DRN-3179595

The complaint

Mrs D complains NewDay Ltd failed to honour a claim she brought under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

The background to the matter is well known to all parties so I will summarise only briefly:

- Mrs D had a membership with a holiday club I will call "C". In January 2017 she entered into a contract with another company I will call R. It said it would arrange for Mrs D to be released from her membership with C and claim compensation for her for the mis-selling of the membership.

- Mrs D paid R £7,914 towards the contract, made up of £2,446 paid from her NewDay credit card to a company I will call MRL and the balance with another credit card. The contract guaranteed that R would achieve the release of Mrs D from her membership within 12 months of January 2017.

- R failed to arrange for Mrs D to be released from her membership with C, and subsequently went into liquidation in May 2018.

- Mrs D brought a claim against NewDay under s 75 of the CCA in October 2018. NewDay investigated the matter and didn't agree Mrs D had a valid claim under s 75 of the CCA. It said that because she had paid MRL, and not R, the necessary "debtor-creditor-supplier" ("DCS") agreement wasn't in place for her to be able to make a claim. Mrs D was unhappy with this decision and complained, but NewDay would not change its position.

- Mrs D brought her complaint to this service, where it was considered by one of our investigators. it. Initially she thought the complaint should be upheld, but after further research she concluded NewDay had been right to say Mrs D didn't have a valid claim under s 75 CCA, because MRL had taken the credit card payments instead of R. Our investigator investigated whether there were any exceptions which meant this might not matter, but she couldn't find any. She also thought about whether NewDay should have charged back the credit card transactions but concluded the bank had been out of time to do so at the point it had been made aware of the issue.

Mrs D didn't agree with our investigator and asked for her complaint to be reviewed by an ombudsman. The case has now been passed to me to decide.

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.

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When someone makes a purchase using the facilities offered by their bank or credit card company, and something goes wrong with that purchase, there's no general obligation for them to provide a refund. However, there are some mechanisms via which they can assist. If a credit card has been used, as in this case, s 75 CCA gives a legal right to the account holder to claim against their credit card issuer in respect of breaches of contract or misrepresentations by the supplier, so long as certain technical criteria have been met.

If any type of card has been used (debit, credit or pre-paid), the card issuer can use the dispute resolution service administered by the card schemes in order to claim back the money paid on the card. This can be done only in certain scenarios and only so long as the dispute fits within the rules set out by the card scheme. This includes scenarios where goods or services have not been received, and the process of disputing payments in this way is generally known as a "chargeback". Although a consumer cannot insist that their card issuer attempts a chargeback, I would expect the issuer to attempt one if there was a reasonable prospect of the process succeeding, and to conduct the chargeback process in a competent way, free of errors.

The Section 75 claim

I don't think Mrs D had a valid section 75 claim against NewDay for essentially the same reasons our investigator explained. I don't think her claim meets one of the required criteria I referred to above.

The criterion in question is the requirement for there to be a DCS agreement in place. The simplest explanation of this is, is that when someone makes a payment on their credit card, in order to be able to make a section 75 claim against their credit card provider they need to have used the credit card to pay the same company they say misrepresented something to them, or breached its contract with them. Mrs D didn't pay R, which is the company she has a problem with. Instead, her credit card payments went to MRL.

There are some exceptions to this general rule. The first exception occurs where the company which is responsible for the breach or misrepresentation ("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 an associate in the everyday sense of being linked in some way or another; the companies have to be associates according to a very 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 directors 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. In general, I would view a company director or majority shareholder to fall into these categories. Being based at the same or a similar business address would not be enough to make two companies associates.

I've carefully considered whether R and MRL were associates at the time of Mrs D's credit card payment, by checking publicly available information about the companies. A Mr K was a controller of R between 1 April 2016 and 1 December 2016, while an associate of his (a Mr U) controlled MRL. This means the companies themselves were associates during this time window. Mr K gave up his shareholding in R from 1 December 2016 and I cannot see that he was a controller of the company from that point on.

It has been suggested that there is some doubt about the Companies House filings which

show Mr K giving up his shares on 1 December 2016. The records were filed late and some have suggested that Mr K controlled R for longer than the records say. But I think this is speculative without further evidence that the records filed with Companies House are not an accurate representation of what happened and when. In the absence of convincing evidence to the contrary, I conclude Mr K was no longer a controller of R from 1 December 2016.

I note there is also an outstanding debenture in Mr K's favour, granted by R, dating back to January 2016. It has been suggested this means he controls the company. I don't agree. All this shows is that Mr K had agreed to lend money to R on a secured basis and this has not yet been repaid.

Because Mrs D's credit card payments were made outside of the window in which R and MRL were associates, this means the exception doesn't apply in his case.

There is another exception which was identified in the case of *Bank of Scotland v. Alfred Truman [2005] EWHC 583 (QB)*. The case concerned a firm of solicitors who had a motor trader as a client. The solicitors took credit card payments from customers of the motor trader, which had no facility to take such payments itself, as deposits for cars which the customers had ordered. The court found that the contractual arrangements between the motor trader and the solicitors were "adequate" to link the motor trader to the card scheme through the transactions processed via the solicitors' credit card facilities, and therefore mean there was a DCS agreement in place.

The judge observed in the *Alfred Truman* case that the above conclusion couldn't be applied in all cases as a general principle, and that there were problems with establishing where the line should be drawn between scenarios where the supplier could be linked to the card scheme, and where things were "too tenuous" to be able to draw this conclusion. The judge noted that the problem would need to be resolved on a case by case basis, and that the "precise contractual arrangements" between the parties would determine whether the creditor had liability under section 75.

A later case in the County Court, *Marshall v. Retail Installation Services Ltd [2016]*, clarified that in the absence of knowledge of the precise contractual arrangements between the company which was meant to supply the services or goods under the contract, and the payee, that the involvement of the payee in the provision of the goods or services could be enough to link the supplier to the card scheme and for a DCS agreement to exist.

In Mrs D's case, not much is known about the precise contractual arrangements between R, which was the supplier of the services, and MRL, which was the payee. It's clear that MRL took payments for R's customers and that this was an established practice, as I've seen evidence that R required its salespeople to tell customers that the name of MRL or another company might appear on their statements.

There is some evidence that a company in the group to which MRL belonged, acted as R's accountants. We have tried to find out more from this group of companies, and the relevant liquidators. Unfortunately, we have not received information which helps to clarify what the arrangements were between the companies. In *Alfred Truman* the court had a much more complete picture of the nature of the arrangements between the parties and had the benefit of direct evidence from the payee. Here I don't have nearly as much information and I feel unable to conclude that R was linked to the card scheme via its arrangements with MRL, on the evidence available to me.

I've considered whether the case of *Marshall* might be applicable to Mrs D's case, but I've seen no evidence that it would be because it doesn't appear MRL was involved in the provision of the timeshare release or compensation claim services Mrs D had contracted

with R for.

I have also noted the claim that there was link between MRL and another company I will call MRTP, but the payment was processed by MRL and I can only consider the link between R and MRL. Nor can I presume there was a link because the different companies operated from the same building. The location of a business is not one of the criteria I can consider under s 184 CCA.

In light of the above, I conclude there was no valid DCS agreement in place to allow Mrs D to make a section 75 claim against NewDay. I therefore don't think the bank was

wrong to reject his claim. I've thought about the arguments Mrs D raised in response to our investigator's assessment, but they don't change my view. I appreciate the frustration with the situation but I cannot require NewDay to pay out money where a claim falls outside the terms of s 75 CCA.

Chargeback

Mrs D hasn't queried our investigator's opinion on whether or not it was possible for NewDay to have attempted a chargeback on either of the credit card transactions.

I agree with the conclusions our investigator reached on this question. The maximum length of time to dispute a transaction via the relevant card scheme. This is because the rules applicable to chargebacks impose a deadline of 120 days from the point that the cardholder "expected to receive the merchandise or services".

Like our investigator I have noted from the Terms and Conditions of the contract - that R confirmed the relinquishment would be achieved within 12 months of the date of the agreement which would have been January 2018. I have noted that Mrs D contacted NewDay two days after she made the payment and said she would call back to check if the payment had been uploaded on to her account. I have not seen any evidence that she did so and at that point there was no reason for NewDay to consider raising a chargeback.

She did contact NewDay again in August 2018 by which time it was too late for NewDay to raise a chargeback.

Protection for consumers

Mrs D has said that she was the victim of a scam and NewDay should have protected her. I have every sympathy with Mrs D, but once she authorised the payment NewDay did not have the power to stop it. I understand it had gone through by the time she contacted NewDay two days later. I don't believe it had any knowledge of the activities of MRL, the company to which the payment was made and the payment was processed as a routine transaction.

Even if it had been given grounds in time to raise a chargeback I suspect MRL would have challenged that and it may well have proved to be unsuccessful. So, again, I cannot say that NewDay has done anything wrong in its handling of this matter.

My final decision

For the reasons explained above, I do not think NewDay treated Mrs D unfairly by refusing to reimburse her. My final decision is that I do not uphold her complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 28 January 2022.

Ivor Graham
Ombudsman