

The complaint

Mr C complains that Tesco Personal Finance PLC trading as Tesco Bank won't reimburse him a deposit he paid for a holiday that didn't go ahead during the Covid 19 pandemic.

What happened

Mr C had booked a package holiday involving flights and a cruise. The holiday was arranged by a travel agent ("B") with the package organiser and supplier ("V"). Mr C paid a deposit of £700 using his Tesco Bank credit card.

The holiday was scheduled to take place in October 2020, with Mr C due to pay the holiday balance by 17 July 2020. Unfortunately, in March 2020 V had to suspend its cruise operations due to the pandemic. The initial suspension was put in place until May 2020, but by early July V still hadn't resumed operations. In light of the uncertainty V offered its customers vouchers against future holidays.

Mr C contacted B about the likelihood of the holiday going ahead. He was understandably concerned about the idea of paying the balance when it appeared unlikely that the holiday would take place. B sent V an email to say that Mr C wanted to cancel the booking and receive a voucher, although Mr C says he didn't cancel. After some delay V issued vouchers, valid for up to two years. However, Mr C became increasingly dissatisfied with the situation and, when B rejected his request for a cash refund, approached Tesco Bank to see if he could get his money back.

Tesco Bank said it attempted to raise a chargeback against B, who was the merchant that took the deposit payment. It gave Mr C a temporary credit of the amount in question, which it reversed after B submitted its defence to the claim. According to Tesco Bank, B challenged the claim on the basis that Mr C had cancelled the booking. Tesco Bank says it sought Mr C's comments in response, but didn't hear back from him. It appears the bank's records of Mr C's email address hadn't been updated.

Tesco Bank says it also considered whether it was liable to Mr C under connected lender liability provisions set out in section 75 of the Consumer Credit Act 1974 ("section 75"). In broad terms this provides for Mr C to bring a like claim either in misrepresentation or breach of contract as he would be able to claim against the supplier. The bank didn't think there was a valid section 75 claim as Mr C hadn't paid the balance of the booking when due, and as a result, there was no contractual obligation from that point to provide the holiday. Tesco Bank also considered that this entitled B to retain Mr C's deposit.

Mr C complained to Tesco Bank about its stance, but the bank wasn't minded to change its position. Mr C referred his complaint to us, and it was considered by one of our investigators. The investigator didn't think Tesco Bank had dealt with Mr C fairly. He noted discrepancies in the response it had received from B, which appeared to suggest that Mr C had cancelled the booking on 9 July and also that the booking was cancelled on 17 July because Mr C hadn't paid the balance.

The investigator considered that Tesco Bank ought to have done more to challenge what B

had said. He also thought the booking arrangements didn't support B's right to retain Mr C's deposit. He recommended that the bank refund the £700 with interest.

Tesco Bank didn't accept the investigator's recommendation. It said B had provided comprehensive evidence confirming Mr C had cancelled the booking, and that Mr C hadn't responded when Tesco Bank put that position to him. The bank expressed concern that the outcome the investigator reached was unfair, given that in its view the evidence was stacked heavily against Mr C. It asked for this review.

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.

Having done so, I'm not persuaded that in considering Mr C's claim, Tesco Bank has had proper regard for the fact that Mr C booked a package holiday, as confirmed on the Air Travel Organisers' Licensing ("ATOL") certificate B issued to him when he made his booking. There is no mention in the bank's submissions of the additional rights afforded to him by the Package Travel and Linked Travel Arrangements Regulations 2018 ("Package Travel Regulations") over and above those set out in the contracts with B and V.

I would have expected this to be a material factor in the bank's consideration both of the chargeback defence submitted by B and its own potential liability under section 75. I say this because Part 3, section 12 of the Package Travel Regulations has the effect that Mr C was entitled to terminate the contract and receive a full refund of any payments made for the package before it started *"in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and which significantly affect (a) the performance of the package, or (b) the carriage of passengers to the destination"*.

Tesco Bank has said that there is comprehensive evidence that Mr C cancelled the booking. That cancellation took place on 9 July 2020, according to B's email to V. Mr C has challenged this assertion, saying that he didn't cancel the booking. It may be that B cancelled it on Mr C's behalf rather than acting under a direct instruction from Mr C. I don't consider it necessary I reach a definitive answer on this point; it is sufficient that the booking was cancelled for reasons other than the failure to pay the balance when due. As I've previously noted, the cancellation took place before the balance payment became due (for completeness, V's invoice indicates a final payment date of 2 August rather than 17 July).

At the material time, V had suspended its cruise operations due to the pandemic. It was unable to give any assurance that the suspension would be lifted by the time Mr C was scheduled to travel (and as it turned out, ended up cancelling all its cruises for the rest of 2020 through to at least mid-2021). As I understand it, the impact of Covid 19 on operators' ability to provide a safe environment was particularly acute in the cruise industry, which led to longer suspensions than in other holiday sectors.

Taking all of this into account, I see no persuasive reason why Mr C would not have been entitled to rely on the PTR provision to terminate the package and claim a refund of his deposit. It seems fairly clear that the impact of Covid 19 would amount to unavoidable and extraordinary circumstances occurring at the place of destination that significantly affected performance of the package he'd booked. It was, after all, the reason that V suspended its operations for more than 18 months.

As such, I consider that Tesco Bank could – and should – have done more to question B's chargeback response saying that Mr C was not entitled to a cash refund on the basis he had cancelled. That position doesn't appear to have been supported by the relevant legislation. I

don't consider Tesco Bank needed Mr C's comments in order to take that legislation into account. There was sufficient in what it already had from Mr C and from B to enable it to do so. I find that the bank's position was not adversely affected by any lack of response from Mr C to B's chargeback defence.

Had Tesco Bank mounted a more robust approach to the chargeback claim, I consider there was a good possibility of it being successful. Even if Tesco Bank decided not to progress a chargeback claim, it's worth noting that section 12 of the PTRs is implied as a term of Mr C's package contract. The bank's obligations under section 75 would potentially make it liable as a breach of contract for failure to provide a full refund to Mr C under this provision.

It follows that I'm minded to conclude there were deficiencies in the way Tesco Bank approached Mr C's claim that led to him being treated unfairly and which suggest it would be appropriate for the bank to address his financial loss.

My final decision

My final decision is that I uphold this complaint. To settle it, Tesco Personal Finance PLC trading as Tesco Bank must, within 28 days of receiving Mr C's acceptance of this decision, take the following steps:

1. pay Mr C £700, representing the deposit he paid for the package holiday
2. if Tesco Bank has charged interest on this amount to Mr C's credit card account since reversing the chargeback credit, it should rework his account removing all associated interest and charges
3. pay Mr C interest on the amount in 1., calculated at 8% simple annually from the date the chargeback credit was reversed until the date it pays this settlement. If Tesco Bank deducts tax from the interest element of my award, it should confirm to Mr C that it has done so and provide him with the relevant tax deduction certificate.

Mr C should note that acceptance of this decision will mean he will be unable to use the vouchers V issued.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 18 January 2023.

Niall Taylor
Ombudsman