

The complaint

Mr F complains that Nationwide Building Society didn't do enough in response to his claim to recover money he paid for flight tickets he bought when his original airline cancelled his return flights while he was abroad.

What happened

Mr F was on holiday overseas with his wife and son when his airline ("R") notified him to say it was cancelling the return leg of their flights. He says R made no attempt to assist him by providing replacement flights and he felt his only viable option was to buy tickets with alternative providers. He duly did so, at an additional cost of £1,800.28. On Mr F's return to the UK he sought recovery of these costs from R. In response R initially offered Mr F vouchers for the unused portion of his original flights, valued at £329.98. It later changed its offer and refunded this amount to Mr F via his Nationwide credit card, as that was what he'd used to make the original purchase.

Mr F was unhappy he was still out of pocket. He attempted to claim the outstanding sum from Nationwide by means of the connected lender liability provisions in section 75 of the Consumer Credit Act 1974 ("CCA"). Nationwide didn't accept Mr F's claim. In support of its position, Nationwide told Mr F that a *force majeure* clause in his agreement with R restricted any liability to pay compensation in the event of cancellation, and that this had been triggered by the Covid-19 pandemic. Mr F complained to Nationwide about its stance, but Nationwide maintained its position and he referred matters to us.

Our investigator didn't think Nationwide had treated Mr F fairly in dealing with his claim. She found that Nationwide hadn't done enough to demonstrate why R had cancelled Mr F's flights due to the pandemic. The investigator noted that other flights – such as those ultimately taken by Mr F and his family – were still operating between the UK and Mr F's location at the material time. So it was unreasonable to seek to rely on the *force majeure* clause to deny the claim.

The investigator was further satisfied that section 75 applied to Mr F's transaction with R, and that the agreement between the parties required R to provide replacement flights if that was Mr F's choice. She recommended Nationwide refund Mr F's flight costs, which – taking into account the £329.98 R eventually refunded – amounted to £1,470.30, together with interest.

Nationwide didn't accept the investigator's proposal. It said:

- its submissions included an email from R that specifically said it had been forced to cancel the flight due to the impact of Covid-19
- that email gave Mr F the choice of a refund or rerouting with an alternative carrier (by means of contacting its Customer Care Team) if it wasn't possible to reroute with R. Nationwide said it didn't know what action Mr F took to reroute his flights other than the alternative booking he was claiming for
- Mr F had made his booking on 13 March, for outbound travel on 15 March. At the time of booking there were some restrictions in place at his travel destination. And

during this time the UK Government published a statement advising against all but essential travel to that destination

- there was an issue over whether there was a valid debtor-creditor-supplier relationship (a necessary element of a section 75 claim) due to Mr F's son being an adult. He also didn't appear to be listed on the travel itinerary for the original flights with R

The matter has been passed to me for review and determination.

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.

Based on the evidence available to me, Mr F's transaction meets the requirements set out in section 75 of the CCA. Section 75 has the effect that where there has been a breach of contract or misrepresentation by R, Mr F has the same claim against Nationwide as he does against R.

Mr F has said that it would be unreasonable for Nationwide to seek to rely on *force majeure*, on the basis that no such provision was in place when he booked his flights. I've reviewed the relevant terms and conditions that applied at the time. They make provision for what happens in the event of cancellation due to extraordinary circumstances. That isn't quite the same thing as *force majeure*, which generally has the effect of terminating the parties' contractual obligations. Here, the agreement was capable of continuing; the relevant clause merely limits the restitution Mr F can seek under the contract.

I've thought about what Nationwide has said, and I can see that it makes some points that have merit. R's email does cite the Covid-19 pandemic as the reason Mr F's return flights were cancelled. However, it doesn't expand on the reasons why that meant R was unable to carry out replacement flights, which seems to have been possible given other airlines clearly were still able to bring home Mr F and his family.

It strikes me that for extraordinary circumstances to apply under the relevant clause, there might need to be sufficient explanation around this; for example, to exclude the possibility that the decision was taken for operational reasons. The Civil Aviation Authority ("CAA") guidance says extraordinary circumstances could include where the Government advises against all but essential travel, as was the case here.

I don't think this helps significantly, because the CAA merely goes on to say that this would mean fixed sum compensation would not be payable. And fixed sum compensation doesn't form part of Mr F's claim. The CAA doesn't suggest extraordinary circumstances also mean that any other obligations would also not apply, such as the requirement to refund or reroute passengers. Further, the CAA says that its stated interpretation of extraordinary circumstances is illustrative and for guidance only, rather than determinative of its view, as each case is context and fact specific. So I don't think I can safely say that, even if the cancellation was due to extraordinary circumstances, Mr F's claim should fail.

Ensuring Mr and Mrs F were returned to the UK was an obligation on R under its conditions of carriage, which incorporated provisions made by relevant legislation (Regulation (EC) No 261/2004). As Nationwide notes, Mr F should have been afforded the choice of a refund or rerouting either with R or an alternative carrier, a point also acknowledged by R.

Mr F was on holiday and needed to return to the UK. I can't see why in such circumstances he would have opted for a refund. He has submitted that he made unsuccessful attempts to

contact R before he made the alternative flight arrangements himself. No doubt if the situation had been less urgent, Mr F could have waited until he was able to speak with R to see when it would be able to reroute him on one of its other flights or with another carrier. However, with the window for making such arrangements closing and alternative flight costs rapidly increasing, I can see why Mr F took the decision he did.

In my view, this was a legitimate effort to mitigate the potential cost of waiting until R could reroute him. Otherwise, Mr F's costs – and subsequent claim – might have been significantly higher, due to increasing flight costs and accommodation.

I'm conscious that while Nationwide's response to the investigator's assessment hasn't touched on this point, its original submissions did seek to suggest that Mr F might not be entitled to claim his additional costs on the basis the terms and conditions excluded compensation. I don't think it's material to the complaint outcome due to R's continuing obligation to reroute Mr F. But I would observe that in the context of that specific term, which appears in the document relating to rights established by Regulation (EC) No 261/2004, compensation should more properly be taken to apply to the definition of compensation under Article 7 of that Regulation. That definition has the same meaning as that used by the CAA in the guidance to which I've already referred, in that it refers only to fixed sum compensation.

Taking all of this into account, I'm satisfied that R – and by virtue of section 75 – had a contractual obligation to Mr F that it failed to fulfil, which was to act on his choice to be rerouted. R's failure to do so is likely to amount to a breach of contract. As a consequence of such a breach, Mr F had to make alternative arrangements himself, and has had to pay additional costs in doing so. He should be reimbursed those costs that reflect the loss due to the breach.

This brings me to Nationwide's final point. Mr F and his wife were named on the original flight itinerary. That transaction, funded by the use of Mr F's credit card, did not appear to include their son. As R didn't have any contractual obligation to carry anyone other than Mr and Mrs F under the terms of their agreement, it follows that neither R, nor Nationwide, can fairly be held liable for costs Mr F incurred in arranging this himself. As I understand it, the cost Mr F paid for his son's flight to the UK was £703.21. Accordingly, we've informed Mr F of this and I've deducted it from the £1,470.30 proposed in the investigator's assessment.

My final decision

My final decision is that I uphold this complaint. To settle it, Nationwide Building Society should take the following steps within 28 days of receiving Mr F's acceptance of this decision:

1. Recalculate Mr F's credit card account by refunding £767.09 backdated to the date he bought the alternative flight tickets (being 23 March 2020)
2. if this would have resulted in a credit balance owed to Mr F, this should be paid to him together with annual interest calculated at 8% simple from that point up to the date this money is refunded
3. Ensure there is no adverse payment information associated with this transaction on Mr F's credit file

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 14 July 2022.

Niall Taylor

Ombudsman