



The complaint

Mrs H complains that NewDay Ltd didn't refund money she lost as part of a scam.

What happened

Mrs H was searching online for investment opportunities and came across a company I'll call 'E'. She was interested in investing with them because well-known celebrities were promoting them and explained they'd earned a lot of money with them. This gave her reassurance that they were legitimate and that she could do the same. She left her contact details on E's webform and was subsequently contacted by a representative who sold her an investment opportunity.

Mrs H was promised training in order to understand the complex trading system and a dedicated account manager. She was also reassured that she'd be in control of her trading account and she'd be able to withdraw her funds whenever she wished. Mrs H was told she needed a minimum deposit to be able to open a trading account and she was subsequently pressured into investing more funds when her investments began to decline. E told her the further deposits were needed to counteract the loss.

Between 16 September 2019 to 23 September 2019, Mrs H deposited three payments totalling £4,500 onto her E trading account using her NewDay Laura Ashley Mastercard credit card. On 23 September 2019, Mrs H deposited a total of £10,999 onto her E trading account using her NewDay Opus Mastercard credit card (this included a single payment of £10,000 which was initially blocked by NewDay and subsequently released following Mrs H's confirmation that she had indeed made the payment).

Mrs H suspected E may not be legitimate when her account manager told her to apply for a bank loan and to give the reason as a car purchase for her son. She contacted NewDay to help recover her money. Mrs H also reported the matter to the police. NewDay declined to assist on the basis that Mastercard didn't have chargeback dispute options available to Mrs H.

Mrs H referred her complaint to this office. One of our Investigators agreed that chargeback wasn't a viable option for Mrs H but felt that s.75 could be applied to the transactions and Mrs H had a valid misrepresentation and breach of contract claim.

As NewDay didn't respond, the case has been referred to me for determination.

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 for largely the same reasons as that of our Investigator.

I've first considered that Mrs H had no valid chargeback rights because the Mastercard chargeback scheme significantly limits any chargeback options related to investments or gambling.

Section 75 Consumer Credit Act 1974

I've considered whether s.75 could be applied to the disputed payments. For s.75 to apply 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.

I'm also satisfied that there is nothing that 'breaks' the debtor-creditor-supplier chain in relation to the payments as Mrs H (debtor) paid E (supplier) using her NewDay (creditor) credit cards.

I'm satisfied Mrs H's payments to E financed their agreement – which was that E would invest Mrs H's money and earn her a profit similar to the celebrities they worked with.

I'm further satisfied that Mrs H's claim relates to the transactions in that she feels she was tricked into depositing the payments with E for the dual purpose of:

- a) Stealing the deposit-transactions; and
- b) Encouraging Mrs H to deposit larger amounts.

Mrs H does not believe that E legitimately obtained celebrity endorsements and believes she was misled into thinking they had. Mrs H also believes that E misled her about the risks involved with investing with them as they told her verbally that she wouldn't lose money and would only profit.

This claim – that Mrs H was misled into depositing funds is clearly a claim "in relation to" the deposit-transactions. The claim must also be one for misrepresentation or breach of contract. In this case, if Mrs H was told by E matters that were factually untrue in order to trick her into entering into the deposit-transactions, her claim would be for misrepresentation. Or, if E made binding promises to her as part of those transactions and went on to breach these that would make her 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.

I'm satisfied E told Mrs H they helped particular celebrities earn large profits and those celebrities endorsed their service. I'm also persuaded that E told Mrs H that her deposit-transactions would be risk-free as professionals would manage her investments for her and she'd be in control of her trading account and able to withdraw funds when she wished. Mrs H was induced into entering into an agreement with E on the basis of these claims.

E was regulated in Cyprus at the time Mrs H invested with them. They also had passporting rights through the FCA to offer their services to UK customers. In June 2020, the FCA removed E's passporting rights. It said in a press release dated 1 June 2020, E (amongst others):

....used social media and webpages carrying fake endorsements from celebrities to entice consumers into the scams involving CFDs.

The FCA estimates that UK investors have lost hundreds of thousands of pounds in these investments.

None of the firms and their operators have any actual presence in the UK and the firms have addresses in Cyprus.

The FCA took action because consumers were not provided with sufficient information as to the nature of the investments, some were pressured into making increasingly large investments in CFDs, which referenced bitcoin, foreign exchange, shares and indices, and some were even encouraged to take out credit to make the payments.

It also appears that the firms had failed to pay money owed to investors, charged customers undisclosed fees and failed to tell them about the risks of trading CFDs. CFDs are complex financial investments which allow traders to speculate on the movement in prices of underlying assets and can cause heavy losses to unwary or inexperienced investors.

A number of customers are known to have lost more than £100,000 to the schemes. The Cypriot-regulated firms – which were permitted to operate in the UK through a method known as passporting – must now cease all regulated activities with UK consumers.

It is the first time the FCA has used its power to remove passporting rights from a firm.”

There are also negative reviews online that echo Mrs H's testimony.

Taking all of this together, I don't think it's likely E informed Mrs H of the risks involved in trading with them and specifically informed her they were risk-free. They sought to mislead Mrs H of her earning potential on the basis of fake celebrity endorsements. I'm further persuaded that they assured Mrs H that if she deposited more money with them, this would be the only way to counteract the losses she was experiencing. I'm satisfied that if Mrs H had known the real risk that she may lose all of her money, she wouldn't have deposited any money with E, so she was induced into the contract on the basis of these misrepresentations.

Breach of contract

Here, Mrs H has deposited funds with E in exchange for being able to use those funds on an investment platform and being able to withdraw them when she 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 E had contractual obligations:

- a) To enable Mrs H to use the funds from her deposit-transactions on an investment platform;
and
- b) To enable Mrs H to withdraw the funds deposited as and when she wished.

Mrs H wasn't permitted to withdraw the funds from her trading account and didn't appear to have control of her trading account at all. She might have made losses or profits from her investment – so a breach of the former term has not – on the balance of probabilities – caused her to lose trading profits and she would (on balance) have been left no better or worse off than when she made the deposit-transactions.

It follows that as a breach of contract can be identified, Mrs H's loss amounts to the full amount of the deposit-transactions.

I think a claim under misrepresentation is the strongest and supported by evidence published by the FCA.

My final decision

My final decision is that NewDay Ltd should refund Mrs H's deposit-transactions plus interest. It should:

- Refund three payments to E totaling £4,500 debited from Mrs H's Laura Ashley Mastercard;
- Refund two payments to E totaling £10,999 debited from Mrs H's Opus credit card;
- Pay 8% interest on each of those payments from the date they were paid to the date of settlement.
- If NewDay Ltd deducts tax in relation to the interest element of this award it should provide Mrs H with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 10 June 2022.

Dolores Njemanze
Ombudsman