

The complaint

Mr T complains that NewDay Ltd (“NewDay”) has refused to refund payments he made to what he believed was a legitimate binary options trading company (Tradorax). These payments were made using Mr T’s NewDay Mastercard credit card.

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 April 2017, Mr T made two payments (using his NewDay Mastercard credit card) to what he thought was his trading account with Tradorax. These payments were for £2,499 and £2,500. At the time, Mr T believed that Tradorax were a legitimate binary options trading firm. However, he later discovered that they were operating a scam.

Mr T 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. In short, she did not think Mr T had any chargeback rights. However, she held that Mr T did have a valid claim for misrepresentation and breach of contract under section 75 of the Consumer Credit Act 1974. Therefore, she suggested NewDay refund to Mr T the payments he made (totalling £4,999); and rework his account so that all interest and charges caused by those payments are refunded.

(The investigator has since clarified to Mr T that the redress she is suggesting is a refund of £4,999, plus 8% interest from the date of his losses until the date of settlement.)

Mr T accepted the investigator’s findings, but NewDay did not. Its position, broadly, is that:

- It does not agree there is a debtor-creditor-supplier agreement under the 1974 Act.
- There was no bilateral exchange, but simply a deposit – which is supported by two previous decisions from our service. The deposit of money was not for the purchase of goods or services, so section 75 is not engaged.
- The claim does not relate to the transaction because the contract was entered into before a payment was made using Mr T’s credit card.
- *‘Whilst we accept the sum in question is within the financial scope of the section, the section refers to a single item to which the supplier has attached a cash price. However, there is no cash price attached simply a deposit of monies into an account. In addition, there is no single item; simply the ability for the monies to be used to trade.’*
- *‘... in relation to interest, we must take issue with an interest rate of 8% on any payments made. Additional interest is to compensate a customer from being “kept out of his money”. With interest rates at an historical low, 8% would significantly overcompensate the customer for being unable to invest this money elsewhere. We*

would suggest that the Court's special account rate of interest would be applicable in the circumstances.'

Our investigator responded explaining why her position remained the same. 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.

Chargeback

I have first considered that Mr T had no valid chargeback rights under the Mastercard chargeback scheme. I say this because he did not have the evidence needed to satisfy the requirements of the scheme rules.

Section 75 of the Consumer Credit Act 1974

I would like to say that I have summarised this complaint in far less detail than the parties involved. I want to stress that no discourtesy is intended by this. If there is a submission I have not addressed, it is not because I have ignored the point. It is simply because my findings focus on what I consider to be the central issues in this complaint.

Moreover, NewDay is more than familiar with this service's approach to these types of complaints.

I am satisfied that NewDay is liable to Mr T for the payments concerned. I say this because, in very broad summary:

- There is a debtor-creditor-supplier agreement falling under section 75:
 - Mr T (the debtor);
 - NewDay (the creditor); and
 - Tradorax (the supplier) – as shown on Mr T's paperwork and on NewDay's business file submissions.
- The transactions Mr T made were financed by his agreement with NewDay ("the deposit-transactions").
- Mr T's claim does not relate to a single item to which the seller has attached a cash price of less than £100 or more than £30,000.

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

I note NewDay has said the claim does not relate to the transactions concerned. However, based on the evidence before me, I am satisfied that Tradorax clearly made promises to Mr T, which in return he made the payments concerned. I am satisfied that these payments were not voluntary deposits made without a prior agreement with Tradorax.

I will now turn to whether Mr T has a valid claim for misrepresentation and/or breach of contract.

Misrepresentation

Turning to Mr T's testimony. In short, he has told this service, amongst other things:

- He approached Tradorax online in response to an online advert offering a return on his capital.
- He was put in contact with 'Jordan' who encouraged him to trade in binary options.
- Jordan told him he should invest more money; and that when his trading account reached £20,000, he would then receive a regular monthly addition to his pension.
- *"Various conversations took place and I was at one point asked to talk with [Andre] who encouraged me to invest as much as was possible as the returns could be significant. (He showed me his own personal account that had millions of pounds in it!)"*
- *"I was then transferred to a [John] who took over the process. It was he who told me stories and encouraged me to invest a lifetime mortgage amount I had recently obtained as at the time it was not receiving any interest. When Jordan apparently left the company I was transferred to a [Daniel]."*
- *"Almost immediately access to my on line account/site ceased to be possible."*

Our investigator asked Mr T why he made the payments in question to Tradorax. He responded stating:

"At the time and with subsequent transactions I was promised a very reasonable return on my investment. My experience of this world of finance was nil and as they were based in London I assumed they were genuine. They also promised to return any money I needed and subsequently did so. On one occasion they returned just over £1000. At the very beginning they took £700 without my permission and promptly returned it. Like all people who have been scammed I believed them, and until the very end they apparently did what they said they would. In hindsight it was too good to be true."

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 Tradorax. This does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact Tradorax offered little more than a video game or simulation.

Moreover, all the above is corroborated not just by other complaints of this nature, but also by the negative online reviews about Tradorax stating that they operated fraudulently.

For the above reasons, I do not think it is likely Tradorax were operating a legitimate enterprise. Therefore, I am persuaded they made misrepresentations to Mr T. 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 T 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 T has deposited funds to 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 (the deposit-transactions) as defined by section 75.

It follows, I think, that Tradorax had contractual obligations:

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

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

It follows that as a breach of contract can be identified, Mr T's loss amounts to the full amount of each of his deposits.

In summary

I have established two grounds Mr T could have recovered his credit card deposit-transactions: misrepresentation and breach of contract. As a claim for misrepresentation gives the highest sum, NewDay should put the Mr T back into the position he would have been had the deposit-transactions not been entered into. So, he should receive refunds of these amounts.

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 T all the money he lost (totalling £4,999); plus
- Pay 8% interest on this amount from the date it was debited from Mr T'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 T with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 19 May 2022.

Tony Massiah
Ombudsman