

## The complaint

Ms W is unhappy with American Express Services Europe Limited's (AESEL) response to a claim she made under s.75 Consumer Credit Act 1974 ("s.75")

## What happened

In June 2022 Ms W bought an item of furniture online from a supplier I'll call V. The item cost £349.95 and she paid for it using her AESEL credit card.

Sometime around April 2023 Ms W asked V if she could return the item. Ms W has said this was because the item was unsuitable and did not fit. V said that its returns policy only permitted Ms W to return items within 30 days of purchase and she was outside of this. So, it didn't accept the return. V did however offer to provide credit to the value of the item or an exchange.

Ms W asked AESEL to consider its liability to her under s.75 as she considered V to be in breach of contract. She said that V had not provided information about cancellation of the contract that it was required to provide by The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("CCR"). She said the consequences of this were that the time within which she could exercise her right to cancel the contract was extended by up to 12 months. And she said the CCR implied a term in her contract with V that if she cancelled within the cancellation period, she was entitled to the return of all payments made.

She therefore considered V was in breach of contract by refusing to provide a refund when she asked it to cancel the contract.

AESEL declined to take further action in response to Ms W's claim. It said V told Ms W that she had 30 days to return unwanted items at the time she bought them so there had been no breach of contract.

Dissatisfied, Ms W referred a complaint to this service.

I issued a provisional decision in August 2024 setting out that I planned to uphold Ms W's complaint. I said:

*"I am looking here at the actions of AESEL and whether it has acted fairly and reasonably in the way it handled Ms W's request for help in getting her money back. In doing so I am required to consider relevant law – which in this case includes things such as s.75 and the CCR.*

*S.75 provides that in certain circumstances the borrower under a credit agreement has an equal right to claim against the credit provider if there's either a breach of contract or misrepresentation by the supplier of goods or services. So, for me to find that AESEL should have met Ms W's s.75 claim I'd need to be satisfied that there was a breach of contract or misrepresentation by V.*

Ms W said V was in breach of contract because it refused to provide a refund in circumstances where it was contractually obliged to provide one.

It is true that the CCR can extend cancellation rights by up to 12 months and 14 days where certain information about the right to cancel has not been provided within a confirmation of contract. It is also true that a failure to return money paid for goods to a consumer in the event the right to cancel is validly exercised could be a breach of terms implied in a contract by the CCR.

V sent Ms W an email confirming her purchase. Within this email it said

*“If you would like to return an item from your order, it’s important that you follow the steps in our **help centre** (bold writing was hyperlinked). Items must be returned within 30 days, please ensure the item is not damaged or marked and within its original packaging.”*

Reg 16 of the CCR says that in the case of a distance contract (which this was), the trader must give the consumer confirmation of the contract on a “durable medium”. The confirmation must also include certain information about the right to cancel where it exists, including the conditions, time limit and procedures for exercising that right in accordance with regulations 27 to 38. The right to cancel did apply to Ms W’s purchase because she bought the goods online and it was a distance contract.

The paragraph contained in the confirmation of contract did not contain all of the information required by the CCR. Although the hyperlinked help centre did contain it, the definition of “durable medium” in paragraph 5 of the CCR states:

*“durable medium” means paper or email, or any other medium that—*

*(a) allows information to be addressed personally to the recipient,*

*(b) enables the recipient to store the information in a way accessible for future reference for a period that is long enough for the purposes of the information,*

*and;*

*(c) allows the unchanged reproduction of the information stored.”*

*In my view, I think it’s unlikely that a link in an email would meet the definition of “durable medium” because the information accessed through that link could be changed at any time in the future, and as such would not satisfy the requirement to allow for the unchanged reproduction of the material contained within it.*

*So, it appears that V didn’t fully comply with the information requirements of the CCR relating to the right to cancel in the confirmation of contract. The consequences of this are as follows:*

*1. Under the CCR, the cancellation period was extended up to the point V did provide that information (up to a maximum of one year and 14 days from when Ms W received the item) (I will refer to this as the “extended time” below) – Regulation 31*

*2. Ms W was still within the extended time period when she exercised her right to cancel in April 2023. When a consumer exercises their right to cancel, Regulations 34 and 35 of the CCRs give rise to a number of contractual responsibilities on the part of the trader, including regarding the reimbursement of payments they have*

made (subject to the conditions set out in those regulations). These are treated by Regulation 34(13) and 35(6) of the CCRs as implied terms in the contract.

3. V breached these implied terms by not reimbursing her the amounts in question when she attempted to cancel within the extended time.

On this basis it appears Ms W did have a valid claim for breach of contract. AESEL has said that there was no breach of contract because Ms W was able to view V's terms on its website before making the purchase and these made clear she had 30 days to return items. I would refer AESEL to Regulation 16 again however which states at 16 (2):

*"The confirmation must include all the information referred to in Schedule 2 unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract."*

So, it is true that there was no obligation on V to send the information in schedule 2 (i.e the conditions, time limit and procedures for cancelling the contract where a right to cancel exists) in the confirmation of contract if it had already provided this to Ms W. However I've not seen evidence the specific information about cancellation was provided before the confirmation of contract. I say this for the same reasons I've concluded the confirmation of contract did not contain all of the information about cancellation required by the CCR.

In any event, 16(2) only removes the obligation to provide the information in the confirmation of contract if it has already been provided in a durable medium. And again for the reasons I've already explained, referral to conditions on a website is not a durable medium because it is not immutable. So, the information referred to in Schedule 2 had not already been provided to Ms W before the confirmation of contract was sent and it was still required to include this information in the confirmation of contract – which it didn't.

I recognise that in reality Ms W was provided with information which made it clear she could return items within 30 days and that despite this, she took 10 months to return the item. However, the CCR is clear as to the consequences of not providing the specific information required and this was implied in Ms W's contract with V. So, despite the fact that some (non- CCR compliant) information about returns was made available and despite the time Ms W took to return the goods, it remained the case that her cancellation rights had been extended, she cancelled within that extended period and was therefore entitled to a return of monies paid for the item. A failure to do this by V was still a breach of contract.

Overall therefore, I find AESEL treated Ms W unfairly by declining to meet her s.75 claim. In the circumstances I find the fairest way of putting things right is to treat Ms W as if her claim had been met and pay her £349.95 plus interest from when AESEL declined to meet her claim. AESEL should also make suitable arrangements with Ms W so she incurs no further costs disposing of the item. If AESEL wishes to see evidence that Ms W has disposed of the goods before making payment, this is reasonable.

I've considered what Ms W said about AESEL's handling of her correspondence. I do understand her frustration that it did not respond in kind to the detailed submissions she made in July 2023. Overall however, AESEL gave its answer on both the claim and her complaint in reasonable time. I don't find AESEL's handling of the claim was so unreasonable that it warrants a separate award of compensation."

I said I planned to tell AESEL to pay Ms W £349.95 plus interest and to make arrangements with her for the collection or disposal of the goods at no cost to her.

AESEL said it accepted my provisional decision but wanted to see evidence Ms W had disposed of the goods before paying her the refund.

Ms W provided comments in response to my provisional decision which I've summarised as follows:

- AESEL should pay her compensation of £250 for failing to deal with her complaint of 23 July 2023 and her subsequent detailed submissions on 30 July 2023 and for failing to apply the relevant legislation when considering her claim.
- AESEL should not require return of the goods as they do not belong to it. It would be inequitable to reward AESEL with a benefit in return for their liability which they have consistently disputed.

The complaint has therefore been passed back to me for a final 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.

Having considered the responses to my provisional decision from both parties, I think it is fair to say that neither of them disagreed with my provisional finding that AESEL should meet Ms W's claim for the cost of the goods. So, I'm not going to repeat my finding about this as its clearly set out in the extract of my provisional decision above.

I've carefully considered Ms W's comments about why she believes she should be compensated for the way AESEL handled her claim. However, for the same reasons I explained in my provisional decision, I've not seen anything that makes me think AESEL should pay Ms W compensation for this. While AESEL could perhaps have had a better grasp of the relevant law in play, I don't think this was a straightforward claim and it did try to explain its reasons for not meeting the claim in reasonable time after Ms W submitted it.

I would also add that the complaint handling activities of AESEL (i.e. the things it did in response to Ms W's complaint) are not activities I can consider as they are not activities which fall under the jurisdiction of this service.

I've also considered Ms W's comments about what should happen to the goods. AESEL does not necessarily have to take possession of the goods. It can for example arrange with Ms W to pay her the reasonably incurred costs of disposing of or returning them.

If AESEL does not make its own arrangements for the collection the goods itself, I still find it's reasonable if it wants to see evidence the goods have been disposed of before it pays the cost of them to Ms W. It would not be fair for Ms W to keep the goods and receive a refund. AESEL should not however place any unreasonable demands on Ms W in this respect. For example, proof of postage or return should be sufficient evidence.

### **My final decision**

For the reasons I've explained above, I uphold Ms W's complaint. To put things right American Express Services Europe Limited (AESEL) must:

- Pay Ms W £349.95 plus interest at 8% simple per year from 26 July 2023 until the

date of settlement\*.

- Make arrangements with Ms W for the collection or disposal of the goods at no cost to her.

\*If American Express Services Europe Limited (AESEL) considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms W how much it's taken off. It should also give Ms W a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 27 September 2024.

Michael Ball  
**Ombudsman**