

The complaint

Mr H complains about the outcome of a claim he made to Tesco Personal Finance PLC trading as Tesco Bank ('TB').

What happened

The parties are familiar with the background details of this complaint – so I will briefly summarise them here. It reflects my informal remit.

Mr H paid for a ski holiday for a group using his TB credit card booked through a retail travel agent ('A') which was provided by a package holiday company ('B').

Mr H said that leading up to the holiday the group were concerned about the poor snow forecasts. He says that about a week before departure he contacted A to ask about options and it said that it had contacted B and there were certain options available, involving re-scheduling, cancelling and losing all the monies, or continuing to travel as planned.

Mr H says that he wanted to cancel for a refund as other options like re-scheduling were not practical for his group. Mr H says his group ended up taking the holiday but learned that other travellers who had booked with B through different agents had been contacted with more favourable offers than A communicated to him. He also found out A was not ABTA registered even though the logo and other references to it appeared on its marketing materials.

In summary, Mr H is seeking a full refund of the package holiday costs. He said this is because A should have made a cancellation and refund option available to him and his group. And because it misrepresented its association membership Mr H says he made a booking he would not have done otherwise.

Mr H made his claim to TB. It looked into things but did not agree to refund Mr H.

Mr H's complaint about the claim outcome was escalated to this service but our investigator did not uphold it.

Mr H has asked for an ombudsman to look at things again for 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.

While I might not comment on everything (only what I consider key) this is not meant as a discourtesy to either party – it reflects my role resolving disputes informally.

I also remind the parties that it is for me as ombudsman to decide what is relevant and material in the circumstances of this case.

I am sorry to hear about Mr H's issue with the holiday he paid for. However, it is worth noting here that TB is not the supplier of the holiday service. So when looking at what is fair I consider its role as a provider of financial services – and what it reasonably could have done to help him with the information that was reasonably available to it at the time. As Mr H used his credit card to pay for the service in dispute I consider the protections of chargeback and Section 75 of the Consumer Credit Act 1974 ('Section 75') to be particularly relevant here.

Chargeback

Chargeback is governed by the card scheme rules – in this case MasterCard. Here, TB said it wasn't able to raise a chargeback because it only had 120 days from when the service was provided to raise one – and when Mr H got in touch it was out of time to do so.

I have considered what TB has said and agree that any chargeback under a relevant rule would time out here because the holiday service was provided at the end of December 2022 and Mr H contacted TB to make a claim around June 2023.

I also note that even if it were argued there was sufficient time to make a chargeback there isn't a chargeback reason code that fits the situation that has occurred here very well because the holiday and booking service were provided. Because of what Mr H says about A's claims to ABTA membership a chargeback reason code such as service '*not as described*' might be relevant but because Mr H has used the service in question it would not likely have succeeded in any event.

Overall, I don't consider TB acted unfairly in respect of the chargeback.

Section 75

Section 75 in certain circumstances allows Mr H to hold TB liable for a '*like claim*' for breach of contract or misrepresentation in respect of an agreement by a supplier of goods or services which is funded by the credit card.

In this situation the credit card transaction funded an agreement with A – so for the purposes of Section 75 TB is only liable for its actions and not the actions of B.

There are certain requirements that need to be met in order for Section 75 to apply – which relate to things like the cash price of the goods or the relationship of the parties to the contract (known as the 'debtor-creditor-supplier' agreement). After considering these factors I think there is a question as to what extent Mr H (as the debtor under the credit card agreement) has a claim against TB under Section 75 for the actions of A as a booking agent. I say this because although Mr H paid for the holiday, it does not appear that he is the person who negotiated with A for the booking and does not appear on the resulting paperwork as the lead booker. However, despite these reservations about Mr H's contractual position in respect of the agreement with A I do not consider it necessary to dwell on it further. I say that because even if I accepted Mr H has a valid claim for breach or misrepresentation by A against TB my outcome would not differ in any event. So for the purposes of the rest of this decision I will assume Mr H has the requisite contractual relationship with A in respect of the allegations made against it.

Breach of contract

I know Mr H has said the focus of his claim is misrepresentation. However, I consider that the dispute he approached TB with also included allegations of breach of contract in respect of A's actions in liaising on his behalf with B. Therefore, I have considered if there was persuasive evidence of breach by A available to TB that meant it should have refunded Mr H.

In order to consider evidence of breach I have thought about any express terms of the contract Mr H had with A – or any implied terms, for example the requirement implied by the Consumer Rights Act 2015 ('CRA') that services will be carried out with reasonable 'care and skill'.

I also note that what A booked for Mr H is a package holiday, therefore I have thought about to what extent the Package Travel and Linked Travel Arrangements Regulations 2018 ('PTRs') are relevant here as they also imply terms into contracts for holidays.

I note that A's role here is not as the organiser of the package holiday – it appears to be selling packages that are already put together by B. Therefore, as the retailer it isn't responsible for the performance of the package under the PTRs and the obligations on it are more limited. However, A does have some responsibilities in respect of providing certain information at the point of sale and passing on messages to the organiser of the package on the customer's behalf.

I am satisfied from the CRA and PTRs (and the terms and conditions A has recounted – which appear backed up by archived terms) that A in its role as agent would reasonably be expected to make the booking and liaise with B on behalf of Mr H in respect of queries about the booking. However, I have not been presented with evidence that persuades me TB would have been fairly minded to conclude that A's role extends beyond that, for example being responsible for weather conditions at the destination or deciding the policy for refunds in the event that travellers decide not to travel on a package supplied by a third party.

It follows that *prima facie* – A was not responsible for the poor snow conditions. Which I don't think anyone disputes. However, it was reasonably expected to liaise with B when Mr H made an enquiry about the options available in respect of cancellation. From the information I have seen it appears that A did contact B and explained to Mr H what B's position was. It told Mr H that his party would lose all their money if they cancelled – which according to the terms of B's contract appears to be accurate (a 100% cancellation fee applies at short notice). I also don't think that Mr H cancelling due to poor snow conditions would mean B had to refund under the PTR's without charging a termination fee – because low snow would appear unlikely to be considered '*unavoidable and extraordinary circumstances*'. It follows that the information A passed to Mr H about cancellation (which is what Mr H wanted to do) appears to be in line with the contractual position of B here.

A told Mr H that the supplier was willing to accommodate re-scheduling for an admin fee, although I know Mr H has explained how re-scheduling for the whole party would not be practical I don't think this is the fault of A. And although Mr H has indicated B had different options to offer to people who booked through other agents – ultimately, I don't think there was persuasive evidence available to TB that showed A was, in passing on information and liaising with B, acting in such a way that would constitute a breach of contract here. It follows that I don't consider TB acted unfairly in not issuing a refund.

Misrepresentation

I understand Mr H has focused on this being a claim of misrepresentation by A. Essentially that it held itself out as being an ABTA member at the time of booking when it wasn't.

A has said that its documents from the time of booking do not refer to it being an ABTA member and that any reference to the scheme is because it sells holidays from ABTA suppliers such as B.

However, Mr H has indicated that A did not make this clear and that at the time of booking A used the ABTA logo on its business cards as if it was registered with ABTA. Mr H has also produced a screenshot of A's website where it refers to ABTA in its complaints procedure, even though this doesn't appear to be in the archived terms I have seen from 2022 and 2023.

If I accept A made a false statement about its membership I would need to be persuaded it meant that Mr H made a different choice about booking. It is arguable that because B provided membership then A's lack of membership was not material. However, Mr H says it was material and has been very clear on that. So in the interest of completeness I have considered the position if misrepresentation by A were made out. After doing so I don't consider it makes a difference to the outcome of the claim here. I will explain why.

Even if TB should fairly have accepted that A misrepresented its ABTA membership to Mr H I don't consider that it would automatically be required to have paid him a refund in any event. I say this because even with evidence of misrepresentation (or breach) – there also needs to be persuasive evidence that said wrongdoing has led to a financial loss for the debtor (Mr H here).

While I note Mr H has explained all the benefits that ABTA offers (including an arbitration service) I just don't consider there is persuasive evidence here that by A not having ABTA membership he has suffered a financial loss. I say this noting that:

- A didn't accept it had done anything wrong when the Section 75 claim was raised – so I don't see how it would react differently to other claims against it;
- the evidence indicates A acted reasonably in finding out information for Mr H – and there is no persuasive evidence it acted outside of its terms in respect of assistance with queries about the holiday – so I don't consider it likely that a claim through ABTA would recover a refund; and
- in any event Mr H has not persuasively shown that A's lack of membership to ABTA was material in causing a loss in light of the other avenues of recourse available to him.

When our investigator was not persuaded Mr H would have obtained a refund via ABTA Mr H responded to say 'that may well be true'. However, Mr H went on to say that this has no relevance. And the events and issues post booking are 'largely academic' to the claim against TB. However, I respectfully disagree – for TB to fairly refund him he needs to have shown it that he has financially lost out due to A's wrongdoing. And I don't consider he has persuasively shown this. So I don't think TB acted unfairly in not refunding him here.

I know Mr H feels very strongly about this matter. But my role here is to look at the actions of TB in an informal way. Mr H does not have to accept my decision and can pursue a claim by alternative means (such as court) if he wishes.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 24 August 2024.

Mark Lancod
Ombudsman