DRN-3286341

The complaint

This is a complaint about NewDay Ltd's decision to decline a claim Mrs B made under section 75 of the Consumer Credit Act 1974 ("CCA"). Mrs B is represented by a claims management company ("CMC").

What happened

The background to this dispute is well known to all parties so I will outline this only briefly.

On 25 February 2017, Mrs B entered an agreement with a company I'll call "R", under which R would obtain her release from liability for a timeshare-like product she held with another company, "D". Mrs B says that R also promised to undertake a compensation claim against D for mis-sale of the timeshare, which it said would result in her receiving £16,000.

Mrs B agreed to pay £8,154 to R for this package of services. She made a payment of £2,450 using her NewDay credit card on 28 February 2017. The payment was taken by another company "MRLL". Mrs B made a further payment of £5,704 on a debit card from a joint account with her husband held with another bank. This payment was also made to MRLL.

On 1 March 2018 Mrs B says she discovered she had been the victim of a scam and R would not be getting any money back for her from D. It also became apparent that she had not been released from her timeshare with D. Later that month, she contacted NewDay to raise a claim under section 75 of the CCA.

NewDay declined Mrs B's claim. It said that because she had paid MRLL and not R, one of the conditions necessary for there to be a valid section 75 claim was not in place. Mrs B replied that she hadn't known she was paying MRLL instead of R, and suggested the companies were linked, but NewDay wasn't convinced and did not change its position. The CMC became involved and took up the case for Mrs B in February 2019, providing some more evidence which it said proved R and MRLL were linked. NewDay considered the new evidence and maintained that Mrs B's claim should be declined. Mrs B complained about this decision, but NewDay didn't respond to the complaint in a timely manner, so she referred the matter to this service for an independent assessment.

The most recent assessment by our investigators has been that Mrs B had a valid section 75 claim due to R and MRLL being "associates" at the time of the transaction on her NewDay credit card. R had also breached its contract with Mrs B as it had been contractually obliged to provide her with a full refund if it failed to release her from her timeshare within 12 months. R had failed to release Mrs B from the timeshare, and had not refunded her either. NewDay has said it disagrees that R and MRLL were associates. It says section 75 protection therefore doesn't apply. As no agreement has been reached, the case has 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.

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

However, if a credit card has been used, as here, Section 75 of the CCA gives a legal right to claim against the credit card issuer in respect of breach of contract or misrepresentation, where certain technical criteria have been met.

In Mrs B's case, NewDay argues that the technical criteria have not been met. This is because her credit card payment was made to MRLL, but she had entered a contract with R. This, the bank says, means the necessary debtor-creditor-supplier ("DCS") agreement is not in place for Mrs B to make a claim.

Section 75 says the following:

"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."

This section refers back to sections 12(b) and (c) of the CCA, which define the DCS agreement. A payment on a credit card falls under section 12(b), and is described as follows:

"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier"

Section 11(1)(b), which is referred to, expands as follows:

"A restricted-use credit agreement is a regulated consumer credit agreement—

…

(b)to finance a transaction between the debtor and a person (the "supplier") other than the creditor"

Reading all of these relevant sections together, it can be seen that in order for a person to be able to bring a claim against their credit card issuer under section 75, the credit card needs to have financed a transaction between them and a supplier. There also need to have been "pre-existing arrangements" between the creditor and the supplier. Finally, the person needs to have a claim against the supplier in respect of a misrepresentation or a breach of contract.

In this case, it's R who was the supplier. And the credit card clearly financed Mrs B's transaction[1] with R, as the payment made on it went towards satisfying her liability under the agreement with R. It's also not been disputed that R was in breach of contract with Mrs B. I've analysed the terms of the agreement Mrs B entered with R, and I agree that this obliged the company to refund all money Mrs B had paid in the event it had failed to release her from her timeshare within 12 months of the date of the contract. Mrs B's provided evidence that D was pursuing her for annual fees relating to the timeshare as late as 2020, so it seems R

[1] This means "transaction" in the ordinary sense of a deal to buy or sell something, as opposed to meaning "payment".

didn't release her from the timeshare within the time window it had agreed to. I understand it didn't refund her either, going into liquidation in 2018.

But Mrs B paid MRLL and not R. The problem with having a credit card payment go to someone other than the supplier, is that the payment will not have been *"made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier".* The payment will have been made instead under the pre-existing arrangements between the creditor and the actual payee. This means there would be no debtor-creditor-supplier agreement in place and therefore one of the key ingredients for a section 75 claim to be made would be missing.

The remaining point of disagreement in this case is whether R and MRLL were "associates". I will come to this later, but before I do that I will explain why it is significant, for the purposes of a section 75 claim, when two companies are associates.

Section 187 of the CCA says the following:

> *"**187 Arrangements between creditor and supplier.***
>
> *(1) A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between persons mentioned in subsection (4)(a), (b) or (c).*
>
> *…*
>
> *(4) The persons referred to in subsections (1) and (2) are—*
>
> *(a) the creditor and the supplier;*
>
> *(b) one of them and an associate of the other's;*
>
> *(c) an associate of one and an associate of the other's."*

The significance of this section of the CCA is that if credit card payments were made in accordance with pre-existing arrangements between the creditor and an associate of the supplier, then the payments will be treated, under the CCA, as having been made under pre-existing arrangements between the creditor and the supplier.

Our investigator concluded R and MRLL were associates at the relevant time. NewDay disagrees. I've considered the available evidence from Companies House carefully, and having done so I agree with our investigator's conclusions. I'll explain why.

Section 184 of the CCA describes the kind of relationships which lead to people, or companies, being defined as associates:

> *"**184 Associates***
>
> *(1) A person is an associate of an individual if that person is—*
>
> *(a) the individual's husband or wife or civil partner,*
> *(b) a relative of—*
>
> *(i) the individual, or*
> *(ii) the individual's husband or wife or civil partner, or*

(c)the husband or wife or civil partner of a relative of—

(i) the individual, or
(ii) the individual's husband or wife or civil partner.]

(2) A person is an associate of any person with whom he is in partnership, and of the husband or wife or civil partner or a relative of any individual with whom he is in partnership.

(3) A body corporate is an associate of another body corporate—

(a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are controllers of the other; or

(b) if a group of two or more persons is a controller of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

(4) A body corporate is an associate of another person if that person is a controller of it or if that person and persons who are his associates together are controllers of it.

…"

The concept of a "controller" of a company, which appears in section 184, is also important. The full definition can also be found in section 189 of the CCA, but in general it means a person whose instructions will normally be followed by the officers of the company, or a person entitled to exercise a third or more of voting power at any general meeting of the company. Company directors and large shareholders will often meet this definition.

Turning to the information available in the public domain about R and MRLL, with the above in mind, public records show that a person I'll call "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 B made her credit card payment. A person I will call "Mr W" was the director of R until 20 April 2017. He was also a director and 50/50 shareholder of RIG at the point Mrs B made her credit card payment.

Mr K and Mr W were joint controllers of RIG at the time of the credit card payment. This means that at that point in time they would be considered "in partnership" and would therefore be associates of one another according to section 184(2) of the CCA. This means any companies they were controllers of separately, would themselves be associates according to section 184(3)(a).

This means I have to conclude that MRLL, which was controlled by Mr K, and R, which was controlled by Mr W, were associates at the time Mrs B made her credit card payment to MRLL.

It follows that, due to the operation of section 187 of the CCA, pre-existing arrangements are held to have existed between NewDay and R, the DCS agreement is valid and Mrs B could therefore have made a valid claim against NewDay under section 75 of the CCA for R's breach of contract.

As I think Mrs B had a valid section 75 claim against NewDay, my view is that by declining her claim NewDay acted unfairly. It should put her in the position she'd have been in, had it

dealt with her claim fairly. R promised a full refund in the event it failed to release Mrs B from her timeshare within 12 months. Mrs B did not receive this refund which she was contractually entitled to, so I think this is what NewDay should have paid to Mrs B when she made her section 75 claim.

Chargeback

In an earlier assessment, one of our investigators gave an opinion that NewDay should have carried out a chargeback on the credit card transaction of £2,450, and obtained a refund of this amount for Mrs B in this way. A chargeback is a way of disputing a transaction which has been made on a plastic card. Because I have already concluded Mrs B's section 75 claim should have been upheld by NewDay and she should receive redress via that mechanism, I don't need to decide whether a chargeback should have been attempted, and I therefore make no findings on this point.

Customer Service

NewDay has accepted it delayed in dealing with communications from Mrs B's representatives. It's offered £100 compensation in respect of these delays. I think it is likely that the impact on Mrs B of these delays was relatively minor given she was being represented by a third party and not having to deal with the matter herself at the time these communication issues occurred, so I think the amount of compensation NewDay has offered in respect of this is fair.

My final decision

For the reasons explained above I uphold Mrs B's complaint and order NewDay Ltd to:

A) Pay Mrs B £8,154, minus any amounts she or Mr B have received from the other bank from which a payment was made towards the contract with R. It will be acceptable for NewDay Ltd to require confirmation of any amounts refunded by the other bank, before it makes any refunds itself. The Financial Ombudsman Service may be able to assist with obtaining confirmation if this information is not readily available to Mrs B.

B) Add 8% simple interest per year* to the refund calculated in "A)", calculated from the date NewDay Ltd first wrote to Mrs B declining her section 75 claim, to the date the refunds are paid.

C) Pay Mrs B £100 compensation in relation to its poor customer service, as it has already agreed to do.

*If NewDay Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs B how much it's taken off. It should also give Mrs B 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 B to accept or reject my decision before 15 March 2022.

Will Culley
Ombudsman