

The complaint

Mr H complains Creation Financial Services Limited (“Creation”) didn’t treat him fairly when he asked for assistance with obtaining a partial refund for a holiday which he had paid for using his Creation credit card.

What happened

I issued a provisional decision on Mr H’s case on 7 June 2023 in which I outlined the background of the complaint and informed both parties of my provisional findings and conclusions. Because of this, I don’t intend to go into detail in this final decision except where necessary.

The circumstances leading up to the complaint could be summarised as follows:

- Mr H used his Creation-issued credit card to pay for a package holiday on a Greek island with a company I’ll call “J” for 18 August 2021 to 28 August 2021. The holiday cost a total of £2,579 and Mr H’s wife, Mrs H, was the person who booked it.
- Mr and Mrs H found the hotel to be very unsatisfactory. It had been booked on an all-inclusive basis and was advertised on J’s website as having a wide range of services and facilities such as multiple bars and eating places, a gym, a spa and various types of entertainment. On arrival Mr and Mrs H discovered the only things on offer were one bar, a buffet and swimming pools, and for several days of their stay they also had no air conditioning.
- A complaint was made in-resort to J’s representative. Mr and Mrs H say the initial narrative was that the hotel was closing early for the season for refurbishment and this was why there were limited facilities, but this later changed to COVID-19 related restrictions being the reason why things were closed or unavailable. Mr and Mrs H didn’t believe this changed story because it wasn’t consistent with what they were seeing at other local establishments.
- Ultimately J rejected Mr and Mrs H’s complaint when they returned home, stating they were not responsible for the hotel’s COVID restrictions. Mr H then approached Creation but they rejected his claim for a refund as well, and refused to change their position when he complained about this decision.

The complaint was subsequently referred to this service. One of our investigators concluded the hotel had been misrepresented and Mr H should have got 30% of his money back for the holiday. Due to section 75 of the Consumer Credit Act 1974 (“CCA”) he considered Creation could be found liable to pay this to Mr H.

Creation didn’t agree with this, arguing that the advertising on J’s website had warned that things could be different due to COVID-19, and that the information about the hotel was subject to change. It also insisted that the reason why the various facilities and services had been unavailable was due to the hotel needing to put in place measures to comply with local and national government guidelines.

No agreement could be reached and the case was passed to me to decide. In my provisional decision I noted there were two routes via which Mr H could attempt to claim redress from Creation in respect of the holiday with J. These were section 75 of the CCA, and the mechanism known as a “chargeback”.

Covering section 75 first, I noted there was an obstacle to Mr H being able to claim in respect of both his and Mrs H’s shares of the holiday. This was because I considered, bearing in mind general legal principles, that Mr H would be able only to claim for *his* losses associated with the holiday. Mrs H could potentially have been able to claim for both of them because she had been the person who booked and had a special status under the contract with J which enabled her to claim on behalf of other members of the party. But she was not the person who had paid with a credit card. I concluded Mr H could claim only in respect of his half of the holiday.

I went on to note that the Package Travel Regulations 2018 (“PTRs”) defined Mr H as a “traveller” under the contract with J. I then covered the further implications of the PTRs:

“The effect of the PTRs is to make it a term of any package travel contract that the organiser will be liable to the traveller for the proper performance of the various travel services included in the contract, such as the provision of accommodation, regardless of whether these services are delegated to third parties such as a hotel. If any of the travel services are not performed in accordance with the contract, then the organiser must remedy the situation within a reasonable period. If they fail to do so, then contractually the traveller is entitled to a price reduction reflecting the period of non-conformity.”

I observed that everyone seemed to agree (or at least, they didn’t deny) that the hotel hadn’t been as described on J’s website. But while Mr H considered this unacceptable, Creation was arguing that it didn’t matter because of the underlying reasons – COVID-related safety measures – and that it had been highlighted on the website that this could be the case.

Having studied the advertising material provided to Mr and Mrs H before the booking was made, I was not persuaded by Creation’s arguments on this point, concluding:

“In my view the disclaimers are vaguely and broadly worded and all they really say is that some things might be different. I don’t think they served as an adequate warning that only the pools, a buffet and a single bar would be available. I think it’s more likely that a reasonable consumer would consider the disclaimers would refer to minor changes to services such as reduced capacity to allow for social distancing, or the wearing of face masks. Had they been intended to warn of significant differences between the advertised facilities and amenities, and what was actually open and available, I’d have expected this to be made much clearer.

This also has to be understood in the context of the COVID-19 rules in place at the holiday destination at the time. The destination country (Greece) did not have any restrictions in place which I have been able to find which would have prevented the hotel from offering the advertised facilities and amenities to guests. I note that the specific island Mr H was visiting was subject to more restrictive rules such as an overnight curfew and a ban on music at all venues (including restaurants and bars), but these restrictions ended on 18 August 2021, the day of Mr H’s arrival. I don’t think that even if a reasonable consumer had read the disclaimers on the webpage on J’s site alongside the COVID-19 rules in place at the destination, that they’d have reasonably taken this to mean there would be significant differences between the advertised facilities and amenities, and the reality.

In light of the above I am also unconvinced by the hotel and J’s claim that the unavailability of facilities and amenities was due to the need to observe COVID-19 related restrictions at

Mr H's holiday destination. Mr H says he was initially told by staff at the hotel and by J's resort representative that the hotel was closing early for the season due to a change in ownership and/or impending renovation, and this was why various things were unavailable. This seems to me to be more likely and is supported by evidence I've been able to find: that the hotel reopened under a new name in June 2022 after a 5 million euro refurbishment."

I went on to conclude further:

"Based on the description of the hotel which appeared on J's website, I think proper performance of the accommodation part of the package travel contract would have included the provision of the various facilities and amenities which were advertised there. These were not provided and so there was a lack of conformity, to use the term which appears in the PTRs. Mr H reported this lack of conformity but J failed to remedy it within a reasonable time as was required, meaning he is entitled to a price reduction to reflect that period of non-conformity (which was the duration of the entire holiday)."

On the question of what would constitute a fair price reduction, I started by noting that in general a price reduction should reflect the difference in value between what someone paid for and what they had received. I observed that this could be difficult to quantify in contracts for services and that the courts had discouraged taking too fine-toothed an approach to such calculations.

I noted that J priced its holidays per person, so Mr H's half of the holiday should come to exactly half the amount paid. This had not been broken down into flights, accommodation and transfers, but market research indicated the accommodation had likely made up about £1,700 of the price. Mr H's share was therefore £850. I concluded Mr H should receive a refund of half of this, reasoning:

"The accommodation in this case fulfilled what I would consider to be its main purpose – to provide Mr H with a place to stay overnight and rest during his holiday – albeit for a number of days this was uncomfortable due to the broken air-conditioning. However, this was not a no-frills hotel which only had the function of putting a roof over Mr H's head; it was a resort in a popular holiday destination, booked on an all-inclusive board basis, and intended to provide a number of other facilities and services for Mr H to enjoy during his stay. I think this was a significant part of the hotel's overall offering to holidaymakers, and would have been factored into the price. Given most of the additional facilities and services were not provided, I think a fair price reduction would equal 50% of the price of the accommodation element of the booking."

I noted Mr H, due to the provisions of section 75 of the CCA, could claim the same amount from Creation – £425.

I then went on to consider whether a chargeback could have resulted in Mr H obtaining a refund in respect of the holiday. I will simply quote what I said in my provisional decision on this subject in full:

"Chargeback is a mechanism for claiming a refund (in full or in part) of a payment made on a plastic card. Chargebacks are subject to rules set by the card scheme to which the card belongs (in this case, Mastercard). These rules contain provisions around what sort of disputes a person can validly raise a chargeback for, the kind of evidence required to support a chargeback, the time limits involved, and so on. There is no guarantee that a chargeback will succeed, and it can be opposed or defended by the financial institution which received the card payment, who may not agree that the chargeback is valid. If no side to a chargeback is willing to concede then the card scheme itself can be asked to make a ruling by a process known as arbitration."

I would expect a credit card provider, approached by a customer looking to dispute a card payment for goods or services, to consider whether it had valid grounds for raising a chargeback, and to do so if it would appear that a chargeback would both be compliant with the card scheme rules and have reasonable prospects of succeeding.

Importantly, Mr H's contractual relationship with J, which as I've explained above affects the amount I think he is able to claim in respect of the holiday under section 75 of the CCA, isn't something which is mentioned in the card scheme rules as something which would limit the amount he could claim as a partial refund. The card scheme, in guidance it issued in May 2020, noted that chargebacks are not a way of determining a dispute according with national laws, and that instead it was the card scheme rules which would decide the outcome of a chargeback case.

A chargeback can normally be pursued when goods or services have been purchased but they are not as described. The hotel in this case was not as described and I have already covered that issue in detail earlier in this decision. Creation decided not to pursue a chargeback. It said this was because Mr H had used the flights and stayed at the hotel for the duration of the holiday. I've been unable to find any reference in Mastercard's chargeback rules to this being a scenario where a chargeback would not be valid, and Creation hasn't provided any further explanation to allow me to investigate this point further.

In light of this, I can see no reason why a chargeback couldn't have been attempted. There was an obvious disparity between the accommodation and facilities paid for, and what was provided, and this was accepted by all parties. So it would seem to me that a chargeback ought to have had a reasonable prospect of succeeding. And while I can't know exactly what amount of money would have been refunded via a chargeback, in my view Creation is on the back foot here because of its failure to attempt one, which has unfairly put Mr H in a position where the opportunity to recover any funds in this way has been lost.

In the circumstances, taking into account the likelihood that a chargeback would have been successful for a partial (but unknown) amount, and that it would not have been restricted to just Mr H's half of the holiday, I think it would be fair and reasonable that Creation pays £425 to Mr H in respect of this, bringing the total amount to be paid (in respect of both the section 75 claim and the chargeback) to £850, which is 50% of the total accommodation cost for the holiday."

Overall, I concluded Creation should pay Mr H £850 along with compensatory interest.

The responses to the provisional decision

Mr H replied to the provisional decision to say he would accept it. Creation didn't explicitly say whether or not it would accept the decision but made it clear that it disagreed with it. I have summarised its key points as follows:

- It didn't agree that a chargeback would have been successful. It said that in its experience a chargeback would have failed because Mr H had remained at the hotel. It reiterated that this is why it had not pursued a chargeback.
- Mr H had been warned that not all facilities would be available, and this was something I had accepted in my provisional decision.
- It didn't think there was evidence to support a contention that the reason some of the hotel's facilities and services were unavailable, was due to an upcoming refurbishment. It was just as likely that the hotel's own measures to comply with COVID-19 rules were the cause of facilities and services being unavailable.

The case has now been returned to me to review once more before making a final decision.

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.

There are essentially two points which remain in dispute in this case, so I have focused on these in this final decision.

The first is Creation's point about the chargeback being unlikely to be successful. It has relied on its experience in dealing with chargebacks to support this point.

I understand Creation's point of view and would be in agreement with it, if it could highlight either specific examples where Mastercard had ruled against it for the reasons it has given, or passages from the Mastercard rules or guidance which support what it has said.

I note that the *Visa* card scheme rules do state that a chargeback can only be made for the unused part of a service. But Mr H's card was not a *Visa* card, it was a Mastercard, and I have been unable to find any similar restriction mentioned in the Mastercard rules.

Because Creation hasn't provided persuasive evidence that a chargeback would have been unsuccessful here, my conclusions on this issue remain as they were in my provisional decision.

The second point of disagreement has two elements – the first is the question of whether or not Mr H was warned that certain facilities, amenities or services would be unavailable prior to booking, while the second is the question of whether the ultimate unavailability of these things was due to impending refurbishment works or COVID-19 measures.

I do not think there is much I can add to my analysis, quoted above, of the warnings given on J's website. I simply do not think they are specific or detailed enough to have been sufficient warning to Mr H that a substantial proportion of the hotel's facilities, services and amenities would be unavailable during his stay.

Creation has suggested the differences in the hotel stay could well have been down to the measures taken by the hotel in connection with COVID-19. I outlined in my provisional decision why I thought this was less likely than the alternative – which was that the hotel was closing early for the season for refurbishment. My reading of the pandemic restrictions in force at the time of the stay is that they would not have prevented the hotel from providing the advertised facilities to its guests.

I think perhaps the point Creation is making is that the hotel could have taken a while to get back to normal service after the lifting of restrictions, but Mr H's account of events appears to me to have the ring of truth to it. It's been detailed, consistent and measured, and also consistent with the available evidence – which is that the then-current pandemic restrictions would not have prevented the hotel from being able to offer the advertised facilities, and that the hotel did in fact close for refurbishment after his stay. On balance I think it's more likely that what he says he was told initially by J's representative was the correct story: that the lack of facilities, amenities and services at the hotel was related to its impending closure for refurbishment, rather than because it had been forced to change its offering due to pandemic-related restrictions.

In light of the above, I see no reason to depart from the findings I reached in my provisional decision, so it follows that I conclude Creation, in declining to pursue a chargeback or

honour a section 75 claim for Mr H, treated him unfairly. I remain of the view that a pragmatic way of settling Mr H's complaint would be for Creation to pay him £850, reflecting the amount he could potentially have recovered via a chargeback and/or a correctly-honoured section 75 claim.

My final decision

For the reasons explained above, including the summaries and quoted extracts from my provisional decision, I uphold Mr H's complaint and direct Creation Financial Services Limited to take the following actions:

- A) Pay Mr H £850 in connection with its failure to attempt a chargeback or honour a valid claim under section 75 of the CCA.
- B) Add 8% simple interest per year* to the amount mentioned in A), calculated from the date it first told Mr H it was unable to obtain any refund for him, to the date the amount mentioned in A) is paid to him.

*If Creation Financial Services Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr H how much it's taken off. It should also give Mr H a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 2 August 2023.

Will Culley
Ombudsman