

The complaint

Mrs G complains about NewDay Ltd's decision to hold her responsible for transactions she says she didn't authorise or make on her credit card.

What happened

The details of this case have been clearly set out by our investigator when he wrote to NewDay upholding in part Mrs G's complaint. As such, the facts are well-known to both parties, so I don't need to repeat them at length here.

Mrs G told us the credit card isn't used often and that it is mainly used for emergencies. She's explained that whilst Mr G, her husband, is not an additional cardholder for the credit card, he knows the PIN and she allowed him to use the card.

On 30 June 2019, six payments were charged to Mrs G's credit card at a bar abroad. Mrs G wasn't abroad at the time – it was Mr G who had visited Benidorm with some friends. Mrs G has explained she gave the credit card to Mr G in case of emergencies and so the credit card was in his possession. The evening prior to returning home Mr G and a friend visited a bar.

Mrs G says Mr G received a free drink on entering the bar and that he then recalls ordering a round of drinks which he was told came to 36 euros. Mr G used his own debit card to pay for these drinks. Mrs G says it later became known on Mr G's return home that he'd been charged 360 euros.

What happened next is not fully known. Mr G suspects his drink was spiked in the bar and, as a result, he can't recall much of what happened after paying for the first round of drinks. He does remember feeling disorientated and staff becoming angry and intimidating but this is the most he can recollect until he woke up around nine hours later.

When Mr G awoke the next morning, he says he wasn't at his hotel. Mrs G has told us Mr G awoke with a black eye and his shoes were missing. Mr G still had his wallet which contained his debit card and Mrs G's credit card.

Mrs G contacted the police in Benidorm on her husband's return home but was told she would have to report this in person.

The six payments on Mrs G's credit card relevant to the dispute are as follows:

Date	Time	Type of transaction	Amount
30/6/2019	01:21	Chip and PIN	£499.01
30/6/2019	01:43	Chip and PIN	£602.41
30/6/2019	02:05	Chip and PIN	£660.86
30/6/2019	02:36	Chip and PIN	£759.76
30/6/2019	03:01	Chip and PIN	£1,038.49
30/6/2019	03:47	Chip and PIN	£1,168.86

30/6/2019	04:20	Chip and PIN (declined)	£1,343.91
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As shown above, a seventh payment was attempted but declined as this would have taken Mrs G over her credit limit. Mrs G in her initial call with us said she got a text message to say she was about to go over her credit limit. She told us she tried to get in touch with Mr G but when this was unsuccessful, all she could do at the time was report the card as lost and stolen online. NewDay's contact notes say the card was reported as lost and stolen via E-servicing later on the same day the transactions were made on 30 June 2019.

Mrs G has told us Mr G's friend had similar transactions charged on his card.

Mrs G complained to NewDay. NewDay said it wouldn't refund the disputed payments as they'd been made using the genuine credit card and PIN, and there was no reasonable explanation as to how a third-party could've made the payments and the card still be in Mr G's possession the following day. NewDay says it tried to contact the merchant (the bar in Benidorm) about the payments but it was unable to make any contact with them. NewDay adds that it was unable to raise a chargeback or section 75 claim for the transactions as there was no evidence to suggest that the goods and services were not received, or not as described, and no refund had been agreed by the merchant. Because of this, it said the transactions would not be covered.

However, NewDay did refund a £12 late payment fee from September 2019 and the £12 over limit fee from August 2019. It also refunded interest totalling £150.86 from September 2019 and interest totalling £149.37 from August 2019 as a gesture of goodwill.

As Mrs G remained unhappy, she brought her complaint to our service. One of our investigators considered the complaint and felt it should be upheld in part. He was satisfied from NewDay's technical evidence that the payments made using Mrs G's credit card account were authenticated by the use of her genuine card and that the correct PIN was entered.

He recognised Mrs G wasn't abroad at the time and so didn't make the payments herself but said that this in itself doesn't mean she didn't give her authority for the payments to be made. Our investigator explained that given the circumstances he could not say for certain what had happened in this case and in reaching his view of the complaint he needed to make a finding on what he thought was more likely than not to have happened. He said Mr G knew the PIN to Mrs G's credit card and had her permission to use the card when necessary. While she may not have given specific consent for the disputed payments to be made by Mr G, he said under section 84 of the Consumer Credit Act 1974 she is responsible for the transactions he made. He concluded that whilst Mr G may have been drugged or deceived, he thought it was more likely Mr G authorised the disputed payments himself.

However, our investigator when looking at the disputed payments and the previous account activity felt NewDay failed to meet its obligation to conduct transaction monitoring to keep account holders safe from fraud. He felt had NewDay investigated the pattern of spending, it would've been concerned and should've made contact with Mrs G to question the payments. Our investigator thought NewDay should've done this from the third disputed payment and, had it done so, he didn't think Mrs G would've approved the transactions and the financial loss would've been limited to the first two payments only. Because of this, our investigator recommended NewDay reimburse Mrs G from payment three, to recalculate any interest and charges incurred by the payments and if at any time she would've had a positive balance it should refund this along with 8% simple interest, to remove any adverse information it's reported about Mrs G on her credit file and, pay £200 compensation for the distress and inconvenience caused.

Mrs G replied to say she accepted the investigator's view of the complaint but that she was disappointed he'd not applied his view to the first two transactions. She also felt more compensation was due.

NewDay disagreed with our investigator's view and asked for an ombudsman's decision. In its response NewDay said:

- It did not agree to liability as neither party can say the goods or services were not provided.
- That repeated transactions validated with a PIN are less likely to be fraudulent. The merchant definition was 'hotel or lodging' and not an 'adult entertainment bar' making it difficult for issuers to monitor.
- Mr G hasn't provided a reasonable explanation as to how the PIN was known and has confirmed the credit card was not stolen.

Prior to issuing my provisional decision, I reached out to NewDay to provide my initial thoughts on this case. I explained that I wasn't satisfied NewDay had provided its response to our investigator's view in relation to the payments triggering. I was persuaded the payments ought to have caused concern when taking into account the quick succession of the payments, that the payments were for increasing amounts and, that they were much higher in amount to previous spending on the credit card. I explained that while I had considered NewDay's point about the merchant definition for the payments, but for the reasons I had highlighted I was persuaded they ought to have triggered concern.

NewDay didn't agree with these, and in reply:

- Reiterated its reasoning for the transactions not being raised as suspicious. It added the card was out of possession and it is not expected to decline any transactions – it can only take relevant steps to ensure the card is not used fraudulently.
- That making it liable for a customer's failure to exercise sufficient oversight of a third parties' behaviour would be disproportionate.
- The terms and conditions state that if the customer authorises a third party to use their card then they will be liable for any spending by that third party.

So, the complaint is now with me to reach a decision.

My provisional findings

After considering all the evidence, I issued a provisional decision on this complaint on 10 May 2021. I provide a copy of my findings from that decision below:

Disputed transactions

One of the regulations that is relevant when considering Mrs G's complaint in relation to the disputed transactions is the Payment Services Regulations 2017 ('PSRs'). In short, NewDay can generally only hold Mrs G responsible for transactions she has authorised herself. If there are transactions that Mrs G hasn't authorised, then the bank would normally have to refund. The PSRs also say that a person to whom a card has been issued must use it in accordance with the terms and conditions governing its issue and use; and must notify the firm which provided it in the agreed manner and without undue delay on becoming aware of its unauthorised use.

Where credit is involved, as is the case in Mrs G's circumstances the PSRs make provision for the Consumer Credit Act 1974 (CCA) to apply in place of certain sections of the PSRs, including those provisions which govern the apportionment of liability in unauthorised transactions.

The relevant sections of the CCA here involve a credit facility. Section 83(1) of the CCA says Mrs G wouldn't be responsible for any loss arising from the use of her credit card facility by another person not acting, or to be treated as acting, as her agent. But Section 83(1) can't be read in isolation. Section 84(2) says that Section 83 doesn't stop Mrs G from being made liable to any extent for the loss to the credit card provider from use of the credit card by a person who had it with Mrs G's consent.

Firstly, for a transaction to be 'authorised' they must first be authenticated. In the circumstances of this complaint, I'm satisfied the transactions in dispute were all correctly authenticated. I'm satisfied Mrs G's genuine card was used for the transactions and the credit card provider's evidence does show the chip in the card was read. But that is not, on its own, enough to enable NewDay to hold Mrs G liable for the disputed transactions.

However, NewDay can hold her liable for the disputed payments if the evidence suggests that it's more likely than not that she consented to them being made. This is the case whether she made them herself or authorised another to do so.

In situations such as these, where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I have to reach my decision on the balance of probabilities – in other words, what I consider is more likely than not to have happened in light of the available evidence and the wider circumstances.

I've carefully thought about whether Mrs G consented to the transactions being made and to help me decide what happened, I've looked at the evidence of the transactions, as well as what both Mrs G and NewDay have told us.

It is not in dispute that Mrs G was not abroad at the time the transactions were made and, so she couldn't have carried them out herself. Mrs G's credit card was in Mr G's possession. This leads me to consider whether Mrs G gave consent for her husband to carry out the transactions.

Mrs G has said the credit card wasn't used often and was mainly for emergencies. She's also said she gave the credit card to Mr G to use for emergencies whilst he was abroad. Mrs G has said Mr G did not use the credit card to make transactions and wouldn't have done so. In brief, our investigator said a possible scenario was that the merchant may have been operating a scam, whereby customers were persuaded to spend more money on their cards than they thought they were as a result of either being drugged or tricked. He thought this seemed like a more likely explanation of what happened in this case. He added that whilst Mrs G's husband may have been drugged or deceived, he thought he most likely authorised the disputed transactions himself and that Mrs G can be held responsible for the transactions whilst her credit card was in his possession with her permission.

Mrs and Mr G have told us they believe he was drugged at the bar he visited. I've not been provided with any evidence to show Mr G had indeed been drugged but based on what I've seen and been told I have no reason to doubt what they've told us about their suspicions, and so this may well be one possible scenario. It is also as equally as possible that Mr G may have been deceived about the payments he was making and, also possible that he may have attempted to make payments on the credit card albeit he may not recollect this.

When considering the above, I also have to keep in mind the terms and conditions of Mrs G's credit card.

The agreement for Mrs G's credit card account included the following relevant terms:

'you will not have to pay for any unauthorised use of your Card or PIN after you have told us that it is lost or stolen, or you think that it may be misused by someone (other than you or an additional cardholder), unless you or an additional cardholder have acted fraudulently or were responsible for the misuse, for example by allowing someone else to have the Card. You may have to pay us up to £50 for unauthorised use before you let us know that your Card or PIN is lost, stolen or liable to misuse.'

While our investigator considered possible scenarios as to what might have happened here as summarised above, I'm not persuaded I need to make a specific finding on this aspect. I say this because, whether the transactions were made or authorised by Mr G or an opportunistic fraudster, either way I find Mrs G can be held responsible for the transactions that took place due to her breaching the terms and conditions of the credit card.

Did NewDay act fairly and reasonably?

NewDay in response to our investigator's view said that repeated transactions validated with a PIN are less likely to be fraudulent. It added that the merchant definition for the transactions was 'hotel or lodging' and not an 'adult entertainment bar', making it difficult for issuers to monitor.

I've thought carefully about what NewDay has said about this, but I'm not persuaded by this point.

As I explained above, prior to issuing this provisional decision, I reached out to NewDay to provide my initial thoughts on this point. And while NewDay didn't agree with these, having considered it's reply my position remains unchanged. I'll explain my thoughts on this point again.

While the transactions might not have shown as being at an adult entertainment bar this does not mean that the transactions weren't suspicious.

In this particular case, there were many payments made at a 'hotel or lodging' within quick succession of each other (within around 20 to 30 minutes of each other) and were payments for increasing amounts. I also note all of the transactions were made within the early hours. So, I find it equally as likely that these transactions ought to have triggered concern even under the definition of 'hotel or lodging'.

I'm also mindful that the amount of the disputed payments were much higher in value in comparison to previous spending on the credit card. The disputed payments ranged from £500 to around £1,300. When looking at the previous usage of the credit card, I can see there were only four payments made between November 2018 up to the disputed transactions. Of these, I can see a chip and PIN payment from November 2018 which was for £31.66. It follows that I consider the transactions in dispute to be unusual when taking into account previous spending on the credit card.

I'm persuaded the transactions (from the third payment) ought to have triggered in the particular circumstances of this case for the reasons set out above. Had they done so, NewDay ought to have made contact with Mrs G for example by text message to confirm the payment was one she was making. As this message would have gone to Mrs G and not Mr G, I'm not convinced she would have replied to say it was genuine. It follows that I'm satisfied she would have disputed the transaction had NewDay got in touch. And had she not responded to contact from NewDay, given the timing of the transactions, I think it would have been reasonable for NewDay to have blocked the account until it had received a response about the payments. I do note that Mrs G has said she received a text message in relation to going over her credit limit but from what I've seen so far, this would appear to have been a message she was sent following the declined seventh payment. I'm persuaded NewDay ought to have questioned the payments on the account before this as set out above.

So, whilst we might treat the transactions as authorised, I think there was enough going on here that NewDay ought to have done more in this particular case to check the payments being made on Mrs G's credit card, as our investigator suggested, from the third payment.

I'm currently persuaded had this happened, Mrs G's loss would have been limited to the first and second payment on the credit card.

Should Mrs G bear some responsibility by way of contributory negligence?

When answering this question, I've thought carefully about what NewDay's obligations were, as set out above. But another key issue is whether Mrs G acted reasonably taking into account all the circumstances in this particular case and whether her actions contributed to the loss. Having done so, I'm persuaded there is fault on both sides and I will explain why.

I've already set out above why I think the transactions from the third disputed payment ought to have triggered with NewDay. But in being fair to all parties, it doesn't feel fair to only hold NewDay liable for the loss from payment three. I say this because, Mr G was not an additional account holder on the credit card and in Mrs G giving her credit card to Mr G to allow him to use it (even if that was meant for emergencies) Mrs G was in breach of the terms and conditions of the credit card. I think a reasonable person would appreciate that in sharing the card and PIN (albeit with their husband) that there is a risk of loss that flows from this. Had Mr G not had the card in his wallet whilst away then the loss (disputed transactions) could have been prevented.

So, I don't think it would be fair or reasonable for me to say NewDay ought to bear the full loss (all of the payments from payment three onwards) Mrs G has suffered when that loss has resulted from her individual actions and, in the card being in the possession of someone who was not the cardholder or an additional cardholder.

Overall, I've explained why I feel NewDay ought to have intervened here (from the third transaction) and that it should have got in touch with Mrs G about the transactions being made on the credit card sooner than it did for the reasons I have explained above. But I also think it's fair that Mrs G takes a share of the responsibility for her losses as the result of her actions.

With this in mind, I think it fair and reasonable for Mrs G to share some of the responsibility for the loss that occurred. This means I'm recommending NewDay reimburse Mrs G 50% of the disputed transactions from and including the third disputed payment.

Additional compensation

The investigator recommended NewDay should pay £200 compensation in recognition of the distress and inconvenience caused to Mrs G.

NewDay hasn't commented specifically in response to this recommendation. As set out above, I think NewDay ought to have intervened and got in touch with Mrs G about the transactions and, had it done so I think it's more likely than not that her loss from payment three could have been prevented. However, given what I've said about Mrs G's actions, I'm currently inclined to say £100 compensation would be fair and reasonable in the circumstances.

NewDay responded to the provisional decision to say it had nothing further to add.

Mrs G has provided a detailed response to the provisional decision, restating and expanding further on what happened. And setting out why she feels she should be reimbursed for the six transactions in full along with associated fees, interest and charges.

In summary Mrs G commented:

- That Mr G had provided a reasonable explanation as to how the PIN was known – it was forcibly obtained by the merchant via drugging, intimidation rendering Mr G incapable of refusing them.
- She asked what the outcome would have been had Mr G been an additional card holder or, if this had happened to her - the cardholder, would the decision be different?
- She doesn't agree she should be held liable for 50% of the disputed transactions and including payment three.
- She doesn't agree with the reduction in compensation and believes this should be increased. Mrs G referred to NewDay's behaviour since raising the disputed transactions, to her requests to freeze the account and that interest continued to be added on the account balance. She's reiterated the stress caused by NewDay and has highlighted evidence from other victims of the bar, along with records of when she tried to contact the police and confirmation of Mr G's injuries. Mrs G suggested NewDay had enough evidence to raise a chargeback or section 75 claim but did not do so.

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 assure Mrs G I've thought carefully about all the points she has raised in response to the provisional decision but that in setting out my final decision on this complaint I may not specifically address each and every point. I will comment on those I think are relevant to the outcome of this complaint.

I am also mindful Mrs G has provided a number of alternative situations and has asked what the outcome would have been. But we can only reach our outcomes based on the circumstances as we know them to be, which is what I have done here.

I will now turn to Mrs G comments reiterating both hers and Mr G's belief that he was drugged whilst at the bar where the disputed transactions were made. Having considered this point further, my stance remains the same. In my provisional decision, I acknowledged Mr and Mrs G's belief about him being drugged and I recognise their strength of feeling on this point.

In Mrs G's response, she said Mr G provided a reasonable explanation as to how the PIN was known – it was forcibly obtained by the merchant via drugging, intimidation rendering him incapable of refusing them. But even if Mr G was drugged when the disputed transactions were made this would not invalidate Mr G's consent. I say this because the acts of a victim of duress are treated as their own legal acts, so duress does not negate the payer's authorisation for the purposes of the PSR.

And in any event, as set out in my provisional decision, I'm not persuaded I need to make a specific finding on this aspect as to whether the transactions were made or authorised by Mr G or an opportunistic fraudster, as either way I was satisfied Mrs G could be held responsible for the transactions that took place due to her being in breach of the terms and conditions of the credit card which are set out above. However, I also said that whilst we might treat the transactions as authorised, I thought there was enough going on here (for reasons summarised above) that NewDay ought to have done more in this particular case to check the payments being made on Mrs G's credit card – from the third payment. Having reviewed the case again, I remain of the view that NewDay should have done more and that had it done so the loss would have been limited to the first and second payment on the credit card.

So, it follows for the reasons I've already explained in my provisional decision (copied above) that I remain of the position it would be fair and reasonable for Mrs G to share some of the responsibility for the loss that occurred. This means I'm recommending NewDay reimburse Mrs G 50% of the disputed transactions from and including the third disputed payment.

I've also taken on board Mrs G's comments in response to the reduction in additional compensation. But I'm not recommending any increase in compensation be made. I appreciate Mrs G is unhappy with NewDay's response to the disputed transactions and it's finding these were not unauthorised. And that interest continued to be charged. As NewDay found the transactions were authorised this meant it considered the balance on the credit card account to be correct and so interest would continue to be charged on this balance. This said, I can see NewDay did refund a £12 late payment fee from September 2019 and the £12 over limit fee from August 2019. It also refunded interest totalling £150.86 from September 2019 and interest totalling £149.37 from August 2019 as a gesture of goodwill. I

don't find NewDay has acted unfairly or unreasonably in this aspect and make no further recommendation in respect of this point.

In Mrs G's response she highlighted evidence from other victims at the bar, along with records of when she tried to contact the police and confirmation of Mr G's injuries. Mrs G suggests NewDay had enough evidence to raise a chargeback or section 75 claim but didn't do so. So, I've thought again about whether NewDay could have done more to help here.

In this particular case a section 75 claim wouldn't be applicable. I say this is because there is no debtor-creditor-supplier agreement here. It is accepted that Mrs G wasn't abroad at the time and could not have entered into a contract with the merchant herself.

I'll turn now to whether a chargeback could have been raised. There is no obligation for a card issuer to raise a chargeback when a consumer asks for one. But I would consider it good practice for a chargeback to be attempted where the right exists and it is reasonable to do so. While I accept what Mrs G has told us in relation to Mr G's state at the time I'm not persuaded this would have been enough to enable NewDay to meet the basic requirements of the card scheme rules. So this point doesn't change my findings.

Overall, whilst I've carefully considered Mrs G's response to the provisional decision, for the reasons I've explained above, along with those previously set out in my provisional findings, my decision remains unchanged.

My final decision

My final decision is that I uphold this complaint in part.

I require NewDay Ltd to do the following:

- Reimburse Mrs G 50% of the disputed transactions from and including payment three
- Rework Mrs G's account to remove any interest and charges which have resulted from the disputed transactions (from the third payment)
- If at any time Mrs G would've had a positive balance, NewDay should refund this along with 8% simple interest; and the removal of any adverse information it's reported about Mrs G on her credit file
- Pay Mrs G £100 compensation for the distress and inconvenience caused

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 7 July 2021.

Staci Rowland
Ombudsman