

The complaint

Mr M complains about the way Nationwide Building Society ('Nationwide') handled a claim he made to it.

What happened

The background facts of this case are well known to both parties so I will only cover these briefly here.

Mr M and his partner were due to travel to Australia on 21 March 2022 on flights they had purchased that February ('Booking A').

However, Mr M says that shortly before the flight he realised they needed to get a PCR test in order to travel. He and his partner contacted the travel agent ('the agent') for help.

Mr M says he used his credit card to purchase the same flights ('Booking B') for himself and his partner but departing a day later (22 March 2022) based on untrue information the agent told him over the phone. In summary, he says the agent said they would be unable to get a PCR test in time to use Booking A.

Mr M complained to the agent about what he later found was an unnecessary additional booking but it refused to refund him - so he raised a dispute with Nationwide. It did not refund Mr M and in its response to his complaint about the outcome of the dispute concluded:

- there are no chargeback rights here because it was Mr M's responsibility to understand the entry requirements for the country he was due to travel to; and
- it could not review any Section 75 claim because Mr M made the booking through a travel agent rather than directly with the airline.

Mr M's complaint was referred to this service and upheld. Our investigator concluded that there was a likely misrepresentation by the agent here and that Nationwide were liable for this under Section 75 of the Consumer Credit Act 1974 ('Section 75') – so it should have upheld the claim.

Nationwide disagrees with this. In summary, it says:

- Mr M made the initial error by not checking the entry requirements for travel and should have checked this well beforehand.
- Mr M has used the booking and received the services so a chargeback would have failed indisputably.
- It is confident that it made the right decision to decline to raise a Section 75 claim due to the requirements for the '*debtor-creditor-supplier*' not being met. This applies regardless of any alleged misrepresentation made by the agent.

- Mr M failed to provide concrete evidence which shows he and his partner were misled – other than recollection of a verbal conversation from the merchant. It would also be difficult to demonstrate the merchant was not telling the truth or wilfully lying about the availability of PCR tests as this is something that could fluctuate and would be out of their control. Even if Mr M was led to believe something on the call it is possible that the situation changed after.

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.

I have read the submissions by the parties but I will not be commenting on them all, only what I consider to be particularly relevant to the outcome of this complaint. This reflects my role in resolving disputes informally.

I note that Nationwide is not the supplier of travel services here – so in looking at whether it acted in a fair way I look at its responsibilities as a provider of financial services. In doing so I consider the card protection scheme of chargeback and the law of Section 75 to be particularly relevant here.

I can see that in handling the claim Nationwide focused on chargeback. It concluded that a chargeback would not have had a reasonable prospect of success due to the limitations of the card scheme. Prima facie I don't disagree with Nationwide particularly as Mr M's claim is focused on misrepresentation. However, because of my conclusions on Section 75 (below) I don't consider it necessary to explain my reasoning any further in respect of chargeback.

Furthermore, I am aware Mr M has mentioned some other things the supplier allegedly told him about the pricing of the re-booking during the call which he thinks were misleading and untrue. I don't consider it necessary to focus on those here as it doesn't change the outcome in any event.

Section 75

Section 75 can allow Mr M to hold Nationwide responsible for a '*like claim*' against a supplier for misrepresentation or breach of contract in respect of the services he paid it for using his Nationwide credit card.

I can see here Nationwide didn't appear to carry out a full Section 75 investigation because Mr M booked through a travel agent while the flights were provided by a separate entity (the airline in this case). It indicates that this caused a '*break*' in the requirement for a valid 'debtor-creditor-supplier' agreement as written in law.

While I agree that because the credit card payment was made to the agent Mr M does not have a valid Section 75 claim in respect of any agreement with the airline, prima facie he *does* have a claim in respect of the agreement with the agent he paid using the credit card here.

It is quite clear Mr M's claim to Nationwide was not about the actions of the airline – but an alleged misrepresentation by the agent. And as I have indicated above – prima facie there is a valid Section 75 claim in respect of the agent he paid – even if he ultimately booked tickets for flights with a third party airline. So I don't think Nationwide did the right thing in not looking at the matter in greater detail at the time with Section 75 in mind. As a result in determining what a fair outcome should be I don't consider it unreasonable for me to do this here.

For completeness I have looked at whether other requirements for a valid Section 75 claim are met here too (such as financial limits and other aspects of the 'debtor-creditor-supplier' agreement). Nationwide has not raised these as issues so I will only deal with them briefly. I noticed Mr M's partner was named on the booking confirmation for Booking B. However, I am satisfied that Mr M was an intended joint contracting party here based on the evidence presented to me here including the wording of the contract, Mr M's involvement in making the booking (he appears to have led the telephone discussions) and other details like the use of his email address for the lead booker information.

As I am satisfied the requirements for a valid Section 75 claim are met I have turned to whether there has been a likely misrepresentation by the supplier.

Firstly, based on the information I have seen online and what Mr M has said it does appear that express PCR tests were available on a weekend and where test results could be obtained on the same day/within hours. Nationwide hasn't provided persuasive evidence to show Mr M would not have had access to a test at the time beyond some general statements about potential fluctuations in availability. I think any service is subject to possible delays or availability issues, however, on balance it appears that express services were available and Mr M would have been able to use them.

I note when Mr M spoke to the agent about the situation it was a Sunday morning about 9am and Booking A was due to leave on Monday afternoon. Which appears to have left more than enough time to get an express test that day. I note following the re-booking of the flight Mr M did get a test that same day anyway – albeit he says with less urgency and not utilising the pricier express service (due to the re-booking). Despite the slower test being carried out around 6pm on the Sunday the result came in just before the original (Booking A) flight was due to depart. So it follows that if Mr M had gone for an express test on Sunday morning it is more likely than not he would have received the results well before Booking A was due to depart.

I now move onto what I consider it likely the agent told Mr M on the phone and whether that is enough to constitute a misrepresentation (or breach of contract).

Nationwide points to the fact that we only have recollections of a verbal conversation to go by - which does admittedly make things more difficult here. However, I don't think that should automatically discount Mr M's claim. Where the circumstantial evidence and testimony is strong enough then it is fair to consider what is most likely to have occurred on the balance of probabilities.

In considering what has likely occurred here I note that:

- While the agent says it was possible the representative on the call *'might have suggested [sic] the customer that they might not be able to get the test results on time'* this is not in accordance with Mr M's testimony. Mr M has provided clear and credible testimony that the agent was *'absolutely insistent'* and told him *'categorically'* there was no possibility of getting a PCR before Booking A was due to depart as it was a weekend and this would take 2 days so re-booking was essentially the only option and needed to be done quickly to gain 'credit' for Booking A.
- Mr M ended up agreeing to pay out £3,262 for Booking B during the same call which was essentially the exact same flight as Booking A (which Mr M says he had already spent £2,337 on) but due to depart a day later. This is a significant decision to make because of the extra cost involved - it appears extremely unlikely Mr M would have made this decision lightly or in that moment unless the agent indicated it was entirely necessary and was in fact as insistent as Mr M says he was.

I think it is also important to note here that Nationwide has failed to provide a phone recording as a defence to the allegations made against the agent of which it is equally liable for under Section 75 in respect of misrepresentation or breach of contract. The agent is the professional party here in the strongest position to record and recover evidence and Mr M as the consumer is in a somewhat weaker position – so I don't think it unreasonable to make adverse inferences here as a result of the failure of the agent (and Nationwide) to provide a phone recording of the booking call. That in itself is not a reason for concluding misrepresentation has occurred – but it does inform the weight I have given to Mr M's recollection in determining what is more likely to have occurred.

On balance, I consider the agent gave Mr M false information. I am not saying this was wilfully false as Nationwide has mentioned. But that doesn't matter here – the point is that the false information was given to him and it clearly influenced his decision making in purchasing an additional ticket that he likely would not have done otherwise.

Even if I were to accept what the agent says Mr M was likely told by the representative on the call (which I don't) then I still think this would constitute a breach of contract in any event. I say this because although the terms and conditions of the agent talk generally about the responsibility of the traveller in respect of making arrangements to satisfy entry requirements I don't think this mitigates the requirement of the agent to act with reasonable 'care and skill' via the implied term inserted into the agency contract via the Consumer Rights Act 2015.

In this case, while I acknowledge the terms and conditions of the agent make it the customer responsibility to check certain travel and entry requirements, it appears there is no dispute that the agent chose to offer some degree of advice over the phone in respect of the situation Mr M and his partner found themselves in. This is in the context of the agent advertising its travel advisors as an advanced team of travel experts. Considering the amount of money at stake here I think it was not prudent for the representative to do so without at least checking the facts. While I accept Mr M could have checked himself he was reasonably relying in that moment on the skill and care of a travel expert over the phone. So even if I were mistaken on my findings in regard to misrepresentation then this claim should have succeeded on grounds of breach of an implied term of the contract (in respect of 'care and skill') in any event.

I note Nationwide's emphasis on the terms and conditions which Mr M signed up for in regard to his responsibilities as to travel requirements. And the fact that he only realised at a late stage that he and his partner needed to take a PCR test within 72 hours before departure (which he does not deny and has been very open about). However, it does not follow that these points:

- Nullify any alleged misrepresentation by the agent made in the course of its dealings with him on the phone; or
- override the implied contractual requirement for the agent to operate with reasonable 'care and skill' in its dealings with Mr M and the information it gave over the phone.

So, I consider that Nationwide should reasonably have upheld Mr M's Section 75 claim here. In doing so I need to consider fair redress. I note Nationwide says Mr M has used the flights so should not get a refund. But the point here is that these flights were unnecessary as he had Booking A made that he could have used (which he has evidenced). It appears Mr M did not use Booking A because of what he was initially told about PCR testing and because he was given the impression the agent had cancelled Booking A and carried over credit to Booking B in any event.

Putting things right

Our investigator has said Nationwide should put things right by re-working the card as if the transaction had not occurred (which will result in refunding interest and charges in the process). Because of what has happened here in regard to misrepresentation I don't think that is unfair. I also note our investigator said Nationwide should pay out of pocket interest on any credit balance from the date it declined the claim on 17 June 2022 to the date of settlement. I think this is fair as well.

My final decision

I uphold this complaint and direct Nationwide Building Society to re-work Mr M's credit card as if the transaction to the agent for £3,262 was never made. In re-working it should refund any interest and charges related to this charge. If the re-working results in a credit balance it should pay Mr M 8% simple yearly interest on said credit balance from the date it declined the claim to the date of settlement.

If Nationwide considers it should deduct tax from any interest award it should provide Mr M with a certificate of tax deduction.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 13 December 2023.

Mark Lancod
Ombudsman