

The complaint

Mr B complains Clydesdale Bank Plc trading as Virgin Money (Virgin) have acted unfairly by not refunding the deposit he made towards a holiday, using his credit card.

A representative has supported Mr B in making this complaint, but for simplicity I'll refer to their submissions as having come from Mr B.

What happened

In October 2022 Mr B used his Virgin credit card to pay a £500 deposit towards a package holiday he planned to take, departing in March 2023. The package holiday was provided by a company I'll refer to as Company A, who also took payment of the deposit. The package included flights, accommodation as well as tour services.

Following this Mr B attempted to contact Company A on several occasions, to enquire about upgrading his airline seats and to notify them he'd been unable to access either their website or the airline's, using the reference numbers they'd provided. He says on each occasion he was assured someone would return his call, but this didn't happen.

On 22 December 2022 Mr B emailed Company A, highlighting concerns about paying the balance due for the holiday - £8,898.02 – given the problems he'd faced. Mr B requested Company A contact him to discuss this.

Mr B says Company A didn't contact him, so he called them on 28 December 2022, to discuss cancelling his holiday. During that call he says he was told he'd lose the deposit paid if he cancelled, but made the decision to do so in any case, confirming this by email and requesting a refund of the deposit.

Mr B also contacted Virgin the same day, in an attempt to claim a refund of the deposit. Virgin reviewed matters but declined the claim because they say the deposit had been non-refundable. Virgin refused to change its position after Mr B complained, and so he referred the matter to this service.

An Investigator here looked into things but concluded there'd been no breach of contract or misrepresentation by Company A. Mr B had made the decision to cancel his holiday and the terms and conditions stated the deposit would be non-refundable. As such, she didn't consider Virgin had acted unfairly.

Mr B didn't agree, saying the reason he'd chosen to cancel was because the information Company A provided didn't verify the booking with either themselves or the airline and they'd failed to contact him on several occasions. He questioned why he'd have paid the balance without confirmation from Company A that the booking was legitimate.

With no resolution the complaint was passed to me to decide.

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.

When a consumer approaches their credit card issuer with a problem with a purchase made using their card, there are two avenues via which the business can help. The card issuer can try to reclaim the amount (or part of the amount) the consumer paid on their card, via the dispute resolution mechanism operated by the card scheme (Mastercard in this case), and which is often known as "chargeback". They can also consider honouring a claim under section 75 of the Consumer Credit Act 1974 (CCA). I will consider each of these mechanisms in turn below.

It's important in this case to take into account that Mr B cancelled his holiday some months before he was due to depart.

I understand Mr B became worried about the legitimacy of Company A, and as such the likelihood they would be able to provide the service he planned to pay for. He's explained this was due to their poor communication and because he was unable to log in to either their website, or the airline's, using the reference numbers Company A had provided. As a result, he chose to cancel the agreement long before the service to be provided under it were to go ahead. Company A's position was that he could cancel, but it would cost him the deposit.

I think it would be helpful to explain at this point, in this decision I'm only able to consider how Virgin handled the dispute Mr B raised with them. I'm not able to consider the actions of Company A, as that isn't within the jurisdiction of this service for these types of complaints.

I'll now go on to consider how Virgin handled the dispute.

Chargeback

Chargeback allows for a refund to be made of money paid with a credit card in certain scenarios, such as when goods have been paid for and not received. Chargebacks are governed by rules set by the card scheme to which the consumer's card belongs – in this case that's Mastercard.

While a consumer cannot require their card issuer to attempt a chargeback, as it isn't a right, our service does consider it good practice to do so, if it is within the time limits and there is a reasonable prospect of success.

Virgin didn't attempt a chargeback in this instance, as they said Company A hadn't breached their terms and conditions as these said the deposit was non-refundable.

I've thought about whether that led to Mr B being unfairly denied the opportunity to have the money returned. Chargebacks can only be raised for reasons specified by the card scheme. If a particular dispute doesn't fall neatly within one of those reasons, then it may not be a suitable dispute to raise via a chargeback.

Ultimately, having considered the reasons for which a chargeback can be raised under Mastercard's rules, I think it unlikely a chargeback would have been successful under any reason code. I say that because Mr B chose to cancel the holiday before Company A were able to provide the service to him, and he's accepted he did so after being informed he would not receive a refund of his deposit. And while I understand Mr B had concerns they wouldn't supply the holiday he intended to purchase, that isn't a valid reason under chargeback.

Given this, while Virgin didn't attempt a chargeback, I don't consider Mr B lost out as a result. Because I don't think a chargeback would have succeeded in any case.

Section 75 of the CCA

Section 75 of the CCA allows consumers who have purchased goods or services using a credit card, to claim against their credit card issuer in respect of any breach of contract or misrepresentation by the supplier of those goods or services, so long as certain conditions are met.

One condition which needs to be met for section 75 to apply to a purchase, is the claim must relate to an item with a cash price of over £100 and no more than £30,000. The cash price here met this condition. A further condition is that there needs to be what is known as a debtor-creditor-supplier ("DCS") agreement in place. That's also been met here, as Mr B's credit card statement shows he made payment to Company A, and it's this company he says have breached their contract with him. As such I've gone on to consider whether there has been a breach of contract or misrepresentation.

Has there been a breach of contract or misrepresentation?

Misrepresentation

I've firstly considered whether there has been a misrepresentation in Mr B's claim.

For the purposes of this case, a misrepresentation is a false statement of fact which induces another party into a contract which leads them to suffer a loss.

Having reviewed all the information provided to Mr B by Company A, as well as looking at Company A's website, I've seen nothing to say the deposit paid would be refunded, or that Mr B only booked the holiday, or made the decision to cancel because he thought that was the case. In fact, Mr B says he was told by Company A if he chose to cancel, he would lose the deposit.

As there is nothing I've seen which would represent a false statement by Company A, I'm not able to conclude there has been a misrepresentation in this case, for the purposes of section 75.

I've therefore gone on to consider whether there has been a breach of contract.

Breach of contract.

A breach of contract occurs when one party to the contract fails to discharge its obligation to the other. These obligations may come about as a result of the express term of the contract, or because of terms implied by legislation.

I've been unable to obtain a copy of the terms and conditions from the time Mr B entered the agreement with Company A, however I've reviewed those available on Company A's website – which are the same as Virgin pointed to. Having done so, I think it's unlikely they would have changed much since Mr B entered the agreement with Company A and particularly for the term relevant here. I say this because this is a very standard contract term and coincides with what Mr B has told us Company A said – that he wouldn't receive a refund if he cancelled. So I've gone ahead with the terms available to me.

In their letter to Mr B on 11 August 2023, Virgin say Company A's terms and conditions state:

"Cancellation by you prior to departure... Since we incur costs in cancelling your arrangements, you will have to pay the cancellation charge as follows: Pre departure at which notice of cancellation is received, More than 70 days then the cancellation charge will be deposit only."

Virgin say Mr B cancelled 71 days prior to departure and as such the merchant didn't breach their terms and conditions by not refunding the deposit Mr B paid.

Having reviewed the terms and conditions between Company A and Mr B, it's not clear why Virgin say the cancellation charge was deposit only. I say this because the terms I've seen, provided by Virgin state:

"Cancellation by you prior to departure.. Since we incur costs in cancelling your arrangements, you will have to pay the cancellation charges as follows:

More than 84 days [prior to departure] Cancellation charge: Deposit only (including initial deposits, where applicable, and further deposits)

84-70 days [prior to departure] Cancellation charge: 50% (but no less than the deposit value)"

As explained, I've no reason to believe these weren't the terms and conditions at the time Mr B booked his holiday. And as Mr B cancelled his trip 71 days prior to departure, the terms and conditions suggest the charge would be: *"50% (but no less than the deposit value)"*.

I've thought about whether this would make a difference to the outcome of Mr B's section 75 claim, but I don't think it would. I say this because Company A's terms don't allow for the customer to cancel at any point without losing the deposit. So at the very least, Mr B would have incurred the cost of the deposit by cancelling when he did, and in fact could have been asked to pay 50% of the holiday cost by cancelling at this point.

I've also considered the difficulty Mr B faced accessing his booking on Company A's website or the airlines – but having done so, I've seen nothing to suggest there has been a breach of contract here either. While the terms include the necessity to provide parts of the package, including the flights, I've seen nothing to say access to the booking areas are included in this. And as our Investigator pointed out, Company A's website says tickets and E-tickets are usually available between seven and fourteen days prior to departure, dependent on the airline.

I understand Mr B spoke to the airline at the time of the booking and says they were unable to locate the reference he'd been given. While I've not seen evidence of this, as explained above this doesn't mean a breach of contract occurred. Mr B cancelled his holiday before the flight was provided and there was no requirement under the contract to provide access to the airline's website.

I understand Mr B considers he should be able to obtain a refund given he considers Company A didn't provide a verifiable booking and nor did they contact him – but as explained, Section 75 is prescriptive in the way a claim can be made, and unfortunately based on what I've seen, I can't agree there has been a breach of contract or misrepresentation by Company A. So it follows that Virgin also cannot be held liable for the cost Mr B has incurred.

My final decision

For the reasons explained above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 26 August 2024.

Victoria Cheyne
Ombudsman