

## **The complaint**

Mr D complains that NewDay Ltd refuses to refund a payment he made to a fraudulent binary options scammer.

## **What happened**

Mr D was introduced to a company I'll call 'S' by a friend who was working with them and earning large profits. His friend passed Mr D's details to an account manager at S and they called him and sold an investment opportunity to him.

He opened his trading account and funded investments via another bank (Bank A) and was contacted and pressured on a daily basis to invest more. He had already invested all of his available savings with Bank A along with his available credit with them and was encouraged by S to use other available credit sources to finance further investments. The account manager emailed and called Mr D on 26 January 2018 and sold him the opportunity to invest further using his NewDay Mastercard credit card, which he did and paid £2,124.69 on the same day. He incurred a transaction fee of £62.68.

Mr D was making profits whilst he was making deposits onto his trading platform but became concerned when he and his friend lost everything on their trading platforms with S. He complained to S who offered to settle his complaint by paying \$2,000 to his credit card account or crediting £30,000 to his trading account – which would be subject to their terms. Mr D insisted on his money back in full based on the promises of his account manager and S declined. At this point, after carrying out further research, Mr D concluded that S didn't offer him a real trading account and instead provided him with a video game/simulation and tricked him into believing he was earning a profit for the purpose of stealing his money. Mr D approached NewDay and Bank A to assist him with recovering his payments. NewDay explained Mastercard's rules didn't cover payments for investments or gambling. Bank A successfully recovered the payments Mr D made with his Bank A accounts.

Unhappy with NewDay's response, Mr D referred his complaint to this office. NewDay sent this office its business file reiterating its previous stance that chargeback didn't apply to the transaction. But noted Mr D was given incorrect information when his chargeback claim was declined. It said it should have told him his chargeback request was made outside the time limits and made an offer of £60 compensation by way of an apology.

One of our Investigators reviewed Mr D's complaint. He concluded first of all that S had operated a scam binary options trading platform. He felt Mr D had a valid section 75 claim under misrepresentation and breach of contract and suggested NewDay returns his money plus the transaction fee. Mr D accepted but despite multiple chasers from our Investigator, NewDay to date, has still not provided a response.

So the case has been passed to me for determination and I've made my decision on the evidence that has been made available to me.

## 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.

Having done so, I uphold this complaint and I'll explain why.

I've first considered that Mr D had no valid chargeback rights because he contacted NewDay outside the applicable Mastercard chargeback time limits.

### *Section 75 Consumer Credit Act 1974*

I've considered whether it would be fair and reasonable to uphold Mr D's complaint on the basis that NewDay is liable to her under s.75. As a starting point, it's useful to set out what the Act actually 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'll deal with each requirement or exclusion in turn. First, there doesn't seem to be any dispute that a credit card account is a relevant debtor-creditor-supplier agreement under the Act. And, I'm satisfied here there is nothing that 'breaks' the debtor-creditor-supplier chain – inasmuch and whilst there are three parties involved in each of the payments:

1. Mr D (the debtor)
2. NewDay (the creditor);
3. S (the supplier) – as shown on Mr D's NewDay statement and correspondence.

The second consideration is whether the 'transaction' is 'financed' by the agreement. 'Transaction' isn't defined by the 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 D has deposited funds in exchange for being able to fund an investment 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'm satisfied there was a 'transaction' for the deposit (which I'll call "the deposit-transaction") as defined by the Act.

Again 'to finance' is not defined under the 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 her purchases from suppliers, because he is given time to pay for her purchase under the terms of the credit card agreement”.*

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

Third, the claim must relate to the transaction. It's important to consider what Mr D's claim is here. It's evident from his testimony and correspondence he provided that he feels he was tricked into depositing the payments with S for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Mr D to deposit larger amounts.

Mr D does not believe that S was operating legitimately and believes he was misled into thinking they were.

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

Finally, the claim mustn't 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.

NewDay has declined Mr D's claim on the basis of chargeback. It said, the deposits were not for the purchase of goods/services, they were a credit to his trading account. I take this to mean that the deposits were nothing more than transferring money onto another account, opened for the purpose of speculating with the money, rather than being a payment that was used to purchase goods.

When funds are deposited onto a trading account this isn't necessarily just a transfer of money between accounts, it may also have been paid in return for something. In this case S has made contractual promises in exchange for the deposit-transaction. NewDay in its refusal to accept liability under s.75 haven't quoted the Act itself. It is important to note that s.75 doesn't use the term 'purchase of goods or services' nor is there anything within the Act that would exclude the present type of transaction.

For the reasons set out above, I'm satisfied that s.75 does apply to the credit card deposit-transaction.

I'll therefore go on to consider whether Mr D has a valid claim for misrepresentation or breach of contract.

### *Misrepresentation*

I consider Mr D has made a claim of misrepresentation by S – 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's necessary to show not just a false statement of fact but also that the statement induced Mr D into entering into an agreement.

#### *A false statement of fact*

If I'm satisfied that S was not likely to be operating a legitimate enterprise - one in which Mr D could have ever received back more money than he deposited, then it follows that any statements made by S to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mr D 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'm satisfied that based on Mr D's account of events, the nature of the situation and Mr D's communication with S that they did claim that Mr D could have made money from the trading platform.

#### *That induced him into entering the agreement*

Again, had Mr D known that the trading platform was essentially a scam designed to relieve investors of their money, rather than a legitimate service, there's really little question of his not investing with S. Consequently, should I be satisfied that S isn't 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've found Mr D's account of events both detailed and compelling. But more than this, it's corroborated not just by other complaints of this nature but specific complaints against this particular merchant. Because of this I'm minded to find her account to be truthful.

So, turning to his account, I note that he mentioned coming into contact with S after his friend recommended their services. Mr D says S promised him large returns with a dedicated account manager who would guide him through his trades. When he was complying with S' requests to fund the trading account, he was earning profits but when he used all of his savings and available credit, the account balance was wiped out. S assured him that he would only earn profits and would be able to withdraw his capital. But these representations happened mostly over the phone whilst S was asking for further money to be credited to his trading account.

I've seen from S to Mr D on the day he paid them using his NewDay credit card. Mr D said S sold him the opportunity to invest and earn larger profits and he agreed to pay them.

There's 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 S. Which does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact S offered little more than a video game or simulation as highlighted by Mr D.

I've noted the following:

- S was not regulated with the FCA (as required) at the time they offered their services to Mr D – or any other jurisdiction as far as I'm reasonably aware. A legitimate investment company would tend to comply with the regulatory requirements.

- The FCA published a warning about S on 5 February 2018 (prior to Mr D's NewDay Mastercard credit card payment).
- The FCA uploaded its warning about S on the International Organization of Securities Commissions Investor Alerts Portal on 5 February 2018.

S is no longer operating and has not operated for some time. There are also several online reviews from victims that share very similar experiences to that of Mr D.

I would also question the legitimacy of any investment broker pressuring consumers into using credit - as S did here - to invest in products that *could* lose money.

Next, is the wiping out of Mr D's account balances after he'd invested all his available savings and credit - again a point repeated across many complaints against similar firms. If I find that S was not operating a legitimate enterprise, it makes no material difference that Mr D lost his available balances as it would not have been S' intention to enable Mr D to profit from his deposit-transaction. I find it odd that after Mr D lost his available balances, he was offered a credit of £30,000 onto his trading account. If Mr D had lost money to genuine trades, it is certainly a strange offer to make. S made the point of stating their terms would be attached to this credit and I have no doubt that the terms would have meant that Mr D would not have been able to withdraw this credit.

Taking all of this together, I don't think it's likely S was operating a legitimate enterprise. This means that I think they have made misrepresentations to Mr D – specifically that they were running a genuine enterprise through which he could ever have got back more than his deposit from the platform. I'm also satisfied that if Mr D had known this, he wouldn't have deposited any money, which includes the NewDay deposit-transaction, so he was induced into the contract on the basis of these misrepresentations.

### **What damage was caused by the misrepresentation**

The legal test for consequential loss in misrepresentation, where a person has been fraudulently induced to enter into a transaction, he is entitled to recover from the wrongdoer all the damage directly flowing from the transaction: *Smith New Court Securities v Scrimgeour Vickers (Asset Management)* [1997] AC 254. This implies two hurdles that must be surmounted before any item of loss becomes recoverable from the wrongdoer:

- a) The loss would not have been suffered if the relevant transaction had not been entered into between the parties. This is the factual "but for" test for causation.  
And
- b) The loss must be the "direct" consequence of that transaction (whether or not it was foreseeable) or be the foreseeable consequence of the transaction.

### **Transaction fee**

The transaction fee linked to the deposit-transaction is somewhat straight forward to cover off. Had the deposit-transaction not have occurred the transaction fee couldn't have occurred. The transaction fee was a "direct" consequence of the deposit-transaction. As the payment was made outside of the UK, it's foreseeable that a bank used by Mr D to make the deposit would attach a fee for converting the payment. So, I'm satisfied Mr D's payment of the transaction fee was consequential loss in misrepresentation.

### **Breach of contract**

Here, Mr D has deposited funds 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’m satisfied there was a transaction (the deposit-transaction) as defined by s.75.

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

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

Mr D lost the funds in his trading account.

Unlike our Investigator, I do not agree that a breach of contract has occurred. Whilst this differs to our Investigators initial opinion, it makes no material difference to the outcome because I agree with our Investigator that a claim for misrepresentation is the most appropriate in this instance.

I think NewDay’s offer of £60 compensation for incorrect information is fair and reasonable in the circumstances and I make no further award on this point.

### **Putting things right**

I’ve established one ground Mr D could have recovered his deposit-transaction:

- Misrepresentation: I’m satisfied Mr D has a claim for misrepresentation on the grounds that S made a series of misrepresentations, namely that they were operating a legitimate enterprise and that Mr D could earn a profit from his deposit-transaction. I’m also satisfied that the deposit-transaction fee meets the test for consequential loss in misrepresentation as it wouldn’t have been incurred “but for” the deposit-transaction. It was also a direct and foreseeable loss as a result of the deposit-transaction.

NewDay should put Mr D back into the position he would have been had the deposit-transaction of £2,124.69 had not been entered into and a transaction fee of £62.68 had not been charged by NewDay. So, he should receive refunds of these amounts, less any amounts credited to his NewDay Mastercard credit card by S.

### **My final decision**

My final decision is that NewDay Ltd should refund Mr D the deposit-transaction and transaction fee plus interest. It should:

- Refund the deposit-transaction, less any amounts credited to his NewDay credit card account by S;
- Refund the transaction fee;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.
- Pay £60 compensation for the trouble and upset caused.
- If NewDay deducts tax in relation to the interest element of this award it should provide Mr D with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr D to accept or

reject my decision before 17 June 2022.

Dolores Njemanze  
**Ombudsman**