

The complaint

Mr T complains about the way American Express Services Europe Limited (AESEL) dealt with a claim he sought to bring against them under the connected lender liability provisions of Section 75 of the Consumer Credit Act 1974 (“Section 75”).

What happened

In January 2022, Mr T purchased flights for himself and another traveller from a supplier/merchant – who I will refer to as the Company – using his AESEL credit card. The total cost of flights charged to Mr T’s credit card was approximately 990.60 EUR. On 15 January 2022, Mr T changed their flight timings to depart one day later on 1 February 2022 and he received a small difference in the booking amount of about 0.78 EUR.

On 23 January 2022, Mr T was notified by the Company that the flights had been cancelled. He also received a refund for the flights, but Mr T thinks that he is due further compensation. He said that this is because the contract, which he had with the Company, was for carriage from an airport located in the European Union, so it was governed by EC Regulation 261/2004 (the “EC Regs”). Mr T also said that further, or in the alternative, the Company’s Conditions of Carriage incorporate (at Article 10.4) the EC Regs to the extent it provides for denied boarding compensation and states that the Company will pay compensation in accordance with applicable law. Mr T said that under the EC Regs, *inter alia*, the Company is liable to pay compensation in the amount of approximately £1,040 per passenger for the breach of contract. So, he raised a claim under Section 75 with AESEL.

In June 2023 AESEL wrote to Mr T and said that the flights in question were cancelled due to extraordinary circumstances that could not have been avoided by the Company, so they said that he is “ineligible for late cancellation or denied boarding compensation under Article 5(3) of EU261.”

Unhappy with this Mr T bought his complaint to our service.

The investigator did not think AESEL was liable to Mr T for the compensation in question. In summary, she was of the opinion that when the Company was referring to applicable law(s) in their contract with Mr T, this was in an advisory or informational purpose. And didn’t make a contractual promise to pay compensation in the event of (for example) the cancellation of flights. She was of the opinion that these rights were something Mr T was entitled to as a result of the statutory laws and regulations, but the Company had no express contractual obligation to pay this compensation. So, the investigator did not think AESEL had acted unfairly by not paying Mr T the compensation in question.

Mr T disagreed with the investigator. In summary, he said that the failure to pay the compensation in question is not only a breach of the regulations but, more importantly, a breach of contract in question. He said that Article 10.4 of the Company’s Conditions of Carriage is a mandatory obligation they have agreed to undertake as part of the mutual undertakings under the contract of carriage. So, he said, that being the case, AESEL is likewise liable for the said breach and the compensation is due.

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.

Where evidence is unclear or in dispute, I reach my findings on the balance of probabilities – which is to say, what I consider most likely to have happened based on the evidence available and the surrounding circumstances.

This decision is not about the Company, who is not a financial service provider for the transaction in question and so does not fall within this service's remit. So, in this decision I'm only considering the question of whether AESEL have treated Mr T fairly when dealing with his Section 75 claim.

Section 75 sets out that, in certain circumstances, Mr T can bring a claim against AESEL for any breach of contract or misrepresentation by the Company. This is because, as the credit provider, AESEL is jointly liable for any breach of contract or misrepresentation by the Company.

The EC Regs, which are also relevant in this case, are a set of consumer protection regulations which give consumers certain rights when specified things go wrong with flights they have booked. These include rights when a flight(s) is/are cancelled, in which case the EC Regs say that a consumer would have "the right to compensation" so long as certain conditions were met. Compensation is calculated according to further provisions within those regulations.

Neither party has argued that the technical criteria of Section 75 have not been met, so I make no comment on this point. Also, it is not in question that the Company was in breach of their contract with Mr T as the flights were cancelled and to remediate this breach, the Company refunded Mr T the price he paid for the flights.

Mr T's main issue is that he and the other passenger are due compensation under the EC Regs in respect to the flights that were cancelled.

There is no suggestion of a misrepresentation here, nor does the available evidence indicate one. So, I've thought about whether Mr T has demonstrated that there has been a breach of contract. And as stated above, Section 75 covers claims for breach of contract. So, before I can say that AESEL should have paid Mr T compensation he may have been owed by the Company under the EC Regs, I would need to be able to conclude that the Company's failure to pay compensation was a breach of contract between them and Mr T. Also, I know that Mr T has gone to great lengths to explain why he is entitled to compensation under the EC Regs, and why he may have a claim against the Company due those provisions. But the issue at hand is whether the claim against the Company can be held to be one he also has against AESEL. Because of the way Section 75 is constructed, this can only be the case if his claim is one of breach of contract.

The relevant articles of EC Regs are not automatically incorporated or implied into the contract between Mr T and the Company, as the EC Regs do not make that provision. So, I've considered whether Mr T's contract with the Company contains any express terms relating to compensation under the EC Regs.

Mr T has provided the text of the Company's Conditions of Carriage at the time he entered into the contract with them. I've cross-referenced these on the Internet Archive. The text Mr T has provided appears to have been current at the time of him entering into the said contract. I also agree with Mr T that the Conditions of Carriage, from the Company's website,

were incorporated into the contract in question, and that they form the basis of it. Article 10.4 states:

“Denied Boarding Compensation

If we are unable to provide previously confirmed space, we shall provide compensation to those passengers denied boarding in accordance with the applicable Convention and or applicable law and or our denied boarding compensation scheme as set out in our regulations.”

Mr T believes that the above Article is a mandatory obligation that the Company have agreed to undertake, and that the word “shall” in “...we shall provide compensation...” makes it a mandatory obligation to pay compensation under the EC Regs. He said that he feels this is expressly agreed by them and incorporated into the contract in question. So, Mr T said that the failure to pay this compensation is therefore not only a breach of the regulations, but, more importantly for present purpose, it is also a breach of contract. That being the case, he feels AESEL is likewise liable for the said breach.

The contract in question says “we shall provide compensation ... in accordance with the applicable Convention [**and or**] applicable law [**and or**] our denied boarding compensation scheme as set out in our regulations” – emphasis added. First, I should say that I think the contract is not very definitive. And, I cannot see the Company’s Conditions of Carriage refer specifically to the EC Regs, but I do see that Article 10 does refer to “applicable law” and, most likely, the EC Regs were applicable to his flights. But I think the references to Convention and or applicable law were only there to serve an advisory or informational purpose. The reference to these was simply for the purpose of letting Mr T know that he *may* have rights under those regulations and laws, and what the Company’s obligations were. I think, most likely, these references did not make a *contractual* promise to him to pay compensation as per the EC Regs in the event of, for example, flight cancellation. And yes, I think most likely the contract does refer to a consumer having rights, under certain applicable laws such as, for example, the EC Regs. In other words, these rights were something Mr T was entitled to as a result of the EC Regs, but not as a result of the terms of his contract with the Company. I think the contract in question, most likely, only references that he has statutory rights conferred on him by EC Regs. So, I do not think that the Company had an express contractual obligation to pay approximately £1,040 per passenger in compensation to Mr T for the cancellation of the flights. And Mr T’s contract with the Company did give him a contractual right to a refund of the price of the cancelled flights, under Article 10 of the Conditions of Carriage which said that if they cancel or delay a flight, they shall make “a refund in accordance with the provisions of Article 11 and shall be under no further liability to you.”

I’ve also further considered if any of Mr T’s rights under the EC Regs should be treated as implied terms, and hence included in his contract with the Company. Terms can become implied in a contract via legislation. For example, the Consumer Rights Act 2015 says that specific terms relating to the quality of goods and services are to be treated as being included in consumer contracts. But I do not see any wording in the EC Regs that would state that the rights they confer upon consumers are to be treated as included or implied in contracts.

Also, I think Article 12 of the EC Regs is of relevance. This article talks about Further Compensation, and it states that:

“1. This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.”

So, I think, most likely, the rights to compensation under the EC Regs are intended to be separate from any rights to compensation a consumer might have for a different reason such as, for example, a claim for damages caused by a breach of contract. Part of this point has also been confirmed in case law where, for example, in *Graham & Anor v. Thomas Cook Group* [2012] EWCA Civ 1355, the court said that there was a distinction between a claim made under the EC Regs, and a claim for damages for a breach of contract. The court said that Article 12 confirms that the compensation provided under the EC Regs is intended to be of a general nature applicable to all passengers and does not exclude any other rights of compensation which a passenger may have from a source other than the regulation. In that case the court also quoted the European Court of Justice and summarised by saying “where there has been a breach of a contract of carriage, the national court is not prevented from awarding damages under ... domestic law as the case may be, for breach of the contract.” As such, I think the courts most likely were trying to indicate that the right to claim compensation under the EC Regs is different to a right to claim compensation for a breach of contract in the form of damages. So overall I think, most likely, the EC Regs are not intended to be implied into contracts.

Having said the above, if Mr T still thinks that he has a claim under the EC Regs for compensation as a result of the cancellation of his flights, then this would be considered a breach of obligations under the EC Regs, and not a breach of contract. So, I do not think that AESEL can be held liable to pay this compensation under Section 75 of the CCA.

Also, this service has a duty to resolve cases on a fair and reasonable remit. So, I've also considered that most likely Mr T has not lost out because he had a refund from the Company for the cancelled flights, and he has not provided evidence that he suffered a financial loss. So even if my interpretation of the EC Regs, and Mr T's contract with the Company, had been different, considering the circumstances I still would not think that it would be fair or reasonable for AESEL to pay anything further to Mr T.

My final decision

For the reasons given above I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 11 April 2024.

Mike Kozbial
Ombudsman