

The complaint

Mr M complains that his credit card provider, NewDay Ltd, hasn't done enough to help him to recover money he paid to a third party as a result of a scam.

What happened

Mr M is registered as a clinically vulnerable person. He had an online profile with an acting and modelling website. He was approached by A, who held himself out to be a producer and agent. Over time and using a variety of methods, A persuaded Mr M that he would produce a showreel that would lead to film and other work. Mr M paid A a total of £790, which he says was to include photography and film production tutorials. Mr M used his NewDay credit card in connection with some of the payments, totalling £540.

None of the services A promised took place and he ceased contact with Mr M. Soon afterwards, Mr M realised he'd been scammed. He raised his concerns with various organisations including the police, Trading Standards, Action Fraud, and his MP. Mr M also made a claim against NewDay under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 ("CCA"). He felt that he had entered into a contract with A on the basis of misrepresentation, and that A was also in breach of contract.

NewDay declined to meet Mr M's claim. It didn't consider there was sufficient persuasive evidence to show that it was liable to him. Mr M was unhappy with NewDay's position and complained to it. However, the bank wasn't minded to change its position and so he referred matters to us.

Our investigator didn't think NewDay had treated Mr M unfairly in the absence of any clear contractual terms that established a concluded agreement between Mr M and A. He also felt it would be incumbent on Mr M to provide further evidence in support of his claim, such as emails and records of telephone calls he'd had with A.

The investigator also considered it unlikely that the way in which the transactions took place would enable Mr M to make a successful claim under section 75. He said the payments weren't made directly to A using the NewDay credit card; rather, the card was used to fund Mr M's personal account with P, an electronic money issuer and payment services provider. The funds had then been sent to A from Mr M's account with P. He thought this interfered with the section 75 requirement that the transaction was made under arrangements between the debtor (Mr M), the creditor (NewDay) and the supplier (A).

Mr M was unhappy with the investigator's conclusions. He and his legal representative have asked for matters to be reviewed, with particular regard to the arrangements involving P and how they affect the debtor-creditor-supplier link.

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.

Let me say, first of all, that I have a good deal of sympathy with Mr M and his situation. I've spoken with him at some length and I'm in no doubt he's been the victim of a particularly cruel scam that preyed on his vulnerability, and this makes it all the more distasteful. However, in considering how NewDay has dealt with Mr M's claim, I have to take an objective view based on the bank's potential liability, rather than on the actions of A.

In this respect, the investigator has raised the question of whether Mr M can bring a claim under section 75 at all, due to the way in which the transaction arrangements were structured. As Mr M's legal representative has noted, the involvement of P isn't in itself sufficient to break the link between the parties – the key question is the role P played and how in particular this affected the dynamic between NewDay and A.

What is apparent here is that Mr M wasn't able to pay A directly by credit card in the way he might if A were a retailer or other merchant. That suggests that there was neither a pre-existing arrangement between NewDay and A, nor that the payment was made in contemplation of future arrangements, as required to meet the debtor-creditor-supplier agreement definition in section 12(b) of the CCA.

That there was such an arrangement between NewDay and P isn't in dispute. But I don't think that helps Mr M; his claim relates to A's actions rather than any breach or misrepresentation on P's part. And the position I've referenced above is reinforced by the information P itself has provided. This demonstrates that the payment to A came from Mr M's electronic money account with P, rather than under an arrangement between NewDay and A.

As such, I can't properly find that Mr M has a valid claim under section 75 against NewDay, as the essential elements of that section are not in place in this situation. It follows that the bank's response to Mr M, while not addressing this aspect, did not put him at a material disadvantage.

It's important I note that this finding is not a reflection of my thoughts on what happened to Mr M. It might be that he has a potential complaint against P, albeit for different reasons from a section 75 claim. It isn't appropriate in the context of this decision for me to address that potential complaint. However, I will be contacting Mr M separately in respect of that matter, in line with our rules (see DISP 3.5.2G in the Financial Conduct Authority (FCA) Handbook).

My final decision

For the reasons I've set out here, while I have every sympathy with his situation I'm unable to uphold Mr M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 April 2022.

Niall Taylor
Ombudsman