

## **The complaint**

Mr H is complaining Creation Limited hasn't refunded losses she incurred after a flight provider went into liquidation. She brings the claim under Section 75 of the Consumer Credit Act 1974 ('S75').

## **What happened**

In March 2019 Mr H entered into a contract with a third party – who I shall refer to as T – to buy some flights. The flights were one-way tickets to travel in November 2019. The total cost of the flights was £442.97. He paid for the flights on his Creation credit card.

In September 2019 T went into liquidation and the flights Mr H bought were cancelled. Mr H says he had no choice but to buy replacement flights for him and his travelling party with a different airline because his outbound flight and hotel were non-cancellable contracts. He initially looked at returning on the same day as he was originally going to do so. But he says the cost of replacement flights were around £2,000. So he chose to extend his holiday by a day as he said this was more cost-effective because the cost of an extra day's hotel and flying back the next day was only around £1,100.

Mr H later contacted Creation and asked it to refund the amount he paid to T. He also wanted it to refund the extra he'd paid for the replacement flights and day's hotel. Creation successfully processed a chargeback claim and Mr H received back the £442.92 he'd paid to T. But Creation said it was only required to put him back in the position he'd be in had the breach of contract not taken place. So it thought it was only required to refund the cost of the tickets Mr H bought from T.

Our investigator upheld this complaint. She said Mr H is entitled to recover consequential losses under S75. She was satisfied Mr H had taken reasonable steps to mitigate his losses, so she thought Creation acted unfairly in declining Mr H's S75 claim.

Creation didn't agree with the investigator as it maintained it wasn't liable for the losses. It said it was Mr H's choice to buy replacement flights and it didn't think it was liable for this under S75. And it asked for an ombudsman to consider this complaint.

## **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.

I've decided to uphold this complaint and I'll now explain why.

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 held jointly liable for any breach of contract or misrepresentation by T. I'm satisfied those circumstances apply here.

Creation says its responsibility under S75 is to put the consumer in the position the consumer would be in were it not for the breach of contract. What S75 actually sets out is that it gives Mr H a 'like claim' against Creation if there has been a breach of contract or misrepresentation by T. 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.

There's no dispute T breached the terms of the contract because it didn't provide the flight it was contracted to provide or provide a replacement flight. So I don't need to consider this further.

Mr H is essentially looking to recover additional losses he says he's suffered as a result of T's breach of contract – i.e. consequential losses. I've read and considered the terms of Mr H's contract with T and given particular thought to the standard principles of contract interpretation, together with Sections 63 and 69 of the Consumer Rights Act 2015. Having done so, I'm satisfied T is liable for any proven consequential losses Mr H can demonstrate he suffered as a result of T breaching its terms and conditions. And Creation hasn't given me anything to show that T isn't liable for these losses.

When thinking about when a consumer can recover consequential losses, I generally have to ask 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 Mr H take reasonable steps to mitigate his 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 Mr H is likely to need to buy replacement flights at an additional expense once T cancelled the flight. So the issue for me to consider is whether Mr H took reasonable steps to mitigate his losses.

The flights Mr H bought were return flights for a holiday. He separately booked flights out to the destination and a hotel for the travelling party to stay in. Mr H has demonstrated that these were non-cancellable contracts. He paid around £2,200 for these. Mr H has said it was more cost effective to buy replacement flights as, otherwise, he'd lose the £2,200 he'd paid. This seems a fair and reasonable approach to take.

I'm conscious Mr H chose to extend his holiday by an extra day. But he's told us the replacement flight to fly back on the same day was around £2,000. But the cost of a replacement flight and staying an extra day was around £1,100. I think Mr H has ultimately chosen to take the most cost-effective option. So I'm satisfied that he took fair steps to mitigate his own and his travelling parties' losses.

Ultimately, I'm satisfied Mr H has incurred these losses as a result of T's breach of contract and he would be entitled to recover them directly from T. So it follows, under his S75 rights, Creation is liable for these losses.

### **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 refund the £876.75 Mr H paid for the replacement flights and the £273.46 he paid for the additional night's stay in the hotel. It should also pay 8% simple interest on these amounts from the date he paid them until he gets them back. It can treat the amount credited back from the chargeback as a payment towards the cost of the replacement flights.

If Creation Financial Services Limited thinks that it's required by HM Revenue & Customs to deduct income tax from the above 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.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 24 February 2022.

Guy Mitchell

**Ombudsman**