complaint

Ms B complains about the way American Express Services Europe Limited ("Amex") handled a chargeback.

background

In 2016 Ms B booked, and paid a deposit for, a holiday apartment through a third party company's online rentals marketplace ("company A"). In doing so, she had to agree to company A's terms and conditions entitled "traveler *(sic)* terms of use" which included a payment protection policy ("the terms and conditions").

She paid the remaining balance through company A in 2017 using her Amex credit card. Company A, in turn, eventually forwarded the monies – less any booking fees and applicable fees or taxes – to the apartment owner ("the owner").

Having arrived at the apartment, Ms B says that it wasn't as described. In particular, it had two bathrooms – as opposed to three as advertised – and it was dirty. She says that she complained to the owner who had it cleaned but the standard was still unacceptable. Ms B couldn't find alternative, suitable accommodation as everywhere within the area was fully booked. So she stayed at the apartment for the rest of her break.

Upon returning home, Ms B contacted Amex and a chargeback was raised against company A, resulting in a refund to Ms B's credit card. But company A defended the chargeback on the basis that Ms B had failed to notify them of any issues within 24 hours of her arrival at the apartment. She had also failed to vacate the apartment by midnight on the first day of the rental period. As both had been conditions of the payment protection policy, as outlined in the terms and conditions, Ms B wasn't eligible for a refund.

On this basis, Amex decided not to pursue the chargeback further and re-debited Ms B's card. Ms B complained to Amex about this decision and also said that she hadn't been notified about the re-debit, causing her to incur interest.

Amex didn't think that they'd mishandled the chargeback. They explained to Ms B how she had failed to comply with the terms and conditions and that she had stayed at the apartment for the duration of her break. So she wasn't eligible for a refund.

Ms B remained unhappy and brought her complaint to our service. Our investigator didn't think that Amex had mishandled the chargeback. So he considered whether Ms B ought to have been reimbursed through a claim under section 75 of the Consumer Credit Act 1974 instead ("s.75").

Our investigator explained that for s.75 to apply there would have to be a debtor-creditor-supplier agreement ("DCS") in place – in this case, Amex, Ms B and the owner respectively. But as Ms B had paid company A, and not the owner, the requisite DCS link was broken and so s.75 couldn't apply to her contract with the owner.

Ms B disagreed and said that there was a DCS link between Amex and the owner. In particular, she referred to section 2.2 of the terms and conditions, which states that company A wasn't party to any contractual relationship between Ms B and the owner. She also said that company A's role was that of a merchant acquirer or payment collection agent, and referred to the following two Court judgments:

- The Court of Appeal's judgment in Office of Fair Trading v Lloyds TSB Bank plc and others [2006] EWCA Civ 268, which stated that merchant acquirers don't break the DCS link ("the OFT case").
- The High Court's judgment in Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583, which stated that in certain circumstances payment collection agents can extend their DCS arrangement with the creditor onto the supplier ("the Truman case").

Ms B was also unhappy about the fact that Amex hadn't considered a s.75 claim at all.

Our investigator agreed that section 2.2 of the terms and conditions referred to a direct relationship between Ms B and the owner. But he didn't think this evidenced an arrangement between Amex and the owner. He also didn't think that company A met the definition of either a merchant acquirer or a payment collection agent. So although Amex hadn't considered a s.75 claim, there had been no detriment to Ms B, as s.75 couldn't have applied.

Ms B remained unhappy and so her complaint was passed onto me for a decision. I issued a provisional decision as outlined below. And the complaint has now been passed back to me for a final decision.

I note that Amex have now refunded Ms B the interest that was charged when her card was re-debited. And so that part of her complaint no longer requires my consideration.

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.

Chargeback

Given the issues that Ms B communicated to Amex, I think they made the right decision in raising a chargeback on her behalf. But as company A defended the chargeback Amex then had to consider that defence and decide whether to take the dispute any further through arbitration. So I need to decide whether Amex's decision not to do that was a fair and reasonable one.

To assist me with that, I've looked at the terms and conditions. In particular, the payment protection policy at section 10. Clause 10.5(d) confirms that company A would reimburse Ms B for any material differences or defects with the apartment. But clause 10.6 goes onto expressly exclude "cleanliness" from the definition of material differences and defects.

Furthermore, clause 10.7(g) states that Ms B would not be provided with any reimbursement arising from material differences or defects if she failed to notify company A of the issues no later than the first day of the rental period and if she failed to vacate the apartment by midnight local time on the day of check-in. It's not in dispute that Ms B failed to do either of these things.

I've also noted that under section 13 of the terms and conditions, company A wasn't liable for any inaccuracies or errors relating to the description of a property.

In defending the chargeback, company A not only referred to the conditions of the payment protection policy but also explained the importance of being notified of any issues on the first day of the rental period – that is to say, a report to them within 24 hours would have given them an opportunity to investigate and prevent payment to the owner.

Furthermore, company A provided Amex with an email from the owner who confirmed that Ms B had requested a reclean upon check in. The owner said this was completed on the same day. As was Ms B's request for the property manager to set the thermostat and explain how the electrical outlets worked. The owner believed that Ms B was happy with the results and there was no indication of any other problems throughout her stay. She also didn't leave a bad review upon check out.

So it appears that any issues with the cleanliness of the apartment wasn't covered by the payment protection policy. Nor was company A liable for any inaccuracy in the description of the apartment. But even if this hadn't been the case, Ms B failed to notify company A of the problems or vacate the property as required under the terms and conditions.

I've considered Ms B's explanation about being unable to find alternative accommodation but I don't think this can explain why she didn't, at the very least, notify company A of the issues on the first day of the rental period. The failure to notify alone was enough to void the payment protection policy and meant that company A lost the opportunity to withhold payment from the owner while Ms B's concerns were investigated.

Plus Amex was given evidence from the owner which, given Ms B stayed at the apartment and failed to notify company A of any issues, could be evidence that arguably suggests that she was happy with the rest of her stay.

So based on all of this evidence, I don't think it was unreasonable of Amex to decide that company A had provided sufficient evidence to defend the chargeback. It therefore wouldn't have been appropriate for Amex to pursue the matter further through arbitration.

S.75 claim

In deciding what I think is fair and reasonable I need to have regard to, amongst other things, any relevant law. In this case, the relevant law is s.75 which says that, in certain circumstances, if Ms B paid for goods and services on her Amex credit card and there was a breach of contract or misrepresentation by the supplier, Amex 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."

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"

And 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"

So the first question I need to decide is what transaction Ms B's credit agreement with Amex financed. To that end, it seems clear from the terms and conditions (clauses 2.2 and 8.5 in particular) that Ms B's payment to company A financed two contracts:

(a) The contract with company A for the use of their site to make the booking and to obtain the benefit of the payment protection policy; and,
(b) The contract with the owner, to rent the property.

I therefore next need to consider whether s.75 applies to those two contracts. In particular, whether company A and the owner each had "arrangements" with Amex for the purposes of creating a DCS link. And, if so, whether there was a misrepresentation or breach of contract that Amex is jointly liable for.

(a) Company A

Clearly company A, or their associates, had an arrangement with Amex because they were authorised to take Ms B's card payment. So I don't think it can be disputed that s.75 applies to Ms B's contract with company A. That being said, I don't think that company A misrepresented anything or breached their contract with Ms B, so Amex wouldn't be liable to her. I'll explain why.

As far as the accuracy of the apartment's bathroom facilities is concerned, Ms B has been unable to provide the original advertisement at the time of her booking. So I don't have any evidence of a potential misrepresentation. But even if I did have that evidence, clause 13.2 of the terms and conditions makes it clear that company A has no control over, or involvement in, the accuracy of property details. So I think it's unlikely that company A would have misrepresented anything to Ms B or be liable for a misrepresentation by the owner.

As for any breach of contract, I've carefully considered the terms and conditions. In particular, clause 1.1 describes company A's services as providing:

"…..an online platform along with various tools and services that enable property owners or managers ("Owners") to list rental properties, enable travelers (sic) to book such properties, and enable both parties to communicate with each other (the "Services")."

And Clause 10.1 included a payment protection policy as follows:

"We provide the Payment Protection Policy (the "Policy") to Travelers (sic) who pay online using our Payment Platform for rental of Properties. If you do not agree to the terms and conditions of the Policy, then you have no right to obtain reimbursement or claim any other rights under the Policy. We may revise this Policy at any time and at our sole discretion by amending the applicable web page on the Website or by publishing notices elsewhere on the Website."

By viewing, booking and paying for her accommodation through the online marketplace Ms B received these full services. She also received the payment protection plan but company A was entitled to refuse reimbursement under those terms for the reasons already

outlined in relation to the chargeback above.

So there doesn't appear to have been any breach of the terms and conditions by company A. It follows that even if Amex had considered a s.75 claim, I think that it's more likely than not that they would have declined it – meaning that Ms B hasn't been disadvantaged by Amex not considering a claim.

(b) The apartment owner

Unlike company A, the owner didn't receive payment directly from Amex. They were one step removed, dealing only with company A. This doesn't automatically mean that the DCS link is broken. The limits of what may constitute an arrangement in law aren't defined, but they can be indirect as in the Truman case.

So I have considered whether the nature of company A's role was of a kind that meant they extended their arrangement with Amex to the owner. Again, I've been assisted by the terms and conditions. In particular, clause 8.5 states:

"You acknowledge and agree that We are not a party to the Rental Agreement between you and the Owner. Notwithstanding that fact, We act as the Owner's payment collection agent for the limited purpose of accepting payments from You on behalf of the Owner. Upon receipt of Your payment to Us on behalf of the Owner, Your payment obligation to the Owner for the Booking is extinguished and We are responsible for arranging remittance of the payment (less the booking fee and any other applicable fees or taxes) to the Owner, in the manner described in these Traveler (sic) Terms of Use. In the event that We do not arrange remittance of any such amounts as described in these Traveler (sic) Terms of Use, the Owner will have recourse only against Us."

I've also looked at the "Owner terms of Use" on company A's website – which is what the owner would have had to agree to. In particular, 3.2.1 echoes clause 8.5 above by stating:

"We will provide Owners with an online payment platform ("Payment Platform"), giving them the ability to accept online payments from Travellers. You hereby appoint Us as your limited payment collection agent solely for the purpose of accepting funds from Travellers on Your behalf. You agree that payment made by a Traveller which we receive on Your behalf via the Payment Platform shall be considered the same as a payment made directly to You and You will provide the Booking to Travellers in the agreed-upon manner as if You had received the Traveller's funds directly. The Traveller's obligation to pay You is extinguished upon Our receipt of the Traveller's funds on Your behalf, and We are responsible for arranging remittance of Your payment in the manner described in these Owner Terms of Use. In accepting appointment as Your limited payment collection agent, We assume no liability for any of Your acts or omissions.

Generally, We will hold the money paid by Travellers until 24 hours after the Booking has commenced, whereupon We will, on Your behalf, instruct a payment service provider to initiate the transfer of payment to the Owner for the Booking (less any applicable fees or taxes) with the Traveller on the next business day (excluding public holidays)….."

Given these terms and conditions, I think that the relationship between Amex and the owner in this case was more tenuous than the one in the Truman case for the following reasons.

In the Truman case, the Court drew attention to the fact that the purchasers provided their

card details to the supplier who, in turn, passed those details onto a firm acting as their payment collection agent for processing ("the firm"). But in Ms B's case, the owner had no direct involvement in taking her payment. They wouldn't have handled her credit card details and so probably wouldn't have been aware about the particular mechanism that was being used by company A to collect payment.

In further contrast with the Truman case, company A doesn't hold and pay out money in accordance with the owner's instructions. It remits to the owner only what they believe is contractually due, after taking their own share of the monies.

The Court in the Truman case also found that the firm was acting as an agent of the supplier and not as a stakeholder. In particular, the card holders contracted with the supplier and had no contractual relationship with the firm. But in this case, Ms B undoubtedly had a contractual relationship with company A under which she obtained use of the booking service and company A's payment protection policy.

So I don't think that company A can be described as the owner's payment collection agent in the way envisaged by the Truman case. Company A received Ms B's payment in their own right as principal as well as in the capacity of payment processor for the owner. This means that company A was itself a "supplier" of services to Ms B and not just an intermediary for payment purposes.

I also can't agree that company A was acting as a merchant acquirer in the terms outlined in the OFT case. As I've said above, clearly company A contracted with Ms B to provide her a service.

So based on all of this, I think it's unlikely that the DCS agreement between Amex and company A was extended to the owner. The contract between Ms B and company A was directed towards receipt and transmission of customer payments in general, as opposed to creating an arrangement between Amex and the owner.

So, again, even if Amex had considered a s.75 claim against the owner I think it's more likely than not that they would have decided that s.75 couldn't apply to the contract between Ms B and the owner.

the response to my provisional decision

Amex have confirmed that they accept my provisional decision and have nothing further to add.

Ms B has made several points. As part of that response she has also provided a copy of a letter – together with attachments – that she sent to Amex in September 2017. In summary, Ms B has said the following:

Chargeback

A consumer is entitled to dispute the outcome of a chargeback. Yet Amex failed to ask Ms B to address company A's defence. So it was unfair and unreasonable not to proceed to arbitration.

Furthermore, Ms B can't understand how Amex and I can say that she was happy with the rest of her stay.

S.75 claim: company A

Ms B's Amex card payment didn't finance a contract with company A. She didn't pay to use their website. Nor did she make a booking or communicate with the owner. Company A's service was provided entirely to the owner and was free of charge for Ms B.

Similarly, the payment protection policy was also provided to Ms B free of charge as a means of ensuring that the owner didn't attempt to avoid paying company A's fees.

In any event, clause 13.2 limiting company A's liability for inaccurate advertisements is an unfair contract term. Any term excluding liability for misrepresentation has to satisfy a reasonableness test – which this clause doesn't. It's also not possible to limit or exclude liability for fraud. In any event, company A receive a commission for sale and advertising – so ensuring accurate advertisements is their responsibility and they failed to make proper checks on the facilities of the property.

Similarly, the terms of the payment protection policy excluding cleanliness and requiring Ms B to vacate the property by midnight on the day of check-in were also unfair and unreasonable contract terms. In particular, company A knew that Ms B would have been unable to find suitable alternative accommodation at short notice given the popular time of year.

S.75 claim: the owner

Ms B disagrees with my statement that the owner was one step removed and didn't receive payment from Amex directly. In any event, Ms B still believes that company A was acting solely as the owner's payment collection agent. She has pointed to the following in particular:

- As stated above, Ms B had no contract with company A and didn't pay for their services. Plus the payment protection policy was for the owner and not her.
- In relation to my comment that company A received Ms B's payment in their own right as principal, their terms and conditions state that company A don't have a capacity in this transaction. But it can't work both ways – they're either a payment processor or not.
- If I'm suggesting that company A had no contractual involvement in the transaction then they are deemed not to exist and therefore payment must have been taken by the owner directly.
- In any event, as was the case in the Truman case, the owner didn't have card facilities and nor were they a member of a card scheme. And company A acted for the owner and upon their instructions. As evidence of this, Ms B has provided a copy of an email relating to her damage deposit in which company A confirms that they would refund the deposit if the owner didn't report any damage.
- My comment about the owner not handling credit card details was a spurious point because if there's no contractual relationship with Ms B then it doesn't matter.
- In any event, the fact that company A doesn't hold and pay out money in accordance with the owner's instructions doesn't matter because they have a contractual agreement with the owner to pay them the monies owed regardless of the owner's instructions.
- It's unfair for me to take into account the "Owner terms of Use" when drawing parallels with the Truman case because no reasonable consumer would have read

> those. In any event, those terms and conditions make it clear that there is a direct monetary link between Ms B and the owner and that company A is solely an intermediary for payment purposes.

Alternatively, a merchant acquirer is a payment processor. So company A is a merchant acquirer.

Furthermore, stating that Amex would have likely declined the s.75 claim amounts to making arguments for them.

Finally, Ms B says that there were two factual inaccuracies within my provisional decision. The first is my reference to her not being able to provide a copy of the original advertisement. The second, is my reference to the owner stating that they believed Ms B had been happy with the remainder of her stay.

my findings

I've re-considered all the available evidence, arguments and my provisional findings to decide what's fair and reasonable in the circumstances of this complaint. I've also considered Ms B's further evidence and comments.

Before I address Ms B's specific comments under each of the three headings, it would first be helpful to address the other general points she has made.

Relating to any inaccuracies, at the time of my provisional decision I hadn't been provided with a copy of the original advertisement, so my comment was accurate. But I've now been provided with Ms B's letter to Amex dated September 2017 and the accompanying attachments. One of those attachments was the original advertisement. So I accept that Ms B provided that to Amex at the time of her complaint.

As for the owner's email, my provisional findings outlined what the owner had said within their email. The fact that Ms B disagrees with the owner's opinion doesn't make that summary inaccurate. I've re-checked the owner's email and I'm satisfied that my summary of it is accurate. So I don't accept that there was a factual inaccuracy on this point.

It's unclear why Ms B believes that I can't take the Owner terms of Use into account. I have at no stage suggested that there was an expectation on her to have read those. Indeed, I agree with her that a traveller wouldn't normally do so. But that doesn't prevent me, within my inquisitorial remit, from taking that evidence into account when deciding the roles played by all respective parties and the services offered by company A. I am not therefore going to exclude that evidence in any way.

Finally, I don't think that my findings that Amex would have likely declined the s.75 claim amount to making arguments for them. Having decided that something went wrong here – that is to say Amex failed to consider a s.75 claim – I then need to consider what would have happened if things hadn't gone wrong. That necessarily includes an analysis of the likely outcome of the s.75 claim in order to decide whether anything needs to be remedied.

Chargeback

When considering this issue – I'm only considering the actions of Amex under the card scheme rules. That is to say whether or not Amex acted reasonably in deciding not to pursue the chargeback.

The chargeback that Amex raised was for goods or services "not as described or defective". They were presented with plausible evidence from company A, as outlined in my provisional decision, that showed that their terms and conditions excluded their liability for any inaccuracy. And that Ms B hadn't complied with the payment protection policy terms.

In any event, in their letter to Ms B dated December 2017 Amex said that "on this occasion bathrooms may have referred to toilet, restroom, shower room, washroom and similar facilities". This was a reasonable conclusion to reach given the following evidence.

The attachments to the September 2017 letter include an "inquiry summary" which stated that the property had "3 bathrooms". The "description from owner" at the time of the booking also referred to "bathrooms 3" at the top. But the detail that followed didn't expand on this meaning or indeed reference the bathrooms at all. Plus in her letter dated September 2017 Ms B outlined how the owner informed her that the local meaning of "bathroom" may or may not include a bath.

So I'm unable to go as far as saying Amex acted unreasonably in deciding not to take the chargeback further. Having decided that, they didn't need to give Ms B an opportunity to comment further. Nor would Ms B have been entitled to dispute the outcome of the chargeback through "pre-arbitration" or a "second chargeback" as she has suggested. That's entirely a decision for Amex. Instead, Ms B would have been entitled to complain about the outcome, which she did. And Amex addressed her complaint fully.

Finally, I haven't said that it's an established fact that Ms B had been happy with the rest of her stay. After all it's not for me to say what Ms B does or doesn't think and I have no reason to doubt she genuinely remained unhappy. My point here was that, regardless of Ms B's true feelings, it wouldn't have been unreasonable of Amex to place weight on the owner's opinion when considering to pursue the chargeback given that Ms B stayed at the property for the rest of her stay.

S.75 claim: company A

Ms B's comments about not having paid for or entered into a contract with company A for their services isn't borne out by the evidence available to me. Clause 1.1 of the terms and conditions states:

"[Company A] …. provides an online platform along with various tools and services that enable property owners or managers ("Owners") to list rental properties, enable travellers (sic) to book such properties, and enable both parties to communicate with each other (the "Services")."

And I've already also cited clauses 2.2 and 8.5 within my provisional decision. In particular, clause 2.2 states:

"The Site is a venue only for the purposes of facilitating interactions and rental transactions between Owners and Travelers (sic). The …. Company is not, and does not become, a party to any contractual relationship between the Traveler and the Owner".

So a service was clearly being offered to Ms B – as well as the owner.

As for whether that service was offered to Ms B for free, again the evidence doesn't support this. Clause 2.4 of the terms and conditions states:

"*If You book a Property using the Payment Platform (as defined in Section 8.1), part of the price You agree to pay for the Booking will be a booking fee payable to Us to cover Your use of the Site, Our provision of customer support, and other business costs. You agree not to circumvent or attempt to circumvent the booking fee."*

Furthermore, one of the attachments to the September 2017 letter was a copy of Ms B's booking receipt email. This made it clear that Ms B's payment to company A included a booking fee. At the bottom of the email, the fee was outlined as being chargeable in order to help company A run their website and offer 24 hour customer service to Ms B. The email also confirmed that the booking fee was non-refundable in the event that Ms B cancelled, unless she did so within the 24 hour booking period.

As for the payment protection policy, it's clear from clause 10.1 that this was part of company A's service to Ms B and their booking fee as it was only offered to those travellers who used company A's payment platform.

In any event, looking at the terms of the payment protection policy, I can't see how it can be interpreted as being aimed at ensuring the owner paid their fees to company A. The terms are for the benefit and protection of travellers against malpractice by owners. Plus it's clear from the Owner terms of Use that I've already outlined that company A deducted anything it was owed before sending Ms B's payment to the owner. So there doesn't appear to be any opportunity for the owner to avoid paying their fees that would require a safeguard.

Based on all of this evidence, and the evidence outlined in my provisional decision, it remains clear to me that Ms B's payment financed a contract with company A.

So I now turn to the terms of that contract and Ms B's comments around unfair contract terms. She has cited the Unfair Contract Terms Act 1977. But for contracts entered into after 1 October 2015 the relevant legislation is the Consumer Rights Act 2015 ("the CRA").

But the principles outlined by Ms B are nevertheless sound. That is to say the CRA works to ensure that terms and conditions in contracts with consumers are fair. It says contracts should be transparent and in plain and intelligible language. A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

Further, where there is ambiguity in relation to a term, the CRA provides that if a term in a consumer contract could have different meanings, the meaning that is most favourable to the consumer is to prevail.

Schedule 2 of the CRA provides a list of consumer contract terms which may be regarded as unfair. Paragraph 2 on the list says *'A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party*

in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.'

With all of this in mind, I don't think there is any issue with the transparency of the terms and conditions. Nor can they be said to not be in plain and intelligible language. So the crux of this point is whether or not the terms and conditions in question caused Ms B an insignificant imbalance and were a detriment to her. And also whether company A inappropriately limited Ms B's legal rights. But I don't think they did for the following reasons.

As I've already outlined, the terms and conditions limited the remit of company A's service to the facilitating of bookings only. Clause 5.1.2 of the Owner terms of Use corroborates that accurate descriptions were the owner's duty as follows:

"You agree that You will accurately describe and present the Property and will disclose any material defects. You will not omit or misrepresent anything that may reasonably be thought to be material to the decision of a Traveller"

Plus the attachments to Ms B's September 2017 letter show that she was in direct contact with the property manager before her trip. She asked about various aspects of the property – including the size of the dining table and fridge – as well as requesting the removal of a "pet fee". I think this is further evidence that company A had no involvement in property details or advertisements.

So based on the evidence available to me the accuracy of advertisements wasn't part of company A's "contractual obligations". It follows that limiting their liability in relation to any inaccuracies – that is to say a non-contractual obligation – wasn't an unfair contract term.

In any event, company A's payment protection policy offered Ms B protection against material inaccuracies. So even if there was an imbalance caused by the limitation of liability – which I don't think there was – this was remedied by this policy. So I now turn to consider the terms of that policy.

I don't think excluding cleanliness was an unfair term given that this wasn't something company A could reasonably control or police. Once again, this would have been the owner's responsibility. Plus "cleanliness" is a broad concept that can have a different meaning, subjectively, to different people. So if anything, including that within the policy would have created an imbalance against company A.

As for Ms B's point about having to vacate the property – I'm not sure this can be said to be an unfair contract term either. If a customer is unhappy with accommodation then it's reasonable to expect them to vacate within a short period of time. Otherwise they could continue to stay at the accommodation, benefitting from it, and yet also avail themselves of compensation under the policy.

That being said, if a traveller was unable to comply with the term, despite trying, for reasons outside of their control – such as unavailable alternative accommodation – then I would expect consideration to be given to nevertheless permitting a customer to benefit from the policy.

But that doesn't change the outcome of this case because this wasn't the only issue that voided the policy. Ms B also failed to notify company A of any issues within 24 hours. So the

policy would have still been voided on this point alone. Company A's explanation around the 24 hour timeframe is a plausible one and corroborated by clause 3.2.1 of the Owner terms of Use as cited in my provisional decision. So I don't think this term can be said to be unfair either – I think that notification within 24 hours is plenty of time.

In reaching these conclusions, I also note Ms B's reference to it not being possible to exclude liability for fraud. This appears to be a general comment but I have nevertheless re-checked the terms and conditions. I can't see that company A has done that. In any event, there's no evidence of fraud that I can see in this case. Especially given the fact that the description of the property was silent on the definition of "bathroom".

S.75 claim: the owner

My statement about the owner being one step removed is an accurate fact given that Ms B's payment went to company A who – in turn – remitted payment to the owner having first deducted their booking fee and any other fees or commission.

I've already addressed Ms B's point about her not having a contract with company A and the payment protection policy being for the benefit of the owner. Those findings apply equally to this section of my decision too.

I haven't said that company A had no contractual involvement in the transaction. Indeed, I've said the opposite which is what takes this case outside of the remit of the Truman case. That is to say, company A has a contract with both Ms B and the owner separately in their capacity as a principal service provider. So their role extends beyond the limited remit of a payment collection agent.

It follows that I still think that my provisional findings in relation to company A receiving Ms B's payment in their own right as principal is correct. As I've outlined, part of that service – for both Ms B and the owner – included processing her payment and remitting what was owed to the owner. But that's only one part of company A's overall service. The difference being that in the Truman case the payment collection agent's role was limited solely to processing the payments concerned – there was no additional service being offered to the customers or the supplier.

I don't have any evidence to support a finding that the owner didn't have card facilities or wasn't a member of a card scheme. But regardless, the evidence – once again – doesn't support the conclusion that company A were acting on the owner's instructions. After all, if that was the case then there would have been no need for separate terms and conditions for travellers and a separate set of terms for owners. It's clear from both sets of terms and conditions – in particular the clauses I've specifically cited – that company A is a principal provider of services to both parties.

Furthermore, I disagree that the email about the deposit is evidence that company A acts upon the owner's instructions. The deposit is something entirely separate to the contract price for company A's services. It's clear from the terms and conditions that Ms B paid for that service as I've already outlined. And the same applies to the owner given that section 4 of the Owner terms of Use clearly refers to company A deducting their fees and commission from the amount they remit to the owner in recognition of their service to the owner. That section also outlines applicable cancellation charges if the owner is the one who cancels the booking – yet further evidence that the owner was receiving a service from company A.

Furthermore, at the bottom of the deposit email – and indeed at the bottom of Ms B's booking receipt email too – the small print states:

"The company that facilitates your booking directly with the property owner is [X], a wholly owned subsidiary of [company A]. Neither [company A] nor any other company in our group ever acts as a property owner, broker or agent".

I disagree that my comment about the owner not handling credit card details was a spurious point. This was a relevant factor in the Truman case – that is to say, the supplier in that case had the contract and relationship directly with the customers concerned. The solicitor's firm then, in turn, acted as the supplier's agent upon their instructions – with no contractual relationship with the customers. In this case, it's the opposite. That is to say, it's company A that has the contract and direct relationship with Ms B, including taking her payment – the owner has had no involvement in that.

The fact that company A doesn't hold and pay out money in accordance with the owner's instructions is also a relevant factor, despite Ms B's suggestion otherwise. That's because in the Truman case a key fact was that the payment collection agent had no stake in the monies. They processed the payments and transferred the monies to the supplier upon the supplier's instructions. But in this case, both Ms B and the owner are charged fees by company A and neither party can instruct company A upon – or have a say in – the amount they're charged or the way the monies are handled. Indeed, clause 4.4 of the Owner terms of Use gives company A the right to vary the amounts chargeable.

I disagree that the Owner terms of Use make it clear that there is a direct monetary link between Ms B and the owner and that company A is solely an intermediary for payment purposes. It may be that Ms B is referring to para. 3.2.1.2 of the Owner terms of Use which refers to a payment via company A being *"considered the same as a payment directly to [the owner]"*. But it's clear from that section that it's "considered the same" in order to protect travellers and ensure that their obligations to the owner are fully extinguished once their payment has been made by company A. It's not confirmation that it's an actual direct link – after all, for that to be true Ms B would have had to pay the owner directly without company A's involvement. In any event, as I've already outlined – I fully accept that part of company A's role was to process Ms B's payment. But the important factor is that this wasn't their only role and the payment processing formed part of their overall, separate services to both Ms B and the owner.

For all of the same reasons, I also don't think it can be right to say company A was a merchant acquirer. They offered contracted, paid for services to both Ms B and the owner that went beyond payment processing.

Overall, the terms and conditions and the Owner terms of Use both provide key evidence in support of the conclusion that company A was providing a chargeable service to both Ms B and the owner. The nature of this extended beyond the limited role of payment collection agent as considered by the Court in the Truman case.

For all of these reasons, and the reasons outlined in my provisional decision, I'm not persuaded to change my mind. I still think that s.75 can only apply to the contract between Ms B and company A. But there was no breach of contract or misrepresentation of company A's terms and conditions.

I know this decision will come as a disappointment to Ms B. But, although I'm not bound by the law, I need to take it into account. And I've explained how I think that both s.75 and the principles in the Truman case apply to the facts of Ms B's case. These are legal principles that I'm not willing to depart from.

my final decision

For the reasons I've given, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 26 June 2021.

Sim Ozen
ombudsman