

## **The complaint**

Mr G is unhappy with the way John Lewis Financial Services Limited (“JLFS”) dealt with a claim he made to recover money he paid for a package holiday.

## **Background to this decision**

I recently issued my provisional decision setting out the events leading up to this complaint and my intended conclusions on how I thought the dispute between Mr E and JLFS should be resolved. I’ve reproduced that provisional decision here and it is incorporated as part of my overall findings. I invited both parties to let me have any further comments they wished to make in response, and I will address their responses later in this decision.

## **What happened**

Mr G booked package travel arrangements through travel service provider “T”. He paid just under £2,600 using his JLFS credit card. Mr G’s hotel accommodation was provided by “A”, a four-star hotel at which he’d previously stayed.

However, when Mr G arrived at the hotel he was disappointed to find that some of the advertised facilities weren’t available, such as the hotel spa, and the indoor pool, and that organised entertainment and activities were extremely limited. Mr G was also unhappy that the air conditioning wasn’t working in many of the hotel’s communal areas. He says when he queried this with A, it told him this had been switched off to save on operational costs.

Mr G says this marred his enjoyment of the holiday. As nothing was done to address the situation during his stay, he raised his concerns with T on his return to the UK, seeking compensation. T acknowledged Mr R’s disappointment with the information it provided about the hotel facilities. It said A could make changes necessary for maintenance, health and safety or staffing concerns. And it apologised for any inconvenience caused.

Mr G wasn’t satisfied with T’s reply. He turned to JLFS to see if he could obtain reimbursement through the bank. Mr G was dissatisfied that JLFS didn’t deal with his claim promptly, and when the bank did respond it didn’t uphold his claim. JLFS said it wasn’t able to pursue recovery using the card scheme’s chargeback process, because that didn’t cover disputes about quality of service.

JLFS also didn’t think it held any liability to meet Mr G’s claim under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 (“CCA”). It said:

- Under section 75 it considered whether there was a misrepresentation or breach of contract. The rating system operated by T couldn’t be relied on to demonstrate this
- T gave no guarantee on the availability of facilities that were outside its control, such as the air conditioning units
- Mr G’s points regarding the air conditioning were subjective and didn’t amount to a breach of contract. There was also nothing to suggest the spa facilities were the

primary purpose for Mr G choosing A, so it couldn't accept this was a breach or misrepresentation

- Mr G had made use of A's services and this wouldn't allow him to claim compensation

Mr G was unhappy with JLFS's response and with the delays he'd experienced. He complained to it – and subsequently to us.

Our investigator wasn't persuaded to uphold Mr G's complaint. She said Mr G hadn't provided sufficient evidence to demonstrate there'd been a breach of contract or misrepresentation by T for which JLFS might be liable. The investigator acknowledged that Mr G had been frustrated by the time JLFS took to deal with his claim, but said there was no set time limit for doing so.

Mr G didn't accept the investigator's conclusions. He asked for matters to be reviewed, making a number of detailed points in support of his position, which I'll summarise here:

- extracts from A's brochure confirming its four-star status and the fact it is fully air conditioned (it does not say partial or any other combination);
- he'd stayed once before at A, a few years earlier. It was fully air conditioned to all areas – public and private – and A was operating fully at the time of his 2022 stay. This had reassured him that he could stay in comfort in A out of the blazing heat of the day and warm, humid, evenings;
- he referenced lengthy professional experience in the field of property, development and facilities management, setting out his opinion of the ventilation and air-conditioning requirements expected of A, which he considered fundamental for a hotel with paying guests. Mr G noted A had air-conditioning infrastructure and grilles in evidence everywhere;
- T advertised the hotel as four-star, 4T, air conditioned with full spa facilities and indoor swimming pool. A was previously known to him. The contract was formed and he paid in full. It was misrepresentation and a breach of contract for T to then declare – post contract – that the spa facilities would not be available
- there was no mention that all air conditioning and mechanical services to all public areas other than the main restaurant would be turned off and/or as a deliberate act by the hotel's owners. T's representative at the hotel was aware of this but didn't disclose it either prior to or after his entry into the contract. That was a clear case of misrepresentation and breach of contract for which JLFS was liable;
- it would be normal for a tour company to provide guests with similar spa facilities in a nearby hotel. This didn't happen;
- the lack of spa facilities on its own was not sufficient reason to cancel the holiday – getting hold of anyone at T would in such an event have been a nightmare in order to guarantee a full refund before departure; his written statements were wrongly being disregarded as evidence, and it was unfair to expect him to provide supporting documentation or recordings to confirm he'd been told the air-conditioning had been switched off. There were numerous online reviews of A from the material time referencing the unbearable conditions in the public areas of the hotel due to the air conditioning being switched off
- neither T nor JLFS had provided evidence claiming there was no air-conditioning in the hotel or stating that it was operational;

- the impact of switching off the air-conditioning in A was fundamental to the enjoyment of the holiday. The investigator's assessment didn't recognise the consequences of such a situation in a hot country during high season. Nor did it take a properly proportionate view in terms of the compensation that would apply. Instead, it had unfairly focused on the closure of the spa facilities and effectively disregarded the key issue of the lack of air conditioning;
- the assessment failed to recognise the problems and delays he'd experienced in pursuing his claim. He had provided evidence published by JLFS that proved there were defined response times. The investigator had wrongly stated there were none and that JLFS could effectively take as long as it liked with a section 75 claim. He'd also supplied a significant amount of evidence of the difficulties in contacting and obtaining responses from JLFS. He attributed the delay and lack of interest in his claim as being connected with a change of ownership during the period in which he made his claim

### **What I provisionally 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 understand Mr G's strength of feeling here. I don't doubt his holiday experience was highly disappointing, particularly given his previous stay at A had set a certain level of expectation. His stay this time around was clearly much less enjoyable.

Mr G has presented a good deal of documentation and testimony in support of that, and I've no reason to doubt what he says in this regard. His evidence is substantiated by contemporaneous online reviews. If this were a case where the determining factor was whether Mr G had a pleasurable holiday, then the answer would undoubtedly be no.

However, while there is case law to indicate it's possible to claim damages for loss of enjoyment in a contract of this nature, the key issue I need to consider is whether JLFS has any liability to Mr G. It doesn't adopt such liability simply by acting as a card issuer. Instead, there are two ways in which JLFS might incur a liability to Mr G. Either directly, for breach of contract or misrepresentation under the provisions of section 75. Or indirectly because its actions – for example, if it failed to raise a valid chargeback claim – caused Mr G loss that it would be reasonable to expect the bank to reimburse.

### **Section 75**

One effect of section 75 is that, where an individual (the debtor) buys goods from a supplier using credit provided under pre-existing arrangements between the lender (creditor) and the supplier, that individual can bring a claim for breach of contract or misrepresentation against the lender in the same way he could against the supplier.

It appears to be accepted that Mr G made a package travel arrangement, the supplier was T and Mr G paid for the travel arrangement using credit provided to him by JLFS. The necessary arrangements were in place and the transaction was within the specified financial limits such that section 75 applies to it.

But that isn't the end of the matter. Section 75 also requires that Mr G has a claim against T for breach of contract or misrepresentation.

Mr G contracted with T for a package travel arrangement. The Package Travel and Linked Travel Arrangements Regulations 2018 imply a term into every package travel contract that

– among other things – the organiser (in this case, T) is liable to the traveller for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers. In practical terms, that means that if there is a failure relating to performance of the contract, T is responsible for that failure just as much as A. A breach of contract claim cannot simply be turned aside on the basis that T has no control over A's actions.

As Mr G booked his package holiday with a UK travel company, the provisions of the Consumer Rights Act 2015 ("CRA") apply to the accommodation services. The CRA incorporates terms into contracts to supply services including that they must be performed with reasonable care and skill, and in relation to things that are said by or on behalf of the trader (in this case, T).

### *Misrepresentation*

It's by no means certain that Mr G's arguments – compelling as they are about the impact on him of the lack of operative air-conditioning or other hotel facilities – amount to a misrepresentation by T. For example, the information contained in A's brochure might well indicate it had air-conditioning throughout the hotel. Mr G's own past experience might also have caused him to have that expectation, as might T's rating system. But neither of these would constitute a misrepresentation by T that induced him to contract with it.

Mr G hasn't provided anything that demonstrates that T made any representation that there would be air-conditioning throughout the hotel, or that it misled him that spa facilities and a full entertainment package would be available. For example, had Mr G asked T about these matters and received false information, or if T knew that Mr G believed the air-conditioning was operating in all areas but said nothing to correct that belief, then this might give rise to a claim in misrepresentation. However, Mr G hasn't suggested this is what happened.

It's sometimes possible to view historic website information, which might have been of assistance in this case in determining what T said about A's facilities. Unfortunately I've been unable to access any useful historic version. The current version on T's website is of little assistance to Mr G, as it doesn't mention spa facilities and refers only to air-conditioning in the context of the bedrooms. Mr G has said the air-conditioning was operating in his room.

If Mr G has a copy of the website information from the time of his booking, then the position might be different. But in the absence of this, it's not unreasonable for JLFS to reject a misrepresentation claim.

### *Breach of contract*

As I've said, there are certain matters that become contractual terms due to relevant legislation, and for which performance becomes T's responsibility. I've thought about whether a functioning air-conditioning system might in any event amount to a contractual obligation, or that a decision not to operate it might indicate a lack of reasonable care and skill in providing the hotel service.

I take on board what Mr G says about his experience in the field. But I think it unlikely a court would conclude that reasonable care and skill in this context has the meaning that A was obliged to operate its air-conditioning in all areas of the hotel. It might well be sufficient to operate it in the bedrooms and some communal areas, as I understand is what A did.

That said, T's obligation to perform its services with due care and skill extends beyond the performance of A's obligations. Mr G makes the point that T was – or should have been –

aware that A had taken the decision not to operate the air-conditioning across the hotel. He's said T's representative was regularly onsite for some two months prior to his stay.

Whether A had taken such a decision is a matter of objective fact. Mr G's evidence is that he was told this by A's staff. I consider him to be a reliable witness to events. JLFS hasn't provided any equivalent evidence to contradict Mr G's account, and I'm satisfied it's appropriate to accept his testimony in this respect.

If T had constructive knowledge of the possibility that as a result guests might find their stays less comfortable during the hotter summer months, then omitting to mention this material information in the course of selling the package to Mr G (or other customers) might amount to an unfair commercial practice under The Consumer Protection from Unfair Trading Regulations 2008 ("CPUT"). It did, after all, consider it important to let guests know about the limited spa facilities (albeit that Mr G describes this wasn't until after he made his booking). If so, then a failure to comply with such legislation could well be viewed as T not meeting its obligation to perform its services with due care and skill.

As such, I think there is a basis for Mr G to have a breach of contract claim against T (and, by extension, against JLFS). It's possible that claim isn't particularly strong, and that might yet fall to be decided by a court of law. But my role here is to take a view on the way that JLFS dealt with Mr G's claim. I'm not currently persuaded that the bank's response to his claim shows that it had sufficient regard for its potential liability towards him.

### ***Chargeback***

JLFS told Mr G it didn't pursue recovery from T by means of chargeback, on the basis that the dispute was about the quality of the services he received. It hasn't provided any supporting evidence – such as an extract from the relevant card scheme rules – to show that this was a legitimate reason to take no action.

I'm conscious the card scheme rules provide for chargeback in circumstances where goods or services are not as described or were in some way defective. That's not quite the same as having a claim in misrepresentation or breach of contract, though in some respect it sets the bar a little lower for a successful claim.

As the assertion that the hotel services were defective was essentially the basis of Mr G's submission, I'd expect JLFS to have raised a claim, unless the card scheme rules prohibited it from doing so. All the other necessary information was available in Mr G's submission.

That doesn't mean the chargeback would have been successful, of course. It could have failed on other grounds, or been defended successfully by T. And it's still open to Mr G to seek recovery under different grounds, as mentioned above. So I can't properly say the failure to progress a chargeback claim has caused Mr G loss. But I am currently minded to conclude that JLFS could have done more to assist in this respect, and that this should be taken into account when considering how best to put things right.

### ***JLFS's handling of the section 75 claim***

I'm addressing this aspect as a separate point, as I'm conscious that Mr G's reply to our investigator's assessment attached no little importance to it. In light of what's been said, I should make clear that the Financial Conduct Authority (FCA) doesn't set any regulatory timescale for dealing with a section 75 claim. While it does set a timescale for dealing with a complaint, there is a distinction to be drawn between a complaint and a legal claim, which is what section 75 enables Mr G to make against JLFS.

Of course, that doesn't mean JLFS could take as long as it liked to respond to the claim. I'd expect it to receive and respond to a claim in a timely way, without unnecessary delay. From the records I've seen, JLFS received Mr G's claim at the end of July, issuing its response to the claim in early November – an overall timescale of 14 weeks. Although I appreciate Mr G wanted a quicker response, I don't consider that timescale indicative of undue delay on the part of JLFS in replying to a legal claim.

### **Putting things right**

I think there are elements of the arrangements between T and Mr G, funded by his credit card payment, that might be successfully claimed by him as a breach of contract or under chargeback. These don't appear to me to have been contemplated by JLFS in its response to Mr G's claim. I'm currently minded to think they should have been, and that it would be appropriate for JLFS to compensate Mr G as a result.

It must be remembered that a contract for a holiday generally incorporates an element relating to enjoyment and relaxation. I don't doubt that the non-operation of the air-conditioning reduced Mr G's enjoyment of the hotel and its facilities. So I can see a situation where Mr G could be successful in claiming for this.

Such compensation isn't likely to amount to the cost of the holiday, or even the accommodation element of the package. But it should fairly reflect the loss of enjoyment Mr G experienced, as well as the inconvenience he had due to the way JLFS dealt with his claim. Noting the £2,600 cost of his arrangements included flight costs as well as the other hotel amenities that he still received, I'm minded to assess suitable compensation as being £500, to recognise his loss of enjoyment as well as JLFS's handling of his claim.

### **Responses to my provisional decision**

JLFS accepted my intended conclusions and had no further comments to make.

Mr G also responded, providing commentary on the lengths he felt he'd had to go to in order for his claim to be considered, and the inconvenience this had caused him. He felt that my decision should give greater recognition to the way in which the section 75 claim was subsumed into the bank's complaint process, and the timescale for the latter

Mr G referenced his partner's health condition and the impact on her from a health and safety perspective. He expressed the view that A had made a reckless decision to switch off the air-conditioning in order to save money, putting guests and staff at risk. Mr G didn't think the proposed compensation went far enough, taking into account the proportion of the total payment that went towards accommodation and meals.

He asked that I reconsider his additional points and further evidence in support of the claim for compensation, along with his claim for interest to be added to the final determination of compensation given the extensive time that has elapsed.

### **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've read Mr G's further submissions, but having done so, I remain satisfied with the findings I've reached and the resolution I've proposed. I therefore adopt them in full as my findings in this final decision, but make the following observations in light of Mr G's comments.

Much of what Mr G has said simply serves to underline the points he's previously made. I don't consider he's presented a clear and persuasive argument or evidence in support of his claims of deliberate concealment or dishonest misrepresentation, though I accept he holds those opinions. I've previously explained that A's brochure doesn't amount to a representation by T and why, in the absence of any evidence to show how T described the hotel facilities, I can't accept a claim of misrepresentation in respect of those facilities.

The arguments Mr G makes in relation to what he terms the 'reckless' decision of A to switch off the air-conditioning are not in my view sufficient to demonstrate a breach of contract, for the reasons I set out in my provisional decision. Much of what Mr G describes is not provided for within the contract. I think it's reasonable to infer from what Mr G has said that he considers A to be in breach of a duty of care.

This, and the type of damages he is claiming might enable a negligence claim in tort against A (or T). It's for him to seek legal advice in this respect. But section 75 provides for connected lender liability only in cases of breach of contract or misrepresentation. It doesn't apply to actions brought in tort. So he can't successfully make such a claim against JLFS.

I'm aware Mr G remains of the opinion that the handling of the section 75 claim should be subject to the same timescale as that set out by the FCA for complaint-handling. As I explained in my provisional decision, I don't hold this view. Nor do I think it would be right to say that the section 75 claim is subsumed into the bank's complaint-handling process. Mr G made his complaint to JLFS in light of his dissatisfaction with the time being taken to respond to his claim. It is appropriate to draw a distinction between the two, not least because dissatisfaction with the way in which a firm has handled a complaint (including the time taken to do so) will generally fall outside the scope of our jurisdiction<sup>1</sup>.

I've thought about Mr G's request that I consider awarding interest on the compensation I've proposed. I'm not obliged to award interest on my awards, though it is within my power to do so. Here, while I've considered Mr G's request I'm not persuaded it would be appropriate for me to backdate an interest award. For the reasons previously explained I'm satisfied that the £500 I've proposed is a fair sum for JLFS to pay in response to Mr G's complaint. However, I will include a provision in the settlement intended to ensure payment is made promptly.

### **My final decision**

For the reasons I've set out here and in my provisional decision, my final decision is that John Lewis Financial Services Limited must, within 28 days of receiving Mr G's acceptance of it, pay Mr G £500 to settle his complaint.

If settlement is not made within 28 days, it must pay interest on that sum calculated at 8% simple annually from then until the point settlement is made. If John Lewis Financial Services Limited deducts tax from such interest, it should provide Mr G with a tax deduction certificate if he asks for one.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 5 December 2023.

Niall Taylor  
**Ombudsman**

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<sup>1</sup> see, for example *Mazarona Properties Ltd v Financial Ombudsman Service* [2017] EWHC 1135 (Admin)