

The complaint

Mr M is complaining that Tesco Personal Finance PLC hasn't refunded an amount he paid on his Tesco credit card for a motorcycle tour.

What happened

Mr M bought a motorcycle excursion to travel around America in April 2020. The excursion was arranged by a third-party provider – who I shall refer to as E. He paid around £6,751.67 for the trip. He made three payments towards this using his Tesco credit cards.

In March 2020 E contacted Mr M to confirm that, despite the restrictions owing to Covid-19, the excursion was still going ahead. Mr M contacted E to explain that he was unable to travel to America due to travel restrictions owing to Covid-19. E responded to say it would give him a travel voucher. Mr M said he wasn't able to use a voucher and asked for a refund. But E maintained it was only able to give him a voucher. So Mr M contacted Tesco and asked it to refund the amount he paid.

Tesco ultimately didn't uphold Mr M's claim. Mr M is unhappy with the way Tesco handled the dispute. He said it initially told him that it was for E to show the excursion went ahead, but later said it for Mr M to show it didn't go ahead. Mr M says he provided sufficient evidence to show E cancelled the excursion, so he maintained that he was entitled to a refund. Tesco said, even if E had cancelled the excursion, he wasn't entitled to a refund as he cancelled the trip before E did so. And it said the terms of the contract didn't allow for a refund in these circumstances.

I issued an initial provisional decision not upholding this complaint and I said the following:

"I should first set out that I acknowledge I've summarised Mr M's complaint in a lot less detail than he has presented it. Mr M has raised a number of reasons about why he's unhappy with the way Tesco has handled this matter. I've not commented on each and every point he's raised but, instead I've focussed on what I consider to be the key points I need to think about. I don't mean any discourtesy about this, but it simply reflects the informal nature of this service. I assure Mr M, however, that I have read and considered everything he's provided."

Mr M is complaining about the way Tesco handled a dispute over a payment he made to a third party for a motorcycle excursion. Where a consumer raises a dispute about transactions made on a credit card, the card provider can consider the dispute under two guises – chargeback and Section 75 of the Consumer Credit Act 1974 (Section 75). I would expect the card provider to consider both avenues. Tesco has done so in this case. I'll consider both separately."

Section 75

Mr M paid for the holiday in three instalments on his Tesco credit cards. Section 75 sets out that in certain circumstances, as the finance provider, Tesco is jointly liable for any breach of contract or misrepresentation by the supplier – E. I'm satisfied those circumstances apply

here.

It seems to me that Mr M asked to cancel the excursion when E said it would still go ahead. I'm satisfied that the content of the email E sent to Mr M sets out that it still intended to provide the excursion at the time Mr M cancelled the booking. However, Mr M believes he's entitled to a full refund as he was unable to travel and because the excursion ultimately didn't go ahead. He also believes the contract was frustrated which meant E was required to refund the full cost of the trip.

I note the investigator said the PTRs applied in this case which meant Mr M was entitled to a refund, but I don't agree. This booking was made through an American travel provider, it was paid in American currency and was to wholly take place in America. So American law is the relevant law in this case, so I don't agree the PTRs are relevant here.

But, even if the PTRs applied, I don't think it changes the outcome. Ultimately, while I accept that it seems that E ultimately didn't provide the service, I can't ignore that Mr M cancelled the booking before the excursion was cancelled. Tesco is only liable for a breach of contract or misrepresentation by E. Mr M cancelled the booking, so E was no longer required to provide a service after this. So the fact the excursion didn't subsequently go ahead doesn't equate to a breach of contract. The issue for me to decide is whether it was fair for Tesco to say Mr M wasn't entitled to a refund. The terms of the contract regarding this are the crux of the matter and they say:

"A reservation may be cancelled up to 45 days prior to the pick-up date with no charge. 50% of the total booking will be applied towards the cancellation fee if the booking is cancelled between 44-31 days from the pickup time. 100% of the booking will be applied towards the cancellation fee if the booking is cancelled within 30 days from pickup time or if the customer does not show up. Refunds, if applicable, will be issued in a form of store credit that can be redeemed within 1 year from the date it was issued."

It's critical to note that the terms of the contract specify that any refund will be given in the form of store credit. Ultimately, E issued Mr M store credit for 100% of the cost of the excursion. Strictly speaking, Mr M cancelled the booking within 30 days of the pickup time, so he wasn't entitled to any refund. But, ultimately, E acted in line with the terms of the contract in providing store credit in the form of a travel voucher. So I can't say that the failure to provide a refund equated to a breach of contract.

I've also thought about Mr M's comments in regard to the contract being frustrated. A contract may be considered to be "frustrated" where unforeseen circumstances has made it impossible for it to be performed. In such circumstances the usual remedy is that the parties are released from their contractual obligations. The Competition and Markets Authority ("CMA") gave guidance that the impact of Covid-19 may potentially result in a contract being considered frustrated where the supplier isn't able to fulfil all or a significant amount of the contract. In such circumstances E wouldn't be obliged to fulfil Mr M's booking, and he should be restored to his original financial position by having his money back.

However it doesn't automatically follow that the contract between Mr M and E would be deemed to have been frustrated. The CMA guidance issued in August 2020 set out that "as lockdown laws and the nature of the legal restrictions they impose change over time, the consequences for individual contracts may become less clear-cut and more fact-specific. Ultimately only a court can decide how the law applies". Ultimately only a court could decide whether a contract has been frustrated or not. However, the crucial point is that it needs to be the supplier who is unable to provide all or part of the service, or significantly changes the service it was contracted to provide.

At the time Mr M cancelled the booking, E had expressly set out that it was still intending to fulfil its contractual responsibilities to provide the excursion. I appreciate Mr M was unable to travel, but this didn't prevent E from being able to fulfil the contract at that time. And this is the crux of the matter. With this in mind, I don't think it's by any means certain that a court would rule that Mr M was entitled to a full refund. And I think it's unlikely it would do so. However, of particular importance in respect to a Section 75 claim is that a frustrated contract isn't a contract that's been breached – it's a remedy in law where a contract can't be fulfilled. Tesco is only liable for a breach of contract or misrepresentation. So the law of frustration doesn't give grounds for a refund under Section 75. Ultimately, I don't think it was unreasonable for Tesco to say that E hadn't breached the terms of the contract.

Chargeback

As Mr M paid for the holiday by card, there are certain circumstances in which Tesco might be able to recover his money through the chargeback process. In this instance, Tesco didn't pursue the claim because it didn't think there were grounds to do so. I've thought about whether it was fair for Tesco to conclude as such.

Chargeback is the process by which a bank or credit card provider looks to resolve a dispute between a consumer and a merchant under the relevant card scheme. The rules under which the chargeback can be pursued are strict and are set out by the individual card scheme provider.

In this instance Mr M cancelled the booking. At that time, E had set out that the service was available to use, but Mr M was unable to use it due local restrictions which meant he was unable to travel to America. I recognise Mr M felt he had no choice but to cancel, but this wasn't down to anything E did wrong. And, for all the same reasons I set out above, I'm not persuaded that a chargeback would have been successful and I don't think there was anything to show he was entitled to a refund of the cost of the booking after he cancelled the contract. So I can't say it was unreasonable for Tesco to not process the chargeback.

Finally, I acknowledge Mr M is unhappy with the way Tesco handled his claim. I recognise that it may have given him misleading information at the start – i.e. that it incorrectly said it was for E to show the excursion went ahead. But I don't think he's lost out because of anything Tesco did wrong. Tesco has offered Mr M £150 in compensation for the distress and inconvenience its handling of the claim has caused him. I think this is fair, so I don't think it needs to offer anything in addition to this."

Mr M didn't accept my provisional decision and, in brief, for the following reasons:

- He said he didn't cancel the holiday. He said the holiday didn't go ahead because of the global travel restrictions owing to Covid-19. He set out that America issued a travel ban for all, but essential travel. He said he couldn't have done anything differently in the circumstances. He also highlighted that California – where the trip was due to start – had issued a stay at home order at the time E said it still intended to provide the trip.
- He said he's had legal advice that the holiday wasn't cancelled, but it was frustrated. And he maintains that he's entitled to a refund in these circumstances.
- He disagreed with my comment that American law applied. He said E had a UK website which set out the prices in UK currency and had a UK phone number to contact customer services, which is how he bought the holiday. He also said he learnt about E at a UK trade fair he visited. He maintained the PTRs applied to holidays marketed and sold in the UK.

Following this, I issued a second provisional decision upholding this complaint and I said the following:

“Of particular relevance to the points Mr M raised is whether the PTRs apply. I’m now persuaded they do. The PTRs set out that “these Regulations make provision in respect of package travel contracts and linked travel arrangements sold, or offered for sale, in the United Kingdom.” I’m persuaded by what Mr M has told us that E did market and sell the trip in the United Kingdom – as it was marketed on a UK website, it had a UK customer services phoneline and was portrayed at a UK travel fair. So, taking everything into account, I think the PTRs are relevant in this case.

The PTRs further set out:

“Termination of the package travel contract by the traveller

- 7) Notwithstanding paragraphs (2) to (6), 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, the traveller may terminate the package travel contract before the start of the package without paying any termination fee.*
- 8) Where the package travel contract is terminated under paragraph (7), the traveller is entitled to a full refund of any payments made for the package but is not entitled to additional compensation.”*

This essentially means that, where Mr M looks to cancel the contract due to an unavoidable and extraordinary circumstance in America, the PTRs imply a term into his contract with E that he’s entitled to a full refund of any payments made. The key point here, however, is the issue has to be in relation to E’s ability to provide the service – not whether Mr M was able to attend due to restrictions in the United Kingdom.

I think it’s widely accepted that Covid-19 was an unavoidable and extraordinary circumstance. I’m satisfied it was Mr M who instigated the cancelation and he did so due to the impact of Covid-19. But, the issue for me to decide, given the language in the PTRs, is whether, at the point Mr M cancelled the trip, Covid-19 was, or was clearly likely to, have a significant impact on E’s ability to provide the trip it had contracted to provide.

I acknowledge E wrote to Mr M to say it was still planning on providing the trip, but I’ve also thought about whether this was accurate – or at the very least misleading. I think it’s particularly important to note that at the time E wrote to Mr M to say it was still planning on operating the tour and he responded to request a refund, America had issued stay at home orders on over 20 states – including in California where the tour was due to start. So it seems to me that it was already apparent the tour wasn’t able to go ahead – or at the very least without a significant alteration to it. I think the PTRs set out that Mr M was in his rights to cancel the packaged holiday as a result of this and, as I said above, the PTRs further set out that Mr M was entitled to a refund, as he had requested.

I think, therefore, that E breached an implied term of the contract in not providing him with a refund when Mr M asked for it. So it follows that I think Tesco is jointly liable for this breach of contract and I intend require it to refund this amount.

Given this, I intend to say that I think Tesco should put Mr M in the position he’d be in if E had provided the refund when he requested it. So, I intend to say it should reconstruct the

credit card as if a refund was given on 29 March 2020 – when Mr M first asked for it. If after doing so, Mr M is out of pocket I also intend to say it should pay 8% simple interest on this from the date he's out of pocket until he gets it back."

Mr M responded to my provisional decision and said the following:

- He maintains he didn't cancel the holiday and believes it's Tesco who's lead the assertion he cancelled the holiday. And he doesn't believe E treated it as a cancellation, as it asked him if he wanted to book the trip for a different day.
- He was happy I was awarding a full refund and 8% simple interest. But he says my decision doesn't take into consideration the emotional distress and anxiety, self-doubt and worry that he and his wife have been living under for the last three years. He also said it doesn't compensate him for the considerable amount of time and effort he's had to spend to resolve this matter.
- He highlighted that Tesco took long periods of time to respond to him and he doesn't believe Tesco acted with "*reasonable care and skill*" in line with the Consumer Rights Act 2015.

Tesco said it didn't have anything further to add, other than it requested that Mr M relinquished his travel voucher.

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.

As neither party has given me anything else to think about, I uphold this complaint for the reasons I set out in my provisional decision.

I acknowledge this matter has caused Mr M a lot of distress and inconvenience in resolving this issue. But I also have to think about who's caused the underlying issue – i.e. is it E or Tesco? While I acknowledge that this matter has taken a long time to resolve, this ultimately stems from E not providing Mr M with a refund, as opposed to anything Tesco did wrong. I've thought about whether Tesco is liable for this. I don't think it is.

I'm looking here at what Tesco should be responsible for. As I said, Section 75 gives Mr M a 'like claim' against Tesco if there has been a breach of contract or misrepresentation by E. So, I must give consideration to what losses Mr M would likely be able to recover in court against E when considering what the 'like claim' might look like. I'm mindful when doing this that courts don't typically tend to make awards for non-financial losses such as distress and inconvenience for breach of contract apart from in limited circumstances (which I don't think would be likely to apply here). So I don't think Tesco is liable for any distress and inconvenience E has caused.

I acknowledge Mr M is unhappy that Tesco delayed responding to him. But these were unprecedented times and businesses were having to adapt to new ways of working, coupled with significant high levels of claims arising from Covid-19. I'm not persuaded Tesco handled the claim in a wholly unreasonable way. So I don't think I can fairly require Tesco to compensate Mr M for any delays that arose at that time.

My final decision

For the reasons I've set out above, it's my final decision that I uphold this complaint and I require Tesco Personal Finance PLC to put Mr M in the position he'd be in if E had provided the refund when he requested it. So, it should reconstruct the credit card as if a refund was

given on 29 March 2020 – when Mr M first asked for it. If after doing so, Mr M is out of pocket it should pay 8% simple interest on this from the date he's out of pocket until he gets it back.

If Tesco thinks that it's required by HM Revenue & Customs to deduct income tax from the simple interest, it should tell Mr M 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 M to accept or reject my decision before 14 March 2023.

Guy Mitchell

Ombudsman