

The complaint

Mr S says that he was misled into entering a contract for the relinquishment of two timeshare interests. He says too that the contract was not performed. Because he used his credit card, issued by Nationwide Building Society, to pay part of the purchase price, he says that he has a claim against it in the same way as he has a claim against the seller.

Mr M is represented by a claims management business, which I'll refer to as "A". Where I refer to Mr S's submissions, I include those made on his behalf.

What happened

Mr S and his wife were the owners of two timeshare units in Florida. They had found however that rising management fees meant that the units no longer represented good value for money. They were however unable to sell them or to relinquish their interest in them.

Mr and Mrs S therefore approached ABC Lawyers Limited ("ABC"), a business which claimed to specialise in releasing clients from timeshare contracts.

Mr and Mrs S attended a meeting with ABC on 1 May 2017. Mr S says that ABC told them it could arrange for him and his wife to be released from their contract with the Florida timeshare company and that it could secure a substantial compensation payment in addition. They would however need to buy membership of Jive Hippo, a company which provided members with a wide range of discounted goods and services, and invest in Staycation Lodges, a business dealing in holiday accommodation in the UK. Consequently, Mr and Mrs S signed three agreements, namely:

- an agreement by which ABC agreed to assist them in exiting their timeshare contract, for a nominal fee of £1 ("the ABC contract");
- a membership agreement with Jive Hippo SL, a company registered in Tenerife, by which they bought a ten year membership of Jive Hippo for £19,950 ("the Jive Hippo contract"); and
- an agreement by which Mr S would become a Limited Partner of Brigg Lodges LP, a Scottish partnership set up by Staycation Lodges Limited and Staycation Lodges (Scotland) Limited at a cost of £17,794 ("the Staycation contract").

Mr S paid a £2,000 deposit by credit card. His statement records that the payment was made to Staycation Lodges Limited. He and Mrs S made a cheque payment of £35,744 to Brigg Lodges LP from their joint account. This represented the balance due in respect of the Jive Hippo contract and the Staycation contract. It does not appear that any payment was taken in respect of the ABC contract.

Matters did not, however, proceed as Mr and Mrs S had expected. In August 2017 ABC wrote to Mr and Mrs S to say that the Florida timeshare contract had been terminated. ABC also sent them a document referring to a "Timeshare Owners Protection Plan", which was said to provide cover in the event that Mr and Mrs S were sued by the timeshare company. The document said that it was not, however, any form of legal insurance but that it entitled Mr and Mrs S to "discretionary" assistance.

In fact, the timeshares had not been relinquished, and the timeshare owners, in September 2019, wrote to Mr and Mrs S seeking unpaid fees of more than US\$5,000. In March 2020 Mr and Mrs S's interests in the timeshare properties were sold through a court auction for just US\$100. The buyer (and, it appears, the only bidder) was the timeshare company.

The Jive Hippo membership did not provide the promised benefits either. After three years Jive Hippo stopped trading. Memberships were taken over by a different company, but members were required to pay a further £95 a year.

I understand that Mr S remains a limited partner in Brigg Lodges LP. He has received rental income from the partnership. However, he also has to pay service fees, and these are more than the income he receives.

In June 2020 Mr S complained to Nationwide. He said that the matters which I have summarised above give rise to claims which, because he paid in part using his credit card, he can bring against Nationwide.

Nationwide offered to pay Mr S £665, representing the additional fees he would have to pay (£95 a year for seven years) in respect of the Jive Hippo contract. It said it had no liability under the Staycation contract, as it was not a consumer contract.

Mr S referred the matter to this service. Initially, our investigator was minded to uphold it and recommended that Nationwide make a full refund of £37,744. In response Nationwide said that the credit card payment had been made in respect of the Staycation contract only, and so the investigator should only be considering claims in respect of that contract. The investigator issued a revised view, this time indicating that she was not minded to uphold the complaint.

Mr S did not agree and asked that an ombudsman review the case.

I did that and issued a provisional decision in which I said:

Mr S's claim against Nationwide arises under section 75(1) of the Consumer Credit Act 1974. And his complaint is that Nationwide's response to that claim should have been to meet it; instead, it rejected the claim.

One effect of section 75 of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a creditor. Section 75(1) says:

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.

Section 75(3) includes:

Subsection (1) does not apply to a claim—

(a) under a non-commercial agreement, or

(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 ...

A credit card payment can fall within section 12(b) of the Consumer Credit Act and will generally do so if payment is taken by the supplier or an associate of the supplier. A company is an associate of another if one controls the other or if both are controlled by the same person.

As I have set out in the background above, there were three contracts here. Mr S says, and I accept, that they were all linked. I accept too that ABC (with which Mr and Mrs S primarily dealt), as a condition of agreeing to the ABC contract, required (i) that they enter into the Jive Hippo contract and (ii) that Mr S to enter into the Staycation contract. I am satisfied too that ABC, Jive Hippo and the partnership were under the control of the same individual or individuals.

In order therefore to consider Nationwide's response to Mr S's section 75 claim, I need to consider which contract or contracts were financed by the credit card payment. I then need to consider whether Mr S might have a claim for breach of contract or misrepresentation in relation to that contract.

Mr S's credit card payment of £2,000 was made to Staycation Lodges Limited. The paperwork relating to the Staycation contract includes a document headed "Information from Staycation Lodges Ltd acting as General Partner of Brigg Lodges LP". That document includes a section headed "Capital Contribution", which says:

"To confirm that you have, today, paid £2,000 of the total Capital Contribution of £17,794, leaving a balance due of £15,794. Payment instructions have been provided separately for your convenience.

"As agreed, your balance payment is expected on or before 22nd May 2017."

In my view, therefore, it is clear that the credit card payment was used to finance the Staycation contract. The other contracts were financed exclusively by the cheque – albeit the payment instructions for the Jive Hippo contract said cheques should be made out to Jive Hippo, not Brigg Lodges LP. If I were to take a different view on that point, I would need to consider the effect of the £30,000 limit in section 75(3).

I must therefore consider the Staycation contract and what Mr S has said about it.

I will first of all address Nationwide's argument that section 75 does not apply because Mr S was not acting as a consumer. A consumer is someone who is acting outside their business, trade or profession. I think it's arguable that Mr S was not acting as a consumer in respect of the Staycation contract – because its purpose was to provide rental income. But the Consumer Credit Act applies to credit agreements with individuals, not only with consumers. I am satisfied Mr S was an "individual".

The Staycation agreement was an agreement by which, in return for a contribution of £17,794, Mr S would become a Limited Partner in Brigg Lodges LP and acquire a 2% interest in the Units identified in the agreement. He would do so on the terms set out in the Partnership Agreement. The agreement included a confirmation that Mr S had agreed to acquire Units and become a partner solely on the basis of the information contained in the partnership agreement and not in reliance on any other information, representations and warranties.

As I have said, I accept that ABC told Mr S that it was a condition of it agreeing to seek to end his timeshare contract that he enter into the Staycation contract. But that was true. Mr S had to agree to all three contracts or none of them. I can understand that it was not what he intended, and it's certainly arguable that the ABC contract and the Jive Hippo contract were not fulfilled. But Nationwide didn't finance those contracts.

I do not believe however that Mr S has made out a case for breach of the Staycation contract. As I say, he paid to become a Limited Partner and to acquire an interest in Units. He is a partner and has such an interest; he has received what he paid for. Nor does it seem

to me that he was told anything which was untrue about the Staycation contract which induced him into entering into it. He signed a confirmation saying that he had not relied on anything which was not in the partnership agreement.

In my view, therefore, Mr S has not shown that he has a claim in respect of his acquisition of partnership rights and Unit shares. It follows that Nationwide's decision to decline his claim under section 75 was reasonable.

Mr S did not accept my provisional decision. He said, in summary:

- The decision not to uphold the complaint cannot be right, given that ABC was closed down and its owner arrested.
- He had not read the “entire agreement” clause in the partnership agreement, and had been given very little time to read or consider the documents.
- The provisional decision did not appear to take into account his response to the investigator's revised assessment. That response showed there had been misrepresentation. Reimbursement of the timeshare expenditure was never achieved.

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 can understand why Mr S thinks that he has been treated unfairly. As I said in my provisional decision, it is certainly arguable that neither the ABC contract nor the Jive Hippo contract was fulfilled. But, for the reasons I explained, I do not believe that Nationwide financed either of those contracts, and it doesn't therefore have any liability in respect of any breach of them. It is not sufficient for Mr S to show that there has been some form of wrongdoing in the overall arrangements he entered into; the circumstances in which a credit card provider can be held liable for the actions of suppliers are rather more limited.

I accept too that Mr S may not have read the “entire agreement” clause in the Staycation contract. Generally, however, a person is bound by contractual terms, whether they have read them or not. That is even more true where – as in this case – the contract is for business, rather than consumer, purposes. It is not unusual for a contract to include a provision that the parties' agreement is set out only in the written contract itself; such clauses can help to ensure that there is no dispute about the scope of the agreement.

In reaching my provisional decision – and indeed this final decision – I considered carefully all the information and arguments from both sides, including Mr S's response to the investigator's revised assessment. In keeping with this service's role as an informal dispute resolution service, however, I am not required to address each point that has been made in detail, I can assure Mr S however that I have considered everything he and A have said.

I am not persuaded however that I can properly make Nationwide liable for Mr S's losses.

My final decision

For these reasons my final decision is that I do not uphold Mr S's complaint and do not require Nationwide Building Society to take any further steps to resolve it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 11 October 2023.

Mike Ingram

Ombudsman