

The complaint

Ms A complains American Express Services Europe Limited (AESEL) (“Amex”) declined a claim she brought under section 75 of the Consumer Credit Act 1974 (“CCA”) in relation to a bouncy castle she purchased using her Amex credit card.

What happened

Ms A used her Amex credit card to purchase a bouncy castle from a supplier, “T”, on 4 April 2021 for £599.95. The transaction was processed via a well-known digital wallet operator, “P”.

In late May 2021 Ms A tried to use the bouncy castle for the first time but it would not inflate due to a leak. She discovered a tear in the fabric which her husband tried to repair unsuccessfully with heavy duty tape. Ms A reported the problem to T, asking for a replacement. T said it would instead try to repair the bouncy castle and provided instructions for Ms A to return the item at its own cost.

T received the bouncy castle on 24 June 2021 and emailed Ms A to say it was wet and mouldy and this would delay the repair as it would need to be dried out first. T had completed the repairs by 12 July 2021 and sent the item back to Ms A. On 20 July 2021 Ms A emailed T to say that the bouncy castle was working but must still have a leak as it “kept going floppy”. T emailed back the same day to ask for a video of the problem as they had not noticed this after completing the repairs. Ms A replied that she had taken the bouncy castle down because it was due to rain but would share a recording “once the weather clears up”.

Around 11 months later, in June 2022, Ms A sent two videos of the bouncy castle to T to demonstrate the problem. She did not receive a reply and requested a full refund for the item on 2 August 2023, about a year later. It appears Ms A received no reply this time either and approached Amex to make a claim under section 75 of the CCA.

Amex considered the claim and rejected it on 21 August 2023, giving the following reasons:

- Ms A had paid for the bouncy castle via P, instead of paying T directly, and this meant Amex couldn’t be held liable for any issues with the item under section 75 of the CCA.
- Ms A hadn’t provided enough evidence that any alleged issues with the bouncy castle were due to an inherent fault rather than wear and tear or misuse.

Ms A complained about Amex’s decision but it stood by its conclusions in a final response dated 23 September 2023. Dissatisfied with this response, Ms A referred her complaint to the Financial Ombudsman Service for an independent assessment.

One of our investigators looked into Ms A’s case. He concluded that the length of time which had passed before Ms A sent a video of the problems with the bouncy castle meant this evidence was less persuasive of there being a fault with the item when it was purchased or

that this fault had been the subject of an unsuccessful repair. Ms A disagreed and made further submissions to support her case, which included sending copies of the videos she'd provided to T.

Our investigator was not convinced however. He thought that, on balance, the bouncy castle did have a fault when it was supplied, because T had agreed to take it back and repair it. T had repaired the item and there was no persuasive evidence that the repair had been unsuccessful. He said he didn't think the videos demonstrated that the repair had failed, noting again that they had been produced 11 months later in any case.

Ms A asked that an ombudsman review her case, so the matter 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.

Section 75 of the CCA allows consumers who have purchased goods or services using a credit card to claim against their credit card provider in respect of any breach of contract or misrepresentation by the supplier of the goods or services, so long as certain technical conditions are met.

In this case Amex has argued that one of the technical conditions hasn't been met, because Ms A paid T via P instead of directly. This technical condition is known as the debtor-creditor-supplier, or "DCS", agreement. Our investigator commented on this in his follow-up assessment. He said that following investigation with P, he thought it most likely P had acted simply to facilitate the payment to T and this did not cause the DCS agreement to be invalid.

I haven't found it necessary to go into great detail on this point as, for essentially the same reasons as our investigator, I think there are other reasons why it wasn't unreasonable of Amex to decline Ms A's section 75 claim. However, in principle my view is that the use of a payment intermediary like P does not mean that a valid DCS agreement will not exist. For a valid DCS agreement to exist a payment needs to have been made under pre-existing arrangements between the creditor (Amex) and the supplier (T), or in contemplation of future arrangements. Having considered the relevant case law, I think such arrangements can be said to exist even when payment is made via a third party like P.

However, assuming there is a valid DCS agreement, Ms A still needs to have a claim for breach of contract or misrepresentation against T, for her to be able to make a valid section 75 claim against Amex. It's not been argued that T made a misrepresentation, so I have focused my analysis on the question of whether there was a breach of contract by T.

A breach of contract occurs when one party to a contract fails to uphold its terms. These terms can be expressly written into the contract, or they may be treated as being included in the contract due to the effect of legislation (sometimes referred to as "implied terms").

When a consumer purchases goods from a trader, as here, there are certain terms implied into the contract by the Consumer Rights Act 2015 ("CRA"). One such term is that the goods will be "satisfactory quality". If the goods are not satisfactory quality then a breach of contract will have occurred and the consumer has certain rights which are also outlined in the CRA. If the problems with the goods are notified to the trader more than 30 days after they have

been delivered, then the consumer is entitled to a repair or a replacement.¹ If this fails to remedy the breach of contract, or cannot be done in a reasonable time or without unreasonable inconvenience to the consumer, then the consumer has other rights including the right to reject the goods and receive a refund.

Ms A's central argument is that the bouncy castle was defective and remained defective after T attempted to repair it, and so she seeks to reject the goods and receive a refund.

It doesn't appear to be disputed that, when the bouncy castle was delivered to Ms A, it had a leak which meant it would not inflate. Considering the purpose of a bouncy castle, I don't think a bouncy castle which cannot be inflated due to a leak can be said to be satisfactory quality. A breach of contract therefore did occur, but the key question in this case is whether or not T remedied the breach of contract. If it did, then there would no longer be a claim which Ms A would be able to bring against Amex under section 75 of the CCA.

When Ms A reported the failure to inflate to T, she asked for the bouncy castle to be replaced. T said that it would take the item back at its own expense and arrange a repair. It returned the bouncy castle to Ms A, claiming to have repaired it, and then Ms A reported ongoing issues about a week later. Specifically, Ms A said: *"It worked but unfortunately there is still a leak somewhere. It kept going floppy."* T asked for a video of the problem, but Ms A only sent video evidence 11 months later. It doesn't appear T responded to her after this point.

Our investigator highlighted the fact that evidence which was not produced at the relevant time, and was in fact generated much later, can lack persuasive power. As more time passes from when the bouncy castle was returned to Ms A, the likelihood that any problem with it *could* have been caused by something other than a failed repair by T increases. And as those alternative possibilities increase, the persuasiveness of the evidence at showing that the problems were down to a defect in the bouncy castle decreases.

However, I think it is also important to consider what the evidence actually shows. Ms A sent the videos to our investigator. Both videos are taken from a few paces away and show children on the inflated bouncy castle. In one video the children are jumping up and down on the main part of the castle, and in the other video, one child is clinging on to a part of the upper section which looks like a crossbeam, which is sagging or bowing under their weight.

To me, the videos do not show any obvious defect with the bouncy castle, or that it is not functioning as it is expected to. It does appear to be less substantial and rigid than the kind of bouncy castle one might hire for an event, but it is clearly inflated and being used for its intended purpose. Indeed, I note the manufacturer describes its bouncy castles as "domestic inflatables" which "won't feel as solid" as hired bouncy castles and that *"areas of low air volume such as beams...will feel softer and easy to...squash."*

Taking into account all the evidence which has been provided in this case, I think it indicates T successfully repaired the bouncy castle, and in doing so remedied its initial breach of contract. This means Ms A no longer had a claim for breach of contract which she could bring to Amex under section 75 of the CCA. It follows that I conclude Amex did not treat Ms A unfairly or reasonably in declining her claim.

My final decision

For the reasons explained above, I do not uphold Ms A's complaint.

¹ If one of the options to repair or replace the goods is disproportionately more expensive to the trader than the other, then the law says the consumer cannot insist on the disproportionate option.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms A to accept or reject my decision before 26 January 2024.

Will Culley
Ombudsman