DRN-4305641

The complaint

Mr T complains about the way TSB Bank plc handled his claim for a partial refund in respect of a trip he paid for with his credit card that was curtailed due to the Covid-19 pandemic.

What happened

In March 2019 Mr T and his partner booked a three-month cruise with a company I'll call C. The cruise was to depart in January 2020. The total cost of the cruise was around £40,000, made up of various different components.

Mr T said he paid a deposit to C of around £1,600 via a debit card with another bank. And he thinks around £400 was transferred from a previous booking he cancelled in favour of this one.

Mr T also paid around £29,000 to C via bank transfers from his TSB bank account over the course of 2019.

Mr T said his partner paid £299 for port car parking and £3,925.80 for 'additions' packages for both of them which upgraded the refreshments they could benefit from.

In November 2019 Mr T said C offered him and his partner an upgrade to their cabin. He paid £5,000 to C for this using his TSB credit card. Following this C sent a 'confirmation invoice' to Mr T's partner showing the following:

Cruise Fare	(listed against Mr T's partner)	£36,679
Cruise Fare	(listed against Mr T)	£36,679
Discount Onboard Booking	(listed against Mr T's partner)	-£5,633.95
Supplement Paid Upgrade		£5,000
Promotional Discount	(listed against Mr T)	-£36,679
Port Car Parking		£299
C Additions Package	(listed against Mr T's partner)	£1,962
C Additions Package	(listed against Mr T)	£1,962
Total		£40,269.85

In March 2020, a little over halfway through the cruise, C told the passengers it would have to curtail it due to the developing situation with the Covid-19 pandemic and lockdowns in the destination ports. C arranged to ferry Mr T and his partner back to the UK port and told them it would be 'offering all passengers a full refund of monies paid from today, until the end of

the cruise'. C explained that it would take around a month to get them home.

In June 2020 C gave Mr T and his partner a 'Refund Credit Note' for £16,358.86. Mr T and C agreed this represented the portion of the trip and associated add ons that hadn't been provided. This was based on a calculation that around 43% of the cruise was missed having been curtailed on 14 March 2020 and around 17.5% of the additions packages and port car parking were missed having been used up until 14 April 2020 (when Mr T and his partner were returned to the UK). The refund credit note said it could be presented as credit against a future booking with C or redeemed for a full refund.

In July 2020, before Mr T or his partner were able to use the refund credit note or redeem it for a cash refund, C entered administration.

Mr T tried to recover the cost of the trip via the relevant bonding agent but was told he would need to go to his bank.

Mr T asked TSB to help him get his money back. It successfully recovered around £2,166 of the £5,000 he paid to C using his credit card via the chargeback scheme (a mechanism a bank can use to recover money paid to a supplier).

Mr T agreed with TSB this sum represented the unused portion (i.e. 43%) of the supplement paid upgrade. TSB said it could not claim the remaining sums Mr T had paid to C via chargeback as he hadn't paid them via one of its plastic cards but instead via bank transfer or cards from another bank.

Mr T asked TSB to consider a claim under section 75 Consumer Credit Act 1974 ("section 75") for the remainder of the money he paid to C. However, TSB said Mr T did not have a valid claim. It said this was because the value of the claim exceeded the financial limits of section 75 as the total cost of the booking for Mr T and his partner was more than £30,000. It also said Mr T had already agreed a remedy with C for its failure to provide the service in full as he'd accepted the refund credit note. So, it said this effectively extinguished his claim under section 75 and it wasn't responsible for the failure of the remedy that the parties had agreed.

Dissatisfied with this response, Mr T referred his complaint to this service.

I issued a provisional decision in July 2023 explaining why I planned to uphold Mr T's complaint in part. I said:

> *"I am looking here at the actions of TSB and whether it has acted fairly and reasonably in the way it handled Mr T's request for help in getting his money back. This will take into account the circumstances of the failed trip and how the supplier has acted, but there are also other considerations, such as the scheme rules a bank has to follow and its own obligations.*
>
> *There are two main ways a bank can help a customer to recover money paid to a supplier who hasn't provided what was promised. It can try to recover the money from the supplier through a process known as chargeback. Or it can assess whether its customer has a valid claim under section 75).*
>
> *Chargeback*
>
> *In certain circumstances the chargeback process provides a way for a bank to ask for a payment Mr T made to be refunded. Where applicable, the bank raises a dispute with the supplier and effectively asks for the payment to be returned to the customer.*

While it is good practice for a bank to attempt a chargeback where the right exists and there is some prospect of success, the circumstances of a dispute means it won't always be appropriate for the bank to raise a chargeback. There are grounds or dispute conditions set by the relevant card scheme and if these are not met a chargeback is unlikely to succeed.

Here TSB raised a chargeback for Mr T in respect of the one transaction he made using his TSB credit card – the £5,000 supplement paid upgrade. TSB successfully recovered the sum Mr T asked to it charge back which was the portion of the service he said he paid for but did not receive as a result of the curtailment. It seems unlikely TSB could have recovered any more than this via the chargeback process as it could only recover sums Mr T had paid using its plastic cards and he didn't pay for any other parts of the trip with his TSB credit card.

Section 75

Section 75 provides that subject to certain criteria the borrower under a credit agreement has an equal right to claim against the credit provider if there's either a breach of contract or misrepresentation by the supplier of goods or services.

One limitation to this is contained in section 75(3)(b) which sets out that it does not apply to a claim so far as it relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000.

TSB said Mr T's claim related to a single item to which C attached a cash price of more than £30,000. It said this was because it considered the whole booking, including both Mr T and his partner's cruise fares to be a single item.

I've thought carefully about this.

The invoice from November 2019 provided a breakdown of the various charges that had been paid by Mr T and his partner. Each of the line items were listed, and some items indicated to which passenger they referred. Two separate cruise fares were listed, one against Mr T and one against his partner.

I find that on balance both Mr T and his partner's cruise fare were single items to which C attached separate cash prices for the purposes of section 75(3)(b). I say this for the following reasons:

- *The contract treated each passenger as (in some cases) individually liable for their fare, and they were able to transfer or cancel their passage (under certain conditions) for costs for which they would be individually liable.*

- *The choice of one passenger to cancel did not appear to impact the ability of the other passenger to continue the journey. This suggests to me that each fare was a separate item. If they were one single item together, I would expect the cancellation of part of the booking to have affected the whole booking.*

- *The discount promotion listed on the invoice was described on C's website as being for 50% off per person suggesting each person's fare was a separate item to which the discount applied. Although this discount is described on the invoice under one line item and listed against Mr T's name, without more information as to how the discount works, it seems reasonable to apply what was described on C's website.*

Working on that basis, it appears that no other combination of discounts, additions or supplements on the invoice (however one might argue they should be apportioned between Mr T and his partner) would have put the cost of either Mr T or his partner's cruise fare over £30,000.

I am satisfied therefore that Mr T's claim does not relate to a single item to which C attached a cash price of more than £30,000.

TSB has suggested the Package Travel and Linked Travel Arrangements Regulations 2018 ("PTR") operated in such as a way so as to roll up both cruise fares into one overall package or single item.

The PTR imply certain terms in travel contracts where different travel services are combined in a particular way by an organiser. Generally, the legislation deals with:

- *the liability of an organiser to a traveller in certain situations and the specific remedies available to the traveller in the event of a lack of conformity with the contract by the organizer.*

- *Protection against the insolvency of package organisers, ensuring travellers are refunded, or where applicable, repatriated should the organiser go bust.*

- *Detailed information requirements that make it clear what product the traveller is buying and the associated protections.*

It's likely Mr T's trip fell within the definition of a package under the PTR as it involved the combination by C of transport and accommodation services. And Mr T was entitled to travel under the package contract so he met the necessary definition of the category of person that could rely on the provisions of the PTR.

It's likely therefore that the PTR would have some relevance in answering whether there was a breach of contract by C. Whether they were relevant in the way TSB suggested however (insofar as the effect of the legislation was that individually listed fares for two separate people were rolled up into one 'single item' for the purposes of section 75 (3) (b) is questionable. There is no case law that I am aware of that supports such position. Neither have I seen anything within the legislation or the guidance produced by the Department for Business, Energy and Industrial strategy that would lead me to conclude this. And TSB has done little to convince me of that either.

Another of the criteria for a claim under section 75 was that the claim had to relate to a transaction financed by a debtor-creditor-supplier ("DCS") agreement. In other words, Mr T's claim had to relate to a transaction between him and C that was financed by his TSB credit card.

From what I have seen, although Mr T's partner was the booking party, there was still a contract between Mr T and C. The terms of the contract said:

> *"In these Booking Conditions references to "you" and "your" include the first named person on the booking and all persons on whose behalf a booking is made or any other person to whom a booking is transferred...*
>
> *By making a booking, the first named person on the booking agrees on behalf of all persons detailed on the booking that:-*

He/she has read these terms and conditions and has the authority to and does agree to be bound by them;"

The contract was therefore binding on Mr T as an individual who was a named passenger. And while there were parts of the contract which held the parties jointly liable (e.g. for damage), there were other parts which said Mr T could have cancelled his participation in the cruise, and he would have incurred the relevant cancellation (or transfer) fees. It appears that this would not have affected Mr T's partner's ability to travel. So, it appears the contract was divisible between the travelling parties as it dealt with each passenger separately rather than dealing only with the lead passenger.

Mr T paid £5,000 to C using his TSB credit card for the supplement paid upgrade around six months after the initial purchase of the cruise was made. Although this was listed as a separate line item on C's invoice, I find a reasonable analysis to be that in practice Mr T and C had agreed to vary his original agreement in return for an increase in the total price.

The upgrade did not add discrete goods or services to what Mr T was already entitled to receive from C; rather, it appears to have substituted one level of comfort for the same journey for another – a better class of cabin. It was the quality or specification of the already contracted services that changed, rather than there being an addition of some add-on service that could be seen as a separate supply transaction.

Accordingly, it appears that there was a transaction between Mr T and C under which he obtained the right to a cruise on the terms ultimately agreed and C received in return a price which comprised both the original amount and the supplement for the upgrade.

I find therefore that TSB did finance a transaction between Mr T and C which included the provision of his cruise.

I've gone on to consider whether there was likely a breach of contract, and if so, what it would be fair to ask TSB to do.

Mr T's agreement with C was for it to provide a cruise for 120 nights, stopping at several destinations around the world. The contract set out that if C became unable to provide a significant proportion of the travel arrangements after Mr T had departed, and was unable to make alternative arrangements, it would pay "compensation…subject to section B of clause 6".

I've looked at Section B of clause 6, It contains a number of exclusions and limitations on when C will pay compensation. It doesn't appear C sought to rely on any of these when it offered to pay a partial refund after the trip was curtailed. So, I think it's reasonable to say they didn't apply.

C's terms mirror somewhat the PTR insofar as the PTR implied terms in the contract that where a significant part of the package could not be performed and a suitable alternative could not be offered, the traveller was entitled to an appropriate price reduction.

It's clear that a significant proportion of the package was not provided by C, the cruise having been curtailed a little over halfway through. And it didn't offer to provide any form of alternative arrangements. So, Mr T was entitled to 'compensation' under

the express terms of the contract or an appropriate price reduction under the term implied by the PTR.

C appears to have accepted this was the case and provided a refund credit note of £16,358.86.

TSB said that because C issued the refund credit note, it had remedied any breach of contract that may have occurred as result of the cruise being curtailed. It said that anything that happened after this (i.e. C going into administration and being unable to honour it or exchange it for a cash refund) was not a breach of contract and therefore not its responsibility to put right.

However, I consider this unlikely to be the position here. Even if Mr T accepted the refund credit note, the note itself had some important details which suggest to me that he would still have been entitled to the refund, and that the breach of contract was not remedied by the refund credit note itself.

The refund credit note included a provision that it could be used to redeem a full refund, rather than only used as credit to make another purchase with C. And it contained a link to the 'Online Refund Form' which could be completed to redeem it for a full cash refund.

All of this suggests that the refund credit note was effectively a confirmation that Mr T and his partner were entitled to a refund of £16,358.86, in line with C's contractual obligations to compensate them or make an appropriate price reduction. The refund credit note is of course not the same as the refund itself. Credit notes are not refunds and unless the contract specifically allowed C to provide one in lieu of a refund (which even then might be subject to an assessment of fairness under the unfair contract terms provisions in the CRA), I don't think it discharged C's obligation to provide compensation or an appropriate price reduction.

So, simply confirming that a refund was owed did not displace Mr T's contractual right to that refund. It appears therefore that having become unable to honour the refund credit note, C remained in breach of its contract to provide compensation to Mr T or make an appropriate price reduction for the part of the trip which was curtailed.

That is not the end of the matter however. As I have explained already Mr T and his partner each had their own agreement with C to be carried on the cruise. Generally, an individual is only able to claim for their own losses unless the contract sets out otherwise. Mr T was not the lead name on the booking and it doesn't appear C had any obligations towards him in respect of the provision of his partner's cruise ticket.

So, it doesn't appear Mr T had a claim against C for breach of contract in respect of his partner's cruise ticket. I recognise it was Mr T that agreed with C that it should provide a refund of £16,358.86 and this was the sum C offered on the refund credit note. But it appears this related to C's obligations to both Mr T and his partner. I don't think it could be implied from C agreeing the overall refund with Mr T, that all of the refund related only to his own losses.

TSB is only liable to Mr T under section 75 in respect of any claim he may have for breach of contract, not one his partner may have. And, as far as I am aware, the appropriate sums in respect of all the other line items on C's invoice (excluding Mr T's partner's cruise fare) have either been recovered by Mr T's partner, or, in the case of the supplement paid upgrade, recovered by Mr T.

Everything considered therefore, I don't think it would be fair or reasonable in this case to ask TSB to pay Mr T's partner's losses to Mr T i.e. the cost of her cruise fare. I think the fair and reasonable thing to require TSB to do here is pay Mr T the equivalent of an appropriate price reduction on his cruise fare. Mr T agreed refunds with C on the basis that around 43% of the cruise was curtailed. This appears to have been worked out on the basis that the cruise ended on the date C confirmed in writing it had been curtailed. In the absence of a fairer way of calculating this, I see no reason to depart from this as fair way of calculating the part of the cruise that Mr T didn't receive.

I therefore calculate Mr T's loss as:

Cruise fare	*£36,679*
Less	
50% promotional discount	*£18,339.50*
Less	
*50% of discount onboard booking honour**	*£2,816.97*
Total	*£15,522*
43.333% of total	*£6,726.43*

**this discount was listed against Mr T's partner on the invoice. This could have been because she was the lead name on the booking. However, without further information and in view of the way the promotional discount was described on C's website, it doesn't seem unreasonable to me that this discount should be apportioned equally across the two cruise fares.*

TSB should therefore pay Mr T £6,726.43 plus interest from when it first declined to meet his claim in July 2020.

I know Mr T will be disappointed that I plan to tell TSB to pay him less than the investigator thought he should. But I have to take relevant legislation such as section 75 into account when deciding what is fair. It wouldn't be fair to ask TSB to pay Mr T something he would not likely have been able to claim for under section 75.

My provisional decision

For the reasons I have explained above, I plan to uphold Mr T's complaint in part. To put things right I intend to tell TSB Bank plc to pay Mr T £6,726.43 plus interest of 8% simple per annum from 31 July 2020 until the date of settlement"

Both TSB and Mr T agreed with my provisional decision. The complaint has therefore been returned to me to finalise matters.

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.

As both TSB and Mr T agreed with my provisional decision, I see no reason to change the findings I made. So, for the reasons explained in the extract of my provisional decision above I still find TSB should treat Mr T as if it had met his claim to the extent I explained therein.

My final decision

I uphold Mr T's complaint in part. To put things right TSB Bank plc must pay Mr T £6,726.43 plus interest of 8% simple per annum from 31 July 2020 until the date of settlement*.

* If TSB Bank plc considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr T how much it's taken off. It should also give Mr T a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 15 September 2023.

Michael Ball
Ombudsman