

## **The complaint**

Miss P complains about NewDay Ltd trading as Aqua's ("Aqua") refusal to give her the refund she has requested.

## **What happened**

I set out the background to Miss P's complaint in the provisional decision I issued earlier this year. However, for ease of reading, in this final decision, I will set out what happened again.

In February 2019 Miss P bought a sofa for her parents from a supplier I will call "D". The sofa cost £3,200 in total and Miss P paid a deposit of £1,900 on her credit card issued by Aqua. It appears that she never paid the balance.

When she first complained, Miss P explained she paid for the sofa because her father did not have a credit card to use. But later Miss P explained the situation more fully. Miss P indicated that she decided with her siblings that they'd club together and buy a new sofa for their parents. Miss P intended to pay for the sofa using her credit card and her savings. And then her siblings between them would split the cost and they'd pay her back their share.

According to Miss P she and her siblings did not tell her parents they were going to buy them a sofa. But it seems, because they wanted to make sure they bought them a sofa they'd like, she had a general chat with them about what sort of sofas they preferred. Then Miss P decided on a shop where she was going to buy the sofa, that shop was D. On the day she bought the sofa, Miss P took her father along to make sure he liked the sofa that she picked out.

Miss P paid the deposit on her credit card supplied by Aqua. She tells us she was asked by D about the delivery address and in reply she gave it her parent's address.

Miss P also tells us D told her initially there would be about a four month wait for the sofa to be delivered. Four months went by and still no sofa arrived. Therefore, Miss P began to chase D on a regular basis to find out what was happening with the sofa. According to Miss P it kept on giving her new estimated delivery dates. Eventually however Miss P found out that D had gone into liquidation. Miss P was left with no sofa and out of pocket, she contacted Aqua for help. In asking Aqua to assist her Miss P relied both on Section 75 of the Consumer Credit Act 1974 ("Section 75") and a process known as chargeback.

Aqua responded to say it could not help her. It explained that this was because to succeed either in a claim based on Section 75 or via chargeback a very particular type of relationship had to be in place, between Miss P, it, and D. This relationship is known as a debtor-creditor-supplier relationship. Aqua did not agree that such a relationship was in place, so it did not agree it could take any further action.

Dissatisfied Miss P complained to our service.

I took a look at Miss P's complaint. I issued a provisional decision. Here is what I said about what I had 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."*

*Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.*

*Miss P relies on two grounds to complain about Aqua's actions. Specifically, she suggests she has a claim against Aqua under Section 75. Miss P also suggests Aqua's approach to the chargeback process was unfair to her. I will look at each complaint point in turn."*

I explained that because the type of credit Miss P used is a regulated credit agreement this service has the power to deal with her complaint. Moreover, because Miss P used her credit card to pay for the goods she may benefit from the protection offered by Section 75.

*"Section 75 says, amongst other things, that in certain circumstances if the debtor has, in relation to a transaction financed by a relevant credit agreement, any claim against the supplier in respect of a breach of contract, then they have a like claim against the credit provider.*

*Miss P's stance is that D had a contract with her. Further she indicates that this contract was breached when D went into liquidation and did not supply the sofa. Therefore, she suggests she has a claim for breach of contract against D and a like claim against Aqua.*

*Before I go any further, I think it's important to set out my role here. In considering a complaint about a financial services provider, I'm not determining the outcome of a claim that a party might have under Section 75. Rather, in deciding what's a fair way to resolve Miss P's complaint, I have to take account of relevant law, amongst other things. Section 75 is relevant law. Therefore, I've taken it into account. But that doesn't mean I'm obliged to reach the same outcome as, for example, a court might reach if Miss P pursued a claim for breach of contract. Our service is an informal alternative to the courts and operates differently from them.*

*Section 75 only applies in very particular circumstances. One of these circumstances is that there needs to be a valid debtor-creditor-supplier relationship. Specifically, here that means that Miss P would need to be the debtor, Aqua the creditor, and D the supplier. Aqua suggests that there is no such valid debtor-creditor-supplier relationship here because it suggests that Miss P's father not Miss P was the contracting party here with D. It seems it says this because the delivery invoice includes Miss P's father's name and address.*

*I agree that a valid debtor-creditor-supplier relationship is required as a pre-requisite for a successful claim under Section 75. I also agree in these circumstances to establish if such a relationship does exist it is fair and reasonable to look at who the contracting parties were in relation to the sofa, so I've done this.*

*In the first instance, I think when looking at the question of contracting parties, I should look at the written contractual documents. I've not seen the actual written contract, if indeed any such written contract exists, but I have seen an invoice from D. I am satisfied this is a contractual document or if not, then it at least sheds light on who the contracting parties were.*

*The invoice has Miss P's father's details against the delivery address section. I don't think that is surprising. However, neither do I think that should be taken by itself, as evidence to show he was the contracting party. I have to look the document as a whole. The invoice also has a payment history section, here it says that it was the customer who paid the deposit.*

*The parties to this complaint both agree it was Miss P who paid the deposit not her father. So, on the face of it, the invoice says that Miss P is the customer. I note that there is a space on the invoice for the customer to sign but on the copy of the invoice I have seen no one has signed it as the customer.*

*Moreover, given the lack of written contractual information, I think it is fair and reasonable to look at the wider circumstances of the complaint to try to establish who contracted with D.*

*Miss P tells us it was her idea to buy the sofa, it appears she was the one who decided to go to D to buy the sofa. She was the one who did all the follow up chasing when the sofa did not arrive on time. She was the one who was using her savings to pay for the sofa. Given it had her payment details I think it is likely that if D had had to chase for payment it would have gone against Miss P rather than her father.*

*All of this suggests to me that Miss P was the contracting party with D.*

*I accept Miss P was buying the sofa to gift it to someone else immediately. But there is nothing in law that prevents party A from buying goods from party B to give to party C. Neither does this arrangement mean that party C then becomes the contracting party rather than party A.*

*For these reasons I find it likely that Miss P was the contracting party with D. It follows I also find there is a valid debtor-creditor-supplier relationship here.*

*Both parties seem to agree that D did not deliver the sofa. On that basis I am satisfied there has been a breach of contract on the part of D. In the circumstances I think it is fair and reasonable that Aqua should put this right by refunding the £1,900 to Miss P.*

*As Miss P paid for the goods and services using her credit card and wanted a refund, I've thought about whether Aqua dealt with her request fairly using all reasonable avenues open to it. The chargeback process is relevant in this case. This is a way in which payment settlement disputes are resolved between card issuers and merchants. They are dealt with under the relevant card scheme rules.*

*In certain circumstances the chargeback process provides a way for Aqua to ask for a payment Miss P made to be refunded. Those circumstances include where goods or services aren't supplied or as described/misrepresented by the company Miss P paid. A chargeback doesn't guarantee a refund.*

*However, Aqua declined to carry out the chargeback at all, on the basis that there was no valid debtor-creditor-supplier relationship in its opinion. As I have already mentioned this is indeed a requirement for a successful claim under Section 75. But to my knowledge this is not a requirement for a chargeback claim. If I am mistaken about this, please can Aqua send me the relevant rule that mentions this specific requirement or send me the rule number so that I can look it up myself.*

*As far as I am aware the chargeback rules provide protection for a consumer in just this situation. That is where they have paid a merchant for goods that the merchant has not supplied. In this case Miss P did not receive the sofa due to the fact that D went bust before it could deliver the sofa.*

*I think on balance if Aqua had carried out the chargeback it would have succeeded,. I think Aqua should now refund the £1,900 for this reason as well.*

*Moreover, I think Aqua acted unfairly in not carrying out the chargeback and this most likely caused Miss P distress and inconvenience, as a result, in the circumstances, I find that £200 is a fair and reasonable award for this."*

*Taking all of the above into account my provisional decision was:*

*"My provisional decision is that I intend to require NewDay Ltd trading as Aqua to:*

- If Miss P has not paid off the £1,900 it must rework Miss P's account as if she never made the payment of £1,900 to D.*
- If it has asked the credit reference agencies to register any adverse information in relation to the £1,900 it must ask them to remove it.*

- *If Miss P has paid off the £1,900 then it must refund the £1,900 to her with interest. The interest is to be at the rate of 8% simple per year. The interest to run from the date of payment to the date of settlement.*
- *Pay Miss P £200 for distress and inconvenience.*

*NewDay Ltd trading as Aqua must pay the total compensation within 28 days of the date on which Miss P accepts my final decision. If it pays later than this it must also pay interest on the £200 from the date of the final decision until the date of payment at the rate of 8% simple per year.*

*If it considers it is legally required to deduct income tax from that interest, it must send a tax deduction certificate with the payment so that Miss P can reclaim the tax if she is able to.*

*Miss P should refer back to NewDay Ltd trading as Aqua if she is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.”*

I invited both Miss P and NewDay to respond to my provisional decision should they wish to do so. They both did send in responses. Miss P responded to say she was happy with the provisional decision. NewDay rejected the provisional decision. In brief, NewDay’s response covered the following areas.

NewDay suggested that it was not fair and reasonable to ask it to take responsibility for the breach of contract by D. It suggested this for a number of reasons.

The first reason being that Section 75 requires a valid debtor-creditor-supplier relationship to be in place, and it did not agree there was one. Specifically, it reiterated its previous stance that Miss P was not the contracting party. And it added that there was no evidence of any contract between Miss P and D. In particular, it pointed out that Miss P had bought the sofa for her parents. Her parents name and address was on the invoice. Moreover, the sofa was not for her personal use. NewDay’s stance is all of these are reasons for saying Miss P had no contract with D.

Further, in relation to the chargeback NewDay told us it did not agree that it could have been processed. It pointed out Miss P paid the deposit to D in February 2019. The original delivery date was May 2019. Miss P contacted NewDay in November 2019. A chargeback has to be raised within 120 days of the original delivery date. Therefore, on this basis the chargeback could never have succeeded because it was out of date.

NewDay asked that I consider its points carefully before issuing a final decision.

### **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.

I thank both Miss P and NewDay for their responses to the provisional decision. It has been particularly helpful that NewDay took the time to set out its views on the reasoning and redress which I proposed in the provisional decision, so that I have been able to gain a fuller understanding of its position and concerns.

I’ve thought about the responses to the provisional decision and I have also reviewed the complete file again and revisited my provisional decision. I would like to reassure NewDay I have considered its points carefully.

I can well understand why NewDay has placed such weight on the question of whether there is a valid debtor-creditor-supplier relationship. When I look at what a fair and reasonable

outcome is here I have to take account of relevant law which includes Section 75. For Section 75 to operate there must be a valid debtor-creditor-supplier agreement, therefore I agree I do need to look at this point. The difficulty for NewDay is that I think there is a valid debtor-creditor-supplier relationship in place here because I think Miss P was a contracting party.

NewDay suggests that there is no evidence of a contract between Miss P and D but there is evidence and I went through it all in the provisional decision and I also again above. In essence NewDay is saying Miss P's parents are the contracting party because their name is on the invoice. In point of fact it is Miss P's dad's name which is on the invoice, however, I get its point namely its position is, that whoever's name is on the invoice is the contracting party. I disagree. Miss P's dad's name and address is on the invoice against the delivery address, he is not referred to as the customer on the invoice, Miss P is. I find that Miss P's dad's name and address are only on the invoice because this was the delivery address.

Alternatively, or in addition NewDay relies on what Miss P initially told it about how it came about that she paid for the sofa. I take on board that Miss P did initially say she bought the sofa for her parents because they did not have a credit card. NewDay seems to have taken this to mean that Miss P's dad wanted to buy a sofa, but he could not afford one or only wanted to buy one using a credit card. Therefore, Miss P agreed that if her dad bought a sofa for himself she'd discharge his contractual obligation to pay for it using her credit card. But she did not intend to be and was not a contracting party. That interpretation of her words is rather a stretch. Whereas Mrs P has told us that because her parents needed a new sofa (in her opinion) and did not have a credit card she and her siblings decided to buy the sofa for their parents as a surprise gift. I am persuaded by this much simpler explanation.

Further, I'm satisfied Miss P's father did not know anything about the sofa being bought for him as a surprise gift. I am not sure how the beneficiary of a surprise gift can be said to have satisfied the requirements of contract law. For example, what offer did he accept from D if he did not even know the sofa was being bought for him?

Moreover, contract law does not require that a contracting party needs to buy goods for their personal use in order to form a valid contract.

The fact that Miss P bought the sofa for her parents does not mean, in itself, that she cannot be the contracting party. As I said in my provisional decision nothing in contract law prevents person A contracting with person B to buy something for person C. I'm satisfied that this is the situation here.

For all of these individual reasons I have not been persuaded by the points raised by NewDay in response to the provisional decision.

It follows as I have already mentioned I am satisfied there is a valid debtor-creditor-supplier relationship here because Miss P contracted with D. I am satisfied that the contract has been breached and I am persuaded therefore that it is both fair and reasonable in the circumstances that NewDay take responsibility for putting things right.

I am aware of the chargeback rules around deadlines. But I think for the purposes of deciding the start point for the 120 days it is the last delivery deadline that D gave to Miss P that is relevant. I say this because I think the original delivery date was superseded by each new delivery date that D put forward and Miss P accepted, how could it be otherwise? And the information I have available to me suggests that the last delivery date was within 120 days of November 2019.

I have not been persuaded by the response from NewDay to my provisional decision. It follows that I have come to the same conclusions for the same reasons as I set out in the provisional decision and in this final decision.

## **My final decision**

My final decision is I require NewDay Ltd trading as Aqua to:

- If Miss P has not paid off the £1,900 it must rework Miss P's account as if she never made the payment of £1,900 to D.
- If it has asked the credit reference agencies to register any adverse information in relation to the £1,900 it must ask them to remove it.
- If Miss P has paid off the £1,900 then it must refund the £1,900 to her with interest on that £1,900. The interest is to be at the rate of 8% simple per year. The interest to run from the date of payment to the date of settlement.
- Pay Miss P £200 for distress and inconvenience.

NewDay Ltd trading as Aqua must pay the total compensation within 28 days of the date on which Miss P accepts my final decision. If it pays later than this it must also pay interest on the £200 from the date of the final decision until the date of payment at the rate of 8% simple per year.

If it considers it is legally required to deduct income tax from that interest, it must send a tax deduction certificate with the payment so that Miss P can reclaim the tax if she is able to.

Miss P should refer back to NewDay Ltd trading as Aqua if she is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 14 April 2022.

Joyce Gordon  
**Ombudsman**