

complaint

Mr P has complained that American Express Services Europe Limited ('Amex') has unfairly declined his claim under section 75 of the Consumer Credit Act 1974.

I'm aware this matter has also affected his wife, Mrs P. However, as Mr P is the cardholder, he's the eligible complainant under our rules, not Mrs P. For this reason I refer only to him, and I intend no discourtesy to Mrs P.

background

facts

Mr P decided to buy a new kitchen, from a supplier I will call 'O'. Unfortunately, it didn't arrive. Despite repeated attempts to contact O about it, he remained (and remains) without the new kitchen. The cost was £24,818, but Mr P paid a total of £24,718. He's explained this was because O didn't take an £100 payment, although it's unclear why this was. As I understand it, O is now in liquidation, so this may explain it. Mr P paid £1,688 of the total using his Amex credit card. Amex has refunded this amount, on the basis of "non-receipt of goods/services", by way of 'chargeback'. But Mr P wanted Amex to reimburse the rest of the money he paid, so lodged a claim under section 75.

Amex considered his claim, but declined it. It said that it didn't meet the requirements of section 75. It said there had been a fourth party called Stripe involved when Mr P made the payment on his Amex card. It said that the involvement of Stripe in the transaction meant the requirements of section 75 hadn't been met.

Mr P was unhappy with this, and brought a complaint to our service. He said that he hadn't been aware of Stripe's involvement, and that his Amex card statement showed the name of the supplier, O. He thinks it should have shown Stripe, so he'd have been aware there was another party involved. Had he known, he says he'd have cancelled the payment and made it by other means, so as to ensure he had the protection of section 75.

One of our adjudicators looked at what had happened. She agreed that the involvement of Stripe had broken the debtor-creditor-supplier ("d-c-s") link that section 75 requires. I'll explain more about what this is, and what it means, below.

Mr P felt this was unfair. In summary, he said that Amex's terms and conditions made no mention of a fourth party meaning the link was broken.

The complaint was then passed to me. As I disagreed with our adjudicator, I issued a provisional decision setting out my reasoning.

my provisional decision

First, I will clarify my role. I am not a court. That means I'm not deciding Amex's liability under section 75. My role is to take into account the law, which includes section 75. Then having done so, I need to decide what I think is fair and reasonable. So, I've thought about whether Amex did enough when it looked at Mr P's claim and, if not, what it should do to put things right.

I appreciate what Mr P has said about the terms and conditions. I will not comment on this

though, because I don't think the complaint turns on it. So I am not making a finding on this point. Rather, I disagree with Amex's interpretation of how the role of Stripe affects the d-c-s link. My provisional decision is that it doesn't. I'll explain why.

Section 75(1) says the following:

"Liability of creditor for breaches by supplier.

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, if there was a misrepresentation or breach of contract by O, then it's fair to require Amex to put things right – provided the requirements of section 75 are met.

Amex said in its letter to Mr P, dated 26 January 2018, that there is no d-c-s link, so this requirement of section 75 hasn't been met. It said:

"Stripe is a Merchant of American Express but they act only as an aggregator, they are not the supplier of goods/services as defined by section 75. As there is no contractual link between American Express and [O], we cannot be held liable for their alleged failings to you."

I agree that Stripe isn't the supplier. The supplier is O. But in a 2007 case in the House of Lords - *Office of Fair Trading (Respondents) v. Lloyds TSB Bank plc and others (Appellants) and others (Respondents)* [2007] UKHL 48 - the judgment said, regarding transactions paid for by credit card:

"Almost invariably - leaving aside American Express and Diners Club, who make their own arrangements - they are entered into today as part of a four-party transaction. But there is nothing in the language of section 75(1) to indicate that transactions of that kind are excluded from the right of recourse."

(I note here that the reference to Amex is historical, so I don't consider this reference to be relevant to Amex's arrangements in 2017, when Stripe was involved in Mr P's transaction.)

In the same judgment, it also said:

"In the courts below, the appellant card issuers contended that the consequence of the development of four-party schemes - whereby a credit card can be used to pay a supplier not recruited into the network by, and not in a contractual relationship with, the relevant card issuer - was that there were no "arrangements", pre-existing or in contemplation, between that card issuer and supplier within the meaning of s 12(b) of the 1974 Act. So, they submitted, section 75(1) could have no application. Both Gloster J [2005] 1 All ER 843 and the Court of Appeal (Waller, Smith and Moore-Bick LJ) [2007] QB 1 rejected that submission, and the House refused permission to appeal on the point."

It's clear to me that the court decided that the involvement of a fourth party, that wasn't in a contractual relationship with the card issuer, didn't necessarily break the link. I see no

reason why it would be fair or reasonable of me to depart from the court's findings. Amex has described Stripe as being its merchant. It is clear to me that under section 12(b) of the Consumer Credit Act, referred to above, there only need to be d-c-s arrangements between the parties (including the contemplation of future arrangements) - there doesn't need to be a contractual link between them. So if Amex signed up Stripe as a merchant, knowing what Stripe's business model was, then I consider that this was reasonably within the contemplation of Amex - and therefore meets the d-c-s requirements. This wasn't a private arrangement between O and Stripe.

Even if Stripe were not a merchant of Amex, it has certainly acted as a payment aggregator – and Amex has also described it as acting as such. And I'm not satisfied that is sufficient to break the d-c-s link, because there would have been an arrangement in place, or the contemplation of future arrangements. But in any event, it seems clear that Stripe was signed up as a merchant.

The involvement of Stripe is a reflection of how modern day transactions may take place. And I'm satisfied the wording of the legislation does not preclude such modern day developments from being covered by section 75. Amex was aware that Stripe would be a party to transactions – it has described it as both its merchant and an aggregator. And I've explained why, in Mr P's case, this does not affect the d-c-s link.

So, to summarise.

- O had an agreement with Stripe, specifically so it could accept card payments from providers such as Amex.
- Amex has a merchant agreement with Stripe, so that Stripe can offer card payment services to retailers such as O.
- Amex is aware of Stripe's operating model, and that it provides facilities to retailers that wish to accept payments made by Amex.
- Whilst Amex has no direct agreement with O, the legislation speaks of "arrangements".
- The link connecting O, Stripe and Amex is sufficient, for the reasons I've explained, to bring Mr P's transaction within the scope of section 75.

For these reasons, I don't think Amex acted fairly in turning down Mr P's claim on the basis of there being no d-c-s. This means I need to think about what Amex should do to put things right.

I don't think it's in dispute that there's been a breach of contract by the supplier. Despite Mr P's best efforts, he remains without the kitchen. Amex appears to have already accepted there was a breach of contract, given it gave a refund through the chargeback mechanism. And from my own research, O is in liquidation. So it looks as if Mr P will not be getting the kitchen he paid for.

I've looked at what Mr P paid, and when. It's as follows:

- 31 May 2016. This was a payment of £1,000, by debit card. Mr P has explained he no longer has this account, but has provided proof of the transaction in the form of a receipt from O.
- 28 April 2017. This was for £9,149.56 by bank transfer. (I note that there were two payments out, but one was in error and was re-credited.)

- 29 September 2017. This was for £12,880.44 and was by bank transfer.
- 7 December 2017. This was the £1,688 paid on Mr P's Amex card, which has already been refunded.

As there has been a breach of contract by the supplier, and I'm satisfied d-c-s is in place, I think it's fair that Amex refunds Mr P the amounts above, that it hasn't yet refunded. And as Mr P has been without the funds, it should add 8% simple interest a year to each amount, from the date Mr P made each payment, to the date of settlement.

I cannot award compensation for the distress and inconvenience Mr P has suffered because of O's failings. But I've thought about whether Amex has also caused him distress and inconvenience. I think it has. As I've explained, I think it was unfair of Amex not to meet Mr P's claim. This has caused him considerable worry, as he thought he would never recoup his significant loss. I think it fair that Amex pays him £250 compensation to reflect this.

responses to my provisional decision

Mr P agreed with my provisional findings.

Amex did not. It did not agree that, in this case, there are the required 'arrangements' in place pursuant to section 12b of the Consumer Credit Act.

my findings

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

Having done so, I am upholding Mr P's complaint. I accept of course that each case must be considered on its merits. And, sometimes a scenario may not be sufficient to have in place the required d-c-s link. However, I am satisfied it is in place here. Or in other words, I'm satisfied that there are the required 'arrangements' in place under section 12b of the Consumer Credit Act, for section 75 to apply.

This is for the same reasons as I set out in my provisional decision, which is set out above and forms part of this decision. Amex's response had not added anything further to persuade me to depart from my position. There is also further case law to support my position. This is the High Court's judgment in *Governor and Company of the Bank of Scotland v Alfred Truman (a firm)* [2005] EWHC 583 (QB).

Here, the court was considering a five-party structure (a debtor, a card-issuer, a merchant acquirer, a solicitors' firm and a car dealership). 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 there still existed 'arrangements' sufficient for d-c-s to be in place.

In Mr P's case, this argument is even stronger. This is because it involves a four-party structure - and Stripe is specifically and publicly in the business of payment processing. And Amex had a specific agreement in place with it. So, in Mr P's case the card issuer would seem in a stronger position both to know about and to influence or prevent the activities of the payment processor than the card issuers were in the Truman case.

Accordingly, I'm satisfied that Amex should have met Mr P's claim. I note, in this regard, that it's clear Mr P did not receive his kitchen, and no dispute has been raised about this. To put

things right, Amex should refund the payments Mr P made (which I set out above, and excluding the refund it has already given), adding 8% simple interest a year, as Mr P has been without these funds. It should also pay him £250 compensation for the distress and inconvenience caused by the claim not being met when I consider it should reasonably have been.

my final decision

For the reasons given above, it's my final decision to uphold this complaint. I require American Express Services Europe Limited to:

- refund Mr P the payments he has made, that it has not already refunded, adding 8% simple interest a year, from the date of each payment to the date of settlement*; and
- pay him £250 compensation for the distress and inconvenience caused.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 29 November 2020.

Elspeth Wood
ombudsman