

The complaint

The estate of Mr H complains that Nationwide Building Society (“Nationwide”) has refused to refund transactions the late Mr H made (using his Nationwide Visa credit card) to a fraudulent investment company (Acervo).

Ms H is the late Mr H’s daughter. She is one of the executors of his estate and the representative in this matter.

What happened

The circumstances of this complaint are well known to both parties, so I will not repeat them all again here in detail. But I will provide an overview of events below. In short, Ms H has told our service the following:

- Acervo persuaded her late father to invest with them.
- *“All conversations and transactions were by phone. Initially it was a small sum and then each month [her late father was] badgered by the ‘Salesman’ the amount increased.”*
- In June 2016, she became aware of the above and persuaded her late father not to invest further.
- She then discovered her late father had made further payments to Acervo in June and August 2016.
- Her late father did not authorise the June and August 2016 payments because she, *“... heard him on the phone tell the ‘salesman’ that he was not investing any more until he saw evidence of a return.”*
- She acknowledges her late father should bear responsibility for the initial payments. However, she argues that the payments made in June and August 2016 were unauthorised and made without her late father’s consent.
- Her late father was 97 years old in 2016 and could not use a computer.
- All the payments were made via telephone, rather than online.
- *“Eventually, back in 2016, the whole matter was causing such distress and a serious rift between Dad and I, that I let the matter drop.”*
- *“Since my father’s death, naturally, all the paperwork has been reviewed with the lawyers and I feel strongly that Nationwide have been negligent in this matter ...”*

The following payments were made using the late Mr H’s Nationwide Visa credit card:

Date	Merchant	Amount
1 March 2016	Acervogroup London	£2,500
3 May 2016	Acervogroup London	£2,400
5 May 2016	Acervogroup London	£2,400

15 June 2016	Acervo Group	£2,400
15 June 2016	Acervo Group	£2,400
10 August 2016	Acervo Group	£2,400
10 August 2016	Acervo Group	£2,400
	Total amount debited:	£16,900

Ms H asked Nationwide to try to recover some of her late father's money. Because she believed the first three payments were authorised by her late father, but the remaining four were not – she only disputed the June and August 2016 payments (totalling £9,600). As Nationwide did not refund the money, Ms H raised a complaint which she also referred to our service.

Nationwide has said:

- It no longer has transaction information relating to the payments concerned.
- The late Mr H and his daughter contacted it in 2016 about the payments, but they later advised that the, *'... dispute with the Society was no longer in place as the member resolved the issue with the merchant direct.'*
- In October 2019, Ms H contacted it disputing the £9,600 (set out above).
- *"... the payments were made online and passed the verified visa security system. Therefore, this would suggest the payments were authorised on each occasion via a website. We could also see that the full balance of the credit card was cleared each month after these payments were made which would suggest [Mr H] was aware of the activity and agreed to it."*

One of our investigators considered the complaint and upheld it. She said that she was not satisfied that Nationwide had provided sufficient evidence to suggest the payments were authenticated, so she did not need to consider consent. For this reason, she was not satisfied that the June and August 2016 payments were authorised and so the late Mr H could not be held liable for them. The investigator went on to say had a chargeback been raised, there would have been no reasonable prospect of success through Visa's chargeback scheme due to the nature of the late Mr H's claim. However, she argued that in her view, the late Mr H did have a valid claim for misrepresentation and breach of contract under section 75 of the Consumer Credit Act 1974, so she suggested Nationwide refund the June and August 2016 payments only.

Ms H accepted the investigator's findings.

Nationwide responded stating it had found details showing the payments were authenticated and made online. It also said the Financial Conduct Authority's ("FCA") warning about Acervo – which the investigator made reference to – was published after the payments were made. Nationwide asked whether these points changed the investigator's view of the complaint – she responded stating it did not. Nationwide said that it would respond again, but it has not.

Because of this, the complaint has been passed to me to make a decision.

On 22 March 2022, I issued a provisional decision upholding this complaint. For completeness, I repeat my provisional findings below:

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

I should say at the outset that based on the evidence before me, I am satisfied that all the payments concerned were authorised by the late Mr H.

For this reason, I have considered whether it would be fair and reasonable to uphold the late Mr H's complaint on the basis that Nationwide is liable to him under section 75 for all the payments. As a starting point, I think it would be helpful if I set out what the section says:

75(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor ... (3) Subsection (1) does not apply to a claim—

- a) under a non-commercial agreement,*
- b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000*

To summarise, there must be:

- 1. a debtor-creditor-supplier agreement falling under section 12(b) or 12(c); and*
- 2. a transaction financed by the agreement; and*
- 3. a claim for misrepresentation or breach of contract related to that transaction;*
- 4. but not a claim which relates to any single item which the supplier has attached a cash price below £100 or in excess of £30,000.*

Debtor-creditor-supplier agreement

First, there does not seem to be any dispute that a credit card account is a relevant debtor-creditor-supplier agreement under the 1974 Act. And, I am satisfied here there is nothing that 'breaks' the debtor-creditor-supplier chain – insomuch as there are three parties involved:

- 1. The late Mr H (the debtor);*
- 2. Nationwide (the creditor); and*
- 3. Acervo (the supplier) – as shown on the documents Ms H has provided and on Nationwide's business file submissions.*

A transaction financed by the agreement

Secondly, the next consideration is whether the 'transaction' is 'financed' by the agreement.

'Transaction' is not defined in the 1974 Act, but it has generally been given a wide interpretation by the courts – to include whatever bilateral exchanges may be part of a deal. Here, the late Mr H has deposited funds to open an account in exchange for being able to use those funds on an investment platform and being able to withdraw them as and when he wished. Given the exchange of money in return for certain contractual promises – I am satisfied there were transactions (which I will call "the deposit-transactions") as defined by section 75.

*Again, 'to finance', is not defined in the 1974 Act. An ordinary definition would be to provide funds to do something. In *Office of Fair Trading v Lloyds TSB Bank plc* [2004], Miss Justice Gloster said in a passage with which the Court of Appeal agreed, "The phrase 'to finance'... approaching the matter in a common sense way must mean 'provide financial accommodation in respect of' ... A credit card issuer clearly provides financial*

accommodation to its cardholder, in relation to his purchases from suppliers, because he is given time to pay for his purchase under the terms of the credit card agreement.”

Applying that ordinary definition here, if the late Mr H had not used his credit card, he would have had to find the cash from his own resources to fund the deposit transactions and obtain the investment account this supposedly entitled him to. So, it is clear that the deposit-transactions were financed by the agreement.

A claim related to that transaction

Thirdly, a claim for misrepresentation or breach of contract must relate to the transaction. It is important to consider what the late Mr H's claim is here. It is evident from what his daughter has said and the evidence she has provided – that she feels her late father was tricked into depositing the payments with Acervo for the dual purpose of:

- a) Stealing the deposit money; and*
- b) Encouraging the late Mr H to deposit further amounts.*

Ms H does not believe that Acervo were operating legitimately and believes her late father was misled into thinking they were.

This claim, that the late Mr H was misled into depositing funds, is clearly a claim “in relation to” the deposit-transactions. The claim must also be one for misrepresentation or breach of contract. In this case, if the late Mr H was told by Acervo matters that were factually untrue in order to trick him into entering into the deposit-transactions, his claim would be for misrepresentation. Or, if the merchant made binding promises to him as part of those transactions and went on to breach these that would make his claim one for breach of contract.

Cash price value

Finally, the claim must not relate to a single item to which the seller has attached a cash price of less than £100 or more than £30,000. Here, the ‘cash price’ of the deposit-transaction is the value of that deposit-transaction. It is both the consideration and subject matter of the contract.

For the reasons set out above, I am satisfied that section 75 does apply to the credit card deposit-transactions in this case.

I will therefore go on to consider whether the late Mr H has a valid claim for misrepresentation and/or breach of contract.

Misrepresentation

I consider the late Mr H has a claim of misrepresentation against Acervo – that claim being that they represented to him that they were a legitimate enterprise when this was not the case.

For a claim of misrepresentation to be successful, it is necessary to show not just a false statement of fact, but also that the statement induced the late Mr H into entering into an agreement.

A false statement of fact

If I am satisfied that Acervo were not likely to be operating a legitimate enterprise – one in which the late Mr H could never have received back more money than he deposited – then it follows that any statements made by Acervo to the contrary are likely to be a misrepresentation.

So, the mere suggestion that the late Mr H could make money from the platform is likely to suffice as entailing, by necessary implication, a statement of fact by the merchant that it operated a legitimate business, i.e. a legitimate trading platform on which investors could profitably trade. And, I am satisfied that based on what Ms H has said – including the evidence before me and the nature of the situation – Acervo did claim that her late father could have made money from the trading platform.

That induced him into entering the agreement

Again, had the late Mr H known that the trading platform was essentially a scam, designed to relieve investors of their money, rather than a legitimate service – there is really little question, to my mind, of him not investing with Acervo. Consequently, should I be satisfied that Acervo is not operating a legitimate enterprise, then inducement will also be demonstrated.

Was the merchant operating a legitimate enterprise?

Before discussing this in more detail, I should mention that I have found what Ms H has said about her late father's situation to be both detailed and compelling. But more than this, it is corroborated not just by other complaints of this nature, but specific complaints against Acervo. Because of this, I'm minded to find Ms H's account to be truthful.

So, turning to what Ms H has provided by way of evidence (including her testimony set out above):

- An email from the late Mr H to Acervo requesting a refund of his funds (£9,600) and instruction that no further payments should be taken. In this email, he also stated that he did not authorise his credit card to be debited £9,600.*
- Acervo's response email stating, amongst other things, "The amounts taken each time have been on a basis of £2400GBP x 2 due to a particular agreement [Mr H] and Mason have. This agreement also does qualify [Mr H] for income and as per our terms and conditions [Mr H] has been informed funds are accessible every 12 months."*
- A further email from Acervo to the late Mr H stating, amongst other things, that 'transaction verification forms' would need to be signed, dated and sent back before any funds could be released once, '... we reach our profit realising stage.'*
- An email from Ms H to Acervo expressing her concerns about her late father's dealings with them.*
- An Acervo trader's declaration with the late Mr H's personal details set out.*
- Other various Acervo documents.*

There is a body of external information available through various regulators, law enforcement agencies, government agencies, press cuttings and the card schemes that

repeat the tactics used by Acervo. This does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact Acervo offered little more than a video game or simulation.

There is further evidence in the form of a warning on the FCA's website dated 13 July 2017. Although the warning was published after the payments concerned, it nonetheless suggests Acervo may not have been acting legitimately:

"Almost all firms and individuals carrying out financial services activities in the UK have to be authorised or registered by us. This firm is not authorised or registered by us but has been targeting people in the UK, claiming to be an authorised firm. This is what we call a 'clone firm'; and fraudsters usually use this tactic when contacting people out of the blue, so you should be especially wary if you have been cold called. They may use the name of the genuine firm, the 'firm reference number' (FRN) we have given the authorised firm or other details."

In summary

I do not think it is likely Acervo were operating a legitimate enterprise. So, I am persuaded they made misrepresentations to the late Mr H. That is, that they were running a genuine enterprise through which he could never have got back more than his deposits from the platform. I am also satisfied that if the late Mr H had known this, he would not have deposited any money, so he was induced into the contract on the basis of these misrepresentations.

Breach of contract

Here, the late Mr H has deposited funds to open an account in exchange for being able to use those funds on an investment platform and being able to withdraw them as and when he wished. Given the exchange of money in return for certain contractual promises – I am satisfied there was a transaction (the deposit-transaction) as defined by section 75.

It follows, I think, that Acervo had contractual obligations:

- a) To enable the late Mr H to use the funds from his deposits on an investment platform; and*
- b) To enable the late Mr H to withdraw the funds deposited as and when he wished.*

The late Mr H was not able to use the funds from his deposits on the investment platform. Further, it appears Acervo prevented him from withdrawing funds from his trading account when he wanted to. Taking these points together, I am satisfied that Acervo breached the above contractual obligations.

It follows that as a breach of contract can be identified, the late Mr H's loss amounts to the full amount of each of his deposits.

Putting things right

I've established two grounds the late Mr H could have recovered his deposit-transactions:

- Misrepresentation: I am satisfied the late Mr H has a claim for misrepresentation on the grounds that Acervo made a series of misrepresentations, namely that it was operating a legitimate enterprise and that the late Mr H could access his money freely and earn a profit from his deposit-transactions.*

- *Breach of contract: I am satisfied the late Mr H also has a claim for breach of contract as Acervo breached their verbal promises to him. Namely, that he could use the funds from his deposits on an investment platform, and withdraw funds deposited as and when he wished. This provides another basis for recovery.*

As a claim for misrepresentation gives the highest sum, Nationwide should put the late Mr H back into the position he would have been had all the deposit-transactions (totalling £16,900) not been entered into. So, his estate should receive refunds of these amounts.

Responses to my provisional decision

Ms H responded to say she agreed with my provisional findings and was happy with the outcome. Nationwide responded stating it had considered my decision and had nothing further to add.

What I have 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.

Given that Ms H agrees with my provisional findings and Nationwide has nothing further to add – I see no reason to depart from them.

My final decision

For the reasons set out above, I uphold this complaint. I therefore direct Nationwide Building Society:

- Pay the estate of Mr H all the money the late Mr H lost (totalling £16,900) – within 28 days of receiving notification of acceptance of my final decision; plus
- Pay 8% interest on this amount from the date it was debited from the late Mr H's account until the date of settlement.
- If Nationwide Building Society deducts tax in relation to the interest element of this award, it should provide the estate of Mr H with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr H to accept or reject my decision before 28 April 2022.

Tony Massiah
Ombudsman