

The complaint

Mr P complains that Nationwide Building Society won't refund money he lost to what he describes as an investment scam.

What happened

Mr P has explained that in 2020, he made the following payments to Rodeler (trading as 24option) from his Nationwide account, using his credit card, for what he thought was a legitimate investment.

Transaction number	Date	Amount (£)
1	7 April 2020	500
2	9 April 2020	5,000
3	10 April 2020	10,000
Total		15,500

Mr P also paid 24option from other bank accounts he held with different providers and in total paid them over £120,000. But I'm only considering the Nationwide payments as part of this decision.

When Mr P subsequently got in touch with Nationwide to explain he'd been scammed, Nationwide didn't reimburse his lost funds. Remaining unhappy, Mr P referred his complaint about Nationwide to this service. As our investigator couldn't resolve the matter informally the case was passed to me for a decision.

On 25 November 2022, I issued a provisional decision not upholding this complaint. For completeness, I repeat my provisional findings below:

Section 75 Consumer Credit Act 1974

I've considered whether it would be fair and reasonable to uphold Mr P's complaint on the basis that Nationwide is liable to him under s.75. As a starting point, it's useful to set out what the Act actually 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*

The concept of a 'like claim' is that the factual foundation of the claims against the supplier and the lender are identical and as a result in the same liability being owed to the debtor by both.

I've seen a settlement agreement titled a Confidential Settlement and Release of Claims and/or Inquiries dated as of 19 May 2020 ('the Agreement') between Mr P and 24option. The recitals to the Agreement state that Mr P submitted an 'Inquiry' dated 19 May 2020, which I've not seen. This presumably contains his complaint against 24option. They go on to record that 24option provided Mr P its 'feedback and views', and again I've not seen these responses. It is then recited that both sides wish to avoid any conflict and/or dispute in relation to the claims, statements and inquiries and they wish to settle the dispute between them on the terms of the Agreement.

Then, under the operative terms of the Agreement 24option agrees to credit Mr P's trading account with €10,000 for Mr P to immediately withdraw (Clause 1). Mr P agrees to 'withdraw and remove the Inquiry submitted against the Company' (Clause 2). This is to take place by Mr P signing and delivering to 24option and competent authorities a waiver in the form of Appendix 1 to the Agreement (Clause 3). The waiver states that Mr P would like to inform the recipient that:

"...my inquiry with regard to my trading experience with Rodeler has been duly resolved as I have been provided with comprehensive information and explanations. The Company, is willing to refund the amount of 10,0000 GBP to my trading account and I am fully aware and understand that the said amount is refunded on an ex gratia basis and does not constitute an admission of any legal and/or other liability on the Company's behalf.

As a result, I confirm that, I no longer have any disputes against the Company."

Clause 4 requires that Mr P sign a confirmation of debit/credit card deposits in the form of Appendix 2. This lists a number of deposits, giving their respective dates and time, the card, and their amount and the statement that Mr P made the deposit and 'received the services purchased through these transactions as intended'. For the avoidance of doubt, I've seen that it includes the list of Nationwide payments currently in dispute. It concludes with the sentence that Mr P has no deposit disputes with the Company.

At Clause 8 it is provided:

"The Trader [i.e. Mr P] agrees to waive all claims, statements and/or inquiries, referred to in this Agreement, against the Company and to release and forever discharge the Company from any and all liability for any claims and/or inquiries and/or damages of any kind, whether or not presently known to the Parties, which the Trader may have against the Company as of the date of execution of this Agreement.

And at Clause 9 it is provided:

"The Trader agrees not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the Company any action, suit or other proceeding concerning the Inquiry and/or any other claims and/or inquiries, whether or not presently known to the Parties, in this jurisdiction or any other."

The Agreement is to be governed by and construed in accordance with the law of Cyprus. And the parties irrevocably submit to the exclusive jurisdiction of the Cypriot courts. (Clause 14).

I've further seen that Mr P submitted his complaint to The Financial Ombudsman in Cyprus however it terminated its consideration of his complaint on 17 June 2021 stating:

'We have been adequately informed that you have reached an agreement with Rodeler Ltd on 21st of May 2020 and you have received the amount of EUR 10.000- as a full and final settlement of your complaint.'

In an email dated 1 August 2022 to our investigator, Mr P said he received the payment of €10,000.

I think this is an agreement under which the parties fixed the amount of Mr P's loss and paid it. The effect of the waiver in Appendix 1 is that Mr P confirms the matters dealt with in the Inquiry have been resolved to his satisfaction by the ex gratia payment of €10,000 and that, as a result, he no longer has any dispute with the Company in relation to those matters. That doesn't seem to me to leave any room for Mr P now to allege that he still has unsatisfied losses incurred as a result of the Company's breaches of contract or misrepresentations. The same can be said of the confirmation in Appendix 2. This seems to me to acknowledge that Mr P received from the Company the services he was entitled to in return for the various Visa and Mastercard payments there listed. Again, that confirmation is quite inconsistent with an assertion that he remains out of pocket for an amount of actionable damages caused to him by the Company as a result of making those deposit payments and/or not duly receiving the services for which they were paid.

It is concerning that Mr P did not volunteer the fact that he had entered into the Agreement, nor does he appear to have given credit for the sums paid to him under it, when he brought his complaints and referred them to our service.

It would seem that the contents of Appendix 1 and 2 don't leave him with any unrecovered losses from his trading account that Mr P can assert amount to actionable damages payable under s.75. And so, I don't think Mr P has grounds to make a valid s.75 claim in light of the Agreement.

Chargeback

Chargeback claims are designed to settle unresolved disputes between the cardholder (in this case Mr P) and the merchant (in this case 24option). When Mr P approached Nationwide for assistance with recovering his payments to 24option, he had already signed The Agreement and received the settlement payment. Whilst it doesn't appear that Mr P brought the Agreement to Nationwide's attention at the time he complained, I don't think chargeback would have been an option for him as he'd already settled his dispute with 24option.

Prevention

Having decided the above, I can only uphold this complaint if I think Nationwide reasonably ought to have prevented some or all of Mr P's payments to 24option in the first place – therefore preventing his loss or part of it.

It's common ground that Mr P authorised the payments in dispute here. So although he now alleges the payments were sent to a scammer, Mr P is presumed liable for the loss in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider Nationwide should fairly and reasonably:

- Have been monitoring accounts – and any payments made or received – to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams;
- Have had systems in place to look out for unusual transactions or other signs that might indicate its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer; and
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

Having carefully considered this, I'm not persuaded that Nationwide could have reasonably known, at the relevant time, that 24option was operating an alleged scam. I say this because at the relevant time, 24option was regulated in a jurisdiction outside the UK, and it would be highly unusual for those operating a scam to agree to comply with the requirements of regulation. It also had passporting rights through the FCA to offer services to UK customers. So, I don't think the fact Mr P was paying 24option, ought to have been of a concern to Nationwide. I've therefore thought about whether there may have been any other reason for Nationwide to potentially have concerns.

I don't think payment one was unusual. This was for a low amount and it didn't appear suspicious.

Whilst payment two was £5,000 – a large amount of money, Mr P didn't tend to use his credit card account often enough to build up a picture of what normal account usage looked like for him. I have seen that he used his credit card abroad in 2019 and made some larger purchases in Euros. This payment didn't utilise the entire credit limit and rather about 33% of it, so I don't think Nationwide ought to have suspected something untoward.

I think payment three was unusual, this was for £10,000 and it did utilise all of Mr P's remaining credit limit and it was the largest payment out of the account from the statements I've seen. So I think Nationwide should have spoken with Mr P to check that all was well, before agreeing to send this payment.

I'm not persuaded this intervention would have made a difference. I say this because, at the material time, 24option were a legitimate regulated company and common characteristics of investment fraudsters (then and now) included the absence of any regulation as the starting position. So, I would have expected Nationwide to first understand who it was that Mr P was dealing with and that this was a genuine company. I think Nationwide would have identified that Mr P was paying a regulated company for investment purposes and whilst the type of investment might have been high risk – Nationwide had no duty to provide Mr P with investment advice. I've also not seen any evidence to suggest that Nationwide prohibited payments towards investments – even from a credit card.

On balance, after learning Mr P was dealing with a regulated company, I don't think Nationwide would have had any reasonable grounds to suspect a fraud or scam was taking place and therefore warn Mr P. I also have to highlight that the FCA didn't provide insight into its concerns about 24option until it published its supervisory notice (on 28 May 2020) and subsequently took the decision to remove 24option's passporting rights (on 1 June 2020) – these notices and decisions were made after Mr P made all of his payments. I therefore don't think it's reasonable to conclude that Nationwide could have known about the practices of 24option before its regulator published this information.

Overall, whilst I agree that Nationwide didn't do what it ought to have done by intervening in Mr P's third payment to 24option, I don't find that it was the primary cause of Mr P's loss. In other words, I don't think it could have prevented Mr P from making the payment to 24option, nor do I think there was any indication that Mr P had fallen victim to a fraud or scam at the material time, such that I would make an award against Nationwide.

Responses to my provisional decision

Nationwide replied to my provisional findings advising it accepted them and had nothing further to add.

Mr P didn't reply to my provisional findings, despite our investigator chasing a response, so I assume he has nothing further to add.

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 the parties didn't have any further comments to add, I see no reason to depart from what I've said.

My final decision

My final decision is that, for the reasons I explained in my provisional findings (repeated above), I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 7 January 2023.

Dolores Njemanze
Ombudsman