

complaint

Mrs W complains that MBNA Limited has refused to fully refund her credit card account following a claim for misrepresentation she made about a holiday accommodation booking.

background

Mrs W paid for a booking for a villa with a supplier I'll call "T" using her MBNA Limited ("MBNA") credit card. Her credit card statement shows she paid \$4,819.11 to T on 2 March 2017 which was converted to £3,928.75 and that \$1,000 of this amount was a deposit that was paid. The booking was for seven nights and for ten guests, which were Mrs W, her husband and two children, her parents and her sister and family.

When Mrs W and the other members of the party arrived at the villa, they were unhappy that it was not a brand new property as described by the advert on T's website. Mrs W says the décor was tired, there was a broken door, the villa was crawling with ants and had numerous bug traps dotted around. Mrs W also says that two members of the party had health conditions which made the villa unsuitable.

Mrs W contacted T and asked for alternative accommodation. However, T did not agree to relocate her and her party. So, they sought and paid for accommodation elsewhere.

Mrs W complained to MBNA when she returned from the holiday asking for a full refund of the money she'd paid on her credit card. She said that the villa was not brand new as described by T. MBNA carried out a chargeback in line with the card scheme operator rules under the reason 'not as described'. However, the chargeback was defended by T on the basis that the villa was as described and that 'brand new' in the context of the advert meant 'brand new' to their portfolio.

The chargeback was eventually taken to arbitration where the card scheme operator ruled in the merchant acquirer's favour. MBNA then considered Mrs W's claim for a refund under Section 75 of the Consumer Credit Act 1974. Initially, they said that there wasn't enough evidence to show that the villa had been misrepresented.

However, MBNA reassessed the claim and overturned their decision. They said that the villa has been advertised by T as being brand new which turned out to be incorrect and that T had changed the advert once Mrs W had complained about it. MBNA also noted that Mrs W had asked T to relocate her and her party and immediately vacated the villa and sought alternative accommodation once this was declined. And they also noted that two of the party of guests had health issues which necessitated changing to different accommodation.

MBNA offered to refund Mrs W a third of the amount she'd paid on her credit card and said this was because their liability only extended to her and her immediate family, which they said was her husband and children.

MBNA said they would ask T to return the deposit Mrs W had paid them and that they would refund a third of this if they didn't hear back. MBNA also said they would credit Mrs W's credit card with £50 for initially declining her Section 75 claim and that it had already refunded the non-sterling transaction fee of £117.46 she had paid for the booking.

Mrs W wasn't happy with this and felt she was entitled to a full refund of what she'd paid T. So, she referred her complaint to us.

Our investigator didn't uphold Mrs W's complaint. She said, in summary, that MBNA was only liable for Mrs W's 'share' of the claim, so in effect one-tenth of the cost of the booking. And as MBNA had offered to refund her a third of the cost taking into account what it described as 'her immediate family', she felt MBNA didn't need to do anything further.

Mrs W didn't agree and said that definition of 'immediate family' should include her parents and sister. Mrs W asked for an ombudsman to review her complaint.

I issued my provisional decision on 16 February 2021, in which I said the following:

When considering if MBNA acted fairly and reasonably in how it's dealt with Mrs W's request for a full refund, I take into account relevant law. In this case, Section 75 of the Consumer Credit Act 1974 makes MBNA equally liable for a breach of contract or misrepresentation by the supplier. In this case, T was the supplier.

Debtor-creditor-supplier relationship and the extent of Mrs W's claim

Firstly, I'm satisfied that the necessary debtor-creditor-supplier link was in place for Mrs W to make a Section 75 claim against MBNA. I consider that Mrs W, as the debtor who made the credit card payment, also entered into a contract with the supplier of the villa. She says that she arranged and carried out the booking and I note this is supported by the confirmation paperwork.

MBNA accepts that Mrs W is able to make a Section 75 claim, however they say their liability is only towards her and none of the other party members (despite offering to include some immediate family in its offer of a partial refund).

I've considered MBNA's position on this, however I am currently minded to disagree with it. I will explain why.

I've seen the terms and conditions for bookings on T's website, albeit these seem to postdate when Mrs W booked the accommodation with T. I will though, in the absence of the terms and conditions from that time, assume that these mirror the ones that were applicable at the time of the booking. MBNA are welcome to provide evidence to the contrary if they wish.

*I note that Clause 1.1 under the 'rental agreement section' states that the booking terms and conditions 'form the basis of **your** contract' with T' (my emphasis added). I can't see that 'your' is defined in the contract whereas the same clause states that "we or us" is intended to refer to T.*

I've looked through the terms and conditions in their entirety and I consider that references in the contract to either 'you' or 'your' to mean whoever made the booking, which in this case was Mrs W. I say this primarily because I can see that there is also reference in the terms and conditions to other persons involved in the booking. And the wording seems to distinguish between the person making the booking and the wider group of people who form the other members of the party. In other words, there are separate references to 'you/your' and to 'other members of the party' or 'you and your party' within the terms and conditions of the contract.

There are some terms which indicate that, through Mrs W, the other members of the party might have agreed their information was correct and that they would be bound by T's terms and conditions. However, it is clear that Mrs W contracted to book the accommodation with T. It follows that regardless of the other people Mrs W had stay at the villa with her she is contractually entitled to make a claim for any refund as a result of the alleged misrepresentation.

I've considered if Mrs W is out of pocket for the full amount of the booking costs despite the involvement of third parties in the stay. I'm satisfied having done so that Mrs W is indeed out of pocket to this extent.

What refund is due?

Mrs W's complaint is that T misrepresented the villa to her as being brand new when it wasn't. For a claim of misrepresentation to be upheld, Mrs W would need to show that the villa was misrepresented to her and that this induced her to enter into the contract with T, to the extent that she wouldn't have done so had the representations not been made.

MBNA accepts that T misrepresented the villa to Mrs W and that she is entitled to a remedy for this. So, I don't need to consider the merits of this in too much detail as this isn't disputed.

However, for completeness, I would add that I find that T did misrepresent the villa to Mrs W. I've seen a copy of the advert for the villa that was shown on T's website and this described it as being a 'brand new home'. I note that T sought to clarify this by saying the villa was 'brand new' to its portfolio. But the advert didn't make this clear and I think the average person would understand a 'brand new home' to mean that it had been recently built with new fixtures, fittings and furnishings. That evidently wasn't the case here.

Mrs W has said that she decided to book this because the villa was 'brand new'. I find her explanation plausible. I say this because I note that Mrs W contacted T immediately upon arrival at the villa to ask them to find alternative accommodation when she discovered that it wasn't brand new. When T did not do so, Mrs W's father did that himself. I find that Mrs W's actions here were consistent with her testimony that the property wasn't suitable and consistent with her specific assertion that the villa being listed as 'brand new' materially influenced her to enter into the booking and contract with T.

I note also that reference was made to two of the party of guests having health problems which again lends credence to why Mrs W chose to book a brand new villa with the expectation that came with that, rather than say one that was significantly older and in less good condition.

So, I am satisfied that T misrepresented the villa to Mrs W and that she wouldn't have agreed to book this had the true position been clear. The issue to determine now is what a fair remedy is for Mrs W. The general position on misrepresentation is that the party concerned is put back in the position they would have been in, had the misrepresentation not been made. In this case, Mrs W would not have entered into the contract with T.

Mrs W says that she's already received the deposit back from T and says she paid that amount off her credit card balance when it was received on 15 May 2018. I therefore provisionally intend to direct MBNA to refund Mrs W the full amount she paid T on her credit card (although MBNA can take into account the deposit that's already been refunded), plus pay her interest.

I invited Mrs W and MBNA to reply to my provisional decision. Mrs W replied saying she accepted. MBNA initially asked whether Mrs W was entitled to the full cost back as they say they were told that the cost of the villa was to be split three ways. However, MBNA didn't reply afterwards to say whether they agreed with my provisional decision or not although I gave them an extension of time to do so.

my findings

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

MBNA queried whether Mrs W was entitled to a full refund of the cost of the villa as they say they were told that this was being split between her and her family. Mrs W has though said that she has paid for the full cost and hasn't received any money for any part of this. I've not seen any persuasive evidence that Mrs W has received any money for this.

I haven't had any further submissions from MBNA other than on this particular point. So, for the reasons set out here and in my provisional decision, I uphold this complaint and will be directing MBNA to refund Mrs W the full amount she paid T on her credit card (although MBNA can take into account the deposit that's already been refunded), plus pay her interest.

my final decision

I uphold this complaint and direct MBNA Limited to:

- rework Mrs W's credit card account as if the payment of £3,928,75 had not been made, deducting the deposit refund already received; and
- if this results in a credit balance, refund this to Mrs W and pay interest at 8% simple per year from the date that credit balance arose, to the date of settlement.

If MBNA Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs W how much it's taken off. It should also give Mrs W a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 30 April 2021.

Dan Picken
ombudsman