DRN-4277709

The complaint

Mrs H complains Capital One (Europe) plc hasn't dealt fairly with a dispute over payments made on her credit card account for the purchase of rare vinyl records.

What happened

Mrs H has a credit card account with Capital One, and her husband, Mr H, is an additional cardholder. Mr H was interested in a record for sale on an online marketplace and contacted the seller to negotiate a deal. The seller, who appeared to be based in Spain, said that he would only accept payment outside of the online marketplace's platform, via a "Friends and Family" payment made on a different online platform, "P". He told Mr H this was because he had previously been scammed by a buyer in France.

Mr H agreed to make the payment in the way the seller requested, using his additional card on Mrs H's account to pay the equivalent (when converted from euros) of £3,239.84 on 22 April 2020. Mr H continued to discuss further purchases of specific records with the seller, resulting in him making further payments on the credit card, in the same fashion, for £3,260.03 on 18 May 2020, and £2,349.93 on 7 June 2020. Later, in August 2021, Mr H also paid a further £44.55 in respect of delivery charges relating to the three purchases, again via a "Friends and Family" payment.

There was a lengthy correspondence between the seller and Mr H between April 2020 and May 2022. I won't relate everything that happened as it's not necessary to do so and the parties involved are aware of the history, but in summary the records failed to turn up with various excuses given by the seller for the delays. Mr H became suspicious and, after making enquiries, concluded the seller had used a false tracking number for a delivery and was using a fictitious name. Believing he had been scammed, he and Mrs H contacted Capital One, in May 2022, in an attempt to reclaim the funds.

Ultimately, Capital One said it was unable to help, stating it wasn't liable under section 75 of the Consumer Credit Act 1974 ("CCA") because the payments had been made via the "Friends and Family" option on P's platform. Mrs H complained about Capital One's decision but it stood by its position. Dissatisfied with Capital One's response, Mrs H referred the complaint to the Financial Ombudsman Service for an independent assessment.

One of our investigators looked into the complaint. He thought that Capital One had ultimately not been wrong to say that it couldn't help in obtaining a refund, but he gave a much more detailed explanation. He considered whether Capital One should have honoured a section 75 claim, charged back the payments or treated them as unauthorised, but ultimately took the view that neither of these avenues would have been successful.

On the matter of the section 75 claim our investigator shared Capital One's view that making the payments via P's "Friends and Family" option meant the necessary criteria for a section 75 claim to be made were not in place. Specifically, our investigator concluded that making the payments in this way meant there were not the necessary arrangements in place between the creditor, Capital One, and the supplier (the record seller), nor were such arrangements contemplated by the creditor. This meant there was no debtor-creditor-

supplier agreement in place and a section 75 claim was invalid. Our investigator also noted that Mr H appeared to have been the purchaser of the records and not the account holder, Mrs H, and that this could also cause the debtor-creditor-supplier agreement to be invalid.

When considering whether the payments to the seller could have been charged back under the Mastercard chargeback scheme, our investigator noted there were time limits imposed by Mastercard and that for all of the payments apart from the last one of £44.50, by the time Mrs H contacted Capital One it had been too late to charge back the payments. Our investigator thought it was unlikely a chargeback on the £44.55 payment would have been successful as the payment had been a "personal payment" rather than a payment for goods or services.

Finally, our investigator noted that although it was possible the seller had been perpetuating a scam, ultimately the payments had been authorised and Mrs H would be liable for them.

Our investigator also considered the matter of Capital One's customer service. He concluded that although it may have been the case that Mr and Mrs H had to spend a lot of time making their case to Capital One, this wasn't down to any error on Capital One's part and some level of inconvenience was always to be expected when raising a claim or complaint of this nature. Our investigator thought that really it was the seller's actions which had been the cause of any impact on Mr and Mrs H. Though he acknowledged there were some things Capital One could have done better, our investigator didn't think it was reasonable to ask it to take further action.

Mrs H asked to appeal against the investigator's assessment and so the complaint has been passed to me to decide.

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.

I know this will be greatly disappointing for Mrs H, but I agree with the general conclusions our investigator reached and I'll explain why.

When a person uses a credit card to buy something, there is no automatic obligation on their card issuer to refund them or help if something goes wrong with their purchase. However, there are some ways in which the credit card issuer may be able to help, via the dispute resolution system operated by the card scheme ("chargeback"), or because they may be required to honour a claim under section 75 of the CCA. Additionally, there are some scenarios where a business might have been expected to do more to help protect a customer from falling victim to a scam.

Should Capital One have done more to protect its customer from falling victim to a scam?

Taking into account regulators' rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, Capital One should have been, fairly and reasonably, on the lookout for out of character and unusual transactions, as well as other indications that its customer might be at risk of financial harm from fraud.

But, in this case, I can't see that Capital One would have had grounds to suspect at the time that the payments made by Mr H were related to a scam. After the initial payment, the payments went to a payee that C had paid before without reported incident. And, while not insignificant amounts, none of the payments were so large that their size alone ought to have caused Capital One concern. The payments were also spread out, with several weeks

between them, so Capital One wouldn't have been able to identify a concerning pattern that might be consistent with certain kinds of fraud.

Overall, I don't think Capital One made a mistake by processing these payments without speaking to Mr or Mrs H.

Should Capital One have attempted to reclaim the payments via the chargeback process?

On the matter of chargeback, our investigator concluded the three large payments Mr H made to the seller could not be disputed under the Mastercard chargeback scheme due to how long ago they had taken place when Mr and Mrs H contacted Capital One for help.

The relevant card scheme, Mastercard, sets the rules about the types of situations and scenarios where a chargeback can be attempted. Capital One has to follow those rules. The rules say that a chargeback can be raised where goods have been purchased and have not been delivered, as here. They then go on to outline the window of time in which a chargeback must be raised, noting that this depends on whether the seller specified a delivery date. If no delivery date is specified, then a chargeback must be attempted within 120 days of the payment being made. If a delivery date *was* specified then an extended window of time applies. It's unclear to me whether a delivery date was originally specified for any of the three records. It seems unlikely for the second or third records as, based on Mr H's email correspondence, these were only to be sent once the seller had received them from a third party. It is less clear for the first record, however the arrangements between Mr H and the seller appear to have been quite informal and I have not seen a specific date mentioned (at least to begin with) in the correspondence which has been sent to us. On balance, I don't think a specific delivery date was agreed from the outset.

In light of this, it seems unlikely to me that any chargebacks could have been attempted by Capital One – because when Mr and Mrs H got in touch for help, the window of time in which to do so had long since passed. But even if that's not right, our investigator made another important point, which is that all the payments, including the £44.55 delivery charge, were made via P's "Friends and Family" facility. The scheme rules treat "Friends and Family" payments as money transfers (or "personal payments", as our investigator described them) rather than purchases of goods, and they are ineligible for chargeback protections which would apply to purchases, such as those which I've described above. So ultimately, regardless of how long it took for Mr and Mrs H to contact Capital One, I don't think it was unreasonable of Capital One not to attempt chargebacks against any of the payments.

Should Capital One have honoured Mrs H's claim under section 75 of the CCA?

This leaves the matter of a potential claim under section 75 of the CCA. Section 75 of the CCA allows a person to claim against their credit card provider, so long as certain conditions are met, in respect of a breach of contract or misrepresentation by the supplier of goods they've purchased using the credit card.

One of the conditions that needs to be met in order for Mrs H (as the debtor under the credit agreement) to be able to make a claim against Capital One under section 75 of the CCA, is that there must be a debtor-creditor-supplier ("DCS") agreement.

In Mrs H's case, there are two key issues which our investigator identified which are relevant to the DCS agreement. Firstly, the involvement of P and its "Friends and Family" payment option. Secondly, the fact that Mr H appeared to be the person buying the records, and not Mrs H.

For there to be a DCS agreement in place for the record purchases, the payments need to

have been made under pre-existing arrangements between the creditor (Capital One) and the supplier (the record seller) or in contemplation of future arrangements between them. I will just refer to these both together as "arrangements". The debtor (Mrs H) also needs to have a claim against the supplier in respect of breach of contract or misrepresentation.

The typical example of arrangements between a creditor and supplier is where the creditor has made a specific agreement with the supplier that the supplier can accept its credit cards. Under these arrangements the creditor agrees to pay the supplier on presentation of a credit card by the debtor, the supplier agrees to provide the goods or services to the debtor, and the debtor agrees to repay the credit provided by the creditor.

In practice however, things are often more complicated than this and various intermediaries can be involved between the creditor and the supplier.

The courts have considered the question of what constitutes arrangements where intermediaries are involved. The Court of Appeal, in the case of *Office of Fair Trading v Lloyds & others [2006]* ("the OFT case"), concluded that arrangements do not need to be direct between the creditor and the supplier, for them to be of the kind required to bring a section 75 claim against the creditor. The Court considered the word "arrangements" as used in the relevant part of the CCA was to be construed loosely, observing that not to do so would result in some consumers being disadvantaged. The Court was dealing with the emergence of a particular type of payment intermediary – merchant acquirers – but the same principles can be applied to more recent developments in how card payments are made via third parties. And the OFT case shows that commercial practices with respect to card payments were evolving even as early as the mid-2000s, and suppliers were being recruited to the card schemes by intermediaries. Further development has occurred since then and the number of intermediaries has grown, catalysed by the growth of new technologies and the popularity of e-commerce. Payment facilitators, for example, are now an established part of the payments industry and the rules of the card schemes have changed to accommodate these developments.

The more recent High Court case of *Steiner v National Westminster Bank plc [2022]* ("the Steiner case") has provided further comment on the concept of "arrangements". In this case the judge reasoned that when a creditor made an agreement with a customer in relation to a card issued by the creditor to that customer, then the agreement was made under the card scheme, and this constituted "arrangements" between the creditor and the other members of the scheme. Therefore, if a supplier was already a member of the card scheme, the agreement was made under "pre-existing arrangements…between the [creditor] and the supplier". The creditor was also aware that other suppliers were likely to join the card scheme in the future, so the agreement was also made "in contemplation of future arrangements", between the creditor and any supplier who subsequently joined the card scheme.

I've considered carefully how all of this can be applied to the circumstances of Mrs H's case. Mr H didn't pay the seller of the records directly. The seller had said he would, in essence, only accept payment via P's "Friends and Family" facility, claiming to have been scammed by a buyer in the past when using other payment options. Mr H agreed to make his payments in this way and it appears his additional card was linked to an account with P as a funding source. When he chose to pay the seller via P's "Friends and Family" option, his additional card was charged and the funds were transferred to the seller's account with P. The key question is whether, in this scenario, there were relevant "arrangements" between Capital One and the seller of the records.

I note that P makes it clear at the point of payment that the "Friends and Family" option for sending money is not intended for buying goods or services. P's own "Buyer Protection"

does not apply when money is sent in this way and, in fact, P's "User Agreement" prohibited Mr H from paying for goods or services in this way.

I think, in principle, arrangements of the required kind between the creditor and supplier can be held to exist where payments are made via an intermediary like P. It's reasonable to conclude that these arrangements exist where a credit card is used to pay for goods or services in a way which is accommodated by the relevant card scheme and the intermediary themselves. However, I think it is difficult to conclude that this should extend to specific methods of payment which are not intended for buying goods or services and, as in this case, are indeed prohibited for that purpose. I don't think it would be reasonable to say that a payment of this type was made under pre-existing arrangements, or in contemplation of future arrangements, between the creditor and supplier, when it is not a normal way of paying for goods or services, and is not allowed by the payment intermediary involved.

Because the necessary arrangements were not in place, I'm unable to conclude the payments to the seller in this case were made under a valid DCS agreement and therefore I cannot see how Mrs H would have had a valid claim against Capital One under section 75 of the CCA.

Earlier in this decision I observed that the debtor (Mrs H) needed to have a claim against the supplier in respect of a breach of contract or misrepresentation, in order for her to have a claim against Capital One under section 75 of the CCA. Our investigator identified this as another potential obstacle to the claim, and I think it is worth developing this point further.

On the face of it, it doesn't appear that Mrs H has any transactional relationship with the seller. She had not agreed to buy anything from him or entered a contract with him, so it's difficult to see how she could have a claim for breach of contract or misrepresentation against him. It is Mr H who potentially has a claim against the seller, not Mrs H. Our investigator thought, on balance, that this was not an issue. He considered that, perhaps, the purchases were joint purchases by Mr and Mrs H and so she could be considered a party to the various deals. The correspondence does not support that conclusion in my opinion. To me the email records indicate these were purchases contemplated, initiated and executed by Mr H in connection with an interest he has in records. I do not think these were joint purchases and, because Mrs H would not have a claim herself against the seller, she would have no claim against Capital One under section 75 of the CCA either.

Ultimately this doesn't matter as there is no valid DCS agreement due to the payments having been made via P's Friends and Family option, but it is another reason why Mrs H did not have a valid claim against Capital One in respect of the purchases. It follows that Capital One did not act unfairly or unreasonably in declining Mrs H's claim under section 75 of the CCA.

I don't lack in sympathy for Mr and Mrs H. It is apparent now that Mr H was deceived into paying thousands of pounds to a person for valuable items which they probably had no intention of providing. However, I am considering a complaint against Capital One, not the person behind the scam, and there are only limited sets of circumstances in which Capital One would be expected to provide redress. This, unfortunately, is not one of them.

Finally, our investigator considered the level of customer service provided by Capital One in connection with Mrs H's claim. He concluded it could have been better but ultimately that the underlying cause of the impact on Mrs H was the scammer's actions. I agree that Capital One could have handled the claim better. It appeared at times to be confused about the payments which had been made and its explanations lacked detail. It was also sometimes difficult to get hold of. Considering the complexity of the claim and the amount of evidence submitted to support it, I think it's understandable that things took a bit longer. Like

our investigator I don't think it's necessary to require Capital One to provide compensation in respect of the way it handled the claim, in the circumstances.

My final decision

For the reasons explained above, I do not uphold Mrs H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 17 January 2024.

Will Culley
Ombudsman