

The complaint

Mrs E complains that Tesco Personal Finance PLC trading as Tesco Credit Card ("Tesco") won't reimburse money she paid for a cruise holiday that she cancelled.

Background

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought Tesco should resolve it. I've attached a copy of my provisional decision, which forms part of this final decision. I invited both parties to let me have any further comments they wished to make in response to my provisional conclusions.

What happened

Mrs E had booked a holiday for herself and her daughter involving flights and a cruise with the package organiser and supplier "N". Mrs E paid an initial deposit of £100, with the balance of £2,680.44 paid around three weeks later. She used her Tesco credit card to make payment.

The holiday was scheduled to take place in late July 2021. It might be recalled that due to the Covid-19 pandemic, a number of companies in N's field had for some time been forced to suspend their cruise operations. By July N had resumed operations. But Mrs E was understandably concerned about going ahead with the holiday. She contacted N with her concerns, prompted by her understanding of Foreign, Commonwealth and Development Office ("FCDO") advice on cruise ship travel, by exclusions applicable to her travel insurance, and by warnings issued by her daughter's employer indicating the potential for disciplinary action. She sought to cancel her trip and receive a full refund.

N rejected Mrs E's request. It disputed that the FCDO advice could be considered a warning against travel. Mrs E responded citing conversations she'd had with the Association of British Travel Agents ("ABTA") that supported her understanding. But N maintained its position. Mrs E was dissatisfied with the situation and she subsequently approached Tesco to see if she could get her money back.

Tesco said it considered whether to raise a chargeback against N, but decided against it as the claim was outside the relevant timeframe in the card scheme rules. Tesco says it also considered whether it was liable to Mrs E under connected lender liability provisions set out in section 75 of the Consumer Credit Act 1974 ("section 75"). In broad terms this provides for Mrs E to bring a like claim either in misrepresentation or in breach of contract as she would be able to bring against N. Tesco didn't think it had a liability under section 75. It said the package went ahead and Mrs E could have made use of it. The bank concluded there hadn't been a misrepresentation or a breach of contract, and declined to uphold Mrs E's complaint.

Our investigator didn't think Tesco had dealt with Mrs E unfairly, for broadly similar reasons as previously mentioned. She noted that while Mrs E had questioned the time limit on chargeback, the bank had been correct to say it was out of time to make a claim by this means.

The investigator didn't think Tesco had wrongly handled the section 75 aspect of the claim either. She said the FCDO advice at the material time didn't place any restriction on travel to the area where Mrs E's cruise was taking place. And while Mrs E had provided a copy of an open letter issued to the travel industry by the Competition and Markets Authority ("CMA"), the investigator didn't think she could take this into account in a complaint about Tesco. She didn't propose upholding the complaint.

Mrs E didn't accept the investigator's conclusions. She's asked for this review.

What I provisionally 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.

Having done so, I'm not persuaded that in considering Mrs E's claim, Tesco has had proper regard for the fact that Mrs E booked a package holiday, as confirmed on the travel documents N issued to her when she made her booking. There is no mention in the bank's submissions of the rights afforded to her by the Package Travel and Linked Travel Arrangements Regulations 2018 ("Package Travel Regulations"), or of the interaction between those rights and the other information Mrs E supplied to the bank, such as the FCDO advice and CMA guidance.

This ought to have been a relevant factor in the bank's consideration of its potential liability under section 75. Even if the chargeback was made outside the relevant time limit, the bank says it considered whether Mrs E had a valid section 75 claim.

I say this primarily because Mrs E clearly brought all of this information to Tesco's attention when she submitted her claim. But even if she had not, Tesco ought to be aware of the potential for a breach of contract liability arising out of a failure to abide by the rights incorporated into the contract by the Package Travel Regulations.

Part 3, Regulation 12 of the Package Travel Regulations has the effect that Mrs E was entitled to terminate the contract and receive a full refund of any payments made for the package before it started *"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"*.

Mrs E has provided evidence in her email exchanges with N that she sought to exercise that right, and that she didn't receive a full refund (which should be made within 14 days of cancellation¹). That in itself is grounds for a breach of contract claim, and one that would be difficult to defend, given that no refund has been made. Whether the cruise itself went ahead is entirely irrelevant; Mrs E's claim is not founded on a failure to perform that part of the contract, but on being denied her cancellation rights. So the key question is whether the circumstances at play in this case were sufficient to enable Mrs E to exercise that right.

Those circumstances are the concerns Mrs E had about taking a cruise trip in light of the FCDO advice and other guidance. I appreciate that the FCDO guidance relating to international travel did not advise against travelling to the area. But that isn't the FCDO guidance that was relevant to the trip Mrs E had planned to take. She had booked a cruise. And while the UK domestic cruise industry had restarted earlier in 2021, at the material time the FCDO advice was against cruise ship travel.

¹ Regulation 14(3)(b)(i) of The Package Travel and Linked Travel Arrangements Regulations 2018

According to the FCDO, its “*advice against cruises applies to international travel on a ship that is exclusively for pleasure or recreation, providing overnight accommodation and other leisure facilities such as entertainment venues or swimming pools.*” That advice was not lifted by the FCDO until the end of July 2021, by which time Mrs E’s booked cruise had already begun.

Given the nature of Mrs E’s cruise would appear entirely to meet this definition, I can see how it would be relevant to a Regulation 12 termination. The CMA ‘open letter’ of 13 May 2021 is also helpful in this respect. That says:

“21. In general, for package holiday contracts, the CMA takes the view that the existence of FCDO advice against travel, or against all but essential travel, to a particular country or region amounts to compelling evidence of extraordinary and unavoidable circumstances occurring at the holiday destination, or its immediate vicinity, which significantly affect the performance of the package or the carriage of consumers to the destination. Where the FCDO advises against all travel to an international destination, that is based on its assessment that UK travellers would face an unacceptable level of risk (typically to health or safety) by travelling to that destination. Similarly, where the FCDO advises against all but essential travel to a destination, that reflects its assessment that UK travellers would face a level of risk that it deems unacceptable for the sake of non-essential travel. The CMA considers this would include travel for the purpose of a holiday. The CMA’s view is reinforced by the fact that most travel insurance policies available to UK consumers planning to holiday abroad exclude cover if the policy holder travels to a destination against FCDO advice, as the destination is deemed to be high risk.

22. Accordingly, the CMA considers that where consumers terminate their package because around their departure date there is FCDO advice against travel to their holiday destination or its immediate vicinity based on health risks and general consequences resulting from the presence of COVID-19 there, they are likely to be entitled to a full refund under regulation 12(7)-(8) of the [Package Travel Regulations]. 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.

23. We would therefore expect any package travel operator seeking to refuse consumers a full refund, notwithstanding FCDO advice against travel, to explain fully the basis upon which they disagree that the FCDO advice reflects circumstances significantly affecting the consumer’s package or travel to the destination, and to provide detailed information about the evidence on which they have relied in reaching that assessment. The organiser would also need to be ready to defend their stance in a court, in the event of consumers bringing court proceedings to obtain a full refund.”

Having considered Tesco’s response to Mrs E’s claim in relation to N’s failure to provide a full refund, I think it’s reasonable to say that it hasn’t met this standard.

Taking all of this into account, I see no persuasive reason why Mrs E should not have been entitled to rely on the Package Travel Regulations, relevant FCDO advice and CMA guidance to terminate the package and receive a full refund. As such, I consider that Tesco could – and should – have done more to address its potential liability to Mrs E under section 75. The position the bank did adopt doesn’t appear to be supported by the relevant legislation, despite the weight of evidence Mrs E submitted in relation to her claim.

It follows that I'm minded to conclude there were deficiencies in the way Tesco approached Mrs E's claim that led to her being treated unfairly and which suggest it would be appropriate for the bank to address her financial loss, and to pay her compensation for the unnecessary distress and inconvenience she's been caused by its handling of the claim.

Putting things right

In light of this I intend to direct Tesco to take the following steps:

1. pay Mrs E £2,780.44, representing a full refund of the money she paid for the package holiday
2. if Tesco has charged interest on this amount to Mrs E's credit card account, it should rework her account removing all associated interest and charges
3. pay Mrs E interest on the amount in 1., calculated at 8% simple annually from 26 July 2021 (being 14 days after the date on which Mrs E sought to cancel) until the date it pays this settlement. If Tesco deducts tax from the interest element of my award, it should confirm to Mrs E that it has done so and provide her with the relevant tax deduction certificate
4. pay Mrs E £200 in recognition of the distress and inconvenience she's been caused due to the way it handled her claim

Responses to my provisional decision

Mrs E accepted my intended conclusions and had no further comments to make. Tesco also responded, making the following points:

- The FCDO advice was in place at the time Mrs E made her booking, and there was at that point no guarantee that international travel restrictions would be lifted. This indicates that the events were avoidable and not extraordinary to Mrs E as set out in Regulation 12 of the Package Travel Regulations
- Mrs E contacted N to cancel because she wasn't covered by her travel insurance policy as required under her agreement with N, and because of her daughter's employment concerns, rather than because of any issues with the holiday destination or the safety of the cruise itself.
- Mrs E's daughter ought to have been aware of her employer's travel advice at the time of the booking
- Both it and N considered it relevant that the travel restrictions had been lifted in the area in which the cruise was taking place, and had interpreted the Package Travel Regulations correctly in this respect. As such, there was no breach of contract

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.

Some of Tesco's response to my provisional decision centres on a basic premise that it shouldn't be liable to Mrs E because of the circumstances at play when she entered into the contract. While I understand the points Tesco has made in this respect, I've not seen anything that might indicate that Mrs E's rights under the Package Travel Regulations are suspended or disapplied in such circumstances. In my view it was legitimate for Mrs E to make a booking anticipating that by the time she was due to travel the restrictions would be

lifted, as had happened with the domestic cruise industry. If not, she had the fall back protection of the Package Travel Regulations.

That brings me to the question of the application of Regulation 12. In my provisional decision I quoted in some detail from the relevant FDCO advice and CMA open letter. I appreciate what Tesco has said about the way it and N have interpreted Regulation 12. However, I have concluded that I can reasonably rely on the advice and guidance issued by the relevant government departments that deals directly with this question of interpretation. In doing so, I'm satisfied that the FCDO advice is sufficient to support the application of Regulation 12 to the cruise Mrs E had booked, notwithstanding what Tesco has said about the lifting of restrictions in the region the cruise was taking place.

I'm not persuaded the fact there were likely other reasons at play that informed Mrs E's decision to cancel means that she should be unable to avail herself of her right under Regulation 12. There's nothing in the Package Travel Regulations that caveats the right under Regulation 12 to applying only if the traveller has no other reasons for cancelling. My reading it that it is sufficient that the provisions of Regulation 12 are engaged, and for the reasons I've set out here and in my provisional decision, I'm satisfied that they are.

With this in mind, I adopt my provisional conclusions in full as part of this final decision. Having considered all that's been said and provided, I remain of the opinion that the resolution I proposed in my provisional decision is a fair and reasonable way to settle Mrs E's complaint.

My final decision

My final decision is that I uphold this complaint. To resolve matters, I direct Tesco Personal Finance trading as Tesco Credit Card to take the following steps within 28 days of receiving Mrs E's acceptance of it:

1. pay Mrs E £2,780.44, representing a full refund of the money she paid for the package holiday
2. if Tesco has charged interest on this amount to Mrs E's credit card account, it should rework her account removing all associated interest and charges
3. pay Mrs E interest on the amount in 1., calculated at 8% simple annually from 26 July 2021 (being 14 days after the date on which Mrs E sought to cancel) until the date it pays this settlement. If Tesco deducts tax from the interest element of my award, it should confirm to Mrs E that it has done so and provide her with the relevant tax deduction certificate
4. pay Mrs E £200 in recognition of the distress and inconvenience she's been caused due to the way it handled her claim

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 1 December 2023.

Niall Taylor
Ombudsman