

The complaint

Mr W complains that NewDay Ltd (trading as Aqua) has refused to refund payments he made to what he believed was a legitimate investments trading company (Elcurrency). These payments were made using Mr W'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 2019, Mr W says he made two payments to what he thought was his trading account with Elcurrency. At the time, Mr W believed that Elcurrency were a legitimate investments trading company. However, he later discovered that they were operating a scam.

Mr W asked NewDay to try to recover his money. At first NewDay treated this matter as unauthorised transactions, but later told Mr W that he had no chargeback or section 75 rights. Unhappy with this, Mr W referred his complaint to our service.

The following payments in question Mr W made using his NewDay Mastercard credit card are:

| Date | Merchant | Amount |
|---------------|----------|-----------|
| 12 April 2019 | SMP | £248.41 |
| 16 April 2019 | SMP | £1,544.76 |

One of our investigators considered the complaint and upheld it. In short, he did not think Mr W had any chargeback rights. However, he held that Mr W did have a valid claim for misrepresentation and breach of contract under section 75. Therefore, he suggested NewDay pay Mr W £1,793.17; and rework his account so that all interest and charges caused by those payments are refunded.

(The investigator has since confirmed to Mr W that the redress he is suggesting is that NewDay pay Mr W £1,793.17; plus pay 8% interest on this amount from the date it was debited from Mr W's account until the date of settlement.)

Mr W accepted the investigator's findings, but NewDay has not provided its response.

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 W 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.

In very broad summary:

- There is a debtor-creditor-supplier agreement falling under section 75:
 - Mr W (the debtor);
 - NewDay (the creditor);
 - SMP (the payment processor); and
 - Elcurrency (the supplier).
- The transactions Mr W made were financed by his agreement with NewDay ("the deposit-transactions").
- Mr W'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.

I have noted that Mr W's payments went to SMP, rather than directly to Elcurrency. NewDay has not disputed that this breaks the debtor-creditor-supplier chain, presumably because it recognises Mr W's payments went from SMP (acting as payment processor) to Elcurrency – creating a four-party agreement.

Further, Mr W has provided a Elcurrency declaration of deposit which sets out the two payments concerned, which match the payments taken from his credit card.

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

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

Misrepresentation

In Mr w's submissions, he has said, amongst other things:

- He found out about Elcurrency online.
- Elcurrency contacted him, explained their procedures and persuaded him to invest funds (set out above).
- Elcurrency promised him high yields and bonuses.

- *“After a few months, I tried to make withdrawals but they didn’t allow me to process the same. Thus, I realized that it’s a scam.”*

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 of investment trading scammers that match those used by Elcurrency. This does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact Elcurrency offered little more than a video game or simulation.

Moreover, there are several negative online reviews about Elcurrency; further there is a warning about Elcurrency on the Alerts Portal of the International Organization of Securities Commissions (“IOSCO”). This was placed on the Alerts Portal on 16 December 2020. I acknowledge this warning was published after Mr W made his payments to Elcurrency. However, taking this (and everything I have set out above) together – further supports that Elcurrency operated fraudulently.

I have also noted that Elcurrency was not regulated (as required) in the UK or abroad (as far as I am reasonably aware). And it would be reasonable for me to conclude that a legitimate company would comply with regulatory requirements.

So, for the above reasons, I do not think it is likely Elcurrency were operating a legitimate enterprise. Therefore, I am persuaded they made misrepresentations to Mr W. 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 W 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 W 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 Elcurrency had contractual obligations:

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

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

It follows that as a breach of contract can be identified, Mr W’s loss amounts to the full amount of each of his deposits.

In summary

I have established two grounds Mr W 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 Mr W back into the position he would have been

had the deposit-transactions not been entered into. So, he should receive refunds of these amounts.

Possible previous payments to SMP

In NewDay's submissions, it says, amongst other things, that Mr W contacted it about the transactions in question on 10 May 2019. It also says it spoke to Mr W before this (on 17 April 2019) about other transactions made to the same merchant, which NewDay says Mr W confirmed as genuine. Because of this, NewDay argues Mr W was aware of the merchant and the nature of its business.

Having listened to the 17 April 2019 call myself, it appears NewDay contacted Mr W about three transactions made from his card on the day to SMP; two of which NewDay said were blocked. The transaction that was not blocked, Mr W confirmed he recognised and agreed to. He also confirmed that he provided his card details (and potentially his passport details) to the merchant over the telephone; but agreed to have his credit card blocked after hearing about the two payments he did not recognise.

I can see our investigator asked NewDay for more information about these transactions – in particular, whether Mr W confirmed they were part of the scam in question. However, NewDay simply provided bank statements showing the two transactions in dispute; further, it has not provided a response to the investigator's findings.

Because of this, and the fact Mr W has confirmed he contacted NewDay as soon as he realised he had been scammed (on 10 May 2019) – I am unable to comment further on these other transactions NewDay has referred to.

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 W all the money he lost (set out above); plus
- Pay 8% interest on this amount from the date it was debited from Mr W'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 W with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 29 June 2022.

Tony Massiah
Ombudsman