

The complaint

Mrs L says that Marks & Spencer Financial Services Plc, trading as M&S Bank, has treated her unfairly in relation to a transaction on her credit card which paid for two sets of flights.

What happened

In January 2020 Mrs L used her M&S credit card to pay for flights purchased through a website marketplace that I'll call 'Firm O' for her and other passengers. She paid Firm O and the outward / departing flights were to be supplied by an airline I'll call 'Firm D'. The returning flights were to be supplied by a different airline which I'll call 'Firm R'. There were two passengers booked on the departing flight and five on the return flight. Mrs L paid £1365.60 for all the flights.

In the end no flights were used by Mrs L or her party. Mrs L says they couldn't fly due to the Pandemic. Mrs L tried to get her money back from Firm O but was only partially successful in recouping funds. However she was still significantly out of pocket.

So she complained to M&S. It said she was out of time for a Chargeback and it didn't feel it should refund her under the Consumer Credit Act. Mrs L didn't agree so she brought her complaint to this service.

Our Investigator felt M&S had treated Mrs L unfairly. They felt M&S position on chargeback was incorrect and had M&S raised a chargeback as it should have, that it would have been successful on the outbound flights (only). Our Investigator concluded that M&S should refund Mrs L the approximate cost of the outbound flights of £97.33 and pay interest on that amount at an annual rate of 8% simple interest from the 27 October 2020 (date the claim was declined) to the date of settlement.

M&S agreed with this position and submitted no further arguments about any material matters here.

Mrs L, who says such a remedy leaves her still significantly out of pocket, thus remains unhappy, and so this complaint comes to me for a decision.

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.

Mrs L used her M&S credit card to pay Firm O for the flights. This means M&S has certain responsibilities to Mrs L (if certain criteria are met) which arise from the relevant law, specifically, Section 75 of the Consumer Credit Act 1974 ('the Act'). There is no need for me to go into great detail about how this operates, but in summary, if certain criteria are met, Section 75 has the effect of allowing Mrs L to hold M&S liable for breaches of contract by the Supplier, or misrepresentations made by it in relation to the agreement made. Again without going into a large amount of detail a breach of contract occurs when one party to a contract

fails to provide what it has agreed to under that contract. Misrepresentation is when something is said which is relied upon and transpires to be untrue leading to detriment.

M&S is also a member of a card network which provides card services. And this network has rules which includes giving M&S an avenue for card transactions to be disputed, namely through the Chargeback process.

I should also add at this juncture that this decision is solely about M&S and whether it did what it should have and whether it treated Mrs L fairly. This decision isn't about Firm O, Firm D or Firm R-none of which are parties to this decision and none of which are within this service's remit for complaints regarding Chargeback and S75 of this type. I hope this distinction is clear.

Section 75

Before deciding on whether there is breach or misrepresentation here there are some requirements set out in the Consumer Credit Act (CCA) which also have to be met before these issues can be considered. One of these tests is around financial limits and having considered these I think on balance that Mrs L's claim meets the financial limits criteria.

Another test in the CCA for a valid claim is that there must be a debtor-creditor-supplier arrangement in place. This is often referred to as the 'DCS relationship' or simply 'DCS'. This means that there needs to be the necessary three-party relationship. This often looks like:

- A debtor (who makes repayments to the creditor for the borrowing for the purchase)
- A creditor (who has to send the borrowed amount direct to the supplier)
- A supplier (who has to provide what was purchased to the debtor)

This means the person who paid for the goods (the Debtor-Mrs L) should have a contractual relationship with the Supplier of the services she's complaining about as well as with the credit provider (M&S).

Mrs L paid Firm O, but Firm O wasn't the party supplying the flights-Firm D and Firm R were due to supply the flights. But Mrs L didn't pay Firm D or Firm R, but she did contract for the supply of the flights and contracted with Firm O for the services it provided. So in relation to each set of flights there were four parties namely Mrs L, Firm O, M&S, and the flight provider (outbound Firm D and return Firm R). So I'm satisfied that there were more parties present than set out in the DCS requirements of s75.

Firm O acts as a marketplace and/or introducer between purchasers and suppliers. Its terms and conditions say it's '*not a party to the contractual relationship in relation to the products and services you order on our Website*'. So when agreeing to use its services consumers the terms and conditions agreed make clear Firm O's role in the matter.

As a consequence of all of the above I'm satisfied that the required relationship as set out in the CCA is not met and thus M&S cannot be held liable for the loss Mrs L has suffered here under S75.

could M&S challenge the transaction through a Chargeback?

In certain circumstances, when a cardholder has a dispute about a transaction, as Mrs L does here, M&S (as the card issuer) can attempt to go through the Chargeback process. Mrs L doesn't dispute that she used her M&S credit card here. Nor does she dispute the amount, date, or any other details about the transaction itself. So I don't think M&S could've challenged the payment on the basis Mrs L didn't properly authorise the transaction, given what I've just set out.

M&S is required to consider whether there is a reasonable prospect of success when it is considering whether to go through the chargeback process or not. If it does go through the process, then it must do so properly. But ultimately the Card Scheme has the final say on this process. So M&S isn't solely responsible for the decision whether to refund or not, when going through the chargeback process. And it can fairly decide to not proceed at any stage if it doesn't think there is a reasonable prospect of success.

M&S originally pointed to the Scheme rules about time limits to raise Chargebacks. And it noted that the transaction was in January 2020, but it says Mrs L didn't raise the issue with it until October 2020, by which time it said to Mrs L that she was significantly outside the time limits applicable.

It has since concurred with our Investigator that Mrs L was actually in time because the applicable dates for the time limits is not from transaction date but rather from expected supply of the service or the cancellation thereof. So the question is, has Mrs L lost out as a consequence of M&S' mistake?

Our investigator's assessment provided evidence to show that the return flights supplied by Firm R actually did take place. Mrs L hasn't disputed this. But rather said she couldn't have flown because of the Pandemic. But the Pandemic isn't any of the parties' involved fault. And Chargebacks can only be successful if something goes wrong in the supply of the goods or services to be provided. But nothing went wrong with regard to the flights supplied by Firm R. Mrs L bought them and Firm R supplied them, but those flight tickets were not used, and the flights flew. So I don't see that Firm R did anything wrong. So I don't think a chargeback on those flights should be successful. So although M&S got its position wrong here on these flights Mrs L hasn't lost out as a consequence.

Our investigator's assessment provided evidence to show that the departing /outbound flights supplied by Firm D did not take place. So if M&S had put in a chargeback on these then I think it likely that those flight costs would have been refunded through the chargeback process.

During the course of this dispute Mrs L has not been able to provide much of the evidence that M&S or this service would want to see, particularly evidence around flight costs and correspondence received from Firm O, Firm R or Firm D. Mrs L has been repeatedly asked for it but has not been able to provide it. We do have the total transaction amount and what has been refunded to Mrs L already, due to things such as tax.

As the individual flight costs were unavailable our Investigator averaged the costs across the outstanding amount having taken into account the refunds received. They then researched the relative costs of flights between outbound and inbound and found an approximate 1:2 ratio of such flight costs. And then applied this to the average cost of a flight (outstanding amount divided by number of passenger flights booked). Our Investigator concluded that Mrs L should be refunded £97.33 for the two flights which should have been recouped through chargeback as they didn't fly.

Neither party has provided contrary evidence to the evidence that our Investigator put forward with regard to flight costs. Furthermore neither party has provided persuasive argument with regard to the manner of calculating redress here. I should add that coming to an approximate conclusion to redress is not ideal. But in the absence of so much pertinent evidence, and bearing in mind the need for finality, and the dearth of persuasive arguments regarding evidence or redress methodology, having considered everything here I think this approach is fair and reasonable in the round.

Mrs L points to the Pandemic and the associated issues of consequential costs of quarantine and that travel was limited by governments. These are all relevant arguments to what happened here. But ultimately M&S isn't responsible for these things. Its responsible for Chargeback here only for the reasons explained. And it isn't responsible for the costs of the flights that flew because the service Mrs L purchased was provided. The contracts Mrs L agreed to were only for the provision of these flights. There were no other protections or services provided other than these flight tickets. So it is my position that any chargeback in relation to the flights that took place would have been unsuccessful. And that M&S should refund the approximate amounts of the flights that did not take place.

I have significant empathy for Mrs L in how things have played out here subsequently in relation to the transaction she entered into in January 2020. And I appreciate that she has paid for flights she didn't use. But M&S can only be held responsible for what its responsible for. And that is performing its responsibilities regarding Chargeback and S75 fairly.

Putting things right

Accordingly, on receiving notice of the acceptance of this decision, I direct M&S to refund Mrs L the approximate cost of the outbound flights of £97.33 and pay interest on that amount at an annual rate of 8% simple interest from the 27 October 2020 (date the claim was declined) to the date of settlement.

Mrs L has made clear that she "*will fight M&S for as long as necessary and as hard as necessary*". And I appreciate that she feels she's lost out here. But this decision marks the end of our involvement in this dispute between Mrs L and M&S.

My final decision

For the reasons set out above, I uphold this complaint against Marks & Spencer Financial Services Plc trading as M&S Bank and direct it to put things right as I've described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 15 July 2022.

Rod Glyn-Thomas
Ombudsman