

The complaint

Mr E complains that NewDay Ltd rejected his claim under Section 75 Consumer Credit Act 1974 in respect of undelivered wine.

What happened

In October 2018, Mr E purchased wine from a merchant at a cost of £4500. He used his credit card for the transaction. He had made other purchases from this merchant and the wine had been delivered to a bonded warehouse as per the contract. However, in April 2019, Mr E realised that the wine he had purchased had not been delivered. He made enquiries and believed he had been the victim of a scam.

Mr E filed a Section 75 claim with NewDay as he felt there was a breach of contract by the supplier given the wine hadn't been delivered. However, this was rejected by NewDay on the basis the expenditure was gambling transaction. It said deposits do not meet the requirements of Section 75 as they are transfers of funds to gaming establishments and are quasi-cash withdrawals. It added that such transactions are categorised as electronic money transfers and compared the transaction to investing in binary options.

Mr E brought his complaint to this service where it was considered by one of our investigators who recommended it be upheld.

NewDay said that Mr E had contacted it on 1 November 2018 asking it to cancel the transaction nothing more was heard until April 2019. It had emailed the merchant but received no reply. It said the invoice from the merchant stated: *"All purchases are traded subject to market risk and may go up as well as down. We are expressly prohibited from guaranteeing accounts against losses arising from market conditions."*

It said that its terms and conditions for the account contained the following definitions: *"Cash advance – cash (other than a Money transfer), traveller's cheques or foreign currency obtained by using the Card or finance payments or Gambling transactions made with the Card"*. It defined a *"Gambling Transaction - using your Card to Purchase lottery tickets or take part in any form of gambling such as betting, gaming or wagering."*

In effect it said that Mr E had placed a cash deposit into an account for the purposes of gambling.

Our investigator said that Mr E had bought physical bottles of wine which appeared not to have been delivered to the warehouse where his previous purchases were stored. Even though he may have purchased the wine as an investment, he still purchased physical goods that weren't supplied and this was a breach of contract.

NewDay didn't agree and said the wine had been bought as an investment and not for personal consumption.

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.

This complaint has been submitted as a claim under section 75 of the Consumer Credit Act 1974. Section 75 offers protection to customers who use certain types of credit to make purchases of goods or services. Under section 75 the consumer has an equal right to claim against the provider of the credit or the retailer providing the goods or services, if there has been a misrepresentation or breach of contract on the supplier's part.

For section 75 to apply, the law effectively says that there has to be a:

- Debtor-creditor-supplier chain to an agreement *and*
- A clear breach of contract or misrepresentation by the supplier in the chain.

I am satisfied the chain is unbroken which leaves only the matter of breach of contract. The merchant describes itself as wine and spirit merchant. Its terms and conditions include the following:

"Description of Goods and Services: We undertake to provide you with the wine listed in the Wine Reservation Form provided to you. By signing the Wine Reservation Form and returning it to us you are confirming you wish to proceed with the order.

[The merchant] will provide you with information on an independent HMRC bonded warehouse to which your wine will be transferred, although you are free to make any arrangements to suit you, including the use of an alternative warehouse account.

You are required to have a private storage account at a bonded warehouse in to which your wine will be transferred. [The merchant] will not hold or store any wines on behalf of any third parties."

Later on, it confirms that *"ownership is transferred to you once the wine is delivered to your nominated bonded warehouse."*

NewDay has made two related arguments, one that Mr E made a deposit similar to those by people who acquire binary options and secondly that he was gambling.

I believe the comparison with binary options transactions to be false. Generally, a person investing in binary options places their money in an account in their name provided by the options company as an intermediary step and the money is taken from that account to invest in the options. The initial transaction is the transfer of money from the credit card account to the holding account of the binary options company. There is no direct purchase of any options. It is a financial transaction with money moving from one account to another with no purchase being made at that point. It is more akin to someone moving money from their current bank account to a savings account.

In Mr E's case I have seen no evidence that he was transferring funds to an account in his name. It seems it was simple and direct transaction. He chose the wine he wanted to buy and he paid for the wine which was to be delivered to a bonded warehouse of his choice. I gather that is what happened with the other transactions he made. Regrettably, the final one wasn't delivered. As such I cannot accept NewDay's argument on that point.

The second argument is that Mr E was gambling and the terms and conditions of his account treat gambling transactions as cash advances. Although there can be a fine line between investing and gambling, I think that in this case there is a clear distinction. In general, gambling is a time bound event whereas investing is not so constrained. For example,

gambling on a horse to win is race is determined by the outcome of that race. But investing in shares allows the investor to choose when they buy and sell.

With wine the value may go down initially, but then go up and the buyer can decide when to sell. They are not obliged to take loss, but potentially can defer selling until the price increases.

An individual can buy any number of different types of asset to hold as an investment, e.g. a vintage car, or diamonds or rare books or records. Section 75 doesn't require that these be purchased for personal consumption. The buyer of the car doesn't have to drive it or the owner of the rare book doesn't have to read it to qualify. The fact that they are seeking to hold an asset in the hope of selling it at a later date at a profit does not make it a gambling transaction.

Mr E simply bought some wine and hoped that he could sell it later at a profit. I do not consider that to be gambling and if anything, it is more like making an investment. I believe it is not disputed that the merchant failed to deliver the goods for which Mr E had made payment and I consider that to have been a breach of contract which falls within Section 75.

Putting things right

NewDay should accept Mr E's claim.

My final decision

My final decision is that I uphold this complaint and I direct NewDay Ltd to refund £4,500.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 17 March 2021.

Ivor Graham
Ombudsman