

The complaint

Mrs M complains that The Royal Bank of Scotland Plc ("RBS") did not treat her fairly in relation to a complaint she made about a holiday she paid for using her RBS credit card.

What happened

Mrs M booked a package holiday with a third party travel agent I'll call "O". The package holiday included, flights, an all-inclusive stay in a hotel for two weeks and transfers. Before she booked the holiday Mrs M checked out the hotel on O's website. According to Mrs M, the hotel was described as having both a kids' club and evening entertainment. Mrs M has young and active children so these features were important to her, so much so she tells us she would not have booked the holiday but for this.

Therefore, Mrs M was extremely disappointed to find that when she got to the hotel it no longer had a kids' club and neither was it providing evening entertainment. Rather it provided water aerobics and darts and not every day. Mrs M considers that the holiday was misrepresented to her and that her contract with O was breached. Moreover, Mrs M said that her whole family was upset due to the absence of the kids' club and the evening entertainment. As a result Mrs M wanted a full refund so that they could repeat the holiday again with the facilities they'd wanted and paid for.

Mrs M tried to complain to "O" whilst on holiday, but it was hard to get hold of and in the end she got nowhere. Therefore Mrs M looked for another way to get her money back. Mrs M turned to RBS because she'd used credit provided by it to pay for the holiday. This gave her the right to potentially claim a refund from RBS under Section 75 of the Consumer Credit Act 1974 ("Section 75").

RBS accepted that it was potentially responsible to Mrs M under Section 75 for any misrepresentation or breach of contract in relation to her contract with O. However, it did not agree there had been any misrepresentation or breach of contract. Rather it indicated by staying at the hotel for the entire two weeks Mrs M forgave any breach and any misrepresentation was not material to her.

Moreover, RBS said it might also have been able to get a refund for Mrs M using a process known as chargeback. But it said this route was not open to it because.

"We have no right to chargeback the payment because the facilities advertised are part of the overall holiday you paid for and are not charged separately, therefore by remaining at the hotel for the whole duration of your stay you have accepted the service and facilities offered so we are unable to assist in raising any dispute."

That said, as a goodwill gesture only, that is without accepting any liability RBS offered to refund 20% of the total cost of the holiday, that is £546.23. Mrs M rejected this offer.

Dissatisfied with RBS's response, Mrs M complained to our service.

One of our investigators looked into Mrs M's complaint. She concluded that RBS had already made a fair offer and therefore she recommended it should pay Mrs M the £546.23.

RBS accepted our investigator's recommendation, Mrs M did not. In rejecting our investigator's recommendation Mrs M repeated her earlier stance.

Mrs M asked that an ombudsman review her complaint.

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.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. Rather, I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulator's rules, guidance and standards and codes of practice and (where appropriate) what I consider to have been good industry practice at the time.

RBS had two possible routes for obtaining a refund for Mrs M, a claim against itself under Section 75 or by raising a claim under the chargeback process. I'll look at each of these options in turn.

Section 75

The general effect of Section 75 is that if Mrs M has a claim for misrepresentation or breach of contract against the supplier she can also bring a like claim against RBS provided certain conditions are met.

I'm satisfied that in the circumstances the conditions are met, in so far as O's responsibility to Mrs M was not simply as a travel agent. Rather, it had further obligations to her. This is because in relation to the booking with O there are provisions other than Section 75 that are relevant. In particular the Package Travel Regulations 2018 ("PTRs").

The effect of the PTRs is to make it a term of any package travel contract that the organiser (here that is O) 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.

Further the PTRs provide that where information relating to key things about the holiday is provided to the consumer it becomes part of the contract and must not be changed unless the traveller agrees otherwise. Also the Consumer Rights Act 2015 ("CRA") has similar provisions regarding implied terms about descriptions. The CRA is also relevant to this complaint. This means the description of the hotel including its features that appeared on O's website could have formed a part of the contract with Mrs M.

However, Mrs M and RBS disagree about whether there was any misrepresentation or breach of contract. So I've got to look at this closely. Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

In this instance misrepresentation means a false statement of fact that induced Mrs M to enter into the contract. I've seen the description of the hotel that was on O's website there is mention of both a kids' club and entertainment. I think this was both a representation and a term of the contract. That said there is no mention of evening entertainment.

Further, Mrs M has explained why it was particularly important to her that there was appropriate activities for her children. And I am persuaded in the circumstances that this was so important to her that the fact that a kids' club and entertainment was part of the offering was one of the reasons why Mrs M booked the holiday.

I can see that Mrs M complained to O about the facilities while she was on holiday. O has not said whether there was a kids' club or entertainment or not. RBS has seemingly not investigated this point it merely suggests since Mrs M did not abandon her holiday she was thereby accepting the holiday "as was" and therefore gave up any rights she may have had to complain about misrepresentation or breach of contract, but I don't see it like that. Rather, I think the fact that Mrs M was straight on the phone to O to complain while on holiday shows she was very much not accepting the situation. I'm satisfied in these circumstances that no kids' club was provided, and this was both a misrepresentation and a breach of contract. However, I don't think that I can fairly and reasonably say that water aerobics and darts did not constitute entertainment, so Mrs M did not get what she paid for in this respect.

That said, Mrs M seems to think that the misrepresentation and the breach in relation to the kids' club ought automatically mean she gets a full refund or a price reduction that equates to a full refund. Nothing in law says that is the case. And neither do I think that would be fair or reasonable. If I were to say RBS had to refund her in full for the holiday, that would be to wrongly imply she received nothing of value, whereas she did get and use the flights, the transfers and the accommodation and the full board.

In the alternative Mrs M indicates the flights and the transfers were consequential losses flowing from the breach of contract. But I think as a question of both fact and law that is not the case. Therefore I've no fair and reasonable basis to ask RBS to refund her in full on this basis either.

Also in the alternative Mrs M asks that RBS refund her the total cost of the holiday so she has sufficient money to take her family on holiday again as she can't afford to do this again without the refund. But that is not a basis on which I can properly ask RBS to make an award.

I do think some redress is appropriate and this is where things become less clear cut. It's difficult here to be precise about the exact value of the service that wasn't provided. And in many ways it's more to do with the resultant inconvenience and loss of enjoyment rather than simply the monetary value. However, I do think when I think about redress here I should limit myself to looking at what Mrs M paid for the hotel, because as I've already said, Mrs M did get the flights and the transfers she paid for. RBS offered 20% of the overall cost (minus the small deposit Mrs M paid). The £546.23 represents more like 40% of the cost for the hotel. Given that Mrs M used the rooms and enjoyed the hotel on an all-inclusive basis for two weeks, I think RBS's offer is fair and reasonable in all of the circumstances. I think Mrs M did experience both inconvenience and loss of enjoyment due to the lack of the kids' club. I can only ask RBS to compensate her for her inconvenience and loss of enjoyment only. This is because she is the only eligible complainant in relation to this complaint. I'm satisfied that RBS's offer also compensates Mrs M for her inconvenience and loss of enjoyment. I'll add for completeness its offer goes further than I would have gone.

I recognise Mrs M is unlikely to agree with my analysis for not agreeing that she is entitled to a full refund due to misrepresentation and breach of contract. But I've explained above why I don't agree I've any fair and reasonable basis to ask RBS to refund the entire amount she paid for the holiday.

Chargeback

I've also thought about chargeback. Chargeback is a way in which payment settlement disputes are resolved between card issuers and merchants. They are dealt with under the relevant card scheme rules.

In certain circumstances the process provides a way for RBS to ask for a payment Mrs M made to be refunded. Those circumstances include where goods or services aren't supplied or as described/misrepresented by the company Mrs M paid.

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. As part of its approach I'd also expect the credit card provider to select the right chargeback reason code.

Therefore it follows that if I am to order RBS to refund all or part of the cost of the holiday, I must be satisfied that it acted incorrectly in the way it made a chargeback claim under the chargeback regulations and that but for that mistake the complaint would have succeeded. I've looked at what RBS did, and the relevant regulations and I think RBS acted correctly. I'll explain why I say this below.

RBS has told us it was precluded from raising a chargeback because Mrs M used the services, but it has not sent us information from the card scheme operator to back up its stance. Such information should be available to it as far as I'm aware. In the absence of this information I don't think it is appropriate to rely on what it says about this.

However, whilst I was prepared to accept on the balance of probabilities that the kids' club was not provided I am aware that the card scheme rules have different requirements, and I don't think those requirements would have been met here on balance. In any event, I find on balance that even if it was accepted that the kids' club was not provided I don't think it likely this would have led to a full refund. I say this because it is likely O would have defended this claim. And even if the chargeback had gone to the next stage (i.e. arbitration) I don't agree this would likely have led to a full refund of the entire cost of the holiday.

It follows that I don't uphold this part of Mrs M's complaint.

My final decision

My final decision is that The Royal Bank of Scotland Plc has already made an offer to pay £546.23 to settle the complaint and I think this offer is fair in all the circumstances. So my final decision is that The Royal Bank of Scotland Plc should pay Mrs M £546.23

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 23 November 2023.

Joyce Gordon
Ombudsman