

complaint

Miss R complains that Marks & Spencer Financial Services Plc wrongly rejected her claim for a refund under section 75 of the Consumer Credit Act.

background

In June 2016 Miss R booked a holiday and paid her deposit using her M&S credit card. In December she cancelled her booking and asked for her deposit back, which she was entitled to under the terms and conditions. But she received no response, and eventually she realised that the holiday company was a scam. There had never been any holiday accommodation. So she asked M&S for a refund under section 75.

M&S did not uphold Miss R's claim. It said that although her contract had been with the holiday company, she had made her payment to a third party. This meant that section 75 did not apply to her contract with the holiday company, and so she was not eligible for a refund from M&S.

Miss R complained to our Service. She said that section 75 should still apply, and said that there was a court precedent in her favour on this point.

Our adjudicator did not uphold this complaint. She said that as there was no direct relationship between M&S and the holiday company, section 75 did not apply. The court case mentioned by Miss R did not affect her decision.

Miss R asked for an ombudsman's decision. She said that the Court of Appeal had ruled in 2006 that "a circumstance such as this is enough to be classed as a direct relationship."

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I agree with our adjudicator that this is not a case to which section 75 applies. I will explain why.

The effect of section 75 is that a creditor – here, M&S – is liable for any breach of contract or misrepresentation committed by the recipient of the credit card payment. So if the holiday company had received the payment, then M&S would have been liable for the scam. Instead, the payment was received by a third party, a payment service provider, which later paid the holiday company in turn. M&S would have been liable for a breach of contract by the third party, if there'd been one. But as things stand, M&S can only be held liable for what the holiday company did if the third party is an "associate" (within the meaning of section 184) of either the holiday company or M&S. There is no evidence that this is the case here.

Miss R has not identified the court case she relies on, but I think it's likely that she means *Office of Fair Trading v Lloyds TSB Bank plc* [2006] EWCA Civ 268. I've considered this case, but I'm afraid I don't think it means what Miss R thinks it means. That case is not about the relationship between M&S and the holiday company. The case is actually about the role in the transaction of a "merchant acquirer" (defined in paragraph 6 of the judgement), and the merchant acquirer's relationships with M&S and with the holiday company.

I have decided that issue in Miss R's favour, in that if a merchant acquirer was involved in this transaction then that would not prevent section 75 from applying. But that does not affect

my decision that the section still doesn't apply anyway, because the credit card payment was not made to the holiday company.

my final decision

So my decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss R to accept or reject my decision before 29 August 2017.

Richard Wood
ombudsman