

The complaint

Mr H is complaining that Creation Financial Services Limited didn't refund an amount he paid for a flight on his credit card. He brings the claim under S75 of the Consumer Credit Act 1974 (S75).

What happened

In October 2018 Mr H bought return flights to Orlando – flying in September 2019 – for him and his wife with an airline – who I shall refer to as T. The flights cost £659.98 per person for premium economy class seats. He paid for the flights on his Creation credit card. In April 2019 he bought two further tickets for his son and son's partner to fly on the same plane. These flights cost £454.98 per person – with economy class seats on the outbound flight and premium economy seats on the inbound flight. He also paid for these flights on his Creation credit card.

In September 2019 T went into liquidation while Mr H and his travelling party were in Orlando and the return flights Mr H bought were cancelled. All of Mr H's travelling party were repatriated under arrangements made by the UK Government, in standard economy class seats on a flight operated by another airline. They did not pay anything extra for their repatriation flight.

Mr H later claimed a refund from Creation for the full cost of the return flights he paid for as he said T didn't provide them. Creation didn't think it was required to refund anything as it said Mr H's travelling party were all flown home. It said it would refund anything Mr H paid towards extra services that he didn't receive. But it didn't think Mr H had shown he'd paid for any extra services.

Mr H remained of the opinion T had breached the terms of its contract with him in not providing an alternative flight – he said the repatriation flight was provided by the UK Government, not T. So he maintained he was entitled to a refund of the return flight cost under the terms of the contract with T.

Our investigator partially upheld this complaint. She didn't think Creation was liable for any breach of contract regarding Mr H's son and son's partner's flights as she didn't think Mr H was a party to this contract. But she did think Creation was required to compensate Mr H for any breach of contract regarding his and his wife's contract. She didn't think Creation needed to refund the full cost of the return ticket because Mr H and his wife were repatriated. But she thought they'd lost out because he'd paid for premium economy tickets, but only received economy tickets. So she thought Creation should refund part of the cost of this ticket.

The investigator said the invoice didn't provide a breakdown between the cost of the outbound and inbound flights. So she thought the fairest way to estimate the cost of the cancelled ticket was to say each flight cost the same – i.e. £329.99 per ticket (£659.98 in total). She further thought that, based on her research, the average cost of a premium economy ticket was double the cost of an economy ticket. So she thought Creation should refund 50% of the cost of the return ticket.

Mr H responded to say he didn't understand why Creation wasn't liable for his son and son's partner's tickets. He also maintained he should be entitled to a full refund of the cost of the return ticket. But he said he was willing to accept the investigator's opinion to resolve the complaint.

Creation didn't agree with the investigator's opinion as it maintained there wasn't anything to show Mr H had paid more for the premium economy ticket. So it still didn't think it was required to refund anything.

As Creation didn't agree with the investigator, the complaint's 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.

Mr H paid for the flights T was supposed to provide on his Creation credit card. S75 sets out that, in certain circumstances, as the finance provider, Creation can be jointly liable for any breach of contract or misrepresentation by T.

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.

Mr H paid for the flights with his Creation credit card, so there is a contractual relationship between him, Creation and T. But there were three other parties on the two bookings. Mr H paid for all the flights himself and the bookings are in his name. In doing so Mr H entered into two separate contracts with T under which T promised to fly him and his travelling party. Mr H bought four tickets under two bookings. 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 Creation is liable for losses arising from all the contracts.

While there are effectively four separate contracts of carriage, Mr H is only a contracting party on one. However, I think Mr H can still claim under S75 if he 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.

I think it would be accepted Mr H and his wife are likely to be financially interdependent of each other. Given this, I think Creation is liable for losses arising from the contracts with him and his wife. But Mr H's son was of adult age when Mr H bought the ticket and I haven't seen anything to show he was financially dependent on Mr H. So I don't think I can say that Creation is liable for losses arising from Mr H's son and Mr H's son's partner tickets and I'll explain why. As I said above, in considering whether Creation has a liability for T's breach of contract, I need to think whether the debtor – Mr H – would have a right to claim against T in regards to this ticket. But, as he was not a party to that particular contract – he merely booked it on their behalf – I don't think he would have a right to claim – that right would rest with Mr H's son and his son's partner.

I've now thought about what losses, if any, Creation are liable for. Mr H bought premium economy tickets, but T cancelled these flights. Clause 26.5 of the contract says, where it cancels a flight, T will arrange an alternative flight for Mr H. But the contract further says he may be entitled to a refund if he 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.

Creation says it has no liability because Mr H was repatriated back, so he was given an alternative flight. Mr H says the repatriation flight wasn't arranged by T, but by the UK government. So he maintains he's entitled to a full refund of the cost of the return ticket under the terms of the contract.

I've thought about this carefully. As I said above, S75 gives Mr H a 'like claim' against Creation if there has been a breach of contract or misrepresentation by T. Ultimately, I'm minded to agree with Mr H that T has breached the terms of its contract with him as it didn't either arrange an alternative flight or provide a refund of the cost of the ticket. While Mr H and his wife were repatriated home, this wasn't arranged by T.

So, I now need to think whether Mr H is entitled to be compensated for this breach of contract. In doing so, I must give consideration to what losses Mr H would likely be able to recover in court against T when considering what the 'like claim' might look like. But, in doing so, I'm also mindful of DISP 3.7.2 R (from the FCA handbook setting out this service's powers) which sets out that any money awards I make must be considered to be "fair compensation" whether or not a court would award compensation.

So, while I need to be mindful of what a court may award, I also need to think what's fair. While I accept it wasn't T who arranged an alternative flight, Mr H and his wife were flown home and they had to "use" their tickets to be eligible for this repatriation flight. I don't think it would be fair to require Creation to refund the full cost of the ticket because I think this would overly compensate them for the loss. However, Mr H paid for premium economy seats, but I understand they were only given economy seats. So I don't think the alternative flight arranged was a "like-for-like" arrangement and I think they have lost out.

I note Creation says there isn't anything to show Mr H paid more for the premium economy seats, but I think this is a disappointing approach for Creation to have taken. While I accept there isn't anything to show how much extra Mr H paid for premium economy seats, it's universally known that premium economy tickets cost more than economy seats as there are a number of benefits available – notably considerably larger seats and legroom, together with complimentary alcoholic beverages. I'm also conscious Mr H and his wife's tickets cost more than his son's tickets as his son's outbound flight was in economy class. So I don't think there can be any reasonable doubt that Mr H paid more for the premium economy seats than he would have done for economy seats. So I think it was unfair for Creation to have declined Mr H's S75 claim.

Putting things right

I've now thought about what a fair refund would be. The contract doesn't provide a breakdown between the cost of the outbound and inbound flights. So I agree with the investigator that the fairest way to estimate the cost of the cancelled ticket was to say each flight cost the same – i.e. £329.99 per ticket (£659.98 in total). There's also nothing in the contract to show precisely how much more Mr H paid for premium economy seats so I have to work this out on a best estimate of the likely uplift in price. The investigator used publicly available information to estimate the average uplift in price, on a transatlantic route, between economy and premium economy tickets. Having done so, she thought premium economy tickets were usually twice the price of standard economy tickets. Creation hasn't given me

anything to think that this was an unfair approach to take. I also think it seems a fair and reasonable approach.

So, taking everything into consideration, I think Creation should refund Mr H £329.99 to his credit card – backdating this to the date it first declined his S75 claim. It should reconstruct his credit card to reflect that the refund was given on this date. If, after doing so, this reveals that Mr H is out of pocket at any point, it should pay 8% simple interest per year on this amount from the date he's out of pocket until Creation refunds this.

If Creation thinks that it's required by HM Revenue & Customs to deduct income tax from that simple interest, it should tell Mr H how much it's taken off. It should also give him a tax deduction certificate if he asks for one, so he can reclaim the tax if appropriate.

My final decision

For the reasons I've set out above, it's my final decision that I uphold this complaint and I require Creation Financial Services Limited to compensate Mr H in line with my instructions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 3 March 2022.

Guy Mitchell
Ombudsman