DRN-3063018

The complaint

Mr H complains that Santander UK PLC has treated him unfairly in regard to his dispute about the purchase of two suits.

What happened

In May 2018 Mr H paid £1988 for two tailored suits to be made for him using his Santander Credit Card. He says he needed the suits for a family wedding and that he explained that to the Tailors making the suits. He says he entered the contract on the basis that the Tailors told him they would deliver by the wedding.

Mr H booked an appointment with the Tailors for the 26 June 2018 for the collection and fitting of the suits, which he says he thought were being made locally. In early August 2018 I can see an email from the Tailors to say that strike action abroad where the suits were being made was causing delay to their supply. Mr H was unhappy regarding the state of affairs as he was approaching the wedding and felt he wasn't getting anywhere with the Tailors, so in August 2018 he contacted Santander for help with his dispute. In October 2018 I can see he told Santander that the Tailors were now saying his suits were available to be collected or delivered. But by now he'd had to buy a suit elsewhere because the wedding had happened.

Santander said the money had been paid to Company A and not the Tailors (the suppliers of the suits) and that as such the required relationship between the parties set out in S75 of the Consumer Credit Act 1974 wasn't in place (often referred to as the "DCS" relationship). And accordingly Santander said it wasn't liable for the suits not being delivered on time and wasn't going to refund him what he paid for them.

However it paid him £50 for customer service issues and offered a further £50 for related issues.

Mr H feels this is unfair, so he brought his complaint to this service. Our Investigator agreed with Mr H and said that Santander should refund him the £1988 and rework his now closed credit card account as if the transaction had been refunded immediately. The Investigator in their discussions with Santander pointed to previous contact this service has had with Santander on the issue of the DCS relationship. Santander also referred to case law in its arguments including what is known as the Truman case. Amongst a number of arguments Santander said that:

"*The processing, holding and treatment of the funds between (Company A) and the supplier* (the Tailors) *firmly takes the various transactions outside of being a singular "arrangement" between the merchant, creditor and customer. We therefore believe that the "arrangement" has become too tenuous as described in Truman and the DCS chain has been broken*."

In essence Santander said that the requirements of the Consumer Credit Act 1974 and following case law were not met and accordingly Santander cannot be held responsible under this legislation for the loss Mr H has suffered.

In July of this year I issued a provisional decision explaining my position and that my thinking at that time was that the DCS 'chain' hadn't been broken and Santander were liable for the loss suffered. So I provisionally decided the complaint should be upheld.

Mr H responded that he had nothing further to add to my provisional findings.

Santander has offered to pay the full claim amount of £1,988.00 and 8% annual simple interest on the transaction amount, from the transaction date until the settlement date. It has done this on an "*entirely goodwill basis*" and doesn't agree with my rationale. I shall address its key arguments as I see them in this decision.

What I've decided – and why

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

Bearing in mind Santander's offer made after my provisional decision is the same as the award I made in my provisional decision I do not propose to comment again on the minutiae of this complaint. I find that it's offer is a fair and reasonable settlement to this dispute and will direct to pay such later in this decision. However I do think there are some important issues at hand here and I shall accordingly address those and Santander's comments thereon.

Chargeback

Santander has helpfully added some clarity to what actually happened within the issue of Chargeback in this case. And I'm grateful for that clarity. And I note that it seems clear at least some delay in this issue wasn't Santander's fault. And bearing in mind Santander's comments on this matter and its overarching position on this complaint I see little to be gained by reconsidering the Chargeback issue. But again note my thanks to Santander for its clarification.

The Liability Issue

Santander hasn't made any comments with regard to its position on whether the contract was breached or misrepresented. It has offered the full redress that I provisionally put forward, so I see no need here to repeat all the arguments I made in my provisional decision here. Other than to note, of course, that I was satisfied on balance that there was a liability for this amount here.

I shall now quote in full what I said in my provisional decision regarding S75 and the DCS relationship (indented and italicised).

> *s75 and the DCS relationship*
>
> *Here I must consider what Santander should do. 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 s75 of the Consumer Credit Act 1974 (the "Act") which says that, in certain circumstances, if Mr H paid for goods or services on his credit card and there was a breach of contract or misrepresentation by the supplier (the Tailors here) Santander can be held responsible. I appreciate that Santander is aware of this, but these are important matters and I think some background here helps provide context to my conclusions on this matter. And I appreciate some of the phraseology and history here are familiar to Santander, but I think consistency and context here are helpful.*

Historically credit cards worked within a commonplace three-party structure. Specifically that there was:

- *an agreement between the card issuer (the creditor) and the cardholder (the debtor) to extend credit by paying for goods or services purchased by the cardholder from suppliers who had agreed to honour the card;*
- *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;*
- *an agreement between the cardholder and the supplier for the purchase of goods or services.*

And accordingly this three-way relationship is often referred to as "DCS" as it represents the interrelationships between Debtor, Creditor and Supplier.

As time went by a new type of party entered the market and specifically these types of transactions, known as the 'Merchant Acquirer'. This led to the creation of four party relationships where instead of the agreement being between the card issuer and the supplier, there were two agreements:

- *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*
- *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 s75 was considered by the Court of Appeal in the case of Office of Fair Trading v Lloyds & others [2006] ("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 s75 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."

They went on to say;

"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."

Bearing in mind some of Santander's arguments here in this case 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) which I think have relevance here:

"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."

Having provided some important context to the circumstances in Mr H's case, I need to now establish the exact nature of Company A's role and involvement. And whether or not that meant that there were the relevant arrangements between Santander and the Tailors under which Mr H's purchase was financed, and therefore whether or not there was the DCS link.

This is a key part of this complaint. I say this because in many cases where there is a DCS link established the focus of the complaint is actually whether or not there was a misrepresentation or breach of contract by the supplier. But Santander hasn't made any persuasive arguments on whether or not there was a breach of contract or misrepresentation here by the supplier (the Tailors). It has pointed to a lack of evidence around the precise terms of the contract agreed but it hasn't made persuasive arguments around whether there has been a breach or a misrepresentation here. It has largely and extensively argued that there is no DCS. But clearly Mr H entered into a contract to purchase these suits and they were not delivered within what he says was the agreement made.

I have considered the particular facts of Mr H's case. In order for s75 to apply there has to have been arrangements between Santander and the supplier (the Tailor) 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 s75.

I say this because 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 said 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 to say 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."

Accordingly to arrive at a fair outcome I need to stand back and consider the whole network of arrangements that were involved in Mr H's transaction and, in particular, what Company A's role was within that network.

From what I can see Santander use (the Card Scheme company) as its card scheme. So I've considered (the Card Scheme) rules regarding the scheme it operates. I note from its rules from around the time it recognises a number of different types of service providers including those described as 'Third Party Processors' and 'Payment Facilitators' and it then goes on to give examples of the types of services the different service providers provide and requirements the scheme has of them.

Santander has pointed to Company A's involvement on the matter. It says its participation in what happened here broke the DCS chain of relationships. It points to Company A's terms and conditions and specifically makes the following observations about them:

- *that they provide for the deduction of fees from the payment before it is transferred to the supplier's account*
- *that they provide for the funds to be held in (Company A)'s client account for varying periods before it is transferred onward to the supplier:*
- *stipulate that transfer to the supplier's account is by a third party for whom (Company A) is not responsible:*

So I need to decide whether Company 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 its role and involvement caused an interference for the following reasons.

Company A describes itself in the following terms:

"As a credit institution we facilitate the processing of payment transactions and, in order for us to do this, we have entered into agreements with acquiring banks ("Acquirers"). A list of the Acquirers we co-operate with for the provisioning of the Payment Service from time to time can be found here."

So having considered this and the rest of the terms and conditions I'm satisfied that it acts as a payment facilitator. The fees to which Santander allude aren't directly applied to the consumer but rather are between it and those that use its services such as suppliers. So I don't think that makes a difference. Nor does the ability to hold funds makes a difference to my mind or use of third parties either. As I've quoted already this is all within a commercial arrangement with which all parties benefit.

Furthermore having considered (the Card Scheme)'s rules I note that it says that acquirers are responsible for all acts and omissions of other parties they have arrangements with such as Payment Facilitators and sub merchants. Having seen this and considered the rules as a whole it seems clear that in the situation that Santander describe Mr H's transaction to be, it seems clear that Company A act as an agent for any merchant acquirer involved. Plus it is clear that as part of the scheme rules the Merchant Acquirer can only act in such transactions under the scheme whilst it meets the scheme rules which include it being responsible for the activities of facilitators and sub-merchants. So clearly there is an arrangement between these parties in this part of the transaction.

In short, it appears that Company A operated a formal and structured system which enabled parties, such as the Tailors in this case, to receive payments made by credit card to pay for the supply of goods and services to the cardholders such as Mr H. Further, both Santander and the supplier were bound to the same network rules through the arrangements here. These features are all consistent with the existence of the required arrangements, for the purposes of s.75, between Santander and the supplier (the Tailors).

I would also note that both Santander and the Tailors undoubtedly benefit commercially from the involvement of the other, through the intermediation of Company A, in a way that makes it possible to regard them all 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 Tailors is able to obtain payments from Santander's credit card holders and so benefit from the credit Santander extended (albeit indirectly).

Furthermore, not every commercial entity accepts (this particular Card scheme's) cards. So where a supplier such as the Tailors here does agree to accept (this card scheme) 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 what we know of the situation here, it seems to me that Santander provided finance to Mr H which enabled him, through the medium of the supplier's account with Company A, to pay for goods from the supplier. The purpose of the credit agreement between Santander and Mr H 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 H at the point of purchase in accordance with his credit agreement.

Santander has argued that Mr H's relationship here is too tenuous for S75 to apply. The High Court considered s75 in the case of Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583, ('the Truman case') the High Court held that it's the nature of the role that each party plays and the nexus between the supplier and creditor that's the relevant consideration. I do not propose to recount all the details of the case here. However I would note the following. In the Truman case it involved the court considering a five-party structure in which the fifth party, had no contractual or other direct relationship with the relevant scheme. But it was held that it did not matter that the card issuers had no direct contractual or other relationship with the fifth party or that the card issuers had no idea of the existence of the fifth party. There still existed "arrangements" sufficient for the requisite DCS link.

In Mr H's case, I think there are stronger indications of relevant arrangements than those in the Truman case given that Company A was specifically and publicly in the business of processing or facilitating payments. This is the nature of the commercial enterprise it is, and it describes itself and advertises itself as such.

So, in Mr H's case the creditors issuing cards within the (this Card Scheme's) network, (that is Santander here) would seem in a stronger position both to know about the activities of the Company A than the card issuers were in the Truman case, whilst the (the Card Scheme) network itself was well placed to decide whether it would permit Company A 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.

Santander has said:

"The processing, holding and treatment of the funds between (Company A) and the merchant firmly takes the various transactions outside of being a singular "arrangement" between the merchant, creditor and customer. We therefore believe that the "arrangement" has become too tenuous as described in Truman and the DCS chain has been broken."

Clearly as I've described in this case and evident in the case law quoted above the existence of one arrangement (or agreement) between two parties or more doesn't mean that there aren't 'arrangements' between parties who are further apart in the broader transaction. Clearly there is an arrangement between the network here and Santander and also between the Tailors and Company A. It does not follow because of these that there aren't 'arrangements' between Santander and the Supplier here. Clearly in such circumstances

there are 'sub-arrangements' if you will, that go together to create the arrangement here. As the Judge of first instance said:

"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."

So I think Santander's rationale is flawed and contrary to the position of the Judge of First Instance which was later supported by the higher court.

The judge decided in Truman that the situation there wasn't 'too tenuous'. I think the situation here is less tenuous than Truman case for the reasons I've given already. And Santander's argument that the presence of sub-arrangements (as I've described them for clarity) is not only not persuasive to me but clearly not persuasive to the Judges' in the cases I've described.

For all of these reasons, my provisional conclusion is that there were arrangements between Santander and the Tailors here through the intermediation of Company A for the various reasons I've given. Meaning that the DCS chain of relationships is intact and is an arrangement and as such S75 applies here.

In response to my provisional decision Santander have made the following points on this matter. I shall deal with these in turn.

Too Tenuous

Santander does not agree with how "*widely*" I applied Truman and says that they're relying on the arguments they've made previously, and they consider this situation too tenuous to maintain the DCS link. I note its comments. However I disagree for a number of reasons. Firstly it ought to be remembered that the originating legislation here was enacted in order to provide added customer protection in certain circumstances and the matters at hand here should be considered through that lens. Secondly I'm required to consider the law and I've addressed what I see as the relevant case law accordingly. It is clear that the Court said the DCS chain should be considered intact where arrangements and other conditions were met unless the relationship at hand was 'too tenuous'. I've explained why I think this case is less tenuous than Truman and hence significantly short of the 'too tenuous' test's bar. I do not see any persuasive counter arguments made to my rationale in my provisional decision being made in Santander's response to my provisional decision on this particular point. The provisional process I decided upon was in order to give Santander every and further opportunity to express in a case specific situation why it felt the findings of the Courts in similar situations (from a legal perspective) shouldn't apply here. It hasn't chosen to put forward argument or case law on this specific point but rather to say it doesn't agree but will offer the redress amount I set out on a goodwill basis. So I see no persuasive reason to change my position on the 'too tenuous' point as I consider I've already addressed the key arguments Santander has made here and it hasn't provided anything persuasive further.

Factually distinct from other cases

Santander has said other cases on such issues that this service have considered are factually distinct. I agree the facts of these cases are different. Nevertheless the legislation and following case law sets out parameters for considering the DCS link and without persuasive arguments to explain why such case law shouldn't be applied in this case and/or why my rationale shouldn't stand in this case then I see no reason to change my position.

Evidence

Santander has said "*We hope FOS will acknowledge that this is another example of where your service was able to obtain further information and documentation from the third party, which was not available to or provided to Santander previously. Of course, Santander is only able to assess complaints on a case by case basis in light of the documentation and facts available to us."*

I think Santander could have gathered this information. It is my position that should firms wish to contest liability under S75 due to the DCS chain not being intact, they would be well advised to gather evidence to support that position when they first arrive at that conclusion. In that way they would possess such evidence to be used as and when needed and would negate the risk of such evidence being lost by third parties whilst complaint processes both at the firm end (and indeed here or elsewhere) played out. And as the Courts have found the mere presence of another party is insufficient to break the DCS chain. It would, of course, be unusual if such firms expected complainants to find the evidence to prove the DCS link was or wasn't in place considering it is this 'DCS is broken' argument that firms use to try and avoid liability to complainants' complaints.

Santander say "Truman is not a catch all to remove DCS considerations from the legal liability of the Bank in multiple party transactions."

Both the Court and I agree here. And Truman sets out that there is no catch all rule to be applied but rather cases should be considered on a case by case basis on the test it describes. And this service is dealing with such issues on a case by case basis. And in doing so is reliant on the evidence put forward, and that which is available.

So having considered Santander's submissions here I am glad it has made an offer in line with my provisional decision albeit for different reasons. Its comments after my provisional decision are insufficient to persuade me that my provisional decision was unfair to uphold the complaint or to change my rationale. Accordingly I see no persuasive reason to change my position as articulated. So Mr H's complaint is successful.

Putting things right

I direct Santander to pay the claim amount of £1,988.00 and 8% annual simple interest on that amount, from the transaction date until the settlement date.

My final decision

For the reasons set out above, I uphold the complaint against Santander UK PLC and direct it to put things right as I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 20 October 2021.

Rod Glyn-Thomas
Ombudsman