

The complaint

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

The complaint was brought to us by Mr and Mrs M however the payment in dispute was made from Mrs M's credit card so I will mainly be referring to her directly within this decision.

What happened

Mrs M had a membership which she held jointly with Mr M with a holiday club I will call "C". In March 2017 she entered into a contract with another company I will call R.

Mrs M paid a total of £8,154 towards the contract. this was made up of £2,446 paid from her Debenhams-branded NewDay credit card on 28 February 2017 to a company I will refer to as "MRLL", who she says R told her were their accountants. A further £5,708 was paid towards the contract on 7 March 2017 on Mr M's credit card with another provider. The contract with R guaranteed that Mrs M would be released from her timeshare membership within 12 months of 27 February 2017. Mrs M also says R had told her it would be able to pursue a claim for compensation amounting to £20,940.

On 7 March 2017, Mrs M received correspondence from another company I will refer to as "TM". TM confirmed that it had been appointed by R to release Mrs M from her timeshare.

TM wrote to Mrs M again on 4 September 2017 to confirm it had completed everything required in order to terminate Mrs M's timeshare, but also suggested C had not agreed to this. Meanwhile, Mrs M continued to receive invoices from C for annual management fees.

On 17 March 2018 Mrs M received an email from C stating that TM and R had been in touch for some of its members. C noted that it had consistently informed TM and R that it will not accept their correspondence to terminate the timeshare, this could only be done by the timeshare member directly, and would be free of charge.

Mrs M contacted TM about these developments, learning in the process that R had gone into liquidation and the originally-conceived compensation claim would not be going ahead. TM suggested Mrs M attempt to reclaim the money she had paid to R via a section 75 claim, and invited her to join a class action it was planning against C. Mrs M declined to join the class action and dealt with C herself from this point on.

Mrs M brought a claim against NewDay under section 75 of the CCA in July 2018.

NewDay investigated the matter and didn't agree Mrs M had a valid claim under section 75 of the CCA. It said that because she had paid MRLL, and not R, the necessary "debtor-creditor-supplier" ("DCS") agreement wasn't in place for her to be able to make a claim.

Mrs M was unhappy with this decision and referred the complaint to our service for an independent assessment. Mrs M had highlighted that Mr M's section 75 claim with his card provider had been successful, and he had received a refund of the payment he had made with that credit card.

Mrs M's complaint was considered by one of our investigators. She initially concluded NewDay had been right to say Mrs M didn't have a valid claim under section 75 of the CCA, because MRLL had taken the credit card payment instead of R. She also thought about whether NewDay should have charged back the credit card transactions but concluded NewDay had been out of time to do so at the point it had been made aware of the issue.

Our investigator then wrote to NewDay and explained further information had come to light. She now thought NewDay should have honoured Mrs M's section 75 claim as the information had suggested R and MRLL were "associates" as defined in the CCA. She concluded there was a valid DCS agreement in place and NewDay should provide Mrs M with a refund as they were liable for T's breach of contract under section 75 of the CCA.

Mrs M accepted the investigator's revised findings. NewDay said it had nothing to add and asked for an ombudsman to make a final decision on the matter.

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.

When someone makes a purchase using the facilities offered by their bank or credit card provider and something goes wrong with that purchase, there's no general obligation for them to provide a refund.

However, there are some mechanisms through which they can help. One of these mechanisms is a chargeback, our investigator considered that this wouldn't have been successful as NewDay were out of time to raise one. Having considered the evidence, I agree. But ultimately this isn't important as, like the investigator, I think Mrs M has a valid claim under section 75 of the CCA.

The section 75 claim

Section 75 of the CCA gives consumers a legal right to claim against the credit card issuer in respect of a breach of contract or misrepresentation by a supplier of goods or services, where certain technical criteria have been met.

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

Generally, for a person to be able to successfully bring a section 75 claim against their credit card issuer, the credit card needs to have been used to pay the same company which they say has breached its contract with them or misrepresented something.

In Mrs M's case, her credit card payment has not been made to R. Her payment instead went to MRLL. So it seems one of the necessary criteria for her to be claim against NewDay under section 75 of the CCA, is not in place.

There are however some exceptions to this general rule. One such exception occurs where the company which is alleged to have misrepresented something, or breached the contract ("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.

Section 187 of the CCA has the effect of making companies which are associates interchangeable for the purpose of the DCS agreement.

Our investigator looked into the question of whether or not R and MRLL were associates. She found that they were at the time payment was taken by MRLL. NewDay has not replied to our investigator’s updated findings or provided specific arguments as to why it disagrees (or even if it disagrees), so I don’t know what, if anything, it thinks the investigator has got wrong.

However, for the sake of completeness I’ll explain why I think the investigator reached the right conclusion.

Information which is publicly available shows 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 M made her payment. A Mr W was the director of R until 20 April 2017. He was also a director and shareholder of RIG at the point Mrs M used her credit card to pay for the contract.

Mr K and Mr W were associates due to their ongoing joint control of RIG and therefore any companies they controlled would be associates of one another. 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 M 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.

Was there a breach of contract or misrepresentation?

I’ve concluded a valid DCS agreement exists, but in order to have brought a successful section 75 claim against NewDay, Mrs M also needs to have a claim against R in respect of breach of contract or misrepresentation.

Having considered the evidence, I think there has been a breach by R of the express terms of the contract.

The terms of the contract states that R gave “...a full money back guarantee that the relinquishment will be achieved within 12 months of this date.” The contract was signed on 27 February 2017 so R had until 27 February 2018 to release Mrs M from her timeshare.

Mrs M has provided us with correspondence from C up until June 2018. It’s apparent from this correspondence that Mrs M had not been released from the timeshare. So neither R or TM had managed to release her from the timeshare, albeit it appears TM did attempt to do so and was rebuffed by C. R had also entered into liquidation by 23 May 2018 and was therefore not in a position to relinquish Mrs M from her timeshare or honour the money back guarantee by this point.

I therefore conclude R failed to release Mrs M from her timeshare by the deadline stated in

her contract, meaning it was contractually obliged to provide her with a full refund. It hasn't done so, meaning it is in breach of contract.

In light of my conclusions, I think Mrs M had a valid section 75 claim against NewDay and it should therefore have honoured this. It was not fair and reasonable of NewDay to decline her claim. Mrs M's loss as a result of the breach of contract, and which I think she was entitled to ask NewDay to make good, is the amount she paid on her NewDay card – i.e. £2,446. As referred to earlier in this decision, it's my understanding that the other payment made towards the contract with R has already been refunded by Mr M's credit card issuer.

My final decision

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

- Pay Mrs M the amount of £2,446, representing a refund of the payment she made on her NewDay card towards the contract with R.
- Pay Mrs M 8% simple interest per year* on the payment above, calculated from the date her section 75 claim was rejected, to the date she receives the payment.

* If NewDay Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs M how much it's taken off. It should also give Mrs M 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 M to accept or reject my decision before 10 February 2022.

Will Culley
Ombudsman