DRN-3949961

The complaint

Ms W complains about the way Marks & Spencer Financial Services Plc trading as M&S Bank handled her claim for a refund in respect of accommodation she purchased using her M & S Bank credit card.

What happened

In February 2020 Ms W booked ten rooms for her and a party of 13 with a hotel I'll call C – to be used in June 2020. She paid £3,537 upfront for the booking and used her M & S Bank credit card to pay all but £100 of it – which was paid via another of her accounts.

On 18 March 2020, C contacted Ms W and explained that in light of the developing situation with Covid-19, *"Until 30th April 2020 if you have a booking with us in 2020 (which has a non refundable cancellation policy) we are permitting you to alter the dates, free of charge to a similar priced stay either later in the year or the same time next year. Should there be an increase in tariff you will only pay the difference, we will work with you".*

Following this Ms W agreed with C to postpone the date of the booking until 5-11 June 2021.

In May 2021 Ms W contacted C again explaining that because of the requirement to quarantine in Guernsey for seven days, the trip would not be viable. She asked C if it would consider postponing the date of her stay again. C confirmed it could postpone the stay another 12 months and asked Ms W for her proposed dates.

Ms W replied and asked for 4-10 June. C asked if she meant 2022. Ms W confirmed she did. C responded with just a smiley face and no words.

Ms W emailed C in December 2021 asking if she could add another individual to the booking. In response to Ms W, C said it would *"make sense to work out which dates and what is allowed before we commit to anything"*

C emailed Ms W in January 2022 asking her to confirm dates and room requirements – which she promptly did, explaining again she wanted to book 4-10 June 2022.

C told Ms W it was reviewing its bookings during the first week of March and would get back to her after this.

In March 2022 C contacted Ms W and said it wouldn't be able to accommodate her on the dates she required. It said that although Ms W *"booked a non-refundable non changeable rate"* it offered to refund what had been paid less a 5% "administration/credit card fee".

After some initial back and forth between the two parties, Ms W eventually told C that although she considered it to be liable for the full sum she paid, she was prepared to accept its offer of £3,537 less 5%.

On 8 April 2022 C said it was prepared to pay a refund of £3,360 in full and final settlement of her claim and would require Ms W's signed acceptance.

Ms W said she wasn't prepared to accept the offer in full and final settlement of her claim as she didn't want to jeopardize a future claim under Section 75 Consumer Credit Act 1974 against M & S Bank for the remaining 5%.

Ms W asked M & S Bank to step in and help her get a refund in April 2022. M & S Bank told Ms W it had contacted C and it had offered to pay her £1,650. M & S Bank said Ms W could only claim for her part of the trip, and not for the rest of her party. It offered (in what it said was a gesture of goodwill) to pay Ms W an additional £145. M & S Bank said this was the difference between C's offer of £127 per person and Ms W's individual portion of the cost of the accommodation.

M & S Bank said it had considered its liability to Ms W under Section 75 Consumer Credit Act 1974 but didn't think there had been a breach of contract or misrepresentation on the evidence it had seen. So, it didn't think it was liable to Ms W for the full cost of the accommodation.

Dissatisfied, Ms W referred her complaint to this service.

An investigator thought Ms W's complaint should be upheld. She said C's cancellation of the accommodation was a breach of contract and because Ms W was the lead booker she was able to claim for the whole cost of the booking. She asked M & S Bank to pay Ms W £3,537 plus interest.

M & S Bank disagreed with the investigator. It said the other travellers had a claim against C for breach of contract but did not have a like claim against M & S Bank as they were not debtors under a debtor-creditor-supplier agreement. M & S Bank also questioned whether any liability on its part should be reduced by the £1,650 C had offered to pay.

The complaint was therefore referred to an ombudsman for further 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.

I am looking here at the actions of M & S Bank and whether it has acted fairly and reasonably in the way it handled Ms W's request for help in getting her money back.

Section 75 provides that subject to certain criteria the borrower under a credit agreement has an equal right to claim against the credit provider if there's either a breach of contract or misrepresentation by the supplier of goods or services. So, given Ms W's claim here, for me to find that M & S Bank should have refunded the cost of the accommodation to her, I'd need to find that there has been a breach of contract.

Amongst the criteria for a claim under Section 75 are that the claim must relate to a single item to which the supplier has attached a cash price between £100 and £30,000 and the claim must relate to a transaction that was financed by a debtor-creditor-supplier ("DCS") agreement, where Ms W was the debtor.

Looking at these criteria in turn, if the single item here was the booking as a whole, the cash price attached was £3,537. If each individual room was a single item, communications between Ms W and C show the cash price attached to the rooms was between £384 and £414 per room. So, the claim was within the financial limits either way.

Turning to whether there was a DCS agreement, it's clear Ms W was the debtor in this case, her being the cardholder. And she had a contract with C (and paid C) for the booking in respect of all ten rooms. I say this on the basis that C only ever appears to have dealt with Ms W without ever requiring the names of the travelling party members – so I don't see how any of the other travelling members could be said to have been contracting with C for the rooms instead of Ms W rather than in addition to her. The closest thing I have been able to locate to a set of terms and conditions for C is an archived version of its 'reservation policy' and nothing I've seen within these makes me think Ms W wasn't contracting with C for all ten rooms either.

On that basis it appears Ms W's claim related to a transaction that was financed by a DCS agreement.

I've therefore considered whether there was likely a breach of contract by C.

C's reservation policy sets out that *'rooms are non-refundable so there are no cancellation or changes possible'*

C said in communications with Ms W that she and her party did not show up to the booking in June 2020 so, in accordance with the terms of the contract, it said it did not have to provide a refund of any kind. C said it offered to change the date of Ms W's stay, and later offer a refund as a gesture of goodwill only.

From what I've seen it appears that C contacted Ms W in March 2020 offering her the opportunity to change the date of her stay without the loss of what she'd paid. Following this Ms W proposed a new date and C confirmed it had amended the booking accordingly. So, it seems likely the parties had mutually agreed to vary the term of the contract that changes to bookings were not possible and to agree new terms whereby the accommodation would be provided on a different date. In other words, the contract between Ms W and C for the provision of the accommodation remained in force.

Whether something similar could be said for the second postponement is the key question for me to answer here. If the parties had agreed something new again in respect of the same booking, it seems logical that a failure to provide the accommodation as per that agreement might have been a breach of contract by C.

I've carefully analysed the course of events therefore to determine this.

In May 2021 Ms W and C had an exchange of emails whereby Ms W asked C to postpone the date of the stay again in 2021, C asked Ms W for her new dates, and Ms W gave them to C. Ms W was then asked if she meant 2022 for the new dates. The closest thing that C seems to have provided in acknowledgment of these dates was a typed smiley face.

I've thought carefully about this but I don't find this was clear enough to constitute an acceptance by C that Ms W's new dates could be accommodated. The smiley face could just have equally been an acknowledgement that Ms W had now provided information about which year she was requesting to book in as it was an acceptance that C could accommodate those dates.

C later appears to have told Ms W in December 2021 that it couldn't commit to anything yet and then in January 2022 it said it would review the booking and get back to her.

When C did get back to Ms W, it explained it couldn't accommodate her on the dates she required – although no explanation was ever provided to Ms W as to why this was the case.

On my analysis of these facts, it seems most likely to me that Ms W and C had not agreed precise new dates for the accommodation to be provided in 2022.

So where did this leave Ms W?

Having not agreed precise new dates for the accommodation to be provided I don't think C breached the contract by telling Ms W it couldn't accommodate her proposed dates.

However, what C did appear to have agreed with Ms W was that she could postpone her trip by 12 months. So again seemingly an agreement was reached to allow changes to the booking. When C emailed Ms W to explain it couldn't accommodate her in June 2022, it also offered to provide a refund of 95% of the cost of the accommodation. I don't find it was unreasonable to imply from this that C wasn't prepared to accommodate Ms W at all. If it was, it seems it would have offered Ms W the opportunity to book alternative dates in 2022 rather than telling her, unprompted, that she could have most of her money back.

So, having agreed with Ms W that she could postpone her stay until 2022 and then seemingly refusing to do this, it appears C was in breach of contract. It had agreed to allow another change to the contract in May 2021 (thereby prolonging the original contract further and varying its terms again) then it effectively went back on that by not appearing to allow Ms W to make said change.

With all of the above in mind, I find M & S Bank treated Ms W unfairly by declining to meet her claim. So, I find it would be fair and reasonable for M & S Bank to treat Ms W as if it had met her claim and pay her £3,537 plus interest from when it declined to meet it.

I've thought about what M & S Bank said in response to the investigator's assessment about the other parties having claims but not being the debtor in this case. The travelling parties may have had their own contracts with C, (although that's not clear from the available terms of business). But that doesn't take away from the fact Ms W appears most likely to have had her own contract with C for the booking of all ten rooms, for the reasons I explained earlier in this decision.

So, Ms W's loss when C breached the contract was not limited to just her own portion of the booking. Rather, as the booking party with a contract for all ten rooms, I think her loss was more likely the cost of the whole booking. I don't think the fact the travelling party reimbursed Ms W changes that either. That was a separate arrangement between those parties and I'm sure they will expect to be reimbursed by Ms W in any event.

M & S Bank questioned whether its liability should be reduced by C's offer. I don't think that would be fair in this case. When M & S Bank told Ms W about C's offer it said it was in full and final settlement of Ms W's claim if she accepted it – which clearly is not what Ms W wants. The acceptance form M & S bank provided to Ms W for the offer also said it would expire on 29 September 2022. So, it doesn't appear that it's even available now in any event.

My final decision

For the reasons I have explained above, my final decision is that I uphold Ms W's complaint. To put things right Marks & Spencer Financial Services Plc trading as M&S Bank must pay Ms W £3,537 plus interest on that sum of 8% simple per annum from 1 September 2022 until the date of settlement*.

* If Marks & Spencer Financial Services Plc trading as M&S Bank considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms W how

much it's taken off. It should also give Ms W a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 21 July 2023.

Michael Ball
Ombudsman