

The complaint

Mrs H complains about the way Sainsbury's Bank Plc ('SB') handled her claim for a refund of a purchase she made using her SB credit card.

What happened

Mrs H paid for a package travel holiday booked by her partner (Mr H) with a package holiday organiser ('the supplier').

Mrs H says that leading up to their holiday departure date (14 March 2020) they became increasingly alarmed by the spread of the Covid-19 pandemic and the announcements being made by several institutions, particularly due to their personal circumstances involving underlying medical conditions and health vulnerability. On the 14 March 2020 Mr H sent a cancellation message to the supplier and they did not board the plane. It later transpired that on the 16th March 2020 the supplier repatriated its customers due to the escalating situation at the destination.

Mrs H tried to claim a refund from SB. It raised a chargeback and considered Section 75 of the Consumer Credit Act 1974 ('Section 75'). However, it did not agree to issue a refund.

Mrs H was not happy and complained about this outcome. However, SB would not alter its stance on the refund. It did offer her £150 in recognition of poor service she had received.

Mrs H wrote to this service stating she would prefer a full refund of the £851.88 spent on the package. She adds that SB delayed and mishandled her claim.

Our investigator considered the case. In summary, she concluded:

- although SB delayed and raised the chargeback outside the time limits in the rules – it would not have been successful in any event as Mrs H cancelled the service which still went ahead;
- at the time of the cancellation there were no records of Covid-19 infections at the destination – meaning that under the terms of the supplier's contract there were no *'unavoidable and extraordinary circumstances'* entitling her to a refund;
- SB's offer of £150 compensation was fair and reasonable and reflected the delays in handling the claim in the particular circumstances.

Mrs H asked the matter to be looked into by an ombudsman.

I looked into the matter and corresponded with both parties for further information and in an attempt to resolve the dispute. I issued a provisional decision on this matter, in which I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When considering what SB should fairly do to resolve matters, I consider its specific obligations as a provider of financial services. SB is not a supplier of holidays so in considering what is fair and reasonable for it to do I have focused on the relevant card protections – in this case these are chargeback and Section 75.

Chargeback

Because of my findings on Section 75 (below) I do not consider it necessary to go into great detail regarding chargeback. However, for completeness I will deal with this briefly.

The chargeback scheme is one way which SB might have been able to recover funds for Mrs H. However, it is limited by the particular scheme rules that apply (in this case I understand the credit card is a Mastercard). I have considered the relevant chargeback scheme rules and any additionally published guidance to decide if SB has acted fairly here.

From what I understand SB raised the chargeback and it was defended as the service was available and because it was out of time. I note that SB appeared to have had enough time to raise the chargeback within the time limits – so what it did was not ideal. However, regardless of this I am not persuaded that the chargeback would likely have succeeded in any event. I say this because:

- Mrs H would be unlikely to have a successful claim for ‘goods and services not provided’ as at the time the holiday was cancelled by her, it was still available and going ahead as far as the supplier was concerned; and*
- The contract terms broadly do not allow for refunds if cancellation is made close to the trip departure date as happened here – so it is unlikely a claim for ‘credit not processed’ would succeed either. While I acknowledge there are some arguments that the supplier’s terms do allow for a refund in particular circumstances it is difficult for me to say that the card scheme operator (had the matter got to arbitration) would likely have decided in Mrs H’s favour in any event.*

So overall, I don’t think that SB’s actions have likely deprived Mrs H an opportunity where she would likely have got her money back through the chargeback scheme.

Section 75

Section 75 in certain circumstances will allow Mrs H to make a ‘like claim’ against SB for breach of contract or misrepresentation by a supplier paid by credit card in respect of an agreement it has with her for the provision of goods or services.

Certain criteria need to be met in order that Section 75 will apply in any given circumstance. This includes that Mrs H as the ‘debtor’ who has the credit card agreement with SB also has a contractual agreement with the supplier of the holiday. I have looked at the situation here to see if that agreement is in place.

Mrs H has confirmed that it was Mr H who made the booking for the package holiday as the lead booker. This is also supported by the documentation which shows Mr H as the lead passenger, whose contact details are used on the booking and who corresponds with the supplier about the cancellation of his booking.

However, despite Mr H being the lead booker, I am satisfied that the supplier is still contracting with Mrs H as a named passenger on the package. Nothing in the terms clearly indicates otherwise and I have taken into account the implied terms under The Package

Travel and Linked Travel Arrangements Regulations 2018 ('PTRs') which give Mrs H as a 'traveller' particular rights and remedies as implied into the contract with the supplier.

I note that a 'traveller' as defined under the PTRs includes any individual entitled to travel on the basis of a contract concluded within the scope of the Regulations. I have gone on to say why I consider the Regulations apply to this contract later on. So overall, I am satisfied that Mrs H has a claim against the supplier in her own right, and therefore a 'like claim' against SB under Section 75. I have therefore gone on to consider if there has been any breach of contract here by the supplier (misrepresentation is not something the parties have argued, and nor do I consider it relevant to the particular circumstances here).

In considering breach of contract, I note that neither party disputes that the service in question is a package holiday contract which the PTRs apply to. For clarity - I consider the supplier which Mrs H paid is the 'organiser' as defined by the PTRs and which has combined and sold the package. As the 'organiser', it has particular obligations to Mrs H as a 'traveller' under the package contract and these obligations implied into the contract by the PTRs.

I note there is no dispute the package was cancelled on the day Mrs and Mr H were due to travel. I have considered the supplier's standard booking terms to see if there is a refund due in these circumstances and note that in most cases there is not because of a cancellation fee representing 100% of the price imposed for late cancellation.

The contract does indicate that in certain circumstances a cancellation fee will not be charged. I consider this section of the contract is an attempt to incorporate the implied provisions of Regulation 12 of the Package Travel Regulations 2018, although it is not very clearly set out. Therefore, I think it likely that a court would find that any implied term operates as per Regulation 12 rather than the way it is set out by the supplier. So I turn to Regulation 12 as it appears in the legislation. Regulation 12 says as follows:

- 12.—**(1) *The provisions of this regulation are implied as a term in every package travel contract.*
(2) *A traveller may terminate the package travel contract at any time before the start of the package.*
(3) *Where the traveller terminates the package travel contract under paragraph (2), the traveller may be required to pay an appropriate and justifiable termination fee to the organiser.*
(4) *The package travel contract may specify reasonable standard termination fees based on—*
(a) *the time of the termination of the contract before the start of the package; and*
(b) *the expected cost savings and income from alternative deployment of the travel services.*
(5) *In the absence of standardised termination fees, the amount of the termination fee must correspond to the price of the package minus the cost savings and income from alternative deployment of the travel services.*
(6) *The organiser must provide a justification for the amount of the termination fee if the traveller so requests.*
(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.*

In my view, it is clear that Regulation 12 allows Mrs H to cancel the package for a refund, but also allows the supplier to apply an appropriate and justifiable cancellation fee. I think that due to the time the cancellation was made (on the day of travel) a 100% cancellation fee is likely to be considered appropriate and justifiable here. In my correspondence with SB, I explained to it why I think Regulation 12(7) is relevant here, namely that Mrs H is entitled to

refund of the package following her cancellation because of the unavoidable and extraordinary circumstances occurring at the place of destination.

SB has indicated that Regulation 12(7) does not apply in this scenario, in summary, because at the time of cancellation there were no cases of Covid-19 reported and there were no quarantine measures in place for travellers at the destination. It also notes that flights were not prevented from travelling to the destination at the time of the cancellation either.

I have engaged with both parties on this point prior to making this decision. SB has communicated its views on the matter in light of information that I had found and my initial thoughts on the application of the PTRs. I have also asked Mrs H to look at the points made – and in response she has provided me with more information and clarification about the circumstances leading up to the cancellation including highlighting particular information. I appreciate the dialogue with both parties to date on this matter and thank both for their patience while I have considered the issues.

After thinking about what the parties have said and provided, I consider it is fair and reasonable to conclude that 12(7) does apply to the situation here and that Mrs H is entitled to a full refund without any cancellation fee being imposed by the supplier. I will explain my rationale for this.

Firstly, it is important to note that as far as I am aware (and SB has not indicated otherwise) there is no specific case law or guidance that concludes that for Regulation 12(7) to apply there needs to have been declared cases of a disease/Covid-19 at a destination or that there has to be flight restrictions in place. With this in mind, I don't think these points are reasons for saying that the Regulation definitively does not apply. While I note that 12(7)(b) does refer to the unavoidable and extraordinary circumstances significantly affecting 'carriage of passengers to the destination', I also note that Regulation 12(7)(a) can still apply even if (b) does not, where the circumstances significantly affect the 'performance of the package'.

In considering whether Regulation 12(7) does apply here I note the following factors leading up to the cancellation of the booking on 14 March 2020:

1. Announcements of a global pandemic and warnings by various agencies

In my view it cannot be underestimated that shortly before the trip a global pandemic was announced by the World Health Organisation ('WHO'). The tone of the WHO announcements at the time underlines the severity and urgency of what had become a situation affecting all countries around the world. The WHO website timeline of announcements shows, for example:

"7 Mar 2020

To mark the number of confirmed COVID-19 cases surpassing 100,000 globally, WHO issued a statement calling for action to stop, contain, control, delay and reduce the impact of the virus at every opportunity."

And

"11 Mar 2020

Deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction, WHO made the assessment that COVID-19 could be characterized as a pandemic.

Speaking at the COVID-19 media briefing, the Director-General highlighted how WHO had been in full response mode since being notified of the first cases and "called every day for countries to take urgent and aggressive action".

Recognising that COVID-19 was not just a public health crisis but one that would touch every sector, he restated WHO's call – made from the beginning – for countries to take a whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimize impact.

Emphasising that "we cannot say this loudly enough, or clearly enough, or often enough", he stressed that "all countries can still change the course of this pandemic" if they "detect, test, treat, isolate, trace, and mobilize their people in the response".

He stressed that "the challenge for many countries who are now dealing with large clusters or community transmission is not whether they can do the same – it's whether they will".

SB has said that:

- the WHO has no power to make travel restrictions and is purely advisory; and*
- the WHO continue to issue warnings about Covid-19 so this in itself is not an indicator of the impact on a holiday.*

However, I think the announcements and advice are important in establishing that the whole world was impacted by unprecedented, unavoidable, and quite extraordinary circumstances where immediate and particular action was outlined in order to attempt to mitigate the health dangers to the public. Mrs H has also referred to published guidance by other agencies which also outline the risks and precautions required particularly for those with vulnerable health.

It is also important to note that while the WHO or other agencies may continue to make warnings in regard to Covid-19 the circumstances leading up to Mrs H's trip was very different to the situation now. At the time we were at the start of a global pandemic, cases were rapidly growing (and had already reached 100,000+) and there were no known vaccinations or established protective health measures in place. It was a very different context to where we have got to since and would likely have caused far more alarm and anxiety in travellers such as Mrs H and her partner.

2. Announcements and actions by the destination country

Mrs H has drawn to my attention the details of an announcement on the 14th March 2020 by the president of the government of the destination region that a mandatory quarantine would be introduced the following day. In the article he says that 'as of midnight today...everyone is in isolation. I cannot wait for measures at the national level in view of the imperative to safeguard the public health...'

The quote from the head of the region indicates that the 14-day quarantine period is a form of 'deterrence' for those who intend to travel there. One quote says 'we are going to control

all the hotels and all the houses. Do not have any doubts about this....this is not a joke. This is not a vacation’.

Furthermore, I note that a few days before this on the 11th March 2020 the head of the region announced he was prohibiting the docking of all cruise ships and intensified passenger control upon arrival at the destination.

I will have our investigator send these articles to SB with my provisional findings. I think they are highly persuasive in supporting the finding that regardless of confirmed Covid-19 cases or the departure of flights to the region at the time of cancellation there were clearly measures in place (and imminent measures that would be coming in during the holiday) as a result of the unavoidable and extraordinary circumstances around the global pandemic and which would significantly affect the performance of the package.

3. The expectations and anxiety of the consumer

It is quite clear from what Mrs H has said that the context of the cancellation is one of health anxiety from those announcements by the WHO and governing bodies around the pandemic. Leading up to their trip Mrs H and Mr H were clearly very concerned about the risk to health and had good reason for that due to underlying vulnerabilities in their particular circumstances.

In considering this factor I have taken note of the Competition & Markets Authority (‘CMA’) open letter to the package travel sector dated 13 May 2021. In particular where they discuss the right to a full refund under the PTRs when cancellation occurs in the context of Covid-19. The CMA mention FCDO guidance rather than WHO however they do state:

In particular, in the CMA’s view, the mere fact that the flight is still operating, and the accommodation is open is not, in and of itself, a sufficient basis to deny a consumer a full refund. This is because the CMA considers that organisers need to take into account the consumer’s reasonable expectations of the package taken as a whole when determining whether a right to a full refund has arisen, including expectations as to safety, enjoyment and freedom from anxiety

I think it is clear in the context of the announcements made, regardless of the number of declared Covid-19 cases in the region Mrs H and her partner would have had extremely low expectations as to safety, enjoyment and freedom from anxiety going on their trip. Therefore, I believe this supports the case for the right to a full refund under the PTRs in the circumstances here.

SB has responded to state that at the time of cancellation the destination had no cases compared to the UK at the time which had cases. So the customer might in fact experience less anxiety going to the destination than staying in the UK. However, I don’t think this is a fair or valid argument in the context of the application of Regulation 12(7) as there is no provision in the Regulation as to how the right to a refund free of cancellation fees is affected by the situation in the home country. Furthermore, I do not consider what SB has said to be in the spirit of the CMA guidance which is clearly referring to the reasonable expectations in relation to the package holiday itself rather than the expectations of said package versus other options such as staying at home. I also note that contrary to the comment it made about this SB has also indicated elsewhere that it was understandable that Mrs H chose to take into account published advice and not take the holiday.

summary and conclusion

In conclusion based on the circumstances leading up to and at the time of cancellation, and in the absence of compelling case law which says otherwise, I believe the evidence supports a finding that Regulation 12(7)(a) does apply here. I consider there is clear evidence of unavoidable and extraordinary circumstances present at the intended destination which would have significantly affected the performance of the package and as a result the supplier is in breach of contract by imposing the cancellation fee and failing to refund Mrs H what she paid.

In making this finding, I have also taken into account what occurred shortly after the time of cancellation and highlight that information SB gathered during its first review of the case (in which it upheld it) indicated the plane was actually turned around mid-flight. SB now refute this to be the case – however, I think the situation is far from clear. I also note that in any event there is no dispute that on the 16th of March 2020, the supplier contacted all its customers holidaying at the destination about evacuation and repatriation. In addition, the destination country implemented quarantine requirements after midnight on 14th March 2020. So ultimately, the fears which Mrs H and her partner had about disruption to the holiday were correct. In the absence of definitive case law about the interpretation of Regulation 12 (7) in these circumstances, I consider this to be a relevant factor when determining what is a fair and reasonable outcome. However, I also note that even if SB were to argue that events following the cancellation are not to be taken into account here in the interpretation of the law – I still consider that events leading up to and at the time of cancellation are sufficient to entitle Mrs H to rely on 12(7)(a).

All things considered I think it is fair and reasonable to conclude that Mrs H, by way of the PTRs, is entitled to a full refund of what she paid for the package and that there has been a breach of contract by the supplier which needs to be remedied. Therefore, with Section 75 in mind, SB now should refund Mrs H the payment she made for the holiday (which is £851.98). I also think that SB should pay Mrs H out of pocket interest from the date it declined the claim on 20 October 2020.

Customer service

I think there were delays in handling both the chargeback and the Section 75 claim here by SB. Some of which can be put down to the unprecedented circumstances around the global pandemic which SB is not fairly responsible for. However, with that said, I still think there are things it could have done better and more quickly. For example, from what I can see it clearly caused Mrs H distress when it told her the chargeback was raised outside of the time limits, when she had contacted SB in good time. There also appears to have been breakdowns of communication and expectations not met as to information that would be received and how things would be handled which also have clearly caused frustration and distress.

I understand that SB has offered Mrs H £150 for the distress and inconvenience caused to her. All things considered (and noting that I am unable to make an award for the distress and inconvenience suffered by her partner) I think this is fair in the circumstances. If SB has not paid this already then it needs to do so.

My provisional decision

I uphold this complaint and direct Sainsbury's Bank Plc to refund Mrs H £851.98 and pay her 8% simple yearly interest on this amount calculated from when it declined her Section 75 claim to the date of settlement. It should also pay her £150 for distress and inconvenience if it has not done so already.

I asked the parties for their comments. Mrs H agreed with my findings, but SB did not. In summary, it said:

- It does not believe it can argue the breach of contract I have relied on in order for it to recover costs from the supplier.
- While it accepts the evidence shows there were unavoidable and extraordinary circumstances occurring at the place of destination there is nothing to show this significantly affected the performance of the package.
- The flights and accommodation were still available at the time the customer terminated the reservation and the services within the package were not affected in such a way that rendered them unusable or significantly affected so there was no entitlement for the customer to receive reimbursement.
- No actual restrictive measures were legally implemented preventing the retailer from providing the services – so the potential effects of the pandemic were essentially circumstantial. Restrictions were not imposed at the destination until 22 March 2020 as a news article it has provided shows.
- There were no cases of Covid-19 recorded at the destination when the customer cancelled and no restrictions so their safety and freedom would not be impacted. The decision therefore relies on the customer's enjoyment being affected which is subjective and unmeasurable.

Mrs H was given an opportunity to comment on what SB had said – she disagreed. In summary, she said:

- It is clear that the flight they would have been on was either turned around or passengers were repatriated shortly after arrival.
- SB is mistaken in saying that restrictions were not imposed at the destination until 22 March 2020 – the article it refers to only concerns the establishment of a new quarantine centre.
- A new article has come to light showing that on 13 March 2020 the government of the destination announced it would cease flights from countries where there is an active transmission of Covid-19.

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 thank the parties for their submissions which I have considered carefully. As an informal dispute resolution service I have not commented on every bit of evidence presented but focused on the matters I consider to be at the heart of this complaint.

While SB has indicated my interpretation of the legislation is wrong it has not offered relevant case law, industry guidance or codes of practice to support its position. In the absence of this information I have considered the evidence I have in order to decide what is fair and reasonable in the circumstances. After doing so I am not persuaded to depart from my provisional findings (as copied above).

I would like to emphasise that my findings are not purely based on ‘enjoyment’ as SB has indicated. In considering what is a fair and reasonable I have carefully considered the wording of the PTRs, while factoring in the specific factual circumstances here alongside relevant industry guidance (such as that issued by the CMA).

SB appears to accept that the circumstances occurring at the place of destination were ‘*unavoidable and extraordinary*’, so I do not think it necessary to focus on this. I consider this aspect of Regulation 12(7) is satisfied for the same reasons I have given in my provisional decision (as copied above).

What appears to be the remaining point of contention is whether such circumstances significantly affected the performance of the package. I consider that I have sufficiently dealt with this in my provisional decision – however, I will briefly go over some key points here in response to SB’s latest comments.

SB has said the package would not be significantly impacted as flights were still taking off and accommodation was still available – but there is nothing in the legislation which states the requirements of Regulation 12(7) will not be satisfied in these circumstances. Furthermore, as I have stated in my provisional findings the CMA guidance indicates the opposite:

‘In particular, in the CMA’s view, the mere fact that the flight is still operating, and the accommodation is open is not, in and of itself, a sufficient basis to deny a consumer a full refund.’

But in any event, and as I have said in my provisional decision– in determining what is fair and reasonable it doesn’t appear to have been disputed by SB previously that the supplier contacted Mrs H and Mr H shortly after their flight was due to land, as part of an initiative to repatriate its customers. In any event, if SB is now disputing this it has not offered persuasive evidence to the contrary. So (along with the mandatory quarantine requirements I have discussed elsewhere) it is evident that even if the plane was not turned around the planned holiday was significantly impacted in any event due to the pandemic, therefore satisfying Regulation 12(7).

I also note that once again SB has referred to there being no Covid-19 cases at the destination at the time of cancellation. Mrs H has disputed this. But in any event, as I have said in my provisional decision, I do not consider there to be persuasive information to show that an absence of declared cases at the time of travel would prima facie prevent Mrs H from claiming under Regulation 12 (7).

At the time of cancellation it was, in my view, clear that the circumstances of the pandemic significantly affected the performance of the upcoming package. I refer back to my provisional findings about the announcements leading up to when Mrs H and Mr H were due to travel. In particular the announcement introducing a mandatory quarantine for all travellers set to take place from midnight on 14th March 2020. For emphasis:

The quote from the head of the region indicates that the 14-day quarantine period is a form of ‘deterrence’ for those who intend to travel there. One quote says ‘we are going to control all the hotels and all the houses. Do not have any doubts about this....this is not a joke. This is not a vacation’.

SB has indicated that there were in fact no restrictions at the destination until 22 March 2020 and has referred to an article to support this. However, I believe SB is mistaken here – as Mrs H has pointed out – this article indicates that a new mandatory quarantine centre has been established at the destination as part of existing quarantine measures already in place.

It does not indicate that the restrictions I previously referred to were not already in place. Overall I am satisfied from the evidence available that a mandatory quarantine at the destination was announced on the day Mrs H was due to travel and started from midnight on 14th March 2020. I am also persuaded that such mandatory restrictions (particularly considering the quote from the head of the region) significantly impacted their upcoming holiday dates. Moreover, as above, it appears that the package was ultimately curtailed.

I also note Mrs H has recently referred to the media announcement on 13th March 2020 (a day before travel) of imminent flight restrictions to the destination due to the pandemic. I have seen this article and note it reinforces SB's initial finding that the plane was turned around in mid-air. But in any event— this announcement clearly adds to the overall picture of measures and restrictions that were being put in place prior to the holiday commencing.

All things considered, at the time the booking was cancelled it was already clear that the travel to the destination and the holiday itself would be significantly impacted by the circumstances around the pandemic. I think this in itself is enough to satisfy the requirements of Regulation 12(7) even setting aside the events which then unfolded during the period of the intended holiday.

When considering whether Regulation 12(7) applies here and what is fair and reasonable in the circumstances I have also taken into account what relevant guidance from the CMA has said namely that *'organisers need to take into account the consumer's reasonable expectations of the package taken as a whole when determining whether a right to a full refund has arisen, including expectations as to safety, enjoyment and freedom from anxiety'*.

In doing so I still consider that regardless of the presence of Covid-19 cases, or the absence of cancellation of flights/accommodation there was enough information presented at the time by authorities including the WHO (of which I have referred to in my provisional decision) and the local government of the destination to create extremely low expectations around safety, enjoyment and freedom from anxiety on the holiday (once again noting here the health vulnerabilities which Mrs H has mentioned and the overall context of the unfolding pandemic at the time).

I have carefully thought about what SB has said – and note that its view differs from mine. However, in the absence of persuasive case law or other supporting information from SB and factoring in the CMA guidance and overall factual circumstances here I consider that my findings (incorporating my provisional findings as copied above) are ultimately fair and reasonable in the circumstances.

Putting things right

For the reasons I have explained I consider Mrs H is able to rely on Regulation 12(7) of the PTRs and therefore the supplier is breaching its contract with her by failing to refund her in full. Considering the requirements of Section 75 on SB it is fair and reasonable for it to put said breach right in accordance with my direction below.

My final decision

I uphold this complaint and direct Sainsbury's Bank Plc to refund Mrs H £851.98 and pay her 8% simple yearly interest on this amount calculated from when it declined her Section 75 claim to the date of settlement. It should also pay her £150 for distress and inconvenience if it has not done so already.

If SB considers it should deduct tax from my interest award it should provide Mrs H with a

certificate of tax deduction so she may claim a refund from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 28 March 2023.

Mark Lancod
Ombudsman