

The complaint

Mr C has complained about the way Bank of Scotland plc trading as Halifax dealt with his claim for money back in relation to purchases he made using his credit card.

What happened

From August 2022 to March 2023 Mr C said he participated in a promotion run by a company I'll call "L" which involved him purchasing a number of non-fungible tokens (NFTs) from it. He said he bought the NFTs and as part of the promotion he was entitled to receive extra benefits. He said a number of the extra benefits weren't received.

Mr C said L's promotion set out that it would sell four NFTs to buyers through its website every month. These were made up of three silver NFTs that cost around \$200USD plus fees, and one gold NFT that cost around \$2,000USD plus fees. Mr C said for each set of three silver NFTs bought he would receive wallpaper artwork each month. He said five months' worth of these had not been provided.

Mr C said if he purchased two consecutive months of silver and gold NFTs he'd receive a sketch. And if he purchased the full eight months of silver or gold NFTs he'd gain access to an exclusive artwork. He said there was also a GLB file to be delivered to holders of the eight gold NFTs which wasn't delivered. He said there were other perks and promises made such as getting the project set up on Opensea; gated channels; delivering value; and virtual world integration which all haven't been done.

Mr C said he complained to L in January 2023 but didn't receive a response. He said after the final purchase was made in March 2023 it became apparent that L had misled him because the silver and gold artwork was the same, and that exclusive artwork for gold customers was sent to other users who hadn't qualified for it.

Mr C said in April 2023 he exercised his right to return and sent an email to L, but he didn't receive a response. He said the terms and conditions didn't set out certain requirements which meant his right to return was automatically extended to a year. He said he'd not taken delivery of any of the artwork provided, and that they were still in the control of L.

Mr C said the total cost for the project was around £18,000. I understand he paid around £11,500 using his Halifax credit card from October 2022, and the earlier ones by other means. Mr C contacted Halifax to put in a claim under section 75 of the Consumer Credit Act 1974.

Halifax asked Mr C for various things including details of the nature of the claim; correspondence with L; invoices or contracts with terms and conditions; internet evidence, adverts or brochures to support the claim. Mr C provided links to websites but didn't provide a contract. Halifax ultimately declined the claim and said it couldn't determine a clear breach of contract. It said although it had been supplied various documents there was no evidence of a contract with L and that there was insufficient evidence items remained undelivered.

Mr C referred his complaint to the Financial Ombudsman and requested a full refund.

Our investigator didn't uphold the complaint. He said he'd not seen sufficient evidence of a breach of contract or misrepresentation. He said from what he understood, the only things Mr C didn't receive were the digital sketch and wallpaper which are rewards in addition to the goods he paid for. He said he didn't think he'd seen enough to say the rewards were part of a contract or that they induced Mr C into the contract. He said even if he were to agree they were part of the contract, Mr C hadn't shown evidence he'd met the conditions to have received them.

Mr C said he'd shown he'd bought all 32 NFTs so met the requirements for the rewards. He said he'd ideally like a full refund. But if not, he requested all payments refunded that were made within 120 days of putting in his claim because he was within the chargeback period. This totalled around £9,000 and covered purchases from December 2022 to March 2023. And he asked for compensation in relation to the missing items from August 2022 to November 2022 of around £750. Otherwise, he said a refund of the value of the missing rewards should be calculated, which he thought was around £3,700.

I issued a provisional decision that said:

I want to acknowledge I've summarised the events of the complaint. I don't intend any discourtesy by this – it just reflects the informal nature of our service. I'm required to decide matters quickly and with minimum formality. But I want to assure Mr C and Halifax that I've reviewed everything on file. And if I don't comment on something, it's not because I haven't considered it. It's because I've concentrated on what I think are the key issues. Our powers allow me to do this.

I also want to say I'm very sorry to hear Mr C feels let down with the purchases. I appreciate they cost a significant sum, and I can't imagine how he must've felt.

What I first need to consider is whether Halifax – as a provider of financial services – has acted fairly and reasonably in the way it handled Mr C's request for getting money back. It's important to note Halifax isn't the supplier. I've gone on to think about the specific card protections that are available. In situations like this, Halifax can consider assessing a claim under section 75 or raising a chargeback.

Section 75 is a statutory protection that enables Mr C to make a like claim against Halifax for breach of contract or misrepresentation by a supplier paid by credit card in respect of an agreement it had with him for the provision of goods or services. But there are certain conditions that need to be met for section 75 to apply. For the payments using Mr C's credit card, I think the relevant conditions for a claim to be considered under section 75 were met. Halifax hasn't disputed this either.

I've thought about the missing rewards Mr C said he didn't receive. Our investigator asked Mr C to explain exactly what was missing, and for him to supply supporting evidence. Mr C provided a few emails between him and L. He said he provided a full breakdown to Halifax but didn't have access anymore. He said the NFT website was not working so he couldn't pull a full list of what was outstanding, but he said from memory it was several silver rewards and a golden utility which is unknown because it wasn't provided.

I've reviewed Mr C's email to L from January 2023 as I think it gives a good indication of what he was unhappy about. It seems that he was unhappy with how the project was being managed and that users were losing interest in it. He referred to issues with the website; lack of communication; payment system issues; poor decision making; poor chain swap handling; functions not working; marketplace removal not communicated; utilities not provided/communicated and a lack of updates.

While I appreciate Mr C was unhappy with how L was managing the project, I have to bear in mind I'm not considering a complaint against L. I'm considering a complaint about how Halifax – a financial service provider – handled Mr C's claim. So I need to consider its liabilities. And under section 75, that stems from its joint liabilities for breach of contract and misrepresentation.

Halifax said it didn't think Mr C had supplied sufficient evidence of a breach of contract or misrepresentation. And, based on what I've seen, I think that was broadly a fair answer. I think there are evidential requirements for a successful claim that I'm not persuaded were met. I appreciate it might be hard to show something wasn't received, but it doesn't seem to be in dispute Mr C received the NFTs he'd paid for using his Halifax credit card. And it seems that he received some of the rewards he said he was promised. He said the outstanding rewards were several silver rewards and a golden utility. I think he's referring to puzzle pieces that L says are utilities that come with the NFTs. Halifax said it didn't have the terms and conditions relating to the purchases Mr C made because they may have changed from the terms and conditions he'd been able to show. From looking at L's website I can see it says:

- Purchase all three collectable NFTs and you'll receive a silver puzzle piece (eight total silver puzzle pieces, one for each month)*
- Purchase all three collectable NFTs and the exclusive limited-edition NFT, and you'll receive both the silver and gold puzzle pieces (eight total gold puzzle pieces, one for each month) At the conclusion of the campaign, those who have collected all eight pieces of each puzzle will gain access to an ultra-rare and exclusive "reveal" NFT --- one silver "reveal" NFT and one gold "reveal" NFT. Additionally, complete the gold NFT Puzzle and receive a...GLB file allowing you to "Virtualize" a to-be-determined ... model in the Metaverse.*

I'm not sure if those were the same terms as when Mr C entered into the agreement, but I assume they were. However, it's not totally clear when the puzzle pieces were to be provided. It's also not totally clear Mr C hasn't received them or that he's done enough to obtain them. Aside from him mentioning missing rewards in his email to L in January 2023 I've not seen further contact between Mr C and L with him complaining about missing puzzle pieces. It seems that the missing rewards were only a small part of what he was unhappy about. I'd like to have been more certain that Mr C was missing something he was due as part of the contract to have determined Halifax's answer to the claim was unfair. And like our investigator pointed out, even if he'd shown us he was missing puzzle pieces (and that they formed part of the contract), it's not clear what value could be put on them so it would make determining redress difficult.

Mr C has also complained he wasn't able to exercise his right to cancel the purchases within around a year. When he sought to exercise that right, I think he was referring to rights under The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs).

L wasn't selling the NFTs from the UK. And in L's terms of use on the website appears to say the supplier of the NFT's has a choice of laws/venue clause which says the terms are governed by the laws of the State of California.

In respect of contractual claims, governing law can be chosen by the parties in business to consumer contracts, but it will only apply to the extent it doesn't conflict with mandatory protections afforded by virtue of the region of the UK in which the consumer has their habitual residence. Examples of mandatory protections include those under the Consumer Rights Act 2015 (the "CRA") in relation to consumer contracts for goods, digital content and services and on unfair terms.

I also think the nature of the CCRs is mandatory and I think the Consumer Rights Directive provides that the governing law clause couldn't be used by L to escape the protections afforded to UK customers under the CCRs.

For the purposes of the CCRs and the CRA I think an NFT is likely to be deemed 'digital content'. So I think contracts for the supply of NFTs are capable of being captured by relevant provisions of the CCRs and CRA in relation to, for example, information requirements, implied terms, and unfair terms.

Traders are unlikely to be able to contract out or avoid the provisions of the CRA and CCRs where the contract is with a consumer habitually resident in the UK due to the mandatory nature of both pieces of consumer rights legislation and the anti-avoidance provisions which apply.

There are specific provisions under the CCRs on cancellation of contracts for digital content not provided on a tangible medium which provide that a consumer may lose their right of cancellation if the digital content in question is supplied before the expiry of the cancellation period under regulation 30. But to my mind that doesn't mean the right to cancel would be lost where the cancellation period was 'extended' under regulation 31 due to a failure by the trader to provide information required by the CCRs and the digital content was supplied within that extended timeframe.

From what I've seen, I don't think Mr C was supplied relevant information in line with the CCRs with regards to the right to cancel under regulation 29 of the CCRs. There are exclusions and limits to the scope of the CRA and CCRs but I've not seen enough to determine any apply to the contract for NFTs and utilities.

Regulation 31 says if the trader doesn't provide the consumer with the information on the right to cancel the cancellation period ends at the end of 12 months after the day on which it would have ended under regulation 30. So in Mr C's case I think it likely the cancellation period did extend by 12 months. If Halifax has anything to show otherwise it can respond with evidence to this provisional decision.

As things stand, I think there was a strong suspicion of a breach of contract Halifax could be jointly responsible for under section 75 when L didn't allow him to cancel within the 12-month extended period.

While I need to take the law as one of the considerations into account when determining what is fair and reasonable, it is not the only consideration I am required to take into account. I'm able to depart from the law where I think it's fair and reasonable to do so. As I've said above, as far as I can tell, NFTs are not currently excluded from the scope of the CRA and CCRs. But I think there are fair grounds that where the trader failed to provide certain information as required under the CCRs (but the digital content was supplied) the consumer should be liable to pay a reasonable cost in respect of receipt of the digital content.

I'm conscious Mr C has had the benefit of the NFTs for the time he's been in possession of them. He's benefitted from having the artwork and he's utilised some of the rewards that came with the NFTs. Overall, he's benefitted from the experience. He's also had the benefit of having the digital content to use as an investment.

Had L included the necessary information as required under the CCRs I don't think there's any indication Mr C would have tried to cancel within the 14 days he should have been allowed. Otherwise, it's likely Mr C would have given his express consent to waive the cancellation rights so he could be supplied the NFTs straight away. It seems that Mr C is

unhappy with how the promotion was ran or how it performed, rather than L not setting out requirements under the CCRs. Mr C's argument didn't stem from L not providing cancellation rights. It stemmed because he was dissatisfied with the promotion. Mr C was supplied the NFTs and a lot of the benefit of the items is through having the opportunity to see if they go up in value.

Having considered things carefully, I don't think it's fair and reasonable to uphold the complaint on a technical breach and direct Halifax to take ownership of the NFTs. It's not even clear if that would be practicably possible. If Mr C were to be put back in the position he should have been in, he would have had correct information supplied in line with the CCRs when he bought the NFTs, but I don't think he'd have exercised the right to cancel within 14 days. The cancellation issue came up at a much later stage. In the very particular circumstances of this case, I'm not intending to direct Halifax to take any action for what happened. Mr C is able to go to court if he'd like to argue the technicalities with regards to L refusing him cancellation under an extended period.

I've also thought about Halifax's decision not to attempt to chargeback the transactions. The chargeback process provides a way for a card issuer to ask for a payment to be refunded in certain circumstances. The chargeback process is subject to rules made by the relevant card scheme. It's not a guaranteed way of getting money back.

While it's good practice for a card issuer to attempt to chargeback where certain conditions are met and there's some prospect of success, there are grounds or dispute conditions set by the relevant card scheme that need to be considered. If these are not met, a chargeback is unlikely to succeed. And something going wrong with a merchant won't always lead to a successful claim.

Mr C has said Halifax could have attempted to chargeback the transactions from December 2022 to March 2023. But I have to bear in mind that chargeback only covers the amount that was paid using the card i.e., it doesn't cover consequential losses. Seeing as though Mr C received the NFTs he paid for, I don't think there'd have been a reasonable prospect of success for Halifax raising a chargeback for the rewards he said he didn't receive.

Overall, while I'm sorry to hear Mr C was unhappy with the promotion, I've not seen enough to determine Halifax's ultimate answer to his claim was unfair. I don't think there was a reasonable prospect of success for a chargeback, and I don't think it's fair and reasonable for Halifax to have to take any action in relation to Mr C's breach of contract claim or complaint. So I'm not intending to direct it to take any action.

Mr C responded to say, in summary:

- In relation to the right of refund for digital content under the CCRs, due to how NFTs work, there's no provision or need to waive that right.
- More weight should be given to the likelihood of a successful chargeback. Halifax ought to have attempted to raise them.
- The minimum he should be compensated is the value of what Halifax would likely have been able to recover.

I can't see we received a response from Halifax.

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'd like to thank Mr C for his response. Based on the evidence I've seen, it's not clear if L provided the cancellation rights in line with the CCRs. On balance, I don't think it did. But whether or not there was a provision or need for Mr C to waive his cancellation rights I don't think impacts my overall decision.

With regards to the chargebacks, as I said in my provisional decision a chargeback would have only covered the amount that Mr C paid on his card. He received the NFTs he paid for. While I appreciate he's said some of the extras that he was due weren't supplied there wasn't a way for Halifax to accurately determine a value for those. Mr C came up with a calculation, but he wasn't able to supply anything like an itemised breakdown or contract from L that might've been helpful. Mr C was due extras if he bought certain sets of NFTs. So there wasn't an easy way to determine the value of a claim for each individual chargeback. Moreover, there wasn't a clear way for Mr C to show he'd not received something that was due. There were several evidential challenges, and I don't think there'd have been a reasonable prospect of success through chargeback based on what Mr C supplied.

For the reasons given above, I'm not going to depart from the conclusions I reached in my provisional decision.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 27 August 2024.

Simon Wingfield

Ombudsman