DRN-4558810

The complaint

Mr G has complained about how American Express Services Europe Limited (AESEL) responded to a claim for money back in relation to a purchase he'd made on his credit card.

What happened

Mr G paid £597 on his AESEL credit card for an online training course for his daughter in May 2020. The payment went to the supplier via a payment processor. The course was sold as an intensive course to prepare the student to pass an admissions exam. The test is an aptitude test used as part of the admissions process for certain universities. After his daughter completed the learning aspect of the course, as part of the course package she was enrolled onto the admissions exam in September 2020.

Mr G tells us he sourced the course for his daughter and paid for it. He said he did this so he could save time tutoring her. Mr G says one of the main benefits of the course was that the course provider offered a free retake of the admissions exam if the student didn't pass it the first time. Unfortunately, Mr G's daughter didn't pass the exam in 2020. Given the guarantee, Mr G and his daughter wrote to the course provider in May 2021 asking to take the exam again later that year. But they didn't hear back.

Mr G contacted AESEL in June 2021 to raise a claim for money back. AESEL responded to say it wasn't going to uphold his claim. It said Mr G didn't have a valid claim under section 75 of the Consumer Credit Act 1974 (CCA) because Mr G paid through what it called a payment aggregator. It said this meant a valid section 75 claim couldn't be considered. It also said goods or services purchased have to be for the benefit of the main cardmember. As the course was for Mr G's daughter, AESEL said she was the contracting party, and so the purchase wasn't covered by section 75.

Further AESEL also said Mr G contacted it too late for it to raise a chargeback because the merchant isn't obligated to respond after 120 days. And as chargeback was a mediation service, it couldn't enforce it.

Unhappy with the response, Mr G brought the complaint to our service. In summary, he said:

- AESEL had a duty of care to pursue all means possible in his claim.
- The fact his daughter was a beneficiary didn't mean she entered into a contract.
- He did receive benefit. His time being able to tutor his daughter was limited so he chose to buy the course.
- The course provider failed to enrol his daughter so breached the contract. He had to tutor her instead of doing his own work.
- He was the contracting party. He paid for the course and was the beneficiary.
- He paid the course provider direct, so there was no aggregator involved. The company the payment went through was a payment service provider.
- AESEL should have responded to him sooner.
- He was unhappy AESEL didn't follow the payment service provider's dispute process and if it had he would've got his money back.
- AESEL didn't respond properly to his subject access request (SAR).

- There'd been inconvenience caused and time spent trying to resolve the situation.
- He requested £200 compensation, £597 refund and £597 in recognition of the time and effort he put in, along with an apology.

Our investigator looked into things but didn't uphold the complaint.

In summary, he said he thought Mr G's daughter was the contracting party with the course provider – so in his view the debtor-creditor-supplier (DCS) agreement was broken. And therefore, AESEL wasn't ultimately required to pay him back under the section 75 claim. He didn't, however, think the presence of a payment service provider broke the DCS agreement.

He said he didn't think the chargeback had a reasonable prospect of success. He indicated Mr G may not have supplied all the information to the course provider when requesting a retake. He said AESEL wasn't required to consider assisting in other ways. And that he wasn't going to recommend AESEL compensate Mr G for time spent in bringing the complaint. Finally, he said Mr G's complaint about how AESEL responded to the SAR request wasn't included in the original complaint, so he wasn't going to comment on that further. But he did ask AESEL to resend the documents.

Mr G didn't agree and reiterated earlier points. I won't go over everything again. But in summary, he said:

- He was the contracting party and the prime direct beneficiary. It's quite normal for someone to enter into a contract and to then delegate someone else to deal with the merchant.
- He spent a significant amount of time tutoring his daughter and provided evidence.
- There's nothing in the legislation that says the transaction has to be for the exclusive benefit of the debtor.
- AESEL had not followed the Financial Conduct Authority (FCA) Principles relating to treating him fairly.
- The payment service provider wouldn't have resisted AESEL's chargeback, and that he raised his claim within the relevant timescales.
- He provided evidence of the guarantee that was unambiguous and didn't prominently display any restrictions on how it could be accessed.

He also provided details of other cases decided at our service that he said had similar themes, and which support his assertions. And in addition to being refunded the purchase price with interest, he asked he be compensated for not only the distress and inconvenience caused, but in recognition of the lengths he'd gone to in putting his submissions together.

I issued an initial provisional decision in July 2022. I'm not going to repeat everything I said, but in summary I set out that I thought it was likely the necessary conditions for a claim to be considered under section 75 did exist. There was a lack of documentary evidence such as a contract. But I considered what Mr G had said: he found the course; he paid for it; and he was going to receive benefit by saving time tutoring his daughter himself. Having done that, I thought there was a strong argument to say Mr G was a contracting party. So, unlike AESEL, I thought the necessary DCS agreement existed. I also didn't think the presence of the payment service provider had broken the DCS agreement.

I went on to think about whether there was a breach of contract or misrepresentation, because section 75 allows Mr G to hold AESEL responsible for those. I reviewed the information supplied and, on balance, decided that the course Mr G paid for came with a free retake. I couldn't be sure what the terms were in 2020 because of the lack of information but again, on balance, I thought the 2020 terms were likely the same as the 2022 terms that said

in order to exercise the right to retake the next available online course for free, the student needed to contact a certain email address. And the email needed to include the student's name; the course booking number; and score transcript. I didn't think that was unfair.

I pointed out Mr G hadn't followed those instructions. He showed us emails and a screenshot of a message left on the course provider's website asking to rebook the course. We contacted the course provider who said:

Regrettably, the client did not respond to the… School email account and instead has emailed a different email account. As an organisation, we do our best to respond to clients as quickly as possible however, can only do so when they contact us on the appropriate channels.

As a show of goodwill, we are happy for them to contact us directly so that we can resolve their issue and also offer them a free re-take. Or alternatively, you can offer a free-retake on our behalf.

I thought about AESEL's liability. I wasn't persuaded there had been a misrepresentation. And I said that for me to say there'd been a breach of contract I'd need to see the course provider refused what was promised in the contract. But, based on what the course provider told us, it didn't refuse what was promised. It looked like it wasn't aware of the request because the wrong email address was used. Moreover, the course provider offered to allow Mr G's daughter to retake the course for free. It didn't seek to penalise him for using the wrong email address. Which I thought seemed reasonable.

I also thought about the clarity of the advertising and how the course was presented. The course provider said the terms and conditions were presented at the bottom of all the web pages; on the account opening page; and on the page where the course was processed. I said I could understand why Mr G thought it should've been clearer. But I wasn't persuaded there was enough evidence to show there'd been a breach of contract.

I thought about whether there were any other viable routes for Mr G to claim his money back through AESEL. But seeing as though I wasn't persuaded there'd been a breach of contract or misrepresentation and given the response we had from the course provider, I wasn't persuaded there was another viable route, such as chargeback that ought to have been successful.

Finally, I also considered Mr G's request for further compensation. Mr G highlighted it took him a lot of time to put his submissions together. AESEL didn't reach the outcome Mr G wanted in response to his claim. But I felt this didn't mean it needed to compensate Mr G for the time it took him to bring his complaint. When pursuing a complaint, a consumer is always put to some level of inconvenience. So I wasn't intending to direct AESEL to pay anything further.

AESEL didn't add anything further. Mr G did. I'm not going to repeat everything but, in summary, he said:

- AESEL unfairly handled the claim so it should've paid him or contacted the course provider to establish facts.
- The ombudsman service's involvement should've ended upon establishing AESEL wrongly denied the claim.
- The relevant term wasn't the reason why AESEL rejected the claim.
- We went beyond our remit when considering the relevant term.
- There's no credible evidence the relevant term existed in 2020.
- AESEL should've contacted the course provider to establish facts.

- The course provider has various websites and the relevant term was not displayed on all of them.
- The relevant term, if it existed in 2020, wasn't prominent enough and was unfair. Therefore, he shouldn't have been bound by it.
- The contact email address he contacted the trader on is what was supplied on one of its websites to 'reach any of us'.
- The course provider's response wasn't credible.
- The relevant term asked for the supply of a live booking number, but this wasn't provided.

I asked our investigator to contact the course provider again. We highlighted that Mr G's daughter no longer had need to use the course. And that the terms and conditions weren't visible on all the web pages. We asked for specific evidence Mr G was provided the terms and conditions. We explained the email address he used to try to rebook was a valid email address that the course provider said could be used to reach it on one of its websites. We asked if the course provider would be willing to refund Mr G.

The course provider responded to us to say it couldn't comment on the operations or content of the websites Mr G highlighted because it's a separate website, separate company, registered in a foreign jurisdiction not under its ownership. But it agreed to refund Mr G in full.

We asked if this resolved things for Mr G. He was happy about the refund. But he said he had to put in a lot of time and effort to bring the complaint. He said AESEL hadn't acted fairly by initially suggesting there was an aggregator involved, and secondly that there was a break in the DCS agreement. He said the terms relating to the retake were not prominent enough and so should be deemed unfair. Mr G thought AESEL should have either paid him straight away when he put in the claim or contacted the course provider to properly investigate it.

Mr G said AESEL should pay him interest and compensation in recognition of the way it handled the claim. He thought it should also apologise.

I issued a further provisional decision in December 2022 that said, in summary:

- The DCS position wasn't clear because of recent developments in the court. But having reconsidered everything I didn't think these conditions in the CCA made a difference to my position because it's not clear the course provider had misrepresented or breached the contract.
- It was difficult to reach conclusions without knowing exactly what Mr G saw, and in the absence of a contract.
- The course provider said the website Mr G highlighted wasn't under its ownership, and that it's from a different jurisdiction. This added another complication.
- There was a lack of clarity on whether there'd been a breach of contract. And I'd like to have seen further evidence on how the terms were presented before saying whether (or not) they were unfair.
- I appreciated Mr G had been put to some inconvenience in bringing his complaint (and in raising his claim), but AESEL answered the claim within a reasonable amount of time. It's not a straight-forward claim to consider given the DCS complications. AESEL was entitled to reject the claim and gave its reasoning. So I wasn't intending to direct it to pay compensation for the way it handled things.
- Mr G received a full refund and I wasn't minded to direct AESEL to take further action.

Mr G again didn't agree. He sent in a lot of further submissions, but I'll summarise his main points:

- Despite attempts made he'd not heard from the course provider after making a request.
- As far as he was concerned a breach of contract had occurred and so he intended to proceed to litigation.
- He thought the Financial Ombudsman was misled by the course provider because the information supplied related to its process in 2022, and there was no evidence the process was in place in 2020.
- The terms relating to rebooking the course were not referred to or shown in the sales webinar. And that Mr G booked the course on his phone while remaining on the webinar website throughout. What is available to see on a phone isn't the same as what can be seen on a computer monitor so all the larger images showing the terms and conditions that the course provider supplied is not what Mr G saw. So even if they were in place in 2020, which there's no evidence, these weren't shown on his phone in the format which the course provider misleadingly supplied to the Financial Ombudsman.
- There was no evidence that the relevant terms and conditions existed in 2020.
- The webinar gave clear instructions on how to book the course but not about how to rebook the test.
- It's not enough to bury terms within the contract, although Mr G reiterates there's no evidence the term relating to rebooking was in existence in 2020.
- Mr G said it's irrelevant whether the terms were present on the course provider's website because he booked through another channel where no terms and conditions were shown. He provided evidence he booked through another channel.
- Leaving out important relevant information was false and deceptive and that the term should be considered unfair. Moreover, there was no 'subject to terms' quoted in relation to the free retake, and that the term wasn't prominent, as required.
- In law fairness of term refers exclusively to whether the term is compliant with law, not whether it appears to be fair as a matter of opinion. An unfair term should be null and void.
- Too much weight was placed on the false and misleading information submitted by the course provider, compared to the submissions from Mr G.
- All the evidence showed strong links between the course provider website and the website Mr G says he booked the course through.
- AESEL unfairly declined the claim and failed to deliver its obligations under section 75.

Mr G also took some advice from his insurance company's solicitor about whether court litigation against the course provider could be funded by the insurer. But he said the compensation he asked me to direct AESEL to pay for the distress and inconvenience caused would not be sanctioned by law. Mr G received a full refund from the course provider. Mr G however reiterated the compensation he asked for was in the region of £600. And he said the Financial Ombudsman had the power to award it.

Mr G thought AESEL didn't handle his claim with due care and attention. He said it failed to apply the FCA Principles. He submitted points he'd made before relating to not being provided details of the terms and conditions. He asked that evidence (from the course provider) is checked for reliability. He recommended I wait for the outcome of a complaint raised through the Advertising Standards Authority (ASA) as to whether a buried term would apply to the effectiveness of the advertised guarantee. He said if the ASA finds against the terms, I'd have further evidence to issue the correct final decision.

I issued a further provisional decision in December 2023. I said that I thought the main outstanding point left to decide is whether AESEL needs to pay any compensation to Mr G. Mr G had requested in the region of £600.

I also took the opportunity to give a summary of the way I was minded to conclude this complaint. I said:

DCS

Having considered the matter further, I wish to make clear that I'm of the view the DCS agreement is intact. I've set out why I remain of the view Mr G was a contracting party and why the fact his daughter carried out the course didn't break the DCS arrangement. So I'm not going to go over that again.

With regards to the payment processor being involved, for there to be a valid DCS agreement there needs to be arrangements between AESEL and the course provider for AESEL to finance the purchase made by Mr G. The credit card scheme is there to put such arrangements in place between those participating in it. In this case, the credit card payment went to the course provider via a payment processor, but this is not an unusual arrangement. This is because the payment processor is a recognised participant in the same card scheme as AESEL, and this model of recruiting and paying suppliers is a common and accepted commercial practice which has evolved over time. AESEL would have contemplated, when agreeing to give Mr G a credit card, that the market for payment services would develop over time and that the card would be used to pay suppliers through the card scheme via any established method which had since emerged. Due to the mutual participation of all parties within the card scheme, therefore, I think there was a valid DCS agreement.

The breach of contract

I've reflected on what the parties have told me. As has been explained, I've not been supplied a contract from 2020 showing exactly what Mr G agreed to. We've asked for this from all the parties, including the course provider, but I've only been given explanations of what Mr G would have seen from the course provider. And explanations of what he didn't see from Mr G. Without specific evidence of the contract Mr G entered into, it's always going to be difficult to conclude whether or not there's been a breach of contract.

The course provider says Mr G was informed about the terms relating to the free retake for the test by various methods. Mr G says they weren't and that the course provider's information was misleading.

If I were to accept what Mr G has said that the relevant term wasn't present, or that it was hidden, then I agree there'd be grounds to say it was an unfair contract term. Part 1 of Schedule 2 of the CRA sets out a list of terms which may be regarded as unfair. Paragraph 10 sets out:

A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.

So, there would be grounds to say the term was unfair if Mr G wasn't made aware of it.

I also note paragraph 17 sets out:

A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.

So, if the formality requirement (in relation to what needed to be done to take the retake) wasn't adequately drawn to Mr G's attention, or that term was onerous, there'd be grounds to say it was unfair as well.

If I were to find the term was unfair – which is difficult because I've not been supplied a contract – the contract would be read without the unfair term being present. This would require me to delete the unfair wording and see if the term could still be read sensibly. To my mind this would be a simple strikethrough of the requirement to email a particular email address to request the resit. Therefore, reading the term without the unfair wording, it follows that there had been a breach of contract when Mr G tried to book the free retake, but didn't get a response from the course provider within a reasonable amount of time.

However, all of this is rather academic because Mr G has received a full refund for the course. This seems to be a generous resolution given he's received 100% back for a course that was completed. Moreover, the course provider eventually offered a free retake. I appreciate this was no longer required due to the time that passed, but the option was given. If it is right that there has been a breach of contract, the loss arising out of that breach has been remedied because Mr G received a full refund. As such there is no longer a loss to Mr G. But if I'm wrong about that, it is my conclusion that, in considering all the circumstances of this complaint, Mr G has received a generous remedy as he is in receipt of a full refund.

In any event, I don't need to carry out more in-depth analysis of what the contract said as I am satisfied that Mr G has received a generous resolution to the issues. I also don't need to wait for any findings from the ASA because he's already [had] *a full refund.*

Compensation requested by Mr G

As I explained above, it seems the main outstanding point for Mr G is whether AESEL needs to pay any compensation to Mr G.

If I uphold a complaint, I can make a money award for compensation such as distress and inconvenience.

I don't think there are grounds to direct [AESEL] *to pay compensation for distress or inconvenience under its section 75 liability, but I am able to consider how it handled the claim.*

AESEL did not consider a refund appropriate upon its initial considerations, but I note the circumstances here were somewhat complex. The relationships between the parties were complicated by having another party – Mr G's daughter – involved in carrying out the course. Having another person involved can impact the DCS agreement. The payment went through a payment processor and having other parties involved in the transaction may have impacted the DCS agreement. There was also a lack of documentary evidence such as a contract supplied. Overall, I think AESEL gave an answer within a reasonable amount of time and provided its reasons. I think it broadly reached its answer efficiently.

In all the circumstances, I don't consider it appropriate to uphold the complaint against AESEL for the way it handled the claim. I don't consider any additional award is necessary given Mr G has received a full refund, along with the course he's received.

AESEL responded to say it would wait for the final decision. Mr G responded to put on record why he thought the decision was unfair. I won't go over everything he said in detail but, in summary, he said:

- He wasn't seeking anything else from the trader. But the refund of the course fee doesn't resolve his issue with AESEL. He requests compensation from AESEL for the wrongful dismissal of his claim, and the subsequent impact of that on him.
- The course provider now goes some way to mention the relevant term during its selling process, but Mr G says it was sold to him with the false pretence that the retake guarantee wasn't subject to any terms. He reiterated previous points about the relevant term, that it wasn't present, and that it was unfair. Mr G said there was no paper contract and under UK contract law, a contract can be verbal. Mr G said he provided all true evidence, but the course provider didn't.
- The Financial Ombudsman can make awards for distress and inconvenience. He said he suffered distress and inconvenience by the unfair treatment from AESEL. He said this led to him researching the matter, writing to the Financial Ombudsman and several other parties, all because AESEL failed to carry out its duties. He said AESEL should have either refunded him straight away or contacted the trader to ascertain the facts. Mr G says AESEL acted with ignorance, arrogance and negligence.
- AESEL ought to have known the payment service provider didn't break the DCS agreement. Mr G said he spent time having to research this, but AESEL should have done this.
- AESEL should have known that he and his daughter were party to the contract.
- It wouldn't be fair to let AESEL get away unscathed. Lessons need to be learned, and by not upholding the complaint it doesn't send the right message to AESEL. The Financial Ombudsman shouldn't have to do AESEL's job for it, which it did by helping him get a refund of the course fee.
- It's normal protocol to direct AESEL to pay compensation when I didn't agree with its conclusion. The process in my provisional decision was unfair.
- Had AESEL done what it should have done at the start Mr G would have been refunded the course fee or had the opportunity to repeat the test. The claim was wrongly dismissed, and he suffered distress and inconvenience so he should be compensated. AESEL should be sent a clear message it's obliged to comply with section 75 and pay due care and attention to claims.

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 want to thank the parties for their further submissions. Several points have been made by Mr G. If I don't deal with a matter expressly in the final decision it doesn't mean I've not considered it. I'm required to determine what is fair and reasonable in all the circumstances of the complaint and I'll directly address the points I need to in order to reach a fair and reasonable outcome.

In essence, the matter still outstanding is that Mr G has requested compensation because of the distress and inconvenience he says he was put to as a result of the way AESEL handled his section 75 claim. I've not been supplied any substantive new evidence to consider so, for the reasons already given, I'm not going to direct AESEL to take further action.

I'm primarily required to consider how AESEL acted leading up to it issuing the final response letter. The final response letter set out AESEL's position on the claim and

complaint that was raised. AESEL didn't uphold the claim and complaint. But as I've said before, it gave Mr G an answer within a reasonable amount of time. As far as the time taken, it's not dragged things out or caused unnecessary delays. I'm therefore not making an award for the time it took to handle the claim.

Mr G says AESEL's reasoning for declining the claim was wrong. And I agree with this. But that doesn't automatically mean it should pay compensation for that. I don't agree that the matter is as straight-forward as Mr G thinks it is. I've set out before there are complications involved in the way the payment was made, and the relationships between the parties weren't typical. While I didn't agree with the reasoning, the matters AESEL was thinking about weren't irrelevant or out of the ordinary. It's common for those sorts of relationships to impact the validity of section 75 claims.

I appreciate Mr G spent time researching matters and putting his submissions together. There's always a level of inconvenience caused when raising a complaint. But as I've said previously, I don't consider it appropriate to uphold the complaint against AESEL for the way it handled the claim. I also don't consider a further award is necessary given Mr G has received a full refund, along with the course he received.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 13 February 2024.

Simon Wingfield
Ombudsman