

The complaint

Mr R complains about the way Clydesdale Bank Plc trading as Virgin Money ('VM') handled a claim he made to it for a refund.

What happened

The background details of this complaint are well known to the parties – so I will only summarise them. It reflects my informal remit.

Mr R paid a retailer £3,462.39 using his VM credit card for a package holiday deal advertised by way of a redeemable voucher. The retailer of the voucher I shall refer to as 'A'. The organiser of the package holiday I shall refer to as 'B'.

In summary, Mr R says A advertised the voucher deal as a multi city holiday with 4 star accommodation. However, when he called B to redeem the voucher and confirm the holiday he was told that the accommodation was 3 star and he had to pay £1,600 to upgrade to 4 star. He says he didn't want to do this – but B kept him on the phone for around two hours and eventually convinced him to pay £440 extra to upgrade some of the hotels to 4 star.

Mr R felt the holiday had been mis-sold and soon after he got off the phone he informed A+B that he wanted to cancel and get his money back. He says that neither would refund him and he is left with no holiday and is out of pocket.

Mr R raised a dispute with VM to get his money back but it would not refund him. His complaint about this came to this service. Our investigator did not uphold the complaint

Mr R has asked for the matter to be looked at by an ombudsman for a final decision. I issued a provisional decision on this case which said:

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

My role is to resolve disputes informally – so I won't be commenting on everything the parties have submitted. Instead I will focus on the information I consider key to resolving matters fairly.

I note VM is not a supplier of holiday vouchers or holidays. So in considering what it is fairly responsible for I take into account its role as a provider of financial services only. In doing so I note that the chargeback dispute scheme and Section 75 of the Consumer Credit Act 1974 ('Section 75') are particularly relevant here. So it is these I have focused on.

Section 75

Section 75 means that in certain circumstances VM is responsible for a 'like claim' for breach of contract or misrepresentation that Mr R has in respect of an agreement for goods or services with the supplier he paid using his credit card.

There are certain other requirements that have to be met in order for there to be a valid

Section 75 claim, for example in respect of the cash price of the goods or services. After considering these I am satisfied that Mr R has a valid claim against VM in respect of the relevant supplier he paid using his card here.

In this case I can see Mr R's credit card transaction for the holiday voucher was with A. So his Section 75 claim is in relation to the agreement he has with A.

I note that our investigator has made a finding that A is not responsible for the provision of the package holiday itself as it is not the 'organiser' under the relevant law relating to package travel. I broadly agree with this but do not consider it necessary to go into detail here as I am upholding the case for other reasons. Ultimately, I am still satisfied that A does have an agreement and consumer relationship with Mr R as a retailer of holiday experiences redeemable by way of voucher. And it is on that basis I have considered Mr R's claim against A (and against VM by way of Section 75) in respect of any breach of contract or misrepresentation by it.

Misrepresentation

A misrepresentation is where there is:

- 1. An untrue statement of fact;*
- 2. which then induces someone to enter into a contract they otherwise would not have.*

There is overwhelming evidence here that the advert which A published for the holiday deal contained untrue information. Not only is Mr R's testimony on this both compelling and consistent and reinforced by the screenshot of the advert he saw on A's site (showing 4 star ratings for the hotels in the voucher deal) I have also seen an email from B to Mr R where it admits the following:

'As per your concern raised in regard to the hotels, we would like to inform you that there was misinformation on the merchant's website stating it as Hotel 4, whereas, if you would have checked the hotels on search engines while purchasing the vouchers from [A], all the hotel stated are 3* and not 4*'*

Therefore, I am satisfied that the first limb for misrepresentation by A is satisfied. In coming to this conclusion I note that A has disclaimers in its terms and conditions in respect of its liability for incorrect information on its website. However, I don't consider this effectively mitigates a legal misrepresentation. While I accept that a misrepresentation can be innocent it is still actionable for the purposes of Section 75.

I also don't think B's claim that Mr R could have discovered the false information himself changes a finding of misrepresentation here. It doesn't alter the fact that A advertised its product with untrue information. Furthermore, I don't think Mr R was acting unreasonably in relying on the information presented to him by A in the first instance.

I am also satisfied the second limb for misrepresentation is met here – in that the untrue information is more likely than not to have caused Mr R to enter a contract he otherwise would not have. It is very clear from Mr R's testimony and actions that the star rating was a crucial aspect of the deal and a key factor in the purchase of the voucher at that price. I think that is made very clear by the fact that shortly after discovering the truth of the situation Mr R requested to cancel the holiday – and he has maintained that stance with both A+B throughout. In fact his strength of feeling is clearly shown by the fact he has refused to go on the holiday despite potentially standing to lose a significant amount of money in doing so.

For completeness, I don't consider Mr R's initial payment towards a holiday upgrade means that the 4 star advert was any less important to him, or that he would have gone through with the booking regardless of the misinformation. I say this because:

- Mr R has provided credible testimony as to how he felt pressured on a very long call with B to agree to part with extra money (and seemingly was made to doubt his own recollection of the deal he agreed);*
- Mr R's actions are consistent with someone who wasn't simply willing to pay extra to get the 4 star upgrade – not only did he not pay to upgrade all the hotels during the call with B, he clearly wasn't happy about what he had been told by it as once he was off the phone he found a copy of the advert and immediately complained and requested to cancel on the basis he had been misled at the outset.*

Mr R says that when he raised a dispute with VM he provided it with all the relevant details including the correspondence he had with A+B. I don't have any reason to doubt this and note his cover letter to VM from April 2023 where he lists all the supporting information he has sent to it. It isn't entirely clear to me the depth at which VM considered this information in its Section 75 or chargeback assessment but I think from this information it would have been reasonably clear to VM that there had been a misrepresentation by A – and that Mr R was entitled to a remedy as a result.

A common remedy for misrepresentation is to put a party back into the position they would have been in were it not for the misrepresentation. So here I consider that VM should not only refund Mr R for the original transaction – but also the upgrade that I am persuaded is a valid consequential loss here and directly flows from the original misrepresentation.

It appears that Mr R originally raised his Section 75 claim with VM in April 2023, and from what I can see by the end of June 2023 it reasonably should have been in a position to uphold it. So I consider any re-working should take place from 1 July 2023.

Because of my finding of misrepresentation above I don't consider it necessary to consider breach of contract (via Section 75) or chargeback in any detail. However, in the interest of completeness I think it is worth noting the following:

- The Consumer Rights Act 2015 implies a term into consumer contracts that a supplier of services will act with reasonable 'care and skill'. The CRA does not exactly define what this is but it is usually taken to be the reasonable standard of care as would be expected in that particular industry. It is debatable if in publishing the advert for the voucher A acted with said level of care and skill. In the first instance it isn't clear if the misinformation that B explained to Mr R came from it or A. But in any event, even if B had provided A with wrong information which it then went on to innocently publish, it would appear relatively easy (from what B has described) for A to have carried out due diligence on the hotel rating (as a key element of any holiday deal) in advance. So I think (aside from misrepresentation) there are fair grounds to say that VM would be liable for a breach of contract here too.*
- VM did not raise a chargeback from what I can see. And while a chargeback is not guaranteed to succeed it would appear that one based on a service not being 'as described' would have a reasonable prospect of success here. While I note that A does attempt to limit its liability for errors in its contract it isn't clear to me (from the MasterCard rules I believe are applicable here) how effective that would be as a defence to a clear case of a service not being as described. I don't see where the specific chargeback rules allow for a merchant of record (as A would be here) to use disclaimers as a defence for misdescriptions of this kind.*

So, even if I were mistaken on my finding in respect of misrepresentation (which I do not consider I am) I think there would likely be grounds for directing VM to refund Mr R in any event.

I upheld the complaint and directed VM to rework Mr R's card for the transactions of £3,462.39 and £440 from 1 July 2023 and pay him out of pocket yearly interest at 8% simple.

VM did not agree with the decision. It said the customer paid A to redeem holidays from a third party supplier – and A completed the contract with the customer 'by providing him with the goods he paid for'. It says that Mr R entered into a separate contract with a third party that VM is not part of. It also says that Mr R has not provided correspondence he had with A and he used the voucher supplied to make a booking – therefore using the service he paid A for.

Mr R accepted the decision, but has noted that since the decision was issued A has refunded him the £3,462.39 he paid it to his VM card.

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 note Mr R accepted my decision so I am going to address VM's objections here.

Firstly, I don't consider it in dispute that Mr R paid A to redeem holidays with a third party. Nor that he entered into a subsequent agreement with the third party. However, this does not mean that his Section 75 claim against VM falls away. I have already explained in detail why I consider that A misrepresented the agreement which Mr R had with it. And that I am also persuaded its actions constitute a breach of the implied term as to reasonable 'care and skill' too. I do not consider it necessary to repeat my reasons as they are copied above and form part of this decision.

Because I consider there to be a breach and/or misrepresentation by A I consider that VM is fairly liable for it under Section 75. And while Mr R approached B to redeem the voucher– he didn't get what was promised by A. As a result he ended up paying extra and ultimately deciding not to go on the holiday. There is no indication that Mr R has benefited from the purchase and the recent actions by A of refunding Mr R also reinforce my findings in the particular circumstances here.

I note VM says Mr R has not shown the correspondence he had with A about the issues. However, I have seen correspondence he had with A where he makes a complaint about the misleading offer. I don't see why Mr R would not have provided VM with this – and VM could have reasonably asked for it from Mr R or A if it didn't get this at the time the claim was considered. Furthermore, Mr R was entitled to approach VM to make a Section 75 claim regardless of this communication.

I note that Mr R has now told us that A has refunded him the £3,462.39 he paid it so VM will not need to refund that now. VM needs to refund him in respect of the consequential loss he suffered paying £440 to B. Any redress will also still need to reflect removal of interest/charges, and payment of out of pocket interest in the event VM had upheld the claim (as I consider it should have).

Putting things right

VM should put things right as I have set out below.

My final decision

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

- Re-work Mr R's credit card as if the transaction for £440 were refunded on 1 July 2023; and
- if the above calculation results in a credit balance it should refund this to Mr R with simple yearly 8% interest calculated from the date of said credit balance to the date of settlement.
- in relation to the £3,462.39 that Mr R has now received back VM should fairly remove any interest or charges accrued on this amount from 1 July 2023 (and if Mr R has paid these it should refund these to him plus 8% simple yearly interest from the date he paid these to the date of settlement).
- in the event that any re-working of the card in relation to a refund of £3,462.39 on 1 July 2023 would have produced a credit balance, VM should pay simple yearly 8% interest on this credit balance from the date of said credit balance to the date Mr R received the refund of £3,462.39 from A.

If VM deducts tax from the interest element of my award it should provide Mr R with a certificate of tax deduction.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 14 June 2024.

Mark Lancod
Ombudsman