DRN-3117983

The complaint

Mrs G complains NewDay Ltd wrongly declined a claim she brought under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mrs G met with a company I'll call "R" on 19 March 2017, with a view to getting out of her timeshare with a holiday club I will call "C", and claiming compensation for the mis-sale of the same timeshare.

Mrs G signed a contract at the meeting, agreeing to pay a total of £8,154 for R's services. She made two payments on her NewDay credit card, one of £1,000 to a company I'll call "MRLL" on 20 March 2017, and one of £7,154 on 19 April 2017 to a company I'll call "MRL". The contract said R would release ("relinquish") Mrs G from her timeshare within 12 months. If they didn't do this, she was entitled to a full refund.

Mrs G says R essentially then did nothing, before going into liquidation in June 2018. In the meantime, C had been demanding payments for maintenance fees for the timeshare. She raised a section 75 claim with NewDay in October 2018, requesting a full refund of the amounts she'd paid. Unfortunately, the claim letter was sent to the wrong bank, who later forwarded it on to NewDay to consider. Mrs G became unhappy about how long it was taking for NewDay to make a decision and complained in either March or April 2019.

NewDay responded to the claim and the complaint in May 2019, rejecting the majority of it on the basis that there was not a valid debtor-creditor-supplier ("DCS") agreement in place which would allow Mrs G to hold them liable under section 75 of the CCA. NewDay did however accept that there had been delays in looking into the section 75 claim and offered to credit her account with £20.

Dissatisfied with this response, Mrs G referred her complaint to this service for an independent assessment. The most recent assessment by one of our investigators agreed that there had not been a valid DCS agreement in place and NewDay were right to have declined the claim and had dealt with the complaint fairly.

Mrs G disagreed and asked for an ombudsman to review her case, which was then passed to me to decide. I carried out some further research which led me to conclude there was a valid DCS agreement in place, due to MRLL and R being "associates" at the time of the payment to MRLL. I also thought it likely that R had breached its contract with Mrs G, and that she'd have been entitled to a full refund. I wrote to NewDay on 1 December 2021 to explain my findings and I invited them to change their position on the case. NewDay hasn't replied to me, so I've proceeded to make a decision.

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.

Section 75 of the CCA provides a degree of protection to consumers who pay for goods or services using a credit card. So long as certain technical criteria are met, it allows a consumer to claim against their credit card provider for any breach of contract or misrepresentation by the supplier of the goods or services.

NewDay argue that the technical criteria to make a section 75 claim have not been met in Mrs G's case. This is because she made her credit card payments to MRL and MRLL, but she had entered into a contract with R. NewDay says that this means the necessary DCS agreement is not in place for Mrs G to make a claim.

The DCS agreement is one of the criteria which needs to be in place for a section 75 claim to be made. What it means in practice is that for a person to be able to successfully bring a section 75 claim against their credit card issuer, the credit card generally needs to have been used to pay the same company which they have a claim against for breach of contract or misrepresentation.

In Mrs G's case, her credit card payments were not made to R, which was the supplier and the company she has a claim against for breach of contract and/or misrepresentation. Her payments instead went to MRL and MRLL. So I can understand why NewDay, and our investigator, concluded there was not a valid DCS agreement in place.

There are however some exceptions to the general rule that the payment must be made to the supplier. One such exception occurs where the supplier is an "associate" of the company which received the credit card payment ("the payee"), at the time the payment is made. This doesn't mean being an associate in the everyday sense of being linked in some way or another; the relationship has to meet a specific definition which is set out in section 184 of the CCA.

According to section 184 of the CCA, in order for companies to be associates they need to be controlled by the same people, or by people who are themselves associates of one another. People are associates of one another if they are relatives, or if they are "in partnership" (for example, being in business together at another company). A person would be in "control" of a company if they are a person whose instructions will normally be followed by the officers of the company, or if they are entitled to exercise a third or more of voting power at any general meeting of the company.

This is important because section 187 of the CCA has the effect of making companies which are associates *interchangeable* for the purpose of the DCS agreement. It wouldn't matter which company was the payee, so long as they were an associate of the supplier.

The association between R and MRLL

My research showed that a Mr K was a 50/50 shareholder of R until 1 December 2016, he was also majority shareholder of MRLL and a 50/50 shareholder of a company I will call 'RIG' at the time Mrs G made her payment. A Mr W was the director of R until 20 April 2017. He was also a director and 50/50 shareholder of RIG at the point Mrs G used her credit card to pay MRLL.

Mr K and Mr W were associates due to their ongoing joint control of RIG (via their 50/50 shareholdings) and therefore any companies they controlled would be associates of one another. R was controlled by Mr W up until 20 April 2017, while MRLL was controlled by Mr K up to this date and beyond. This means R and MRLL were associates until Mr W left R on 20 April 2017.

It follows that it doesn't matter in this case that Mrs G paid MRLL instead of R using her

NewDay credit card. A valid DCS agreement exists which would allow her to bring a claim against NewDay under section 75 of the CCA. This would allow her to recover payments she has made via other means or to other companies, so long as they were payments made towards this contract or transaction.

However, just because there's a DCS agreement in place which would allow NewDay to be held liable to Mrs G under section 75 of the CCA, doesn't mean that she's entitled to redress. There still needs to have been a breach of contract or misrepresentation by R.

The breach of contract by R

At the time of my last communication with NewDay, I didn't have documentary evidence that Mrs G had not been released from her timeshare by R, but I was satisfied on the balance of probabilities that they had not achieved this. Since then, Mrs G has sent evidence that, as of April 2018, she was still responsible for the timeshare with C, who were pursuing her for unpaid fees and clearly still considered her to be bound by her contract with them.

The contract with R came with a "money back guarantee". This was worded as follows:

"[R] give a full money back guarantee that the relinquishment will be achieved within 12 months of [19 March 2017]."

I take this to mean that R made a contractual promise to refund everything Mrs G had paid towards the contract, if she was not released from her timeshare within 12 months of 19 March 2017. As of April 2018, Mrs G had not been released from her timeshare. She has also not been provided with a refund. So I conclude there was a breach of contract by R, in failing to provide the full refund.

Mrs G can hold NewDay liable for this breach of contract under section 75 of the CCA, and ask them to compensate her for her losses as a result of the breach. In this case, Mrs G's loss is the amount she paid towards the contract and which should have been refunded, this being £8,154. This is the amount I think it is fair and reasonable that NewDay should refund her, taking into account their responsibilities under section 75 of the CCA.

I note NewDay offered Mrs G £20 compensation for delays in handling the original section 75 claim. I think it should still pay this, if it hasn't already done so. While the amount is rather small, I note some of the delays in dealing with the claim were caused by Mrs G's claim having been sent to the wrong bank initially. I also think Mrs G has been insulated from any distress or inconvenience caused by the delays, as she has been represented by a claims management company throughout. In view of this, I won't be asking NewDay to increase this compensation further.

My final decision

For the reasons explained above, I uphold Mrs G's complaint and direct NewDay Ltd to take the following actions:

- Pay Mrs G £8,154, this being a refund of the amount she paid on her NewDay credit card.

- Pay 8% simple interest per year* on the above refund, calculated from the date Mrs G's section 75 claim was declined, to the date she receives the refund.

- Pay Mrs G £20 compensation as it has already agreed to do. If it has already paid this compensation it doesn't need to do this again.

* If NewDay Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs G how much it's taken off. It should also give Mrs G a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 10 February 2022.

Will Culley
Ombudsman