DRN-3092362

The complaint

Mrs G is complaining MBNA Limited hasn't refunded losses she incurred after a flight provider went into liquidation. She brings the claim under S75 Consumer Credit Act 1974 ('S75').

What happened

In April 2019 Mrs G entered into contract with a third party – who I shall refer to as T – to buy some flights. She bought flights for six people – herself, her husband, her three children and her mother-in law. The flights were one-way tickets to travel in November 2019. The total cost of the flights was £1,575.94. She paid for the flights on her MBNA credit card.

In September 2019 T went into liquidation and the flights Mrs G bought were cancelled. Mrs G says she had no choice but to buy replacement flights for her and all passengers with a different airline, because her outbound flight and hotel were non-cancellable contracts. The total cost of the replacement flights was £4,348.55.

Mrs G later contacted MBNA and asked it to refund the amount she paid to T. She also wanted it to refund the extra she'd paid for the replacement flights. MBNA successfully processed a chargeback claim and Mrs G received back the £1,575.94 she'd paid to T. But MBNA said the terms and conditions of the contract excluded any liability for consequential losses as a result of T not providing the flight. So it said it didn't have to refund what Mrs G paid for the replacement flights.

I issued a provisional decision in January 2022 upholding this complaint and I said the following:

"Mrs G paid for the flights T was supposed to provide on her MBNA credit card. S75 sets out that in certain circumstances, as the finance provider, MBNA can be jointly liable for any breach of contract or misrepresentation by T.

I think there are three things for me to consider in this decision:

1. *Is MBNA liable for T's breach of contract under S75; if so*
2. *Is it liable for her consequential losses; and*
3. *If it is liable for her consequential losses, does it have to refund everything Mrs G paid?*

I shall consider each point separately.

Is MBNA liable for T's breach of contract under S75?

As I said above, in order for S75 to apply, there are certain criteria that need to be satisfied – one of which is establishing a debtor-creditor-supplier agreement (DCS) between the parties. In essence, the key here is that it's the debtor who is entitled to make a claim against the creditor, and their claim against the creditor is the same as their claim against the supplier. So, if the debtor doesn't have a claim themselves against the supplier, they can't hold the creditor liable for any breach of contract with the supplier.

Mrs G paid for the flights with her MBNA credit card, so there is a contractual relationship between her, MBNA and T. But there were six parties on the booking. Mrs G paid for all the flights herself and the booking is in her name. In doing so Mrs G entered into a contract with T under which T promised to fly her and her travelling party. Mrs G was considered the "lead passenger" and effectively acted as an agent for all the travelling passengers in arranging the flights with T. But I understand that T provides each passenger with their own ticket which means they have their own individual contract with T – their Conditions of Carriage. And it's these contracts that T has breached. So I need to consider whether MBNA is liable for losses arising from all the contracts.

While there are effectively six separate contracts of carriage, Mrs G is only a contracting party on one. However, I think Mrs G can still claim under S75 if she derived a joint benefit from the contract or the contracting party is considered a dependant. Where a person makes a contract on behalf of those they are financially interdependent with, they have a financial interest in the success of the contract, and they can (in the event of a breach) claim for losses experienced by those other individuals.

Given this, I think MBNA is liable for losses arising from the contracts with her, her husband and children. But I don't think I can say that MBNA is liable for losses arising from her mother-in-law's ticket and I'll explain why. As I said above, in considering whether MBNA has a liability for T's breach of contract, I need to think whether the debtor – Mrs G – would have a right to claim against T in regards to this ticket. But, as she was not a party to that particular contract I don't think she would have a right to claim – that right would rest with her mother-in-law.

Does the contract exclude liability for consequential losses?

There's no dispute T has breached the terms of the contract with all passengers as it cancelled the flight. Clause 26.5 of the contract says T will arrange an alternative flight for Mrs G, but it further says she may be entitled to a refund if she didn't want the alternative arrangements. Further to this Clause 28.5 says that, where it cancels the flight, it will refund the cost of the ticket. In this case, as T had gone into liquidation, it didn't provide a replacement flight or a refund of the cost of the ticket.

MBNA believes the remedies Mrs G is entitled to under these two clauses is the limit to T's liability. And it says, as Mrs G has already received the cost of the flights back through her chargeback claim, it doesn't have anything further to pay under S75. The issue I need to consider now is whether I think it was fair for MBNA to say the terms of the contract excludes liability for consequential losses.

I think the key consideration here is to think about the normal principles of contractual interpretation. I'm aware that the principles of contractual interpretation were helpfully set out and summarised in "The Ocean Neptune" [2018] EWHC 163 (Comm) – which is further endorsed in Chitty on Contracts at 15-052. This sets out that:

"The court must consider the language used and ascertain what a reasonable person, that is

a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

I've also had consideration to the comments of Briggs LJ in Nobahar-Cookson v The Hut Group [2016] EWCA Civ 128 [18-19] where he said:

"Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect."

I've particularly taken note that the above sets out a requirement that a contracting party must use clear words when seeking to reduce or remove liability for losses that would ordinarily be recoverable under standard contract law. Further to this, I think an additional crux of this matter that I have to decide is whether the intention of the contract was clear and what a reasonable person would have understood what the contract was intended to say.

There are a number of clauses in the contract that need to be considered here. As a starting point Clause 26.5 sets out what T offered to do where it cancels the flight – namely to provide an alternative flight – and explains what the customer must do to obtain a refund. And, as I said above, Clause 28.5 further sets out that T is contractually required to provide a refund of the cost of the ticket where it cancels a flight.

In my opinion, I think the purposes of Clauses 26.5 and 28.5 are clear – insomuch as setting out what T's responsibilities are when it cancels a flight and explains what Mrs G needs to do to claim a refund. However, I think Clause 33, by contrast, serves the opposite purpose. This says:

"Our liability to you shall be limited to the rights and remedies set out in these Conditions of Carriage and we will have no further liability to you unless otherwise provided by Regulation 2027/97, the Warsaw Convention or the Montreal Convention (as applicable)."

On the face of it, it would be possible to read the above clause that T has sought to limit its liability as to what MBNA believes – namely to be required to provide an alternative flight or a refund of the cost of the flight and nothing further. But I think this also needs to be read alongside clauses 53 and 57.2 of the conditions of carriage. These set out:

*"**Our [T's] liability to you***

53.1 The liability of each carrier involved in your journey will be determined by applicable law and the carrier's Conditions of carrier. Applicable law comprises Regulation 2027/97, the Convention and/or local law in individual countries.

57.2 Except as may be specifically provided otherwise in these Conditions of Carriage or by applicable laws, we will be liable to you only for recoverable compensatory damages for proven losses."

I think it's clear that Clauses 53 and 57 are intended to be read together and Clause 53 expressly accepts that T can be liable under the "local law" of individual countries – i.e. under English Law in this case. And I think it's important to note that normal English contract law allows Mrs G to claim for damages arising from a breach of contract – including her right to recover damages to compensate her for proven, recoverable consequential losses. I think this is effectively acknowledged by Clause 57.2 when read in its full context and together with the applicable principles of contractual interpretation.

I'm particularly conscious that both clauses 26.5 and 28.5 are silent on whether T's responsibilities in the event of it cancelling a flight is limited to the remedies expressly set out in these clauses – i.e. it doesn't say that a refund of the cost of the ticket is T's sole responsibility in the event of it cancelling the flight. I think it would go against the principles of contractual interpretation if it was considered that this meant Mrs G was excluded from a fundamental right – i.e. to be entitled to claim for consequential losses owing to T's breach of contract. And given what I said above in regard to previous court rulings, where a business wishes to exclude such a right, it must use clear words to that effect. I'm not persuaded T has done so – if it has in fact used any words to exclude this at all.

With this in mind, I've thought about the language in clause 57.2 which I think potentially adds a further layer of compensation and effectively raises the possibility that the refund is only the starting point, as I think clause 57.2 could be interpreted to say it's contractually confirming Mrs G's right to common-law damages. This would mean, if she has suffered "recoverable compensatory damages for proven losses" which exceeds the value of the refund, then potentially these losses are also recoverable as an additional remedy for the breach of contract.

MBNA disputes this interpretation of clause 57.2 as it maintains the conditions of carriage limits liability under the contract to the cost of the ticket – i.e. it doesn't set out any additional right or remedy to the refund. I accept that it's possible an alternative interpretation of clause 57.2 is that it doesn't give a further compensatory right, but it acts as a further limit to compensation – namely the total amount that Mrs G can claim in damages is limited to items that are both recoverable in law and "proven".

I think both interpretations are potentially a reasonable way of considering the effective operation of the clause. So to consider this matter further, I think it's important to ascertain what liability T accepts under Clauses 26.5, 28.5, 53 and 57.2 respective, because, as I said above, Clause 33 seems to seek to limit T's obligations to Mrs G.

As I said above, Clauses 26.5 and 28.5 are silent as to whether T's liability to Mrs G in the event of cancellation doesn't extend further to what was set out in these clauses – i.e. to provide an alternative flight or a refund. There isn't anything in these clauses to say that T won't be liable for any additional costs if Mrs G goes ahead and arranges alternative flights herself. I don't think such an exclusion can be implied into the contract – the contract needed to expressly set out these losses weren't covered if T intended to do so.

I've thought about MBNA's assertion that Clauses 33 and 57.2 does the above – i.e. to limit T's liability. But, as I said, I think there are two reasonable ways of interpreting the intention of Clause 57.2. I think normal contractual principles favour the interpretation that the clauses gives further rights to Mrs G for the following reasons:

- *As I said above, I think Clauses 53 and 57 are intended to be read together – they both fall under the contract heading of "our liability to you". Clause 57.2 is part of a series of clauses that sets out T's liability to Mrs G. So I think it's reasonable to think, considering the purpose of the surrounding terms, the clause should acknowledge that T may bear liability for compensatory damages, rather than being read purely as limiting the amount*

of liability under other clauses.

- *I think it's reasonable to read Clause 57.2 as an acknowledgement of liability under the general "local" law, but only for compensatory damages for proven losses. And I think reading it this way the clause fulfils two functions: (1) allows Mrs G to claim for compensatory damages under local law for proven losses; and (2) to exclude punitive or exemplary damages, which aren't compensatory in nature and don't necessarily require proof of any loss.*
- *As I set out above, it's a standard principle of contractual interpretation that parties need to use clear words if they intend to cut down valuable consumer rights under the general law. I don't think Clause 57.2 does so. So, it follows, that I don't think it can be read as excluding such damages.*

While I think the crux of this matter turns on the principles of contract interpretation, I also think consideration should be given to Section 69(1) of the CRA which states that "if a term in a consumer contract could have different meanings, the meaning that is most favourable to the consumer is to prevail."

I note MBNA disputes Section 69(1) should apply in this case. It's set out the Supreme Court in the case of Arnold v Britton [2015] UKSC 36 confirmed that, when looking at the interpretation of an ambiguous clause in a written contract, a court would try and find out the parties' intentions by reference to what a reasonable person (having all the background knowledge) would think. And it said the court wouldn't just find in the favour of the consumer without looking at other considerations – namely:

- *the nature and ordinary meaning of the clause*
- *any other provisions of the contract;*
- *overall purpose of the clause and the contract;*
- *the facts and circumstances known or assumed by the parties at the time the contract was entered into; and*
- *commercial common sense.*

But I don't think this changes what I've set out above. Ultimately MBNA suggests that, just because Mrs G had to pay more for her new flights, it doesn't mean the contract should automatically be read in her favour. I've considered MBNA's comments in respect to this and I agree with MBNA that Arnold v Britton may give a useful guide as to how courts might apply Section 69(1) when considering ambiguity – particularly regarding Mrs G's case. However, we need to be mindful that this was considered before the CRA came into effect. And the CRA, alongside other court findings, gives clear guidelines as to how ambiguity should be considered.

I think one of the key considerations here is whether the intention of the clause was clear. As For the reasons I set out above, I'm not persuaded it's sufficiently clear what T meant from the clause, as I think both interpretations of the clause are a reasonable interpretation of T's intention.

Further to this, I think it would generally be regarded as commercial common sense that a contracting party wouldn't give away their important rights available under the general law without the contract clearly stating as such. The terms of the contract don't clearly take these rights away. So, I think it's entirely in line with commercial common sense that Mrs G should still be entitled to her normal contractual rights to damages for consequential loss.

So I think it is fair to apply Section 69(1) in this case. Clearly in this case the interpretation of the clause granting an additional compensatory remedy to Mrs G is the most favourable to her.

However, even if any of what I've said above wasn't the case, I think a court is likely to find that a clause which removes a right to standard common law damages would probably constitute an unfair term under section 63 of the Consumer Rights Act 2015 (CRA). I say as such because it would relieve T of its responsibility to fulfil its contractual obligations and leave Mrs G with no right to compensation.

In thinking about this I'm conscious Schedule 2 of the CRA gives examples of terms that might be considered to be unfair. I think the following examples are relevant here:

Para 2
A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations

Para 3
A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.

So, even if I was to accept that Clause 33 contract did limit T's liability to exclude liability for consequential losses, which I don't, I think it's likely a court would find it unenforceable. I think the presence of this limitation creates a significant imbalance in the parties' contractual rights and obligations to Mrs G's detriment – namely Mrs G can have no recourse where she suffers a loss due to T's failure to fulfil its contractual requirements. I say as such because in effect – as has happened in this case – T would be able to cancel the flight, breach it's required to provide an alternative flight, which would mean the consumer has to make their own arrangements. But the consumer wouldn't be entitled to claim compensation for any losses she suffers as a result of this due to the alleged restrictions set out by Clause 33. I think this is the sort of situation Para 2 and Para 3 I've set out above intended to refer to.

In actuality, I think, given the considerations of S63 of the CRA, this further indicates to me that the terms of the contract can't properly be read as excluding T's liability to pay damages under common law.

So, taking all of this into consideration, I don't think it was fair for MBNA to say Mrs G wasn't able to recover her consequential losses.

Is MBNA liable for all of Mrs G's losses?

I've now thought about what losses Mrs G could have claimed had MBNA handled her S75 claim fairly. Mrs G is looking to recover the extra amount she paid to buy replacement flights through a separate company – namely £2,772.61. In assessing whether I think Mrs G can claim for consequential losses, I need to ask myself three questions:

1. *Is the loss a direct result of the breach of contract;*
2. *Is the loss a reasonably foreseeable loss flowing from the breach of contract; and*
3. *Did Mrs G take reasonable steps to mitigate her losses?*

I don't think it can be disputed that the need to buy replacement flights is a direct result of T's breach of contract. Similarly, I think it's reasonably foreseeable that Mrs G would look to buy replacement flights at an additional expense once T cancelled the flight. So the issue for me to consider is whether Mrs G took reasonable steps to mitigate her losses.

The flights Mrs G bought were return flights for a holiday. She's separately booked flights out to the destination and a hotel for the travelling party to stay in. I understand these were non-

cancellable contracts. And Mrs G had paid around £5,000 for these. Mrs G has said it was more cost effective to buy replacement flights as, otherwise, she'd lose the £5,000 she'd paid. This seems a fair and reasonable approach to take. So I'm satisfied that she took fair steps to mitigate her own and her travelling parties' losses.

I've now thought about whether MBNA is liable for everything Mrs G paid for the replacement flights. As I said above, Mrs G has already received the refund for the cost of the flights T was supposed to provide. I think the total loss to the traveling party is the extra that Mrs G paid – i.e. £2,772.61. However, it doesn't follow that MBNA is liable for the full loss.

While I accept Mrs G paid the full cost of the replacement flights and is out of pocket for this amount, I don't think MBNA needs to refund this full cost. As I said before, MBNA is only liable for consequential losses arising from contracts between Mrs G and T. And this extends to contracts which she derives an actual benefit from or to a contracting party who is considered a dependant of Mrs G. So, for the reasons I've set out above, MBNA needs to compensate Mrs G for losses she incurred regarding the contracts involving her, her husband and children. But I don't think it's liable for the consequential losses arising from the breach of contract on her mother-in-law's contract. I recognise this is Mrs G's loss as she paid for her mother-in-law's flight. But it relates to a contract between her mother-in-law and T. As Mrs G is not a party to this contract, MBNA isn't liable for any losses arising from that contract. So it follows that I don't think MBNA is liable for the cost of that ticket.

Mrs G paid £4,348.55 in total for all the replacement flights. We don't know the exact breakdown for each individual passenger. On average this works out as £724.76 per passenger. But I think it's likely the cost of the children's tickets would have been less than the adults' tickets – especially given £4,348.55 isn't equally divisible between six. Mrs G doesn't have a breakdown of how much each ticket cost. So we can't know for certain what the precise loss is per ticket. Given this, I need to estimate what the loss is reasonably likely to be.

As there's no exact way to calculate the exact cost of Mrs G's mother-in-law's ticket, I'm taking a pragmatic approach. Taking everything into consideration, I think the fairest way to resolve this is MBNA refunds £3,600 of the amount Mrs G paid for the flights – estimating the adult ticket to be around £748.55.

Mrs G paid for this using her MBNA credit card and I think she should get this money back. So I think MBNA should reconstruct her credit card as if she hadn't paid for these flights. If, after doing so, it finds she is out of pocket it should refund this. It should also pay 8% simple interest on any amount due from the date she was out of pocket until she gets it back.

I've also thought how the refund Mrs G received from the chargeback should be used as part of the reconstruction of the credit card. Had T not breached the terms of the contract and provided the flight, Mrs G wouldn't have had to receive a refund for the cost of T's tickets or buy the replacement flights. So, when considering the reconstruction of the credit card, I think MBNA should treat the money credited back to the account from the chargeback as a part-payment towards the cost of the replacement flights."

Both parties accepted my provisional decision and said they didn't have anything further to add.

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.

As neither party has given me anything new to think about, I see no reason to reach a different conclusion to the one I reached in my provisional decision. So I uphold this complaint for the reasons I set out in my provisional decision.

My final decision

For the reasons I've set out above, it's my final decision that I uphold this complaint and I require MBNA Limited to reconstruct Mrs G's credit card reducing the amount she paid for the replacement flights by £3,600. MBNA limited can treat the amount credited back from the chargeback as a payment towards the cost of the replacement flights. If, after doing so, it finds she is out of pocket at any point it should refund this. It should also pay 8% simple interest on any amount due from the date she was out of pocket until she gets it back.

If MBNA Limited thinks that it's required by HM Revenue & Customs to deduct income tax from the above interest, it should tell Mrs G how much it's taken off. It should also give her a tax deduction certificate if she asks for one, so she can reclaim the tax if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 14 March 2022.
Guy Mitchell
Ombudsman