

Charge Cards and their use - An Important Decision

James Duncan v American Express Services Europe Limited

Charge cards are not governed by the Consumer Credit Act 1974. Therefore common law principles regulate the conduct of the parties involved. With no statutory regulation, problems can arise in respect of responsibility of loss resulting from misuse of the card by third parties. Until recently the issue had not arisen in UK courts, However, in a recent case in Glasgow Sheriff Court, the issue was considered. Our Firm acted for Mr Duncan.

In the case of James Duncan v American Express Services Europe Limited, the pursuer, Mr Duncan, held an American Express ("AmEx") charge card for many years. The case in question arose as a result of the fraudulent activity of a former employee ("S") of Mr Duncan's, which was conducted over a period of seventeen years, between 1987 and 2004, whilst S was, amongst other duties charged with looking after the financial affairs of Mr Duncan and his family.

In 1993 AmEx issued a supplementary card to S at his request. S used the card to charge items to Mr Duncan's account. AmEx debited Mr Duncan's account with the amounts charged. The monthly statements, containing both transactions conducted by Mr Duncan and his family and by S, issued by AmEx, were discharged in full, either by direct debit, or latterly, from 1996 onwards, by cheques drawn on Mr Duncan's account with the his Bank, but signed, not by Mr Duncan, but by S.

Mr Duncan entered into a compromise agreement with his Bank in respect of the disputes arising from the transactions conducted by S in December 2003.

The issues arising from the case, which the Sheriff sought to decide are as follows:

1. Precisely what were the contractual terms governing the parties' relationship from time to time over the course of the 17 years between 1987 and 2004
2. Where AMEX issued a card on Mr Duncan's account to a third party, the third party charged items to that card and AmEx debited Mr Duncan's account with the amounts charged, all without Mr Duncan's knowledge:
 - (a) was AmEx entitled to charge these sums in terms of the contract between it and Mr Duncan?
 - (b) Was there a contractual obligation (either express or implied) on Mr Duncan to pay these sums unless he could prove that the card was being used without his consent and he informed AmEx promptly of this unauthorised use?
 - (c) Did promptly mean the earlier of (i) upon the issue of each statement containing charges relating to unauthorised use, or (ii) when Mr Duncan became aware of the unauthorised use, or (iii) when, by exercising reasonable diligence, Mr Duncan should have become aware of the unauthorised use?
3. If Mr Duncan was, in fact not obliged to pay the sums, was he entitled to have these sums reimbursed to his AmEx account, which would result in a credit balance on the account?
4. Was Mr Duncan's claim a payment of a balance due on an account or a series of separate claims for the repayment of monies paid by Mr Duncan in the mistaken belief that they were due?
5. Whether the cheques drawn and signed by S on Mr Duncan's account to discharge the balances due to AmEx were forged, in which case the monies paid were that of Mr Duncan's Bank and not Mr Duncan's. If this were the case, AmEx claimed that Mr Duncan's only remedy was against his Bank for breach of mandate.
6. Whether the nature of the compromise agreement between Mr Duncan and his Bank precluded him from making a claim against AmEx.

After hearing submissions from both parties, the Sheriff concluded the following:

1. In terms of point 1 above, prior to the Proof, the parties had entered into a Joint Minute of Admissions, agreeing on the content of AmEx's standard terms and conditions applying successively from May 1993 through to August 2004. The Sheriff therefore did not comment further.
2. The Sheriff held that the starting point for determining this issue was the contract between the parties, of which there had been 8 different incarnations over the period 1993-2005. However, both parties had accepted that the material terms of the contract had remained the same. The Sheriff accepted Counsel's submission on behalf of Mr Duncan, having examined the various contracts existing between the parties from time to time, that the terms did not impose any liability on Mr Duncan for the use of supplementary cards which were issued without his authority. The Sheriff rejected AmEx's Counsel's argument that terms in the agreement could be construed as a "conclusive evidence clause", which would have meant that a failure by Mr Duncan to query any charges on his monthly statement within a brief period of time after its issue, would have precluded him from raising a query at a future date.
3. The Sheriff dealt with points 3&4 above together. AmEx had, prior to this case, re-credited Mr Duncan's account with sums which had arisen from some of S's fraudulent activity. However, when these credits were made, Mr Duncan's card had already been cancelled by AmEx and therefore he could not utilise the credits. AmEx had eventually agreed to repay to him, the credit balance. It was accepted by AmEx's counsel, after evidence from a forensic accountant called by Mr Duncan, that it was possible for an American Express charge card account to be in credit from time to time. However, there was not a term in the contract that firstly, any such credit should be reflected in the monthly statement, nor that that the cardholder should be able to demand repayment of the sum in credit. However, Mr Duncan's argument that the charge card was a running account credit facility in terms of the Consumer Credit Act 1974 was accepted by the Sheriff. Charge card agreements are exempt from the provisions of the Act in terms of regulations made under section 16. However, the Sheriff held that the fact that such agreements are exempt did not detract from the Act's characterisation of the agreement as a running account credit facility. This, the Sheriff concluded, put AmEx in a position of debtor towards Mr Duncan and he was therefore entitled to seek repayment of the sum in credit. Following on from this proposition the Sheriff stated that it would be inconsistent with the nature of a running account credit facility that Mr Duncan should be required to make a series of separate claims in respect of each individual incorrect entry on the account.
4. Issue 5 (above), proceeded on the hypothesis that some of the cheques by which the items charged to Mr Duncan's AmEx account were discharged were forged, which in turn raised the question whether the monies paid were that of Mr Duncan's Bank and not Mr Duncan's, in which case was D's only remedy against the his Bank? However, the Sheriff found that many of the cheques in question were, in actual fact, signed by S himself and therefore were not forged. Therefore, rather than the cheques being forged, there were, in actual fact paid by the Bank in breach of mandate. This distinction, in the view of the Sheriff, agreeing with AmEx's counsel was academic. The Sheriff, in concurring with Mr Duncan's counsel, held that the source of the funds used to discharge the various statements did nothing to restrict Mr Duncan's right to claim against AmEx.

Further, the Sheriff stated that the fact that Mr Duncan may have a claim against a third party was no reason to deny him the right to payment of the credit balance on the charge card account he held with AmEx, since the existence of parallel remedies against different parties was not unusual and indeed, AmEx failed to place any authority for the proposition that parallel claims were precluded before the court

5. Issue 6 concerns the effect of the compromise agreement between D and Mr Duncan's Bank. The Sheriff examined the agreement and heard submissions from both parties. However, he concluded that the agreement in question made no reference to any claims against third parties or agreement to forego or waive any such rights. Nor was the agreement, which discharged Mr Duncan's Bank completely, a settlement of all of the losses D and his family suffered.

It is an interesting decision, and one which has been appealed to the Court of Session.

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