

The complaint

Mr A complains about how MBNA Limited handled a claim he made to it.

What happened

The facts of this matter are well known to both parties – so I will not repeat them in detail here. Instead I will briefly summarise the background and focus on giving reasons for my decision.

Mr A used his MBNA card to pay for cosmetic implant surgery from a clinic ('the supplier'). He says that he is unhappy with the results and that the surgeon did not carry out the procedure as agreed at the start. In particular he did not use a certain type of fixing.

MBNA considered the matter under Section 75 of the Consumer Credit Act 1974 ('Section 75') but did not uphold the claim.

Mr A's complaint about MBNA's handling of the claim was looked at by our investigator. She concluded there was not persuasive evidence that the supplier had breached the contract it had with Mr A. So it wasn't unfair of MBNA not to offer a refund to Mr A.

Mr A disagreed. So the matter came to me for a decision.

Before coming to my decision I wrote to Mr A to cover off some additional points, including chargeback and the terms implied into the contract with the supplier by the Consumer Rights Act 2015.

Mr A responded with some comments. In summary, he says that the supplier did not carry out what was agreed, in particular it didn't use a certain way of fixing (screw fixing) and did not do an extra procedure that it promised (meaning Mr A had to get it done elsewhere at additional cost). Mr A says the surgeon working for the supplier mis-led him about the fixing method he would use and he wouldn't have gone ahead with the treatment had he known he wasn't going to get screw fixing.

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 have considered the evidence and arguments on this case but I won't necessarily comment on all of these. This is not intended as a discourtesy it simply reflects my role resolving disputes informally.

I am sorry to hear about the dissatisfaction Mr A has described with the treatment product he bought. However, my starting point here is that MBNA is not a supplier of the goods and services. So I am considering its role in respect of the specific financial services it provides. In doing so I consider the card protections of chargeback and Section 75 to be particularly relevant here. It is these that I have focused on.

Section 75

Section 75 in certain circumstances allows Mr A to have a '*like claim*' against MBNA for misrepresentation or breach of contract by a supplier of goods and services paid for using his credit card.

Section 75 has technical criteria that needs to be satisfied in order for there to be a valid claim in respect of the actions of a particular supplier. For example, relating to who was involved in the agreement, how it was paid for and what the goods or services cost. In this case we have quite limited information about the nature of the contract agreed (which I will discuss later on). However, based on what I do have I am broadly satisfied the criteria is met for Mr A to have a valid claim against MBNA for a possible breach of contract or misrepresentation by the supplier in respect of the treatment he purchased.

In order to determine if there has been a breach of contract by the supplier I have considered any specific terms and conditions of the package Mr A bought along with any terms implied by consumer law.

In this case I consider the Consumer Rights Act 2015 is particularly relevant as it implies terms into consumer contracts in respect of goods and services as follows:

- that goods will be of '*satisfactory quality*'
- that services will be performed with '*reasonable care and skill*'

It is important to note here that Mr A purchased a complex medical product and something which I do not have expertise in. It is something which involves an invasive process and possible complications and side effects involving the human body. It is commonly known that there are many variables with a medical treatment – and unlike some other services there is often a reasonable expectation that things may not always turn out as planned. So judging whether the supplier has acted without reasonable care and skill or breached the contract in some other way (even if discussions took place about a desired course of action at the outset) is not straightforward.

It is particularly challenging here with a lack of independent expert evidence to say there has been a breach of professional standards reasonably expected here, further compounded with a lack of paperwork to show what was explicitly agreed between the parties (along with any conditions on this). This service (unlike a court) is not able to compel witnesses for cross examination either – which makes getting to the bottom of things much more difficult.

I know Mr A has indicated that the supplier did not provide him with paperwork and it is at fault for this. It isn't entirely clear if any paperwork does exist but in the absence of this or any other persuasive evidence (such as an expert report) and considering the complexities and variables involving a medical treatment I am not able to fairly say MBNA should pay the cost of his treatment here. I will explain more.

I have considered what Mr A has said about what was verbally agreed and the text messages between him and the supplier. However, it is difficult to base a finding of breach of contract on this alone where there is no outright admission of wrongdoing by the supplier. Particularly noting where in the field of medical procedures there is usually an agreement that sets out the risks and variables (including how things might go a different way based on the judgement of the surgeon carrying out the procedure at the time).

In this case I note that it appears that the doctor decided to fix the implants in a different way and confirmed the rational to Mr A after via a message:

'as this does not destroy the bone. Your anatomical build of bone was better' with a particular type of fixing.'

It is difficult to say that a surgeon exercising professional judgement is a breach of contract here – either of an express term or of the implied term to exercise reasonable care and skill. Particularly noting the evidential concerns I have already noted above.

I know Mr A says a certain way of fixing was important to him so he could continue certain activities – but I have limited information to show what was agreed about this at the point of sale. I know Mr A has suggested that the supplier having explained why the surgeon carried out one method of fixing over the other shows he agreed to screw fixing in the first place – but I don't think it persuasively shows he only agreed to do this. It seems likely that in this context it is simply the surgeon justifying why he used one method over another based on his medical opinion.

In summary and noting the complexity and possible variables here I am unable to fairly say on balance there is a breach of contract by the supplier in respect of the implied terms regarding the quality of the product or the way the procedure was carried out. Nor does there appear to be persuasive evidence of any express term of the contract which entitles Mr A to a refund here.

I note Mr A says there was an additional procedure which the supplier was meant to carry out for him which he had to get done elsewhere – but once again there is limited information to show this is the case – so as it stands I am unable to fairly say that MBNA should reimburse Mr A for this.

In addition to breach of contract I have also considered whether there is persuasive evidence of a misrepresentation by the supplier. I don't have recordings of the conversations Mr A had with the supplier. This does not mean I have discounted what he has said he was told. However, I think discussing the preference or possibility of a particular way of doing things is different from an outright false statement of fact. And my starting point is that in a medical procedure with the variables and possible unknowns it seems less likely that a surgeon would agree to a guaranteed outcome.

So for similar reasons to those explained above and noting the lack of information showing the supplier made an unequivocal agreement to use a certain type of fixing (and noting the limitations I have in compelling witnesses in the way a court might) I am unable to fairly conclude that Mr A was, on balance given information at the point of sale about the procedure which means that MBNA should fairly pay him a refund.

Furthermore, it is worth noting that even if I were able to conclude, on balance, a breach of contract or misrepresentation here – determining fair redress would not necessarily be straightforward - noting that Mr A has claimed that he is now spending more money to correct the outcome of the surgery and that the surgery he has had is having an ongoing detrimental impact on his life. This service is unable to make certain types of awards in respect of consequential loss – including those for loss of amenity – so I would not necessarily be able to make the kind of award that Mr A is potentially looking for here in any event.

Chargeback

I have considered chargeback as this is another way MBNA might have been able to help Mr A with a dispute about a card transaction. However, it isn't guaranteed to succeed and not all circumstances will suit a chargeback.

It appears MBNA didn't raise a chargeback due to insufficient information about the service to be provided. This doesn't appear unreasonable on the face of it considering the apparent lack of contractual paperwork confirming the specifications of the service agreed at the outset. And even if MBNA did raise a chargeback it is difficult to say it would likely have succeeded here in any event considering the complex nature of the dispute and the apparent lack of admission by the supplier that it did anything wrong.

I know Mr A feels strongly about this case not being upheld. This is not to say that he might not have other routes to pursue his case against the supplier – such as court – but that will be a matter for him to decide and potentially seek legal advice on. All things considered, in its role as a provider of financial services I don't think MBNA acted unfairly in not refunding Mr A as part of the dispute he raised with it.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 8 September 2023.

Mark Lancod
Ombudsman