

The complaint

Mr G complains that NewDay Ltd (“NewDay”) has refused to refund transactions (made using his NewDay (Aqua) Mastercard credit card) to a fraudulent investments trading company (CFD Corporate).

What happened

The circumstances of this complaint are well known to both parties, so I will not repeat them all again here in detail. But I will provide an overview of events below.

In short, in May 2018, Mr G made three payments to what he thought was his trading account with CFD Corporate. At the time, he believed that CFD Corporate were a legitimate investments trading firm. However, after making his payments, he discovered that CFD Corporate were operating a scam.

Mr G made the following payments to CFD Corporate using his NewDay (Aqua) Mastercard credit card:

Date	Merchant	Amount
18 May 2018	CFD Corporate	£500
21 May 2018	CFD Corporate	£2,000
24 May 2018	CFD Corporate	£4,500
4 June 2018	CFD Corporate	£1,000 (credit)
	Total amount debited:	£7,000
	Total less credits:	£6,000

Mr G asked NewDay to try to recover his money. As this did not happen, he raised a complaint, which he also referred to our service.

One of our investigators considered the complaint and upheld it. He said chargeback rights are limited under the Mastercard scheme rules regarding claims about gambling, investments or similar – but they are not excluded altogether. That said, he held that Mr G did have a valid claim for misrepresentation and breach of contract under section 75 of the Consumer Credit Act 1974. Therefore, he suggested NewDay refund to Mr G all his money, less credits.

Mr G accepted the investigator’s findings, but NewDay did not. Its position, in short, is that chargeback rights did not apply; and that there is no debtor-creditor-supplier agreement under the 1974 Act: ‘... *it is our belief there is no bilateral exchange, but simply a deposit.*’

As an agreement could not be reached, the complaint has been passed to me to make a decision.

What I have 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.

Having done so, I agree with the conclusions reached by the investigator for reasons I set out below.

Section 75 of the Consumer Credit Act 1974

I have considered whether it would be fair and reasonable to uphold Mr G's complaint on the basis that NewDay is liable to him under section 75. As a starting point, I think it would be helpful if I set out what the section says:

75(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor ... (3) Subsection (1) does not apply to a claim—

- a) under a non-commercial agreement,*
- b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000*

To summarise, there must be:

1. a debtor-creditor-supplier agreement falling under section 12(b) or 12(c); and
2. a transaction financed by the agreement; and
3. a claim for misrepresentation or breach of contract related to that transaction;
4. but not a claim which relates to any single item which the supplier has attached a cash price below £100 or in excess of £30,000.

I will deal with each requirement or exclusion in turn.

Debtor-creditor-supplier agreement

First, there does not seem to be any dispute that a credit card account is a relevant debtor-creditor-supplier agreement under the 1974 Act. And, I am satisfied here there is nothing that 'breaks' the debtor-creditor-supplier chain – inasmuch as there are three parties involved:

1. Mr G (the debtor);
2. NewDay (the creditor); and
3. CFD Corporate (the supplier) – as shown on Mr G's paperwork and on NewDay's business file submissions.

A transaction financed by the agreement

Secondly, the next consideration is whether the 'transaction' is 'financed' by the agreement.

'Transaction' is not defined in the 1974 Act, but it has generally been given a wide interpretation by the courts – to include whatever bilateral exchanges may be part of a deal. Here, Mr G has deposited funds to open an account in exchange for being able to use those funds on an investment platform and being able to withdraw them as and when he wished. Given the exchange of money in return for certain contractual promises – I am satisfied there were transactions (which I will call "the deposit-transactions") as defined by section 75.

Again, 'to finance', is not defined in the 1974 Act. An ordinary definition would be to provide funds to do something. In *Office of Fair Trading v Lloyds TSB Bank plc [2004]*, Miss Justice Gloster said in a passage with which the Court of Appeal agreed, "*The phrase 'to finance'... approaching the matter in a common sense way must mean 'provide financial accommodation in respect of' ... A credit card issuer clearly provides financial accommodation to its cardholder, in relation to his purchases from suppliers, because he is given time to pay for his purchase under the terms of the credit card agreement.*"

Applying that ordinary definition here, if Mr G had not used his credit card, he would have had to find the cash from his own resources to fund the deposit transactions and obtain the investment account this supposedly entitled him to. So, it is clear that the deposit-transactions were financed by the agreement.

A claim related to that transaction

Thirdly, a claim for misrepresentation or breach of contract must relate to the transaction. It is important to consider what Mr G's claim is here. It is evident from his testimony and correspondence he provided that he feels he was tricked into depositing the payments with CFD Corporate for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Mr G to deposit further amounts.

Mr G does not believe that CFD Corporate were operating legitimately and believes he was misled into thinking they were.

This claim, that Mr G was misled into depositing funds, is clearly a claim "in relation to" the deposit-transactions. The claim must also be one for misrepresentation or breach of contract. In this case, if Mr G was told by CFD Corporate matters that were factually untrue in order to trick him into entering into the deposit-transactions, his claim would be for misrepresentation. Or, if the merchant made binding promises to him as part of those transactions and went on to breach these that would make his claim one for breach of contract.

Cash price value

Finally, the claim must not relate to a single item to which the seller has attached a cash price of less than £100 or more than £30,000. Here, the 'cash price' of the deposit-transaction is the value of that deposit-transaction. It is both the consideration and subject matter of the contract.

For the reasons set out above, I am satisfied that section 75 does apply to the credit card deposit-transactions in this case.

I will therefore go on to consider whether Mr G has a valid claim for misrepresentation and/or breach of contract.

Misrepresentation

I consider Mr G has made a claim of misrepresentation by CFD Corporate – that claim being that they represented to him that they were a legitimate enterprise when this was not the case.

For a claim of misrepresentation to be successful, it is necessary to show not just a false statement of fact, but also that the statement induced Mr G into entering into an agreement.

A false statement of fact

If I am satisfied that CFD Corporate were not likely to be operating a legitimate enterprise – one in which Mr G could never have received back more money than he deposited – then it follows that any statements made by CFD Corporate to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mr G could make money from the platform is likely to suffice as entailing, by necessary implication, a statement of fact by the merchant that it operated a legitimate business, i.e. a legitimate trading platform on which investors could profitably trade. And, I am satisfied that based on Mr G's account of events and the nature of the situation, CFD Corporate did claim that Mr G could have made money from the trading platform.

That induced him into entering the agreement

Again, had Mr G known that the trading platform was essentially a scam, designed to relieve investors of their money, rather than a legitimate service – there is really little question, to my mind, of him not investing with CFD Corporate. Consequently, should I be satisfied that CFD Corporate is not operating a legitimate enterprise, then inducement will also be demonstrated.

Was the merchant operating a legitimate enterprise?

Before discussing this in more detail, I should mention that I have found Mr G's account of events both detailed and compelling. But more than this, it is corroborated not just by other complaints of this nature, but specific complaints against CFD Corporate. Because of this, I'm minded to find his account to be truthful.

Turning to what Mr G has told our service, which, in the interest of conciseness, I will repeat parts here:

- On 18 May 2018, CFD Corporate contacted him and presented themselves, '*... as an investment institution that based in the UK.*'
- He applied for trading lessons which he did not receive.
- '*... as part of the service they provide me with a "Financial adviser" that immediately start by gambling my funds without stop.*'
- '*I got a lot of frustration working with them as the trades always continues and I haven't known how to stop it the company has a policy that says up to 72 hours each withdrawal request will be proceeded instead it getting cancelation on them and excuses why it can't happen now.*'
- His 'bonus' was added and then removed.
- CFD Corporate's support email address does not exist.
- CFD Corporate appear to be based in Israel – connected to another company.
- He is still unable to make withdrawals and his requests for support is ignored.

There is a body of external information available through various regulators, law enforcement agencies, government agencies, press cuttings and the card schemes that repeat the tactics used by CFD Corporate. This does lead me to seriously question whether

any actual trades were being placed on the outcomes of financial markets or whether in fact CFD Corporate offered little more than a video game or simulation.

There is further evidence in the form of a warning on the Financial Conduct Authority's website dated 26 June 2018. Although this was published post the payments concerned, the warning suggests CFD Corporate may not have been acting legitimately:

'We believe this firm may be providing financial services or products in the UK without our authorisation. Find out why you should be wary of dealing with this unauthorised firm and how to protect yourself.'

The FCA's warning about CFD Corporate can also be found on the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO").

In summary

I do not think it is likely CFD Corporate were operating a legitimate enterprise. Therefore, I am persuaded they made misrepresentations to Mr G. That is, that they were running a genuine enterprise through which he could never have got back more than his deposits from the platform. I am also satisfied that if Mr G had known this, he would not have deposited any money, so he was induced into the contract on the basis of these misrepresentations.

Breach of contract

Here, Mr G has deposited funds to open an account in exchange for being able to use those funds on an investment platform and being able to withdraw them as and when he wished. Given the exchange of money in return for certain contractual promises – I am satisfied there was a transaction (the deposit-transaction) as defined by section 75.

It follows, I think, that CFD Corporate had contractual obligations:

- a) To enable Mr G to use the funds from his deposits on an investment platform; and
- b) To enable Mr G to withdraw the funds deposited as and when he wished.

Mr G was not able to use the funds from his deposits on the investment platform. Further, he says CFD Corporate prevented him from withdrawing funds from his trading account when he wanted to. Taking these points together, I am satisfied that CFD Corporate breached the above contractual obligations.

It follows that as a breach of contract can be identified, Mr G's loss amounts to the full amount of each of his deposits.

Putting things right

I've established two grounds Mr G could have recovered his deposit-transactions:

- **Misrepresentation:** I am satisfied Mr G has a claim for misrepresentation on the grounds that CFD Corporate made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Mr G could access his money freely and earn a profit from his deposit-transactions.
- **Breach of contract:** I am satisfied Mr G also has a claim for breach of contract as CFD Corporate breached their promises to Mr G. Namely, that he could use the funds from his deposits on an investment platform, and withdraw funds deposited as and when he wished. This provides another basis for recovery.

As a claim for misrepresentation gives the highest sum, NewDay should put Mr G back into the position he would have been had the deposit-transactions not been entered into. So, he should receive refunds of these amounts, less any amounts credited to him by CFD Corporate.

My final decision

For the reasons set out above, my final decision is that I uphold this complaint. I therefore direct that NewDay Ltd:

- Pay Mr G all the money he lost (set out above); including any transaction fees (if applicable), less the amount CFD Corporate credited to Mr G's account – within 28 days of receiving notification of his acceptance of my final decision; plus
- Pay 8% interest on this amount from the date it was debited from Mr G's account until the date of settlement.
- If NewDay Ltd deducts tax in relation to the interest element of this award, it should provide Mr G with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 25 April 2022.

Tony Massiah
Ombudsman