

The complaint

Miss L complains about the way Marks & Spencer Financial Services Plc trading as M&S Bank ('MSB') handled a claim she made to it.

What happened

The background facts are well known to the parties so I will cover these briefly and focus on giving reasons for my decision.

Miss L paid a hotel ('the supplier') for two accommodation bookings for a stay involving her and a group of friends and family. She paid a total of £2,849.24 for it using her MSB credit card.

Miss L says the stay didn't go ahead due to a fire at the hotel and the Covid-19 pandemic. She says there were attempts to reorganise but the hotel stopped responding to her messages and appears to be permanently closed.

Miss L raised a dispute with MSB for a refund. It considered the matter and said it was unable to determine that a breach of contract or misrepresentation had occurred. It also said that it was only responsible for the cost of Miss L's stay – not the other guests. It offered her a partial refund of around £130 and said this was a goodwill offer.

Miss L brought a complaint about the way MSB handled the claim. Our investigator upheld the complaint looking at this in light of Section 75 of the Consumer Credit Act 1974 ('Section 75') and the chargeback scheme.

MSB disagrees. In summary, it says:

- Miss L was contracting with the supplier so it is only her portion of the booking costs that can be returned and the supplier's liability doesn't extend to other members of the party who she paid for;
- Section 75 only covers the main cardholder's financial loss – so it maintains that it will only cover Miss L's loss; and
- in addition the terms and conditions of the supplier are about Spanish law.

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.

My role here is to resolve disputes informally – so although I have read and considered the submissions of the parties I will only comment on the matters I consider central to this complaint.

It is important to note here that MSB is not the supplier of accommodation services. So in

deciding what is fair and reasonable I consider its role as a provider of financial services. In that respect I consider chargeback and Section 75 to be relevant.

Chargeback

The chargeback scheme is one way in which MSB might have been able to recover Miss L's money. It isn't guaranteed to succeed and is governed by the strict rules of the card scheme. However, it is often good practice to raise one where there is a reasonable prospect of success.

In determining what is fair I have considered the relevant provisions of the Mastercard chargeback scheme.

I note that Miss L had provided MSB evidence to show that there was a fire at the hotel and that it never re-opened. I also note that it would have been quite easy for MSB to discover more about this as well. So prima facie it would appear Miss L did not get the service she paid for and a chargeback reason of 'service not provided' would be relevant.

Flight cancellations around the pandemic did cause Miss L to request her original booking date to be changed. However, I note that:

- the hotel would not have been available for use at that time in any event; and
- the hotel offered Miss L a no penalty change of dates for the future in any case – which it wasn't able to honour.

So even with the considerations around the pandemic in mind I think this is a fairly clear case of a service not being provided by the supplier.

I don't see where MSB attempted a chargeback. It indicates a chargeback would have been out of time here. However, I don't think it would have been. I say this with regard to the Mastercard Covid-19 guidance which effectively extended chargeback rights in cases where a consumer is offered a reasonable alternative for a cancelled service. This could be through a voucher or re-booking promise.

I appreciate that in circumstances like this the fire at the hotel appears to have made the service unavailable regardless of the Covid -19 difficulties that came in to play for Miss L later on - so it isn't entirely clear how the Mastercard guidance would apply here. However, in the absence of evidence to the contrary (which MSB has not provided) I don't see why this guidance should not be read in favour of Miss L here.

MSB appears to have focused on a long stop time limit being exceeded from when the transactions were made to when Miss L got in touch to raise a claim in early February 2022. However, for this reason code (service not provided) the relevant time limit appears to be 120 days from the last anticipated date of the service. In this case Miss L would be in time if her upcoming re-booking for April 2022 (which she wasn't able to use in the end) was taken into account in accordance with Mastercard guidance.

So overall, I think MSB should have pursued a chargeback here. And had it done so I think Miss L had a strong case for a service not being provided. I don't think the supplier would likely have defended it successfully (if at all). As a result I think this complaint succeeds based on the chargeback claim alone – and as Miss L paid for the full booking cost on her credit card she should have fairly got it all back via MSB pursuing this route.

However, even if I were mistaken about chargeback I think Miss L's claim succeeds via

Section 75.

Section 75

Section 75 in certain circumstances can allow Miss L to make a '*like claim*' against MSB for a breach of contract or misrepresentation by a supplier of goods or services paid for using her credit card.

There are certain requirements that have to be in place for Miss L to have a valid claim. I note she arranged the booking and contracted with the supplier as the lead booker. The booking paperwork reflects this. So I am satisfied the correct agreement is in place for a valid claim against Nationwide.

I am satisfied that on balance the supplier breached its contract with Miss L for the booking. In that it had agreed to provide accommodation for her and her guests – but it failed to do so. I have detailed the reasons for this above – but in brief it appears that a fire at the hotel and its subsequent permanent closure is the underlying reason why the service was never provided (including any re-arranged dates).

My impression is that MSB now accept there is a breach of contract by the supplier. But it states that Miss L is not able to recover the full booking costs – and that doing so is contrary to Section 75 as it is not her financial loss.

The contract from the supplier says the party it is entering into a legally binding contract with (which it refers to as 'you') is the person arranging the booking. Here that person is clearly Miss L who arranged the booking and appears on the contract as lead booker. After considering the wording of the supplier's contract nothing in it persuades me that Miss L is not contracting for the fulfilment of the entire booking here. Therefore, I am persuaded that she would have a right to take the supplier to court in respect of problems with the booking.

I agree with MSB in one respect - Miss L is unlikely to have been able to recover costs against the supplier if they relate to losses she hasn't suffered. However, here the starting point is that Miss L paid for the entire booking upfront on her card. Therefore, prima facie the financial loss should the booking not be fulfilled is entirely her own. I do accept that Miss L has private arrangements with friends and family who have paid her for their portion of the booking. This can create a question mark over whether she will be recovering funds that she has been reimbursed for. However, because the stay did not go ahead it follows that Miss L will have to pay her friends and family their money back – and she has confirmed this to be the case in her correspondence. Therefore, I don't believe it is reasonable to restrict her losses here in the way MSB has suggested.

I note MSB has pointed out that Spanish law applies to the contract between the supplier and Miss L. However, it has not articulated how that would make a difference here to what appears to be a straightforward case of breach of contract for a service not being provided. Therefore, I don't consider this makes a difference to my findings in regard to Section 75 or chargeback here.

Putting things right

In summary I am persuaded that a chargeback would have likely succeeded. But as a result of the supplier's breach of contract Miss L is out of pocket for the full cost of the two bookings. So, in any event this needs to be refunded to her in light of the provisions of Section 75.

In the particular circumstances I think it fair that Miss L's card should fairly be re-worked from

1 March 2022 which is soon after the date MSB determined that a chargeback claim would not succeed. It should include out of pocket interest if applicable from this point.

My final decision

Marks & Spencer Financial Services Plc trading as M&S Bank should rework Miss L's credit card as if it had credited the £2,849.24 refund to her card on 1 March 2022. If this results in a credit balance it should pay this to Miss L including 8% simple yearly interest calculated from the date of said credit balance to the date of settlement.

If MSB considers it has to deduct tax from any interest award it should provide Miss L with a certificate of tax deduction.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss L to accept or reject my decision before 30 November 2023.

Mark Lancod
Ombudsman