

The complaint

Mr and Mrs B complain that U K Insurance Limited (UKI) declined their travel insurance claim and about its service. My references to UKI include its agents.

What happened

Mr and Mrs B and their three young children have travel insurance through a bank account. The insurer is UKI.

In 2019 Mr and Mrs B booked a skiing holiday to France. They were due to travel with their children and other family members departing on 22 March 2020 and returning on 29 March 2020.

On 15 March 2020 the accommodation provider wrote to Mr and Mrs B to say it had cancelled their chalet booking due to the Covid-19 situation. The booked and paid for childcare provider at the resort had cancelled on the 14 March for the same reason. On 16 March the French government announced a nationwide lockdown and advised against all but essential travel in France from 17 March 2020. On 17 March the UK Foreign Commonwealth Office (FCO) also advised against all but essential travel.

Mr and Mrs B claimed on their travel insurance policy for their proportion of the unused accommodation (inclusive of transfers), ski school and childcare costs. They had their flight costs refunded from the airline.

During the claim process Mr and Mrs B complained about UKI's service. In summary, Mrs B says she spent over 17 hours on the phone to UKI, UKI closed the claim without telling them and asked for the same documents in support of the claim several times.

UKI declined the claim as the policy didn't cover costs that were recoverable from elsewhere. It told Mr and Mrs B to contact the providers, or if they had paid with a credit or debit card the card provider, to get a refund. UKI said if that wasn't successful Mr and Mrs B could contact its legal assistance team, under the legal expenses section of the policy, who may be able to help them get a refund.

UKI apologised that Mrs B experienced delays in trying to contact it by phone. It said the delays were due to having to change its ways of working and the unprecedented demand on its service due to government restrictions in place due to Covid-19. UKI accepted it asked Mr and Mrs B for documents it already had. It said it would pay £80 compensation for Mrs B's inconvenience. Mrs B told UKI that it paid £80 into her bank account twice.

Mr and Mrs B complained to us. They want the claim paid and Mrs B said she wanted more compensation for her wasted time as she'd lost four days work due to UKI's handling of the claim.

Our investigator said UKI unfairly declined the claim and it should reassess the claim under the remaining policy terms.

UKI disagreed and wanted an ombudsman's decision. It said despite the accommodation

provider's contract terms the provider had a legal liability to give a refund and under the legal expenses cover it could support Mr and Mrs B to bring a legal claim. It noted the accommodation provider had now changed its terms and conditions so that it would refund the costs. UKI also referred to another case we had considered where we said UKI's approach was fair.

In February 2021 I made a provisional decision explaining why I was intending to partly uphold the complaint. I said:

'UKI has referred to another case we've considered to support its position on this case. But we consider each case on its individual circumstances. The case UKI refers to has different circumstances – it was about a package holiday refund which has different issues to consider. Also, there wasn't an ombudsman's decision on that case.'

I have to decide whether UKI fairly and reasonably declined Mr and Mrs B's claim, and I don't think it did. But I do think UKI paid reasonable compensation for Mr and Mrs B's distress and inconvenience due to its service. I'll explain why.

Claim

Our service is an informal alternative to the courts which settles disputes informally taking into account what is fair and reasonable in all the circumstances. The relevant rules and industry guidelines say that UKI has a responsibility to handle claims promptly and fairly. And they shouldn't reject a claim unreasonably.

The cancellation section of the policy says Mr and Mrs B are covered for certain expenses in the event of:

'The Foreign and Commonwealth Office (FCO) advising against "All Travel" or "All but essential travel" to your intended destination, providing the advice came into force after you opened your (bank account) or booked your trip (whichever was the later) and was in the 28 days before your departure on your trip'.

Mr and Mrs B say they didn't cancel their holiday, it was the accommodation provider and other providers who cancelled upon the French government announcing immediate restrictions. So on a strict interpretation of the policy terms Mr and Mrs B didn't cancel their trip on FCO advice. But I can depart from a strict application of the policy terms if I think that produces an unfair result.

In this case, it doesn't make a difference whether the accommodation provider and other providers, or Mr and Mrs B, cancelled. That's because the FCO advised against all but essential travel on 17 March 2020 as a result of the Covid-19 pandemic, five days before Mr and Mrs B were due to travel. So even if the providers hadn't cancelled the bookings, following the closure of all non-essential public places in France, Mr and Mrs B would have needed to cancel their trip after the change in FCO guidance. They booked this trip well before the change in guidance. So I think it would be fair and reasonable for UKI to consider their claim as falling within the scope of the cancellation section of the policy.

As to which costs are covered, the cancellation section of the policy says:

'We will cover you for your:

- unused deposits;*
- accommodation and travel costs (including car hire, excursions and activities); and*

– unused kennel, cattery, professional pet sitter or car parking charges

that you have paid or legally have to pay if you unavoidably need to cancel your trip for one of the following reasons...'

So the accommodation and inclusive transfer costs relevant to Mr and Mrs B and their children are clearly covered by the policy terms. Mrs B has told us her sister initially paid for the full costs of the chalet and Mr and Mrs B are claiming £2,423 as one half of the total accommodation costs. There were 10 people in the party and Mr and Mrs B are claiming the costs for their family of five, so the proportion of the total cost is fair.

Mr and Mrs B are also claiming two thirds of the ski school costs they paid, which is the proportion relating to their children, and the childcare costs they paid for their children.

The ski school and childcare costs claimed aren't specifically covered by the policy but I think the ski school was an activity, and costs for 'activities' are covered by the policy terms. I've also considered whether these two costs could reasonably fall into 'unused deposits' and I see no reason why they shouldn't, the policy doesn't state parameters for what the deposit must be for.

Mr and Mrs B had paid the full costs, not just a deposit, for the ski school and childcare costs. But I think it's fair for UKI to pay those costs as they are costs that are unused for a reason that it's reasonable for UKI to cover and through no fault of Mr and Mrs B. Also given that cancellation happened only a week before Mr and Mrs B were due to travel it's probable that before the date of cancellation full payments would have been required by the ski school and childcare providers. And as I've said, I also think the ski school costs were covered under 'activities'.

However, UKI has referred to two policy exclusions to decline to cover the claim. I think the more detailed exclusion, on page 24 of the policy, UKI referred to doesn't apply to this claim. That exclusion relates to the delayed or missed departure section of the policy, which isn't relevant in this case. But the cancellation section of the policy, which is relevant, has an exclusion for:

'any expenses (including Air Passenger Duty) that you can recover from elsewhere'.

There's no evidence that the Package Travel Regulations (PTR) 2018 apply in this case. Based on the evidence I've seen the flights, chalet, ski school and childcare were separate bookings. The website for the chalet business says it's not a travel agent and the ski school and childcare aren't optional extras it provides. There's no evidence that the accommodation, ski school or childcare providers are members of a trade body or association that offers to refund unrecoverable costs. So Mr and Mrs B don't have the option to try and recover their outstanding costs through a trade body scheme or other dispute resolution schemes.

Mr and Mrs B have provided documentary evidence that the accommodation, ski school and childcare providers have said they will not refund the costs paid. The accommodation and childcare providers specifically referred to their terms and conditions that a refund wouldn't be provided in the circumstances.

The accommodation provider's terms and conditions list reasons why it may not be liable to pay refunds if its contractual obligations can't be fulfilled. These include 'epidemics or pandemics' or 'all similar events outside our control'.

The childcare provider's terms and conditions, shown through the link on the provider's letter

to Mr and Mrs B, say the provider isn't liable to refund if 'cancellation is made by either party due to any issues arising from any FCO or other travel restrictions or resort/country closures/quarantine measures or any other restrictions or enforcements in place preventing you from receiving your Nanny service'.

So those providers' booking terms and conditions state they have no contractual obligation to refund Mr and Mrs B their cancellation costs.

UKI notes the accommodation provider has since changed their terms and conditions so that a refund would now be available if it is 'unable to provide our service, specifically due to government initiated Covid-19 related travel or operational restrictions'. But the accommodation provider's website is clear that those terms just apply to bookings made from 21 August 2020. Mr and Mrs B booked in 2019 so the new booking terms don't apply.

The ski school provider's letter to Mr and Mrs B said 'Unfortunately, due to the unprecedented circumstances, we are unable to offer a refund for this booking'. I've looked at the provider's terms and conditions on its website. Mr and Mrs B booked the ski school sometime in September 2019 and the provider's terms and conditions changed on 13 September 2019. But both the terms and conditions that could be relevant to Mr and Mrs B's booking say that 'if the resort is completely closed we will do our best to reschedule lessons where possible. Where this is not possible we will offer a refund'. So there's a difference between what the ski school provider told Mr and Mrs B about the refund and what its terms and conditions say.

UKI has referred to guidance from the Competitions and Market Authority (CMA) in relation to consumers impacted by changes in their travel plans as a result of Covid-19. UKI say Mr and Mrs B should contact its legal assistance team so the legal merits of seeking a refund from the providers can be considered by a lawyer under the legal expenses section of the policy.

But I don't think it's fair or reasonable for UKI to expect Mr and Mrs B to take legal action in the circumstances of this case. They've paid for a travel insurance policy, one which includes cover for their unused accommodation, deposit and activities costs and would otherwise cover their claim. A successful legal expenses claim isn't certain – Mr and Mrs B would need to get over the 'reasonable prospects of success' hurdle first and this route could take a significant period of time, particularly as the accommodation and childcare providers have referred to their terms and conditions which limit their liabilities to refund in this situation.

UKI also told Mr and Mrs B that if they had booked with a credit or debit card they should contact the credit/debit card provider about a refund. So UKI suggested that Mr and Mrs B recover their money through a chargeback or section 75 claim through the card provider.

Mr and Mrs B did pay some of the costs by card. But as the relevant policy exclusion doesn't specify that they have to attempt to recover the costs by chargeback or section 75 claim I don't think there's a contractual obligation on Mr and Mrs B to do that. So I don't think it's reasonable for UKI to reject the claim on that basis.

Taking all of the above into account I don't think it is reasonable in the circumstances of this case for UKI to decline the claim on the basis that the costs are recoverable from the providers. The fair and reasonable outcome is for UKI to pay the claim in line with the remaining policy terms and limits, minus the policy excess, plus interest as I've detailed below.

Service

Mrs B says she lost four days work due to dealing with this claim. I don't generally award compensation for a consumer's time spent on a claim or complaint, and there are no reasons for me to do so in this case. Mrs B was understandably frustrated that she spent a lot of time trying to contact UKI on the phone about this claim. But I accept that UKI was operating in unprecedented and extraordinary times with demands on its service.

UKI shouldn't have closed the claim without informing Mr and Mrs B. It looks as if the closure was linked to UKI wrongly thinking it didn't have documents from them. UKI accepts it shouldn't have asked for the same documents several times and that caused a delay in dealing with the claim. UKI said it would pay Mrs B £80 compensation for distress and inconvenience, which I think was a reasonable amount. Mrs B then told UKI it had paid her £80 twice, so a total of £160. It's not clear if she repaid one payment to UKI and I've not seen that UKI asked for repayment. If not, then in all the circumstances I think it's fair for Mr and Mrs B to keep the additional £80, in effect a payment of £80 compensation each'.

Responses to my provisional decision

Mr and Mrs B accepted my provisional findings and added that they didn't pay any costs by credit card. They had paid for the childcare costs by bank transfer. I asked them for further information about the card payments. They said:

- They paid for the ski school by Mrs B's debit card. When they spoke to the bank about getting a refund the bank said it wouldn't refund as it was a debit card payment and they should claim on their travel insurance which they had through the same bank.
- Mrs B's sister paid for the accommodation by card payment and they paid their portion of those costs to her sister by bank transfer. Her sister successfully claimed her family's costs through travel insurance and Mrs B provided evidence of her sister's insurance claim settlement.

UKI didn't accept my provisional decision and provided a detailed response. In summary UKI said:

- The exclusion it was relying on applies where a recovery is available from any third party, not just those third parties who were required to provide a refund through the PTR as I'd suggested.
- The policy provides legal expenses cover for Mr and Mrs B to use to make a recovery where a provider refuses to refund. If they made a legal expenses claim which succeeded it would be beneficial to Mr and Mrs B because no excesses would be deducted. If the panel solicitor determines the claim has no reasonable prospects the claim will then be considered under the cancellation cover, so Mr and Mrs B would not lose out financially. The use of legal expenses cover in insurance policies was an acceptable practice and a benefit of the policy.
- The holiday was booked through a UK company that is subject to the comments by the Competition and Markets Authority (CMA) about customers and the impact of Covid-19. The CMA gave clear guidance that providers' terms and conditions which say refunds are not payable are likely to be unfair and unenforceable under the Consumer Rights Act 2015. UKI quoted the following CMA guidance:

'In the CMA's view, for consumer contracts the above rights to a refund will usually apply even where the business says part of the payment is a non-refundable deposit or advance payment. This is because the contract will

have been frustrated and terms which allow a business to provide no service but keep a consumer's money (including deposits or advance payments) are likely to be unfair, and therefore unenforceable under Part 2 of the Consumer Rights Act 2015.'

- UKI also considered those principles the CMA referred to applied to a wide variety of contracts with UK based companies, including the accommodation, ski school and childcare providers. UKI said the CMA had issued an 'open letter' in respect of childcare providers which said that contract terms requiring consumers to pay providers who are not providing the services agreed in the contract are likely to be unfair and unenforceable.
- UKI doesn't accept that where a customer made a booking with a debit/credit card that it doesn't have a contractual right to 'force' customers to seek refunds from the card provider. The policy exclusion says there is no cover for any expenses that can be claimed from elsewhere and that includes the section 75 right of recovery that is available to those customers who paid by a credit card. The Financial Conduct Authority (FCA) has given guidance which listed claims under section 75 of the Consumer Credit Act 1974 as a possible route for customers to claim their money back. UKI said if Mr and Mrs B attempted to make section 75 recovery and it was rejected UKI would cover that loss subject to the use of the legal expenses cover to seek recovery from the third party where appropriate.
- It considered the right outcome would be for me to agree to the claim being assessed under the legal expenses section of the policy.
- It didn't dispute that Mr and Mrs B's accommodation provider cancelled the holiday and didn't take issue with the individual expenses that would be covered. UKI said if Mr and Mrs B claimed under the legal expenses cover in the policy and the appointed solicitor concluded there wasn't reasonable prospects of success of refund from the providers all elements of the claim would be paid, subject to the applicable excesses.

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 done so, while I've carefully considered all of the points UKI has raised, I've decided it must now pay Mr and Mrs B's claim. I'll explain why.

I've considered UKI's submissions, their travel policy wording, the legislative and regulatory framework, The Competition and Market Authority (CMA) guidance and Financial Conduct Authority (FCA) guidance, in particular the FCA's April 2021 'Finalised Guidance: Cancellations and refunds: helping consumers with rights and routes to refunds' and good industry practice.

I've noted UKI's comments about the exclusion it's relied on not just applying to holiday refunds that can be obtained under the Package Travel Regulations (PTR). But the issue here is whether UKI can reasonably rely on the exclusion to decline Mr and Mrs B's holiday cancellation costs, which isn't covered under the PTR, in the specific circumstances.

As I outlined in my provisional decision the relevant exclusion says that UKI doesn't cover:

'any expenses (including Air Passenger Duty) that you can recover from elsewhere'.

However, in my view the fact that Mr and Mrs B are potentially entitled to a refund isn't the same as actually obtaining one. The exclusion says that UKI won't cover expenses that Mr and Mrs B 'can' recover from elsewhere. However, the ordinary meaning of the word 'can' as defined in the dictionary is 'to be able to'.

I think this exclusion reasonably applies where there is a real, viable opportunity for Mr and Mrs B to recover their losses from their travel provider. Otherwise the exclusion would apply even if there was only a remote chance that they could. For the reasons I'll go on to explain I think Mr and Mrs B have taken reasonable steps to recover their losses.

The Legal Expenses Insurance (LEI) section of the policy

UKI says the right outcome would be for me to agree to the claim being assessed under the legal expenses section of the policy.

UKI seeks specifically to rely on the CMA's guidance to turn down Mr and Mrs B's claim. UKI's position seems to be that it considers the contracts between Mr and Mrs B and the accommodation, childcare and ski school providers have been frustrated. UKI considers that Mr and Mrs B may legally be entitled to a refund from those providers regardless of the providers' terms and conditions and/or the providers' refusal to refund. So it considers I should conclude that Mr and Mrs B must use the legal expenses cover on their travel insurance policy to take legal action against the providers to try and obtain a refund.

The FCA guidance UKI has referred to is guidance issued in October 2020 to insurers and credit card providers and debit card providers in dealing with consumers who haven't been able to obtain a refund from their travel provider. This guidance is called 'Finalised guidance: Cancellations and refunds: helping consumers with rights and routes to refunds'. The FCA guidance acknowledges that insurance claims are governed by the policy terms and then goes on to provide an indication of how the FCA expects the terms of travel insurance policies to be interpreted. In particular, there's relevant guidance relating to the interpretation of policy terms which require policyholders to mitigate their loss at Annex 1, paragraphs 1.6 and 1.7. These say:

'1.6 Any potential claim on an insurance policy will depend on the terms of the policy. However, where an insurance provider requires policyholders to demonstrate or take reasonable steps to mitigate a financial loss under the terms of the policy, consumers should not have to go to unreasonable lengths to do this. For example, where a travel provider is resisting a refund, and the consumer is unlikely to have a valid section 75 claim, a consumer should not be expected to take more than reasonable steps to pursue the refund. What is reasonable will depend on the circumstances in each case.'

'1.7 For example, a consumer might be seeking a refund after a hotel has cancelled their booking. We think it could be reasonable to expect a consumer to have pursued a claim up to a point where it appears from the correspondence (including the absence of replies) that a refund is unlikely to be forthcoming, or there is insufficient indication of when it may be expected so as to give rise to sufficient uncertainty as to whether there may be a refund. This will depend on the facts and circumstances – but where a consumer can demonstrate that they have made several unsuccessful attempts to obtain refund from the hotel, it might be unreasonable to expect them to do more. We would generally view it as unreasonable to expect that a consumer would need to go to court to recover their money.'

So I think the FCA has given a clear indication that insurers shouldn't require policyholders to go to unreasonable lengths to mitigate their losses. The FCA has explicitly stated that it

would generally see it as unreasonable to expect a consumer to go to court to recover their losses. In my view, it would be unreasonable for UKI to require Mr and Mrs B to try to take legal action through their legal expenses cover before accepting this claim under the cancellation section.

Also, Mr and Mrs B's policy includes a list of 'General Conditions' that apply to the insurance contract. One of these says:

'We are entitled to... take proceedings in your name to get back any money we have paid under this policy.'

It seems to me that if UKI considers there is a good legal chance of recovering a refund from any or all of the accommodation, childcare and ski school providers due to the frustration of the contract, then the terms of the policy means it's open to UKI to attempt legal recovery itself, to recover the monies it paid out to Mr and Mrs B.

Overall, I'm not persuaded that the claiming on the LEI section of the policy is in Mr and Mrs B's best interests. The FCA guidance supports its consumer protection objective and was designed to reduce consumer confusion and frustration by setting out more information to insurers and to make the consumer journey easier. It wasn't designed to set out the order in which consumers should make claims but to ensure that policyholders should not have to go to unreasonable lengths to demonstrate or mitigate financial loss. Potentially that would mean a lengthy and costly means of recovering their losses through the courts, which I don't think is reasonable.

S75 and chargeback

UKI's response also says Mr and Mrs B should make a claim for the costs paid by their card. That isn't a requirement of the contract of insurance.

The wording of the FCA guidance at Annex 1 paragraph 1.6 might suggest that where a consumer has a likely valid section 75 claim then in some circumstances it may be reasonable for an insurer to expect a consumer to make a section 75 claim before claiming on their travel insurance.

But section 75 only applies if a consumer has paid the provider by credit card payment and Mr and Mrs B paid the ski school provider by debit card. They paid for the two other providers' services by bank transfer and section 75 doesn't apply to bank transfers.

Even if I thought that the FCA guidance at Annex 1 paragraph 1.6 should be read as also applying to a 'chargeback' claim, which can apply to debit card payments, then I don't think UKI could reasonably say that Mr and Mrs B should first make a chargeback claim for the childcare costs before making a claim on their travel insurance. I say that because the Summary section in the same FCA guidance says:

'Chargeback

1.6 If the consumer has paid for the cancelled services using a debit or credit card, then they might be able to make a 'chargeback' claim. Under this arrangement a debit or credit card provider reclaims the money back from the travel provider, under specific circumstances set out in the card scheme rules ((card providers' names)).

1.7 Chargeback is not a statutory right. The card issuer and the card provider's bank will normally work together to look into the refund for a consumer. Consumers normally have 120 days to raise a chargeback claim with their card issuer from the

expected delivery date of the goods or services not being provided'.

Even if Mr and Mrs B paid the ski school provider on a debit card that is part of the scheme, chargeback requires the card issuer and card provider's bank to work together to look into a possible refund for the consumer. Mr and Mrs B say their bank told them that a chargeback wasn't possible on their card and to make a claim on the travel insurance provided through the same bank account. I think Mr and Mrs B reasonably understood from the bank's information that a chargeback wasn't possible in their circumstances. Also, consumers normally have 120 days to raise a chargeback claim with their card issuer from the expected delivery date of the goods or services not being provided. The 120 days limit passed some time ago so if Mr and Mrs B hadn't already made a formal chargeback claim, in my opinion, it's likely they wouldn't now be able to do so and I don't think they unreasonably delayed given the information they received from the bank.

Conclusion

Having reviewed this complaint again in light of UKI's submissions I'm satisfied that this claim should fairly and reasonably be covered by the cancellation section of the policy. It's clear that following the change in FCO guidance on 17 March 2020 Mr and Mrs B would have had no choice but to cancel their trip even if the accommodation and childcare providers hadn't cancelled already due to Covid-19.

Whilst I accept that the policy terms specifically exclude costs which may be recoverable from elsewhere I'm satisfied that in the very specific circumstances of this complaint, Mr and Mrs B have taken reasonable steps to try and obtain a refund and that it's fair and reasonable for UKI to cover their claim. I think it's unlikely that Mr and Mrs B will be able to recover their losses through the chargeback scheme and the other payments they made are not covered by section 75 or chargeback. And I think they've taken reasonable steps to recover their losses by contacting the relevant providers and seeking to obtain refunds. Those attempts have been unsuccessful and, for the reasons I've outlined above and in my provisional decision, I don't think it's fair and reasonable that they should have to claim on the legal expenses section of their insurance policy.

Neither Mr and Mrs B or UKI made any comments on my provisional findings that UKI's two payments of £80 compensation for Mr and Mrs B's distress and inconvenience due to UKI's poor service was a reasonable amount. So I've no reason to change my mind that the £160 compensation was fair.

Putting things right

Overall, I'm satisfied that in the specific circumstances of this complaint the fair and reasonable outcome is for UKI to pay Mr and Ms B's cancellation claim in line with the remaining policy terms, minus the policy excess, plus interest as I've detailed below.

My final decision

I partly uphold this complaint.

I require U K Insurance Limited to pay Mr and Mrs B's claim in line with the remaining policy terms, minus the policy excess, plus interest* at 8% simple a year from the date of claim to the date of settlement.

*If U K Insurance Limited considers that it's required by HM Revenue & Customs to take off income tax from that interest it should tell Mrs and Mr B how much it's taken off. It should also give Mrs and Mr B a certificate showing this if they ask for one, so they can reclaim the

tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 5 January 2022.

Nicola Sisk
Ombudsman