DRN-4713338

The complaint

Mr A complains how Clydesdale Bank Plc trading as Virgin Money ('VM') handled a dispute about a purchase on his credit card.

What happened

The background details of this complaint are well known to the parties so I will only summarise them here.

Mr A purchased a diving holiday experience in Mexico and paid three instalments toward the total price using his VM credit card totalling £4,301.61.

Mr A says the supplier of the experience cancelled it 14 days before it was due to start due to governmental restrictions imposed in the region. It offered Mr A rebooking for a different experience but he wanted a refund which it would not provide.

Mr A made a claim to VM for a refund. It considered chargeback and Section 75 of the Consumer Credit Act 1974 ('Section 75') but declined the claim. In summary, it cited the supplier's 'Force Majeure' clause and noted no refunds were due in such circumstances. It concluded there was no breach of contract.

Our service considered the complaint. Our investigator did not uphold it. In summary, she concluded that the contract was likely frustrated rather than breached.

Mr A has asked for the matter to be considered by an ombudsman so I have looked at the matter for a final decision.

I issued a provisional decision on this case as follows:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have considered the information submitted by the parties however, I won't be commenting on it all, only the matters I think are key. This reflects the informal nature of this service in resolving disputes.

VM is not the supplier of the holiday experience here so in deciding what is fair and reasonable I look at its role as a provider of financial services only. In doing so I consider the card protections of chargeback and Section 75 to be particularly relevant.

Because I am proposing to uphold this complaint in respect of Section 75 I do not consider it necessary to cover chargeback in any detail here. Therefore I will focus on Section 75 only.

Section 75 can allow Mr A to hold VM responsible for a 'like claim' that he would have against the supplier for breach of contract or misrepresentation in respect of an agreement for goods or services financed by his credit card.

For Section 75 to apply certain criteria need to be satisfied in law. For example, relating to the cash price of the goods or services in question, and the relationship of the parties to the agreement. In this case I have given thought to said criteria and consider the requirements are met for Mr A to have a claim against VM for breach of contract or misrepresentation by the supplier of the holiday experience. Therefore, in considering whether its response to his claim was fair I have gone on to look at whether there is persuasive evidence of a breach of contract or misrepresentation by the supplier here.

From what I can see here Mr A's booking consisted of several elements including transport, accommodation, transfers and a diving excursion. As a result I have taken into account the implied terms under The Package Travel and Linked Travel Arrangements Regulations 2018 ('PTRs') which give Mr A as a 'traveller' particular rights and remedies as implied into the contract with the organiser of a package holiday.

A package holiday is generally taken to be the combination of two or more different types of travel services, which are combined for the purpose of the same trip. A travel service can be carriage, accommodation and 'other tourist services' such as an excursion.

Because of the elements which make up the holiday in this case (for example, travel and accommodation by boat along with a diving experience) I conclude that it would likely be considered a 'package travel contract' as defined by the PTRs. Therefore, from now on I will refer to the booking as a 'package'.

I consider the supplier which Mr A paid is the 'organiser' as defined by the PTRs as it has combined and sold the package. As the organiser, it has particular obligations to Mr A as a 'traveller' under the package contract and these obligations are implied into the contract by the PTRs. From now on my references to organiser should be taken to include references to the supplier here.

In my considerations I have noted that the organiser was not based in the UK but was selling package holidays to customers like Mr A in the UK. I note that the PTRs will still apply in these circumstances as clarified in the 'Guidance for businesses' published in July 2022 by The Department for Business, Energy & Industrial Strategy which says as follows:

> *Q: Do the regulations apply to organisers who are not established in the UK?*
>
> *A: Yes. The regulations apply to package travel contracts and linked travel arrangements sold, or offered for sale, in the UK no matter where the seller is established….. Note also that the regulations imply the same terms and conditions into all booking contacts, including those that select a law other than UK law. An example of this would be a trader based outside the UK whose booking contract selects the law of its own country.*

It does not appear to be in dispute here that the organiser cancelled the package shortly before it was due to start, and that the reason was because of government restrictions put in place in the particular region which prevented the package from going ahead.

In this particular case I consider that Regulation 13 of the PTRs is relevant. It says:

Termination of the package travel contract by the organiser

> ***13.**—(1) The provisions of this regulation are implied as a term in every package travel contract.*
>
> *(2) Paragraph (3) applies where—*

(a)the number of persons enrolled for the package is smaller than the minimum number stated in the contract and the organiser notifies the traveller of the termination of the contract within the period fixed in the contract but not later than—

(i)in the case of trips lasting more than 6 days, 20 days before the start of the package;

(ii)in the case of trips lasting between 2 and 6 days, 7 days before the start of the package;

(iii)in the case of trips lasting less than 2 days, 48 hours before the start of the package; or (b)the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package.

(3) The organiser—

(a)may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package;

(b)is not liable for additional compensation.

I consider Regulation 13(2)(b) is particularly relevant here as it appears the organiser was prevented from performing the contract because of sudden government intervention. Because it then cancelled the package as a result 13(3)(a) entitles Mr A to a full refund of the payments he made for the package. However, it does not entitle him to consequential losses – only the payments made for the package.

I have noted the contents of the organiser's standard terms and conditions. However, because Regulation 13 is implied into the contract Mr A has with the organiser I consider it renders the Force Majeure clause VM is relying on (and any further exclusion clauses contained within the contract) to be ineffective. And I consider it provides a contractual remedy to a cancellation in these circumstances (as opposed to frustration). Therefore, I consider a failure by the organiser to pay Mr A the full refund of the payments he has made after it cancelled the package is a breach of contract which VM is responsible for by way of Section 75.

In summary, because of Section 75 and the implied terms in the contract for services by way of the PTRs I consider that VM should have fairly upheld Mr A's claim. Because it didn't I am directing it to refund him as it fairly should have when it gave him its Section 75 claim outcome (which appears to have been on 30 November 2022).

Therefore, I consider VM should re-work Mr A's credit card as if it refunded him the full £4,301.61 on 30 November 2022 – removing all interest and charges which have accrued from that date onwards.

I note Mr A has confirmed that more recently he has received a partial refund of $2,000 from the organiser to date. Therefore, I consider it fair that after VM has re-worked the card as directed above it then adds back the sterling equivalent of $2,000 to the balance to avoid double recovery. So Mr A needs to confirm the sterling equivalent refund he has received (ideally showing what account this was credited to and when).

If there is a credit balance after the re-working is carried out above VM should pay this to Mr A with 8% simple yearly interest added from 30 November 2022 to the date of settlement.

It is worth noting that as a result of this decision VM is not prevented from informing the organiser that it has reimbursed Mr A for the balance of the refund he is seeking from it. And

if it transpires that Mr A has received more than $2,000 in refunds prior to VM settling in line with my direction then it can deduct this from any settlement in a similar way to how I have directed above to avoid double recovery.

I am unclear exactly how Mr A has obtained a refund of $2,000 to date and I am aware he has referred to certain lawsuits ongoing against the supplier. From what I can tell from his testimony to date he has had someone help him in making representations to the organiser but is not involved in any ongoing lawsuit, or had any court judgement (in whatever jurisdiction) on this matter in his favour to date. Nor does it seem that this partial refund was subject to certain 'full and final settlement' terms with the organiser. My decision is based on this understanding being accurate. However, either party is free to make further representations on this as it might impact the proposed remedy here.

My provisional decision

I uphold this complaint and direct Clydesdale Bank Plc trading as Virgin Money to:

- *Re-work Mr A's credit card as if it had refunded him £4,301.61 when it declined his claim on 30 November 2022 which includes removing associated interest and charges;*

- *after completing the re-working add back the sterling equivalent of the $2,000 refund Mr A has received in accordance with my direction above; and*

- *if after the steps above have been completed the re-working results in a credit balance this should be refunded to Mr A with simple interest calculated at 8% yearly from 30 November 2022 to the date of settlement.*

If VM considers it should deduct tax from any interest award then it should provide Mr A with a certificate of tax deduction so he may claim a refund from HMRC if appropriate.

Clydesdale agreed to carry out my direction. It notes that Mr A had the $2,000 refunded to his credit card which is the sterling equivalent of £1,532.75.

Mr A agrees with the decision but noted he had paid the supplier more than the amount of £4,301.61. However, he was unable to evidence this so has agreed to accept my decision to get the matter resolved.

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.

Both parties have broadly agreed with my direction here. Overall, I don't consider either party has said anything that changes my provisional findings, which I still consider fair and reasonable for reasons already stated.

I note Mr A has referred to paying the supplier more than the amount I am directing VM to refund. However, although the overall amount due on the invoice is for more than I am asking VM to refund it appears payments to the supplier were made by instalments and Mr A has not evidenced that he paid what appears to be the final instalment or any more than the amount I have directed VM to refund here. I also note that although Mr A refers to the figure of 5,570 on the invoice as 'payment received to date' this appears to be in Canadian Dollars – not sterling. It appears the amount paid in sterling would be around the amount I am

asking VM to refund (subject to any deductions for refunds to date). So overall, I don't consider Mr A should be receiving more money back here.

I note that VM has evidenced that in July 2023 Mr A received the $2,000 refund back to his card from the supplier which is the sterling equivalent of £1,532.75. However, this does not alter the methodology of my redress because Mr A should have received this amount sooner. Therefore, VM needs to calculate a re-working of the card based on it refunding the full £4,301.61 at the time it declined the claim, and then once this has been done add back the £1,532.75 as a debit to avoid double recovery (because Mr A has already had this amount back). Any credit balance after this re-working can then be paid to Mr A.

Putting things right

VM should put things right as set out below for the reasons specified here and incorporating the findings in my provisional decision (as set out above).

My final decision

I uphold this complaint and direct Clydesdale Bank Plc trading as Virgin Money to:

- Re-work Mr A's credit card as if it had refunded him £4,301.61 when it declined his claim on 30 November 2022 which includes removing associated interest and charges;

- after completing the re-working add back the sterling equivalent of the $2,000 refund (being £1,532.75) Mr A has received in accordance with my direction above; and

- if after the steps above have been completed the re-working results in a credit balance this should be refunded to Mr A with simple interest calculated at 8% yearly from 30 November 2022 to the date of settlement.

If VM considers it should deduct tax from any interest award then it should provide Mr A with a certificate of tax deduction so he may claim a refund from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 28 April 2024.

Mark Lancod
Ombudsman