

The complaint

Mr T has complained that Nationwide Building Society ("Nationwide") unfairly turned down a claim he made under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mr T was called by someone who told him that he could make a claim in respect of holiday club memberships he'd purchased previously. But the company that deal with the claim was based in Tenerife, so he would need to travel there to make the claim.

In January 2016, Mr T went to Tenerife and spoke with a representative of a company called Slonce ("S"). He was told that he could take out holiday credits from a company called Travel Home & Adventure SL ("THA") that offered holidays and travel benefits, but also he was given five 'free' worldwide holidays. Mr T also says he was told a claim would be made on his behalf in relation to his holiday club membership. For these services, Mr T made two payments on his Nationwide credit card - £1,971.40 to THA and £1,972.17 to a company called Luxury Leisure Group ("LLG").¹

In August 2017, Mr T, using the help of a professional representative ("PR"), made a claim to Nationwide under s.75 CCA. PR said that the claim made was in relation to the payment made to THA for £1,971.40, arguing that the payment was taken on the day of the sale which was a breach of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). PR pointed out that the Timeshare Regulations say that no payment can be taken in a fourteen day withdrawal period, but here payment was taken on the same day. PR also said that Mr T returned the day after the sale to cancel the agreements taken out. Despite that, Mr T didn't receive a refund and he never used any of the services purchased.

Nationwide responded in September 2017 to say it didn't accept the claim as it said there wasn't the right evidence to show that what Mr T said was right. Unhappy with what was said, PR referred a complaint to our service that Nationwide hadn't properly considered Mr T's claim.² After then, Nationwide responded to say it still didn't accept it was liable. It said that the evidence suggested that any attempt to cancel the agreements took place outside of any fourteen day cancellation period and there was no evidence to suggest that any of the agreement had been breached or there was any other valid claim under s.75 CCA.

One of our investigators considered the complaint, but didn't think Nationwide needed to pay compensation to Mr T. She didn't think there was enough evidence to show there had been any misrepresentation or breach of contract. Further, she thought the evidence showed that Mr T tried to cancel the agreements more than fourteen days after they were taken out, so

¹ Mr T entered into agreements relating to these payments alongside his wife, however as the credit card was in his name, only he is able to make the complaint he has about Nationwide. So I will refer to only Mr T throughout.

² It appears that Mr T may have complained to Nationwide earlier in December 2016, possibly without the assistance of PR, as I've seen a letter to Mr T dated 14 February 2017. But in this decision, I'm only considering the complaint referred by PR, albeit it appears to cover the same ground.

outside of any of the time limits PR argued applied.

PR responded to say Mr T disagreed with our investigator. In response, it said the sales meeting took place over several hours on a hot day, so the sale was under duress. PR said Mr T went back the second day after the sale to cancel the agreements. Also that Mr T was told the payments made on the card were 'on hold' and payment wouldn't be taken at the time. Finally, PR argued that Mr T was told that the businesses were ABTA and ATOL protected, which wasn't true. As Mr T didn't agree with our investigator, the complaint has been passed to me for a decision.

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.

When evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is most likely to have happened given the available evidence and the wider circumstances.

The only evidence there is from the time of sale is from Mr T. He has provided all of the documentation he has, along with his memories. So when considering this claim, that is the only evidence there is available. I'm mindful that his memories may not be an accurate representation of the precise sales process as memories are imperfect. So I've had to weigh all of that up when deciding what I think most likely happened. I don't think it's unfair to Nationwide for me to do this – ultimately I must decide the complaint in front of me based on the evidence available.

When considering this complaint, I think it is important to set out what I find Mr T agreed to and with which business. I'll then consider any legal claims that Nationwide needed to consider, given the legal relationships between the parties. Finally, I'll consider whether Nationwide needs to do anything further to resolve this complaint.

The available documents

Much of the documentation comes from the sale that took place on 30 January 2016 ("the Date of Sale"). I've seen a number of different documents, each signed separately by Mr T. It's not entirely clear what they relate to, so I've set them out in some length before I can say what I think happened.

There are a number of documents provided on S's headed paper. They include confirmation that S would instigate two claims on Mr T's behalf totalling £38,172. It was explained that once these claims were paid, Mr T would be expected to pay a percentage to S and that the claims would take sixty days to be paid.

There is a document titled "*SUBSCRIPTION FOR THE EXCLUSIVE USE OF [S] TRAVEL*" that shows Mr T agreed to pay £4,000 by bank transfer by 1 March 2016. It appears that this was an agreement lasting one year offering a form of travel agency services by S to Mr T. Attached to that document is a set of terms that include:

"10. The Purchaser understands that the Product is not a long term holiday product (LTHP) or Timeshare, and as such does NOT fall under any part of the 2011 EU Timeshare Directive, with regards to a statutory requirement of a "COOLING OFF PERIOD".

S's bank details were also provided, but the transfer value was given as £3,960. Mr S also signed to say he received £40 from S for services provided.

There is a document on THA headed paper that is called a "Subscription Application". It says:

"[THA], referred to as the Vendor, a registered Spanish Company and authorised to represent and market in Europe, ..., are established under Law to allow members to access and participate in [THA] Entertainment, Home and Leisure Reservation System based on the appropriate subscription.

The Applicant(s) hereby apply for the subscription of [THA] and agree to use the services provided applicable. The Applicant(s) hereby agree to pay the subscription fee specified and agree to be bound by the usage of [THA]. This agreement is subject to the Terms and Conditions on the second page and the Applicant(s) acknowledge they have read and understood in full.

Your subscription fees are non-refundable and this agreement cannot be cancelled after commencement of the attached terms and conditions. Commencement of your agreement begins upon agreeing and authorising payment"

It says that £2,000 was paid for this and was received on the Date of Sale. The subscription is described as a "One Time Only" Subscription.

Two of the attached terms read:

"4. The duration of this application is for a period of 364 days from the date of registration for no additional cost and this facility is repeated at the end of each 364 day period. The Purchaser understands that the Product is not a long term holiday product (LTHP) or Timeshare, and as such does NOT fall under any part of the 2011 EU Timeshare Directive , with regards to a statutory legal requirement offer of a "COOLING OFF PERIOD"...

10. Partners consistently change, update and evolve the range of partners and destinations with whom it works. All travel arrangements are booked through ABTA and ATOL bonded agents. Credits have a start date from the "initial Payment" date, credits have no expiry date but end once all credits are spent."

Mr T has also signed a document to say that he used 92 THA credits for a dinner for two people, leaving 708 credits.

Mr T has also provided a document stating that he was receiving five free holidays, but it's not clear which business was providing this.

Finally, Mr T has provided a copy of a credit card receipt showing that €2,577 was paid to THA.

What payments were made?

It is recorded on Mr T's Nationwide credit card statement that he made two payments 1 February 2016. One was for £1,971.40 (being €2,577) to THA and one for £1,972.17 (being €2,679) to LLG.

I've not been shown any evidence of a bank transfer being made to S.

What were the agreements?

I find that Mr T purchased something from S as detailed in the document titled "Subscription for the exclusive use of [S] travel". It's not clear to me what this was for, Mr T says it was for travel and holiday services, which would fit with the other agreements he entered into on the Date of Sale. The contract price was £4,000. I can't say whether the payment toward this was the payment made by bank transfer of £4,730 on 28 June 2016

I also think S agreed to make a claim on Mr T's behalf in relation to existing timeshare memberships he held. It is not clear what that claim was actually for, but S said Mr T would get a pay out within sixty days of the Date of Sale. In exchange, Mr T agreed to pay a percentage of what was recovered to S.

Mr T also purchased services of some kind from THA. I find this was arranged by S, most likely acting as agents for THA, as Mr T only recalls one meeting on the Date of Sale when he agreed to go ahead with the agreements. I think this was paid for by the credit card payment made to THA, even though the payment was recorded on the statement as having taken place two days after the Date of Sale.

These agreements were entered into at the same time and at the same meeting, so to some extent they are linked in that there is nothing to suggest Mr T was offered these parts of the deal individually. But I can't see that the businesses involved were all linked or trading names of the same company.

Was Nationwide jointly responsible for any breach of contract or misrepresentation?

S.75 CCA states that in certain circumstances, when a debtor has a claim against a supplier in respect of a misrepresentation or breach of contract, they will have a like claim against the creditor. So here, Mr T (the debtor) was asking Nationwide (the creditor) to answer his claims about what he said had gone wrong.

But this doesn't apply to every claim Mr T may have. Nationwide is only responsible for claims when there is a debtor-creditor-supplier ("DCS") agreement in place. This is set out more fully in s.11(b) and s.12(b) CCA, but in short, there have to be arrangements in place so that the supplier of goods or services is paid using the credit card. In Mr T's case, he paid LLG and THA directly with his credit card. I don't think it is in dispute that Nationwide could be held jointly responsible for any claim of a breach of the contract with THA that arose from the THA agreement or of a misrepresentation that led Mr T into entering into agreement with THA. It's not clear whether the payment to LLG was used to fund that agreement with S, but I don't need to make a finding on that as, for the reasons I'll come on to, I don't think Mr T's complaint succeeds even if Nationwide were also responsible for a breach of the S agreement too.

Did Nationwide properly consider the claims?

Nationwide has said there was no evidence that there was a misrepresentation made or a breach of contract that it could be responsible to answer and our investigator agreed. So I've considered what Mr T said went wrong and whether any of that was something Nationwide was also responsible to answer under s.75 CCA.

Mr T has said that S breached its agreement with him as it failed to cancel the agreements when he asked it to and, under the Timeshare Regulations, he had fourteen days to cancel it, during which S shouldn't have taken payment.

I'm not sure that the Timeshare Regulations applied to Mr T's purchases. I say that as he

bought these things overseas, but the Timeshare Regulations are UK legislation and I can't see that UK law applied to any of Mr T's agreements. The Timeshare Regulations are also based on a 2009 EU Directive, which came into effect in 2011. I noted that both the S and THA agreements I've detailed above say the 2011 EU Directive doesn't apply and I assume this is in reference to the Directive published in 2009. But, even if it did and there was a fourteen day 'cooling off' period, I don't think it means Nationwide needs to do anything further.

Mr T has provided a copy of a letter that was sent to cancel the agreements dated 22 February 2016. It noted that the agreements were taken out on 30 January and said this letter was confirmation that Mr T wished to cancel the agreements with immediate effect. The letter states that Mr T was told the money paid would be put into a holding account for thirty days, but actually the payment was taken from the credit card, which hadn't been agreed on the Date of Sale.

The cancellation letter was sent more than fourteen days after the Date of Sale and nowhere in the letter does it say that Mr T tried to cancel the agreements earlier. Further, what PR has said about when Mr T tried to cancel has been inconsistent – when the complaint was first made, it was said Mr T tried to cancel the following day, but in response to our investigator's view, it said it was two days after. Based on everything I've seen, I think Mr T tried to cancel the agreements outside of any fourteen day cancellation period. It also follows that, even if payment was taken improperly within that period, S and THA would be entitled to take it before Mr T tried to cancel twenty three days later, so I can't see he's lost out as a result of anything he said went wrong. Further, the fact that Mr T has provided a receipt showing he made a payment to THA on the Date of Sale doesn't fit with his memory that no such payment would have been taken at the time.

In response to the view, Mr T said the sale took place on a hot day and was pressured. But I can't see how that could amount to either a misrepresentation or breach of contract, which were the things he could make a claim for against Nationwide under s.75 CCA. Further, Mr T being told that S or THA were ABTA or ATOL registered could amount to a misrepresentation if it was an untrue statement of fact, which induced him to enter an agreement, thereby causing him loss. But Mr T only mentioned this after he'd received our investigator's view – it wasn't part of his initial claim and he didn't mention it to us sooner, so I can't say that the status of the seller was something that was important to him or something he relied upon when taking out the agreements.

Mr T has said that he didn't get any of the benefits he expected to receive under the agreements, however he's not said that was because they weren't offered to him, rather it was because he tried to cancel the agreements. So I can't say, on the evidence presented, that there was any breach of the agreements. Nor has Mr T pointed to any misrepresentation that induced him into entering the agreements. So I don't think it was unfair for Nationwide to decline his claim under s.75 CCA based on the evidence provided and arguments made.

My final decision

I don't uphold Mr T's complaint against Nationwide Building Society.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 28 December 2023.

Mark Hutchings
Ombudsman