

## **The complaint**

Mr O complains that Nationwide Building Society hasn't refunded a payment he made using his credit card.

## **What happened**

In 2019, Mr O entered into a contract with a holiday tour operator (who I'll refer to as "T"). The total cost of the tour was £10,978.79 for two people. Mr O paid this in three instalments. The first two instalments were paid on a credit card from another lender and the final instalment of £6,279.88 was paid using his Nationwide credit card. The tour was marketed as a specialist 'music tour' whereby a well-known musician would accompany the tour group for the duration of the tour and perform a series of intimate performances throughout the two-week duration. Mr O says he booked this tour specifically because it was his favourite musician that would be accompanying them on the tour.

The tour price did not include flights, so Mr O had to arrange these himself in order to arrive at the starting location of the tour. Mr O booked his flights separately and he arrived a few days before the start of the tour. A few weeks before the tour was set to take place the owner of T passed away. Mr O was informed by T that the tour would however still be going ahead. A few days before the tour was due to start, and after Mr O had already arrived in the country where the tour was set to take place, T informed him that the musician had pulled out of the tour.

T said that the tour would still be going ahead but that each member of the tour would receive a small refund which was a proportion of the fee T was due to pay the musician for their participation on the tour. This refund later transpired to be £744.68 and was received after the tour had ended.

Mr O tried to obtain a larger refund from T. He said there had been a breach of contract as the main selling point of the tour was the inclusion of the well-known musician. He said that as this wasn't provided a significant proportion of what he paid for hadn't been provided. However, T went into administration and no further refund was provided to him. Mr O therefore approached Nationwide for a refund under section 75 of the Consumer Credit Act 1974 ("section 75").

Nationwide didn't agree there had been a breach of contract or misrepresentation by T which they would be jointly liable for under section 75. It said that T's terms and conditions for the tour said that the itinerary for the tour could be amended by varying, shortening or re-routing any trip. Further, it said the terms stated that T could not be held responsible for any performance of the contract that was outside the T's reasonable control. Lastly, Nationwide said that it couldn't consider Mr O's loss of enjoyment as part of a section 75 claim.

Our investigator recommended the complaint be upheld. She considered the absence of the musician from the tour was a significant change from agreed tour and was a breach of contract. She said that had Mr O been given reasonable notice of this substantial change in the contract he would likely have cancelled. Further, she was persuaded the total cost of the tour would have been significantly cheaper had it not included the well-known musician. As

Mr O had gone on the tour, she considered a refund of 40% of the amount Mr O paid to be a fair price reduction for the breach of contract.

Mr O accepted that outcome, but Nationwide didn't. In summary, it said:

- The reason the musician pulled out of the tour was because the owner of T had passed away and the musician was uncomfortable continuing with the tour in those circumstances. Nationwide said that the owner's passing was outside of T's control.
- While Mr O had already flown to the country where the tour was due to take place, it had been his choice to fly four days early. His presence in the country at the point he was notified of the musician pulling out was unrelated to the tour itinerary.
- There was no breach of contract as T's terms and conditions don't state that a refund will be provided if the musician pulls out of the tour.
- Mr O still decided to continue with the tour despite the musician not being present. He therefore accepted the new contract terms and there is no breach of contract.

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.

The general effect of section 75 is that if Mr O has a claim for breach of contract or misrepresentation against T, he can bring a like claim against Nationwide (as the provider of credit), provided that certain conditions are met. I'm satisfied those conditions are met here.

Nationwide argues there was no breach of contract by T that it could be held jointly liable for. It says that T's terms and conditions state that it is not liable for events considered "force majeure" i.e. those outside of its reasonable control. However, I'm not persuaded that what happened here could reasonably be classed as force majeure under the contract. The relevant section of T's terms states:

#### ***"10. Force Majeure***

*[T]'s obligation to perform under these Terms and Conditions and to provide any service to you shall be suspended to the extent that such performance is affected, directly or indirectly, by any event or circumstance the origin or effect of which is beyond [T]'s reasonable control. For example, [T] is not obliged to perform under these Terms and Conditions to the extent such performance is affected by, directly or indirectly, by war, riots, civil strife, terrorist activities, industrial disputes, strikes, natural/nuclear disasters, adverse weather conditions, wind, hail, flood, fire."*

While it doesn't include an exhaustive list of events, the intention of the clause appears to relate to large scale issues that impact the wider population or area of intended travel i.e. extreme and/or unexpected natural or manmade events or disasters. I'm not persuaded that T (or by extension Nationwide) could reasonably rely on the death of T's owner as a force majeure event under the contract for this and several other reasons:

1. This scenario or anything remotely related to it is not listed within the clause in the contract and I would consider it reasonable for that to be included if T had sought to rely on it.

2. T does not appear to have relied on this clause at any stage when discussing with Mr O the performance of the contract following the musician's withdrawal.
3. The death of the owner did not prevent T from operating the tour. The tour went ahead as planned.
4. While the musician appears to have pulled out of the tour because of the death of the owner, there was no unexpected or uncontrolled event that reasonably *prevented* the musician from participating. All the communications between T and the musician show he pulled out through his own choice, not because of any contractual or logistical issue caused by the owner's death. He simply no longer wished to participate. T even confirmed in its email to Mr O that the musician withdrew at short notice with no "*valid reason*".

Given the tour was marketed and sold specifically with this musician in mind (the tour was labelled with his name) and he could seemingly pull out at any time for any reason, it seems wholly unreasonable that T could somehow contract out any liability for that eventuality. This is especially when it seems there was a significant mark-up for the cost of the tour compared to one that did not include a well-known musician. Having reviewed the terms and conditions, I'm not persuaded they entitle T to avoid any liability in these circumstances.

Having reviewed the itinerary for the tour, it's clear the musician was a significant focus of the tour. As I've said above, the tour title included his name. A number of private performances were scheduled to take place over the two weeks and he would travel with the tour group each day. Therefore, in providing the tour without this significant component I think does constitute a breach of contract. The services Mr O was provided with were significantly different to those that he paid for and expected to receive. The musician's inclusion, attendance and performances were included within the contract.

I accept that Mr O did still go on the tour. However, I note that T did not offer in its correspondence with Mr O an opportunity for a refund or offered him the choice to cancel when it informed him of the musician pulling out. In any event, even if it had, at this point Mr O was already in the country where the tour was scheduled to start, he'd paid a significant amount of money for the tour and some of those services would still be provided. I therefore don't think he acted unreasonably in still going.

I don't agree with Nationwide that by doing so Mr O had accepted that contract in its new form and he therefore couldn't make a claim for a breach of contract later. Mr O's actions weren't unreasonable as part of the contract could still be provided and ultimately mitigated his total losses. Had Mr O simply refused to go on the tour at all, T (and Nationwide) might have sought to argue that he should have still attended in order to receive the part of the contract that hadn't been breached.

As I'm satisfied there was a breach of contract for which Nationwide could be held jointly liable, I think it's fair and reasonable that it now puts things right.

As the services within the contract were completed in part, I don't think Mr O should receive a full refund of everything he paid. Mr O also appears to accept that a full refund would be unreasonable. The tour was initially booked before the global coronavirus pandemic and had to be rescheduled because of those reasons, which is why it didn't take place until late 2022. Given how long ago it was booked, the fact T has gone into administration and prices of travel have changed since the pandemic, it's not been possible to ascertain with any certainty what the cost of a similar tour might have been without the inclusion of the well-known musician.

The investigator recommended a 40% price reduction to reflect the fact that a significant part of the contract wasn't provided. Mr O agreed this was an acceptable reduction in the circumstances. Nationwide hasn't provided any persuasive reasons or evidence to explain why that level of deduction would be inappropriate for the services that weren't provided.

Taking into account all the circumstances here, including the price paid, the itinerary and what wasn't received, I'm satisfied that a 40% price reduction is a fair and reasonable way to put things right. I note Mr O has already received a refund of £744.68 so this should be deducted from the refund. If this refund would have resulted in a credit balance on Mr O's credit card from November 2022 onwards (when he ought to have received the price reduction refund from T), then Nationwide should add 8% simple interest per year onto that refund from the date of the first credit balance to the date of settlement.

### **My final decision**

For the reasons given above, I uphold this complaint and direct Nationwide Building Society to:

- Refund Mr O £3,646.84 representing a 40% price reduction of the total amount Mr O paid. This amount already includes the deduction of £744.68 he has already received.
- Mr O should have received this refund in November 2022. If the refund would have resulted in a credit balance on Mr O's credit card after this date, Nationwide should pay Mr O 8% simple interest per year on that refund from the date of the first credit balance to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 19 April 2024.

Tero Hiltunen  
**Ombudsman**