

The complaint

Mr V complains about American Express Services Europe Limited's response to his attempts to recover money he'd paid using his credit card for a holiday booking.

What happened

Mr and Mrs V booked a short break through a third party travel company "J". The holiday package comprised flights, accommodation and coach transfers, and was scheduled to take place the following month. The package cost was £1,325. J made it a condition of the holiday arrangements that travellers should ensure they had adequate travel insurance. Mr and Mrs V also purchased J's travel insurance, bringing the total cost to £1,401.

The sum was charged to Mr V's American Express credit card and J issued the booking confirmation and travel insurance documents. But when Mr V called the insurance underwriter to disclose a pre-existing medical condition, the insurer told him that it wouldn't be able to provide cover. J refunded the £76 travel insurance premium. However, Mr V believed he should also receive a refund of the holiday booking. He said he was induced to take out the holiday on the basis that he could take out the insurance, and that as such, the holiday was misrepresented to him.

J wasn't willing to return any further payment, so Mr V sought to recover his money from American Express as his card provider, using the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 ("section 75"). However, American Express didn't think there'd been any misrepresentation or breach of contract that would give rise to a section 75 liability.

Specifically, American Express said

"There is no indication that the information you received or were told by J before purchasing the holiday in question was inaccurate or misleading. The travel insurance offered by J was optional, and you accepted the terms at the time of making the booking. Please note that without the benefit of any documentation from you to substantiate what you were allegedly informed over telephone calls, we are unable to consider this.

[the booking confirmation included] You will not be covered under this policy for any claims arising directly or indirectly from a pre-existing medical condition unless it is included in the "Waived Conditions" section of the policy wording (page 15) or it has been declared to us and accepted by us in writing for cover. Please refer to page 18 of your policy wording for the terms and conditions relating to health and pre-existing medical conditions. If you have not yet informed us of a pre-existing medical condition, please visit [J's website or telephone line].

Additionally, it is our understanding that J confirmed that the travellers were marked as no-shows. We also note that the terms and conditions of the booking, which were accepted at the time of purchase, state the following: If you do not present yourself for your outbound flight, we will treat this as a cancellation by you and we will cancel all of your travel arrangements (including but not limited to your transfers,

accommodation, and inbound flight where applicable) and you will not be entitled to any refund or compensation.

In view of the above, we consider that J has fulfilled their contractual obligations with you and that you are not entitled to a reimbursement via Section 75."

Although Mr V was unhappy with American Express's response and raised a complaint, the card provider wasn't minded to change its stance. Mr V remained dissatisfied and referred matters to us.

Our investigator didn't think American Express had acted unfairly in reaching its decision to decline to meet Mr V's claim. He wasn't persuaded a section 75 claim would be successful, noting that there was no contractual obligation in the holiday contract for J to provide the travel insurance and expressing the view that it was open to Mr V to arrange cover elsewhere before the holiday was due to take place. The investigator wasn't persuaded American Express had any liability towards Mr V.

Mr V responded to ask for a review of his complaint. In doing so he sought to emphasise the following points:

- His complaint is more that the flight and insurance was sold together without appropriate procedure before taking his money. As he'd previously noted, J's agent had told him that its website should take purchasers through a simple set of questions before selling the insurance, as other organisations do
- Contrary to the investigator's second key point, insurance was not optional. Rather, J made it very clear throughout that he and Mrs V could not fly without insurance
- Had J merely offered a flight without the tick box to add insurance, they would have first sought insurance as a pre-requisite. They would have established for themselves beforehand that it was impossible to arrange, given Mr V's health circumstances at the time. This position would not have changed until after Mr V had his operation some months later, and so they would not have purchased the flight; and
- J's failure to provide insurance was critical to restricting their ability to fly

The investigator wasn't persuaded to change his assessment and so the complaint has been passed to me for review and determination.

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.

I shall deal firstly with the question of whether the necessary debtor-creditor-supplier arrangements are in place, as this is a key requirement of section 75. It appears to be accepted by both parties that Mr V had a contractual relationship with J, through whom it appears Mrs V made the booking arrangements. Payment was made to J using credit supplied to Mr V by American Express.

However, only the flight and accommodation arrangements meet the definition of a package travel or linked travel arrangement. Travel insurance doesn't fall within the definition of a "travel service" as set out in The Package Travel and Linked Travel Arrangements Regulations 2018 ("Package Travel Regulations"). The underlying European Union Directive¹ from which the Package Travel Regulations derive goes further still, explicitly

¹ Directive (EU) 2015/2302 (25 November 2015)

stating that “*Financial services such as travel insurances should not be considered as travel services.*”

That means that there were two separate contracts. One was a contract with J for the flights and accommodation; the other was a contract for insurance for the travel insurance policy to be provided by a third party insurer “R”, for whom J was acting as an appointed representative. This is supported by the booking confirmation email Mrs V received.

In terms of the holiday contract with J, I’ve no reason to question that it was funded by a debtor-creditor-supplier agreement involving Mr V and American Express, or that the financial limits applicable to section 75 were met.

However, the same can’t be said of the travel insurance contract. Given J’s relationship with R, the construction of the contract doesn’t necessarily affect the applicability of section 75. However, the £76 cost of the insurance contract was below the section 75 financial requirement of being between £100 and £30,000. That in itself might be sufficient for a claim against American Express in relation to any exercise by J of due skill and care or representations J made about the insurance policy to be unsuccessful.

Even if I am wrong on that point or if it could be successfully argued that the claim arises from the holiday contract element of the arrangements, I’m satisfied American Express has made a fair argument in response to that claim. It has reviewed the information J provided when Mrs V made the booking and – correctly, in my opinion – reached the conclusion that there was no misrepresentation on J’s part either in respect of the travel insurance requirements or that the insurance would be accepted irrespective of Mr V’s existing medical condition.

It is common ground that the holiday booking included a term that made it a requirement that Mr and Mrs V arrange “*adequate travel insurance.*” What is adequate is a matter of personal opinion rather than being defined. Generally it is for the person(s) arranging such a policy to decide on the level of risk they are willing to take, whether in terms of the amount of cover or the perils that are covered.

Mr and Mrs V were aware of Mr V’s medical condition, and that he was in need of an operation. It isn’t particularly unusual for a travel insurance policy to exclude or limit cover where pre-existing medical conditions are a relevant consideration. Indeed, it is so commonplace that I find it difficult to accept that Mr and Mrs V could reasonably have expected a policy would cover a claim that arose in connection with what appears to have been a serious medical condition. That speaks to what they might reasonably have considered to be adequate travel insurance.

In light of this, it was for Mr and Mrs V to establish whether they could comply with the booking condition before they committed to the holiday. They don’t appear to have done so; rather, they made the booking assuming that they would be able to obtain insurance. That J’s website did not contain a specific medical questionnaire and contained a tick box option did not mean it was reasonable for Mr and Mrs V to assume that there would be no difficulty in getting cover. In my view, the significant nature of Mr V’s condition was such that it was incumbent on them to confirm this before they made the booking.

There is nothing in the arrangements between J and Mr and Mrs V that required travel insurance to be provided via a policy arranged by J. The arrangement that was made through J appears to have been as a matter of convenience at the time of booking, rather than because Mr and Mrs V were contractually obliged to take out that particular insurance policy.

It is perhaps possible that Mr and Mrs V might have been able to find another insurer – it isn't clear whether they sought to do so. But I'm afraid that even if this wasn't possible, that this doesn't mean that I can fairly require American Express to make good Mr V's loss. In my view, American Express hasn't acted unfairly in defending the claim made against it.

While the complaint hasn't specifically been brought in relation to chargeback, for the sake of completeness I should add that I can't see a chargeback claim brought on similar grounds would be any more likely to recover Mr V's payment, for reasons similar to those I've already mentioned.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 29 April 2024.

Niall Taylor
Ombudsman