complaint

Mr W complains on behalf of his late father's estate that HSBC Bank Plc wrongly refused to refund a credit card payment made by his father for a timeshare resale.

background

In October 2013 Mr W's father paid nearly £1,300 to a firm. He soon realised that he had been ripped off, and asked HSBC to refund him the money. He died during HSBC's investigation, and his two sons now bring this complaint for his estate. One of them is the executor, and he has authorised his brother, Mr W, to represent him.

HSBC considered three ways in which it might have been able to process a refund, and rejected them all. It said that a chargeback was not possible, because there was no deadline by which the contract had to be performed. Section 75 of the Consumer Credit Act 1974 did not apply, because there was no debtor-creditor-supplier ("DCS") agreement between the parties to the transaction. And Mr W's father had authorised the payment, so it had not been a fraudulent payment.

Our adjudicator agreed with HSBC's position. She did not accept Mr W's argument that the supplier's failure to comply with an EU directive (which required a 14-day cooling-off period to expire before processing the payment) was a breach of contract for the purposes of section 75.

Mr W asked for an ombudsman to consider this complaint. He has made a number of arguments in support of his case, which I will summarise below.

my findings

I was sorry to read about the death of Mr W's father, and about how he was a victim of fraud. I would like to offer my condolences to his family.

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And I agree that HSBC was not able to use the chargeback process to recover the money, for the same reasons given by HSBC and our adjudicator.

Mr W has pointed out that the definition of fraud relied on by HSBC and our adjudicator is a very narrow one. They both said that as Mr W's father authorised the credit card payment, the payment was not a fraudulent one – as opposed to the scenario where, for example, a fraudster impersonates the bank's customer, or steals his credit card, to make an unauthorised payment. So Mr W has quoted the Fraud Act 2006, which defines fraud much more widely, to demonstrate that his father was indeed a victim of fraud.

I have no doubt that Mr W's father was defrauded by the timeshare firm, which induced him to part with his money and gave him nothing in return. And the Fraud Act is indeed the law that the firm (or its director) would be prosecuted under if there was a criminal case. So I can see why Mr W has drawn my attention to it. But as he correctly suspected, we have been using a more narrow definition of fraud for the purposes of this complaint (other than for the section 75 aspect of it, which I'll come to later). If the firm had tricked the *bank* into making the credit card payment without its customer's authority, then the bank would be liable to refund the money. That liability would arise independently of section 75, and it wouldn't

matter that the chargeback process wasn't available. But the firm tricked the bank's *customer* into authorising the bank to make the payment. So the bank was only doing what its customer had told it to do. The key difference is that one type of fraud leads to the bank letting money leave its customer's account without the customer's permission, and the other type does not. This complaint is about the second kind. That means that HSBC is only liable to refund the money if section 75 applies.

Where section 75 applies, it makes the bank liable for any misrepresentation or breach of contract by (in this case) the timeshare firm. The sort of fraud Mr W was referring to when he quoted the Fraud Act would certainly be enough for the purposes of section 75. So the question I have to decide is whether the section applies or not.

Before I can describe Mr W's arguments, I need to briefly summarise the adjudicator's reasoning. Section 75 only applies to a credit card transaction if there is a DCS agreement between the credit card holder (the debtor), his bank (the creditor), and the timeshare firm (the supplier). The agreement will only be a DCS agreement if it has been made under pre-existing arrangements between the creditor and the supplier.

In this case, Mr W's father did not pay the supplier. He paid another firm – a fourth party. That means the payment was not financed under pre-existing arrangements between the creditor and the supplier. The DCS agreement could still be treated as having been made under such arrangements if the two firms had been associates (within the meaning of sections 184 and 187 of the Act), but they were not. So section 75 does not apply to the transaction.

Mr W says that the section still applies. He has referred to a Court of Appeal judgement in which the court states that section 75 applies to arrangements between four parties just as much as it applies to arrangements between three parties. (The reference is to paragraphs 61 to 66 of *Office of Fair Trading v Lloyds TSB Bank plc* [2006] EWCA Civ 268, which I have read carefully; I also consider paragraph 56 to be relevant.) He argues that this means that section 75 might just as well apply where there are more than four parties to the arrangements. He further suggests that section 75 can apply whether or not section 187 applies to the arrangements between the parties.

I understand the points Mr W is making, and I appreciate the care he has taken to present his case in a thorough and clear manner. But I respectfully disagree with his interpretation of what the Court of Appeal said. I have read how the House of Lords explained the position in paragraphs 23 and 24 of its own decision in the same case (reported at [2007] UKHL 48). And I think that the reference to four-party arrangements does not mean the sort of situation our adjudicator described. I think the four-party arrangements the courts meant is one in which the four parties are the debtor, his bank, the supplier, and the supplier's bank ("the merchant acquirer"). That would still be a valid DCS agreement, if there were no other parties involved, because there would still be pre-existing arrangements between the creditor and the supplier. But the firm which took Mr W's father's money would now be a fifth party, and the merchant acquirer would be its own bank, not the supplier's bank. (They might have two different banks or they might share the same bank, but in the latter case the merchant acquirer would not be acting in its capacity as the supplier's bank.)

I think that such a transaction is not financed by a DCS agreement made under pre-existing arrangements between the creditor and the supplier. The arrangement was not with the supplier, but with the firm which took the payment. If the two firms were associates of each other then that wouldn't matter (because of section 187), but they're not. I accept what Mr W says about section 187 not being an exhaustive list of the only ways in which arrangements

can exist. But I can't see that there was any arrangement between the creditor and the supplier, under section 187 or otherwise.

Mr W has also referred me to a High Court case in which a solicitor's firm collected payments on behalf of another firm which sold cars. The court held that section 75 still applied because there were pre-existing arrangements (a contract) between the two firms, and therefore there were arrangements between the creditor and the car dealer (which was the supplier). (The case is *Bank of Scotland v Alfred Truman (a firm)* [2005] EWHC 583 (QB); the most relevant paragraphs are 89 to 101.) Mr W argues that that case is very similar to this complaint, so I should adopt the approach the judge followed and hold HSBC liable under section 75.

I have read the case, and I do see that it supports Mr W's position. Other ombudsmen read it when it was decided. While we have regard for what the law says, our statutory duty is to make decisions which we consider to be fair and reasonable. And the view my colleagues took then, and which I take today, is that it would not be fair to HSBC to stretch the ambit of section 75 as far as the court did in that case. Just because there were arrangements between HSBC and the firm which accepted payment, and further arrangements between that firm and the timeshare firm, does not mean it would be fair to say that there were arrangements between HSBC and the timeshare firm such that HSBC should be liable for the timeshare firm's misrepresentations. That extra step is a step too far. So I don't think it would be fair and reasonable to construe the section so broadly.

In view of what I have decided about section 75, I don't need to consider Mr W's arguments that a breach of an EU directive also amounts to a breach of contract, or that his father had no signed contract with the firm he paid his money to.

While I acknowledge – and regret – that Mr W will be disappointed by this outcome, I emphasise that I have determined this case on a fair and reasonable basis, rather than a strict legal basis. Clearly if he does not accept my decision, his brother is free to pursue the estate's case in court.

my final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and his brother to accept or reject my decision before 27 June 2016.

Richard Wood
ombudsman