S didn't "finance" the transaction between Mr S and the supplier as required by section 11(b) of the CCA. Instead, the credit agreement financed Mr S's purchase of electronic money from business A's online wallet, which was then used to fund the purchase with the supplier. Meaning that it was business A that "financed" the transaction between Mr S and the supplier, not Santander.
- Also, business A's terms and conditions state "in order to serve in *(sic)* as a payment processor, we must enter into agreements with Networks, processors and an

acquirer, including our current acquirer….". So there is a clear separation between the transaction paying funds into an account with business A and the transaction paying those funds to the supplier.
- In addition, Mr S's payment wasn't made under pre-existing arrangements between Santander and the supplier.

Santander have also made the ancillary point that, although knowledge isn't a requirement of s.75, Mr S knew he was paying through business A because his electronic invoice for the £1,500 contained a payment weblink which, when followed, would have taken Mr S to business A's payment page.

Finally, Santander have referred to the High Court's judgment in the case of *Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583* ("the Truman case") in which the Court stated that the extension of s.75 shouldn't be "too tenuous". And Santander say that applying a DCS link to Mr S's circumstances would be too tenuous.

As Santander didn't accept the investigator's view, the matter has been passed onto me for a decision.

Mr S has also since confirmed that his kitchen floor remains incomplete and hasn't yet been rectified. He has explained that as the floor was more expensive than usual flooring, and he had already paid the supplier more than had been agreed for the stage of the works, he has been unable to afford any rectification work.

my provisional decision

In my provisional decision, I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Section 75

I must decide what, if anything, Santander should do to resolve Mr S's complaint. To do this, I have to decide what I think is fair and reasonable, having regard to, amongst other things, any relevant law.

In this case, the relevant law is s.75 which says that, in certain circumstances, if Mr S paid for goods or services on his credit card and there was a breach of contract or misrepresentation by the supplier, Santander can be held responsible. In particular, s.75(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 s.75 only applies if:

i) There is a debtor-creditor-supplier agreement of the type that falls within s.12(b) or (c);
ii) That agreement finances the transaction between the debtor (Mr S) and the supplier;

and,

iii) Relating to that transaction, the debtor (Mr S) has a claim against the supplier in respect of a misrepresentation or breach of contract. If so, then the creditor (Santander) is jointly and severally liable to the debtor.

S.12(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"

And s.189 says *"finance"* means to wholly or partly finance, and that *"financed"* shall be construed accordingly.

Legal background to s.75

Before I turn to the particular facts of Mr S's case, it would be helpful to first outline the background to the CCA, which was enacted at a time when credit cards were generally issued within the framework of a three-party structure which involved (i) an agreement between the card issuer and the cardholder to extend credit by paying for goods or services purchased by the cardholder from suppliers who had agreed to honour the card; (ii) an agreement between the card issuer and the supplier under which the supplier agreed to accept the card in payment and the card issuer agreed to pay the supplier promptly; (iii) an agreement between the cardholder and the supplier for the purchase of goods or services.

This three-party structure subsequently developed into a four-party structure involving a "merchant acquirer", whose function was to recruit new suppliers willing to accept the issuer's card. Under this four-party structure, instead of the agreement between the card issuer and the supplier, there were two agreements: (a) an agreement between the merchant acquirer and the supplier, under which the supplier undertook to honour the card and the merchant acquirer undertook to pay the supplier; and (b) an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agreed to pay the supplier and the card issuer undertook to reimburse the merchant acquirer.

The impact of this development on the application of s.75 was considered by the Court of Appeal in the case of *Office of Fair Trading v Lloyds & ors [2006] EWCA Civ 268* ("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 s.75 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."

The Court of Appeal also considered whether four-party structure transactions between the debtors and suppliers were "financed" by the credit agreement, even though the creditor's payment went to the merchant acquirer, not the supplier. They pointed out that the creditors had argued in the court below 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 at first instance had rejected that argument because the purpose of the credit agreements had been to provide customers with credit to buy goods and services from the supplier, which amounted to financing those transactions. On appeal the creditors dropped this argument and the Court of Appeal clearly agreed that the argument had been rightly abandoned by the creditors, stating at paragraph 56:

"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."

The Court of Appeal then examined whether the creditors were correct to argue that the four-party structure fell outside the definition of restricted-use credit, because section 11(3) of the CCA excludes agreements under which the credit is in fact provided in such a way as to leave the debtor free to use it as he chooses. They rejected the argument, because the card could only be used to purchase goods and services from some businesses – namely the suppliers who had agreed to accept the card.

The Court of Appeal also held that the definitions in s.187 were not intended to define the only type of arrangements that fell within s.12(b). The word "arrangements" is capable of carrying a broad meaning and, in the context of the CCA, must have been deliberately chosen by Parliament with a view to embracing a wide range of different commercial structures having substantially the same effect. (Para. 61-66 of the judgment).

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 held 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". She went on at paragraph 26:

"In my judgment, in the natural ordinary sense of the word, there are clearly arrangements in place made between the card issuers and the suppliers, notwithstanding the absence of any direct communication between them, or any direct contractual relationship, or even of knowledge on the part of the issuer of the identity of the particular supplier. The fact that there are a number of different arrangements, reflecting the various roles, contractual or

otherwise, played by different participants in the network, does not mean that there is not an arrangement in place between the issuer and the supplier. I consider that it is unrealistic to look merely at the individual links in the chain; rather one should stand back and look at the whole network of arrangements that are involved in the operation of the schemes. If one does so, one can, in my judgment, properly conclude that, by virtue of the supplier and the issuer being subject to the rules and settlement processes common to all participants in the card network, there is indeed an arrangement (albeit indirect) between them."

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 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."

It's also important to note that in the OFT case the court saw evidence about the particular rules governing the activities of merchant acquirers. The Judge at first instance drew attention to the following features (paragraph 30):

"The evidence showed that the rules of the four-party card schemes control which suppliers may participate in the schemes by, for example, (i) stipulating that merchant acquirers must only put transaction details into interchange for suppliers with whom they have valid and subsisting merchant acquirer agreements; (ii) requiring merchant acquirers to screen suppliers before entering into agreements with them, in order to establish that the suppliers are creditworthy and carrying on bona fide businesses; (iii) requiring merchant acquirers to monitor suppliers to deter wrongful activity; (iv) requiring merchant acquirers to forward information to the network merchant databases where, for example, a supplier is suspected of fraud or where a supplier's ratio of transactions "charged back" by the card issuer exceeds established criteria. Likewise card issuing creditors exert leverage over suppliers, through the networks [operated by MasterCard, Visa and American Express], in that the networks reserve rights to insist that suppliers' merchant acquirer agreements are terminated and to exclude suppliers from entering into merchant acquirer agreements. Thus some sort of leverage is available, at least in domestic four-party transactions, but even if it were not, that would not affect my conclusion."

The issues I therefore need to decide in this case, and in this order, are whether:

(1) The nature of business A's role and involvement meant that there were no relevant arrangements between Santander and the supplier under which Mr S's purchase was financed, and therefore no DCS link. ("The DCS issue").
(2) If there was a DCS link, whether there was a misrepresentation or breach of contract by the supplier, which Santander must remedy under s.75. ("The liability issue").
(3) And, if there was liability, its amount. ("The quantum issue").

(1) <u>The DCS issue</u>

With all of this in mind, I have considered the particular facts of Mr S's case. In order for s.75 to apply there has to have been arrangements between Santander and the supplier to

finance transactions between Santander's cardholders and the supplier. It's clear that there was no direct arrangement between them but this isn't necessarily fatal to the application of s.75, for the reasons outlined in the OFT case above.

I also don't think that Santander's point in relation to there being two transactions, within itself, is fatal. After all, the very nature of the four-party structure considered in the OFT case involves two separate agreements.

Instead I need to stand back and consider the whole network of arrangements that were involved in Mr S's transaction and, in particular, what business A's role was within that network.

Our investigator contacted business A to get a better understanding of this and the services they provide. They responded to say that the supplier held an account with business A and business A processed Mr S's payment made to the supplier under their "merchant acquiring services". They remitted the funds collected on the next business day to the bank account that the supplier had linked to their account with business A.

I have looked at business A's website, which contains a great deal of information about the services that they offer to their account holders. I note that these include providing them with card readers that accept all the major credit cards, so that they can take payments from their (that is, the account holders') customers. In this case, Mr S says, and all the evidence suggests, that the supplier used such a card reader to take payment from Mr S's credit card.

Business A also provided a link to the relevant terms and conditions that the supplier would have had to agree to when signing up to an account with business A. These can be found on the UK version of their website. The "payment terms" section states the following in particular:

- Clause 1 describes business A's role as providing services which include allowing their account holders to accept credit and debit cards from customers for the payment of goods and services, which they describe as "merchant acquiring services", and remitting the proceeds to the account holder.

- Clause 1 also states business A is a "payment processor" that allows suppliers to accept cards from customers for the payment for goods and services. Business A is not a bank and a supplier's account with business A isn't a payment account.

  Furthermore:

  "In order to serve in (sic) as a payment processor, we must enter into agreements with Networks [that is, American Express, Mastercard and Visa], processors and an acquirer, including our current acquirer, ….. or any other acquirer with respect to which we may notify you from time to time (the 'Acquirer'). …… With respect to the processing of payments through the Mastercard Network, [business A] enters into these Payment Terms with you as agent of the Acquirer."

- Clause 2 states:

  "In connection with the Payment Services, you authorise us to act as your agent for the limited purposes of holding, receiving and disbursing funds on your behalf."

And later:

"Our receipt of transaction funds satisfies your customer's obligations to make payment to you."

- Clause 3 restricts the types of businesses that may use business A's payment services by listing numerous prohibited industries including, for example, credit counselling, betting, automated fuel dispensers, bankruptcy lawyers and car rentals.

- Clause 11 states:

  "[Business A] will value date and credit the amount of a payment transaction to your [Business A] Account on the Business Day on which it receives the funds. [Business A] will automatically initiate a payout of Proceeds from a given Business Day to your valid, linked bank account during the next Business Day and funds received into and credited to your [business A] shall be deemed made available to you for this purpose. [Business A] will initiate a payout of Proceeds received on non-Business Days on the next Business Day."

- Clause 12 allows business A to defer payment to the supplier or restrict their access to the proceeds of a payment in some circumstances including upon a recommendation from the related company that licenses the point of sale equipment and if business A needs to investigate or to resolve a dispute relating to the services. They can also do so, if required by law or requested by a government entity, and if the supplier breaches their contractual obligations.

- Clause 14 also allows business A to withhold funds from the supplier and to place these in a reserve account as security for the supplier's performance of their own contractual obligations and of business A's obligations to their merchant acquirer or any of the card networks.

- Clause 23 requires the account holder to use the payment services only "*to submit transactions in respect of goods and/or services that you provide to your customers*".

- Clause 27 states:

  "By using the Payment Services, you agree to comply with all applicable bylaws, rules and regulations set forth by the Networks, as amended from time to time ('Network Rules'). The Networks amend their rules and regulations from time to time. [Business A] may be required to change the Payment Terms in connection with amendments to the Network Rules. Significant portions of the Network Rules are available to the public at [Visa, Mastercard and American Express URLs]. In the event of inconsistency between a Network Rule and the Payment Terms and except as otherwise agreed between [business A] and the Network, the Network Rule will take precedence.

  The Networks have the right to enforce any provision of the Network Rules and to prohibit you from engaging in any conduct the Networks deem could injure or could create a risk of injury to the Networks, including reputational injury or that could adversely affect the integrity of the interchange system, information the Networks deem to be confidential or both. You agree not to take any action that could interfere with or prevent the exercise of this right by the Networks. You agree to cooperate

with [business A] and the Acquirer in respect of any issues arising out of a breach of security in relation to the holding of any confidential data."

- Clause 29 states:

  "Your use of Network logos and marks ('Marks') is governed by the Network Rules; you must familiarise yourself with and comply with these requirements. The Networks are the sole and exclusive owners of their respective Marks. You will not contest the ownership of the Marks for any reason and any Network may at any time, immediately and without advance notice, prohibit you from using its Marks for any reason. [Business A] may require you to make modifications to your Website or other advertising and signage in order to comply with Network Rules related to the Marks."

- Clause 33 states:

  "By accepting Card transactions through the Payment Services, you agree to process returns of and provide refunds and adjustments for, your goods or services through your [business A] Account in accordance with the Payment Terms and Network Rules. Network Rules require that you disclose your return or cancellation policy to customers at the time of purchase."

- Clause 42 contains a number of specific requirements in relation to the use of American Express cards, such as that the supplier must always indicate they accept those cards whenever communicating payment methods to their customers; and must not criticise American Express or any of their services or programs. These requirements appear to have been included in business A's terms and conditions mainly for the benefit of American Express and the card issuers within that network.

Networks, merchant acquirers, suppliers and card issuers (all referred to in these terms and conditions) normally inter-relate in the following way: a card scheme is the business that runs the payment network rules (in this case Mastercard) and links the card issuer (Santander), the card holder (Mr S), the merchant (the supplier in this case) and the merchant acquirer. The merchant acquirer is the financial business that provides the supplier with the facility to accept card payments. The cardholder's instruction is routed from the merchant to the merchant acquirer then through the card scheme to the card issuer. Where payment is approved, the card issuer debits the cardholder's account and settles this with the merchant acquirer. This is the four-party structure that the Court of Appeal considered in the OFT case and confirmed doesn't break the DCS link.

In the absence of any other evidence, I think it would be reasonable to assume that Mr S's transaction was channelled through a merchant acquirer. I say that because the terms and conditions above clearly refer to business A operating through a merchant acquirer and, more importantly, as an agent of the acquirer for any Mastercard transactions. Santander have confirmed that Mr S's credit card was a Mastercard.

But the important difference in this case is that business A was an additional fifth party involved in the processing of Mr S's transaction. So I need to decide whether business A's role and involvement interfered with what appears to have been the usual underlying four-party structure in a way that meant the relevant creditor-supplier arrangements didn't exist in this case. I don't think their role and involvement caused an interference for the following reasons.

Business A's terms and conditions not only confirm that their role is limited to that of a payment processor but they also, in transactions involving Mastercard, show that business A act as an agent for the merchant acquirer. Santander have, themselves, cited this part of business A's terms and conditions. But they haven't cited the full clause – namely, the part about business A being an agent of the merchant acquirer. So I don't think Santander's statement that there is a clear separation between the transaction paying funds into an account with business A and the transaction paying those funds to the supplier can be right.

The terms and conditions also make it clear that the supplier had to agree to the relevant network rules and that those take precedence over business A's terms and conditions. Plus the networks are explicitly given the right to enforce their rules and place prohibitions upon the supplier.

Santander have referred to business A not transferring funds to the supplier straight away and also being able to withhold funds from the supplier. In relation to the former, I don't think the transfer timescales within themselves change the nature of business A's role from a payment processor to something more. As for the latter, I assume Santander is referring to business A's rights under clause 12 and 14, which I have mentioned above. But those rights seem to me to have the main purpose of securing the supplier's compliance with their various obligations and protecting business A against loss. I consider that they serve an ancillary role, rather than going to the purpose of the contract, and I don't think that their inclusion in the terms and conditions changes the character of the arrangements between the parties.

In short, it appears that business A operated a formal and structured system which enabled their account holders, such as the supplier in this case, to receive payments made by credit and debit card to pay for the supply of goods and services to the cardholders. Further, both Santander and the supplier were bound to the same network rules and therefore subject to the rules and settlement processes common to all participants in the card network. These features are all consistent with the existence of the required arrangements, for the purposes of s.75, between Santander and the supplier.

It's also possible to go as far as saying that there is some sort of indirect leverage available to Santander over the supplier, through the network rules, in that the networks reserve rights to insist that suppliers' merchant acquirer agreements are terminated and to exclude suppliers from entering into merchant acquirer agreements. The fact that the networks can implement prohibitions under business A's terms and conditions arguably intimates this and supports such a conclusion. Indeed, the content of the terms and conditions seems to me to suggest that the card networks are able to influence, to their own advantage, the terms on which business A trades (see Clause 27 above and also my comments on clause 42).

I'm also not persuaded by Santander's reasons for why they say their credit agreement with Mr S didn't finance the transaction with the supplier. There's no evidence that I can see that Mr S purchased electronic money from business A's online wallet. Indeed, this does not even appear to be a service business A offers. For this assertion to be true, I'd generally expect to see the transaction funds being deposited into an electronic money account held by Mr S. However, on this occasion there's no relationship between Mr S and business A at all. Instead, Mr S needed to pay the supplier and it was the supplier that drove the transaction through their account with business A, using business A's payment services.

It follows that I don't think it makes sense to say that the transaction financed by Santander was one that took place between business A and Mr S. Mr S wasn't an account holder of

business A and the reason he used his card was to pay the supplier for the goods and services he was purchasing.

I would also note that both Santander and the supplier undoubtedly benefit commercially from the involvement of the other, through the intermediation of business A, in a way that makes it possible to regard them as in something akin to a joint venture. Specifically, by financing purchases from the supplier Santander are able to lend money to their customer and make interest and/or other charges for that service, whilst the supplier is able to obtain payments from Santander's credit card holders and so benefit from the credit Santander extended.

Furthermore, not every business accepts Mastercard. So where a supplier does agree to accept Mastercard that results in Santander providing restricted use credit, regardless of whether Santander has a direct agreement with the supplier or not.

Taking this into account, and looking at the principles outlined in the OFT case and business A's terms and conditions, it seems to me that Santander provided finance to Mr S which enabled him, through the medium of the supplier's account with business A, to pay for goods from the supplier. The purpose of the credit agreement between Santander and Mr S is to give him the means to pay for goods and services, which is what he did when he paid the supplier. So, following the reasoning in the OFT case, Santander financed that transaction by making credit available to Mr S at the point of purchase in accordance with his credit agreement.

Santander have also pointed to the weblink contained within Mr S's invoice. But Santander also confirmed that they have only ever had a copy of the invoice where the link doesn't function. So Santander's comment that the link would have redirected Mr S to business A's webpage is a doubtful assumption. As I've said above, the evidence indicates that Mr S made his payment using a card reader. But even if this wasn't the case, I think it's unlikely that the weblink would have made Mr S appreciate that there was no direct agreement between Santander and the supplier. So he would have had no means of knowing whether his transaction with the supplier was conducted under one or other arrangement. And, as Santander have rightly pointed out, Mr S's knowledge isn't a relevant factor for s.75 in any event.

I have also considered Santander's comments about the Truman case and whether extending the application of s.75 to Mr S's transaction would be "too tenuous". In the Truman case, the bank (a merchant acquirer) paid money to a solicitors' firm ("the firm") under a merchant services agreement, which it sought to recover. The firm acted for a car dealership which had no facility to accept payment by credit card and so used the firm to take credit card payments from customers. The bank paid money to the firm under the merchant services agreement in respect of a series of transactions where credit card payments had been taken from the dealership's customers to purchase cars. However, the card holders involved in those transactions did not receive their cars. The card holders made claims under s.75 against their respective card issuers for the reimbursement of the payments. The card issuers duly repaid their card holders then recouped those sums from the bank via chargeback. The bank, in turn, sought repayment of those sums from the firm, which defended the claim by arguing that the card holders had no valid claim against the card issuers under s.75. Meaning that the chargeback scheme should not have operated.

The court was therefore considering a five-party structure (debtor, card-issuer, merchant acquirer, the firm, car dealership) in which the fifth party, the car dealership, had no

contractual or other direct relationship with either the Visa or MasterCard scheme. But it was held that it did not matter that the card issuers had no direct contractual or other relationship with the dealership or that the card issuers had no idea of the existence of the car dealership. There still existed "arrangements" sufficient for the requisite DCS link.

In Mr S's case, I think there are stronger indications of relevant arrangements than those in the Truman case given that business A, as the fifth party, is specifically and publicly in the business of payment processing. Plus all parties to the structure appear to have had a relationship with the Mastercard scheme. Whereas in the Truman case the card issuers dealt through a merchant acquirer with a merchant ostensibly carrying on business as a firm of solicitors, rather than the business of payment processing for third parties.

So, in Mr S's case the creditors issuing cards within the Mastercard network, including Santander, would seem in a stronger position both to know about the activities of the payment processor than the card issuers were in the Truman case, whilst the Mastercard network itself was well placed to decide whether it would permit the payment processor to carry on that business in relation to its cards and to influence the terms on which it could do so. I therefore don't consider the arrangements to be more tenuous than those examined by the court in the Truman case, but rather the opposite.

For all of these reasons, my provisional conclusion is that there were indirect arrangements between Santander and the supplier under which Santander financed transactions between their card holders and the supplier, including Mr S's purchase from the supplier in this case. Meaning that DCS is intact and s.75 applies.

So I move onto the next issue.

(2) The liability issue

I need to first decide what the terms of the contract between Mr S and the supplier were. There was no formal, written contract in this case so I've instead considered the other evidence available to me. In particular, I have Mr S's own account and also the following text messages:

- A message from Mr S to the supplier, prior to the agreed works, enquiring about the supplier's experience in laying the specific resin floor that Mr S says he wanted.
- A message from the supplier confirming his experience in laying that particular type of flooring.
- A message from the supplier to Mr S confirming that the agreed total price was £10,500 comprising of an immediate deposit payment of £1,500, followed by £3,750 after day two of the work and the remaining balance upon completion. Followed by a further message from the supplier confirming that the work would take five to six days to complete.
- Messages between the supplier and Mr S discussing the alternative type of flooring Mr S says the supplier ordered in error and Mr S's ultimate confirmation that he would still like to proceed with the type of flooring he originally requested.

So overall, I think it's more likely than not that the terms of the contract were as Mr S has outlined. Namely, a total contractual price of £10,500 to lay a specific type of resin flooring in five to six days.

I've next gone on to consider whether these terms were breached in any way. Again, Mr S

has provided his own account as well as the following text messages and additional evidence:

- A message from the supplier to Mr S confirming that due to "the cost difference and money tied up across materials" he had no funds left to keep paying for his van. So he had no money or transport to return and complete the work.
- Mr S's message asking what it would therefore cost for the supplier to return and complete the work.
- The supplier's response that it would cost £2,650, which included him paying for the van rental, re-hiring it the cost difference between the materials "as money is tied up", filling in the flooring and to do the "colour" and top coat.
- Mr S's response that this amount would take the total contract price to £11,900.
- A report from the manufacturers of the resin flooring stating that the supplier's work hadn't been completed with reasonable care and skill to the expected standard of a competent installer. The work was of a "substandard level" and the "subfloor" hadn't been prepared sufficiently. To rectify the issue the primer needs to be sanded back, the subfloor made well and the floor relayed.

Overall, I think that there is sufficient evidence to conclude that it's more likely than not that the supplier breached the terms of the contract with Mr S. The breach was twofold. Firstly, the supplier failed to return and complete the work as agreed due to his financial difficulties. It appears from both the messaging and the report from the manufacturers that the supplier only got as far as completing the primer and subfloor, which is consistent with Mr S's account.

Secondly, the Consumer Rights Act 2015 ("CRA") implies a term, amongst others, that a contract of this kind is carried out with reasonable care and skill. From the evidence I've seen in the manufacturer's report, it appears that the work that was completed by the supplier didn't reach this expected standard.

So I now turn to the final issue.

(3) The quantum issue

I've looked at all of the evidence available to decide what losses Mr S has suffered as a result of the breach of contract.

Mr S says that he paid £1,500 as a deposit, a further £1,000 to the supplier in cash, £6,480 for the resin and £27.87 for DIY materials. I accept this given the following corroborative evidence:

- Mr S's Santander credit card statement showing the £1,500 deposit payment
- A message from the supplier requesting a cash payment of £1,000.
- Mr S's bank statement showing a withdrawal or £5,000 cash. He has explained that this was initially in order to buy a car but that then fell through. So he used £1,000 of this to pay the cash requested by the supplier.
- Mr S's receipt from the resin flooring manufacturer for the £6,480 materials he bought.
- Mr S's receipt from a DIY store confirming purchase of items totalling £27.87. The date of this receipt is the same date that the supplier started the work.

So Mr S paid a total of £9,007.87 to the supplier. As an aside, he has also mentioned that he

gave the supplier £150 for food and fuel. But in the absence of any receipts or corroborative evidence of this, I'm afraid that I'm not willing to take this additional amount into account.

As I've outlined above, the work stalled at a very early stage of the works – namely the primer and subfloor and yet Mr S paid close to the agreed full contractual price. So it seems more likely than not that he has significantly overpaid for the stage that the works reached.

Given that some of the work was completed I've considered what benefit Mr S has derived from that in order to ensure he is not over compensated for his losses. In considering this, I've thought about the fact that the work that was completed was substandard and it seems from the manufacturer's report that Mr S is going to have to have the work redone. So it would be reasonable to conclude that Mr S hasn't actually derived or retained any benefit from the work that was completed.

I also need to consider the fact that Mr S is still in possession of the resin flooring materials he purchased. But Mr S has provided a "technical data sheet" relating to the resin floor materials. This confirms that the materials need to be used within 12 months but, looking at the date of Mr S's receipt, more than 12 months has now lapsed. So it appears that the materials he bought, and which were never used due to the supplier failing to return and complete the work, are no longer usable. Meaning it's more likely than not that he'll need to repurchase this in order to complete the flooring.

It is of course arguable that Mr S could have mitigated his losses by having the work rectified and completed by a different supplier within the 12 month period. I've considered Mr S's explanation around this. He has provided a detailed account of the inconvenience his family went through and will have to go through again when the flooring is rectified. Namely, moving into a partially finished home and the prospect of now having to move everything back out for the floor to be relayed. I think it unlikely that Mr S would have entertained this disruption if he'd been able to afford to pay someone else to rectify the work. Especially given the significant overpayment he made to the supplier. So, without any evidence to the contrary, I find his account persuasive and accept that not only does the floor remain unrectified but that he couldn't afford to have it relayed as recommended by the manufacturer's report.

For all of these reasons, I think that a fair and reasonable outcome is for Mr S to be refunded the full amount he paid for the work, namely £9,007.87. This will remedy the losses he has suffered from the breach of contract by permitting him to use the funds to have the work redone and completed to the right standard.

I think that Santander should also pay Mr S 8% annual simple interest on that refund amount. The calculation should be from the earliest opportunity that Santander had to refund Mr S – namely the date at which Mr S provided all necessary supporting information to support his claim. Looking at Santander's internal notes relating to Mr S's s.75 claim, there is a note on 11 February 2019 confirming that the "information/evidence" Mr S had provided had been looked at. So in the absence of any other evidence, it appears that this would be

the fairest date from which the interest should be calculated.

the response to my provisional decision

Santander accepted my provisional decision.

Mr S says that he now faces the additional costs of moving out in order to have the flooring relayed. He would like me to consider awarding for this as well and has offered to gather quotes to evidence the potential cost.

my findings

I've re-considered all the available evidence, arguments and the responses to my provisional decision in order to decide what's fair and reasonable in the circumstances of this complaint.

When there has been a breach of contract I need to think about what losses have been incurred as a result of that breach and the fairest way to remedy that for both parties. The potential future costs that Mr S has referenced haven't yet been incurred or crystalised and so, although I'm grateful for his offer to gather quotes, this isn't something that I am willing to take into account.

I've considered the option of delaying my final decision until the remedial work is completed. But it's more likely than not that this will build further, significant delay into what has already been a long and drawn out complaint process and I need to be fair to both parties. So I think that the benefit to both parties of being able to draw a line under this matter, without further delay, far outweighs the option of keeping the complaint open for an unknown and indefinite period of time.

For all of these reasons, and the reasons outlined in my provisional findings, I'm not persuaded to change my mind.

my final decision

For the reasons I've given, my final decision is that I uphold this complaint. I direct Santander UK Plc to:

- Pay Mr S £9,007.87 plus 8% annual simple interest* calculated from 11 February 2019 up until the date of settlement.

**If Santander considers they should deduct income tax from any 8% interest element of my award they may do so, but they should give Mr S the necessary certificate.*

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 19 May 2021.

Sim Ozen
ombudsman