

The complaint

Mrs A complains that NewDay Ltd didn't refund payments she disputed on her credit card account and has registered a default.

What happened

Mrs A contacted NewDay to report a number of payments made using her card in Amsterdam as fraudulent. These came to nearly £2,380 and had all been made on 25 January 2020. Mrs A told NewDay that she hadn't travelled abroad and that the last time she had used her card was the day before in a local supermarket. She told it that she had kept her PIN safe by memorising it and not writing it down. And she hadn't allowed anyone else to use her card.

NewDay said it wouldn't be refunding the money. It said that payments were made when the chip on the card was read and the PIN entered. And it didn't accept that these were made by an unknown third party. It held Mrs A liable for the balance and as she hadn't made required repayments it had registered a default.

Our investigator recommended that the complaint be upheld, and the money refunded with interest and charges and the default removed from Mrs A's credit file.

She said that the payments were authenticated with Mrs A's details. But a large part of the spending was for luxury brands abroad which was out of character. She thought it plausible that someone had seen Mrs A use her card and PIN in the supermarket at about lunchtime on 24 January 2020. And there were no set rules for how a fraudster would act and so why that person couldn't have kept the card, travelled to Amsterdam and only started to use it from 25 hours later. Mrs A's representative had tried to prove she didn't make the payments and Mrs A hadn't raised any similar claims in the past. Our investigator didn't think that Mrs A consented to these payments being made.

NewDay didn't agree and said it wanted an ombudsman to review the complaint. It said that the complaint shouldn't be upheld based on assumptions and potentials but that the balance of probabilities should be applied. It thought it unlikely someone in possession of Mrs A's card and PIN would wait 25 hours to use it. There had been no contact with police. The information pointed to either Mrs A making the payments, or someone known to her doing so with her consent.

my provisional decision

I issued a provisional decision about this complaint on 1 August 2021 and I said that I wasn't intending to uphold it. I set out below what I said.

I said that I wouldn't be able to say *exactly* what happened and I'm thinking about what is *most likely*. I needed to take account of the Payment Services Regulations 2017. And to think about whether Mrs A authorised the payments from her account. That's more than the payments being authenticated but would require her to consent to them. Where credit is involved as on a credit card account here, the Consumer Credit Act 1974 applies, and it

states that a consumer wouldn't be liable for an unauthorised payment *unless* they consented to someone else having possession of that card.

I asked our investigator to obtain some more information from NewDay about what alerts if any were sent about the disputed payments, what caused the payments to stop and how they were authenticated. And whether, as it inferred was possible in the final response, any payments were made using a contactless facility on the card.

NewDay has said that all the payments were made when the chip on the card was read and the PIN entered. I've seen a copy of an audit log showing that. I'm satisfied that these were authenticated with Mrs A's card information.

NewDay has explained that one of the payments, for the sterling equivalent of around £30, triggered an alert at 22:05 that evening and this led to the card being blocked. This wasn't because it says it knew the payment was fraudulent, but its systems took into account the volume and value of previous payments that day. A balance enquiry using the card was then made at 23:20 and an attempt to draw out cash from a cash machine declined. There are no other reported attempts to use the card after that.

It has explained that although it told our investigator that no text message was sent to Mrs A about the payments, that wasn't correct. It was too late to phone her that evening and it has shown that instead it sent a text message on as far as I can determine the next day at 17:13. Mrs A responded to that text message at 22:11 to say she didn't recognise the payments. And she called to report the fraud at 22:29 and was able to speak to the fraud team the following day to discuss what had happened with the help of her representative.

The fraud alert on the account is consistent with an unusual pattern of payments but it doesn't show there was actual fraud. In addition, Mrs A's explanation that she responded to a text message gives an explanation of how she found out about the payments if she didn't authorise them. She has as our investigator has stated consistently said she didn't make the payments and attempted to find evidence of this with her representative's help.

But I said that I thought that the following points indicate that it is unlikely these were fraudulent payments:

- The only possible point of compromise for the PIN Mrs A puts forward is when she used the card in the supermarket the day before. It seems to me highly unlikely that an opportunistic fraudster able to obtain her card and having seen her PIN wouldn't attempt to use the card quickly. Even if that person had come up with a plan to use the card abroad there was no attempt at any test payment or to determine whether it would be worthwhile to go abroad to use any available limit on the card.
- So, I find it highly unlikely that a fraudster in possession of the card would wait over a day to use it to make payments. That person risked the loss of the card being detected at any time and the card then becoming useless. And that person could have been in Amsterdam within a matter of several hours if that had been the plan.
- Even when the card was being used there was no attempt to make a balance enquiry before over £2,300 of purchases made in a number of separate transactions over the course of a day. And there was no attempt to withdraw cash until late that evening.

I needed to think about potential scenarios here.

an unknown third party took the card and discovered the PIN and made the payments.

For the reasons I'd explained I thought that this is unlikely.

someone known to Mrs A was able to take the card and find out the PIN without her knowing

Mrs A has been clear that she has kept her PIN safe. She hasn't explained how someone else could have taken her card from her without her knowing. Or how that person could have known the PIN. She hasn't identified anyone who had access to her property that could have done this without her knowing.

either Mrs A made the payments, or she consented to someone known to her having her card

Mrs A hasn't been able to provide evidence she was in this country at the time the payments were made. And she has explained that she was able to make previous trips abroad including in November 2019. But even if she was here that doesn't rule out her giving someone else the card. NewDay says she hasn't reported this matter to police, and this could be consistent with someone known to her making the payments. If she had allowed someone to have her card and disclosed the PIN then she would be responsible for what that person did with the card. I appreciated that her position is that this never happened. But having considered the other possible explanations I found that this is the most likely scenario applying a balance of probabilities test.

the credit card balance and default

That meant I provisionally found Mrs A is responsible for the payments and the account balance. And given this I didn't think NewDay should reasonably have restricted the use of the card and account any earlier than it did.

So, I thought NewDay was entitled to expect her to make repayments as it requested her to do. As she knew its position and didn't make the payments I also thought it was entitled to register a default. I appreciated the impact of this for her and that she will be very disappointed by my conclusions.

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.

NewDay said it didn't have any further comments to make.

Mrs A didn't agree with my provisional decision and her representative made a number of comments on her behalf. He said that they did call the police but were told that as the transactions happened abroad they would need to contact police abroad. It hadn't been proven that Mrs A was out of the country. She had never bought items in luxury shops before and she had always paid her bills on time. This pattern of payments didn't make sense for her. Mrs A also didn't consent to anyone else using her card. It is possible that someone shoulder surfed her when she last used the card for a genuine payment. This isn't a fair decision and the representative wanted to know what other proof could be provided.

I have considered these further comments carefully. It was a matter for Mrs A to provide any further evidence in response to my findings. I had raised some further questions from NewDay before reaching my provisional decision – as I referred to above. And I consider I have the information and evidence I need to make a decision about the complaint.

I explained in my provisional decision that I am thinking about what is most likely. I won't be able to say exactly what happened and for example say it was Mrs A who personally made

the payments. I am thinking about whether it is most likely she consented to them. I note what is said about this being reported to police and have no reason to doubt the response. That wasn't something that was brought to NewDay's attention based on what it's said. But it doesn't make a difference to the outcome in my assessment now and there is no evidence of a police investigation taking place. I'd already referred to and noted the pattern of disputed payments on the account and I accept that this was different to the way the account had been used before. I can't know whether Mrs A was in this country at the time of the payments. But that doesn't preclude her consenting to the use of her card by someone else and for that person to make the payments described as I explained above. So, I don't need to resolve where Mrs A was to make a decision about this complaint.

There is no new evidence that assists me and I have thought about the further points made. Having done I still think for the reasons I gave in my provisional decision and having weighed everything up that the most likely explanation is that Mrs A consented to the use of her card in this way to make the payments. I explained why I didn't think it likely that her PIN had been discovered when she last used it and a fraudster would wait so long before attempting any use of the card at all. And I still think it was reasonable for NewDay to hold her responsible for the payments and for the balance. So, I won't be asking it to do anything more.

I fully understand how disappointed Mrs A will be by my decision. If she doesn't accept it she remains free to pursue this matter in court subject to any relevant time limits.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 20 September 2021.

Michael Crewe
Ombudsman