

The complaint

Mr O complained that NewDay Ltd, trading as Aqua, ("NewDay") unfairly turned down his claim brought under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

Mr O signed up with a travel company with the aim of being able to take holidays. He made three separate payments in November 2016, January 2017 and August 2017 totalling £613.84 and was entitled to take a total of seven holidays. The payments were made using his NewDay credit card. But Mr O said that he wasn't able to book holidays as expected as the travel company never had availability.

Unhappy with the service he received from the company, he complained to NewDay under provisions in the CCA, arguing that it was jointly responsible for what had gone wrong. NewDay responded to say it didn't accept the claim made as it couldn't identify a breach of contract.

Mr O called NewDay to say he wasn't happy with its decision not to uphold his claim, and it agreed to look at it again, but having done so, it didn't change its position on the claim. NewDay said the travel company had explained that it had offered alternative weeks to Mr O when he couldn't get the availability he wanted, so they had offered to provide services under the contract. Mr O said this wasn't the case and that the travel company hadn't actually offered him accommodation. Unhappy with the response, Mr O brought his claim to our service.

One of our adjudicators looked into the complaint, but didn't think it was one that should have been upheld. They looked at what Mr O had said, but didn't think there was sufficient evidence to say that he was told there would be unlimited availability or that he would be able to book fortnightly holidays. Mr O didn't agree with the view and asked for the complaint to be looked at again by an ombudsman.

The complaint was passed to me and, after considering all of the available evidence and arguments, I came to a different conclusion to our adjudicator. So I issued a provisional decision setting out my provisional findings and inviting both parties to give me anything further they wanted me to think about.

In my provisional decision, I noted that Mr O's complaint was that NewDay turned down his claim under the CCA. The provisions of the CCA, to which Mr O referred, deal with products bought using credit. He said that the travel company hadn't provided him the holidays he expected under the agreement and pointed to s.75 CCA to say that NewDay was jointly liable to him for those breaches.

S.75 CCA reads:

"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.”

So I looked at what Mr O said happened to see whether that could amount to a breach of contract.

Mr O set out the holidays he said he tried to book. He said that he originally took one short break in England in 2017. Later that year he tried to book another break in England for that December, but he said the travel company lost his booking and then later said there was no availability in England until 2018. Mr O said he was offered a weekend away in Scotland, but this wasn't suitable due to the travel time for a short break, and he also noted that the holiday in England that he had tried to book was still showing as available on the travel company's website. He said he tried to book two holidays overseas, but was told he had to complete one holiday before he was allowed to book a second one and that the travel company would not book fortnightly holidays. Following this, Mr O raised his claim.

Whilst the complaint was with our service, Mr O said he was contacted by the travel company asking why he had not booked any holidays with them. Its records showed that a week had been booked in 2017 for the following year, but had been cancelled. Mr O said this didn't happen and asked to see a copy of the booking logs, but nothing was subsequently provided by the travel company.

In September 2018 Mr O was able to get a two-night hotel booking through the travel company, albeit after a lot of pushing to get it arranged and outside of the provider's normal timescales for confirming a booking.

Throughout 2019 Mr O said that he tried to book stays through the travel company without success, often being promised call backs that didn't materialise. And in 2020 he tried to make bookings that appeared available on the travel company's website, but was told they were not available for the entirety of the year. Mr O's entitlement to use the holidays ran out in August 2020.

After I reviewed the file, I asked NewDay to get some more evidence from the travel company so I could understand its position on what had been alleged. I noted that for the travel company to fulfil its side of the agreement, it would have to be able to provide seven holidays to Mr O. So I asked for it to set out what availability it had for holidays and what records it had of Mr O trying to book holidays. I also asked for it to set out how it operates in arranging holidays and how this was presented to Mr O.

The travel company responded with the following:

“I can see that having reviewed our mutual clients account, they had a total of 7 breaks active until August of 2020.

I can see that the travelled on two breaks, both in the UK, since the earliest date that you have pointed out in the email below, but I cannot discuss anything further due to Data Protection Regulations.

The breaks purchased are subject to availability, against a number of hotels/resorts on the company website and are not for a specific date nor destination.

In reviewing the account I do not agree with the assessment that has been made, that the company was in breach of contract and the breaks have now expired, as per the contract with our mutual client.”

Based on what Mr O set out, I thought it was clear that he tried to book holidays with the travel company, but had been unable to do so. I thought the evidence he presented had been clear and consistent and I had no reason to doubt what he said. In contrast, the travel company had not provided any evidence that Mr O would have been able to book the holidays he was entitled to under the contract. Having looked at the evidence, I thought it more likely that Mr O did try to book holidays, but he was not given the holidays he wanted nor was he offered any reasonable alternative. It followed I thought the travel company didn't provide what it had agreed to provide under the contract it had with Mr O, so I thought it was in breach of that contract.

I noted that under s.75 CCA, NewDay could be held jointly liable with the travel company for that breach of contract. So I considered what damages Mr O would have been entitled to and, therefore, what I thought NewDay needed to do.

Mr O paid a total of £613.84 for seven holidays. They were supposed to be either a week-long overseas holiday or a shorter break within the UK. Mr O was able to go on two trips, so I thought he was entitled to compensation for the missed trips, i.e. 5/7 of the contract price or £438.46. Mr O also needed to be paid compensatory interest on this amount. I thought that interest should run from the time he first tried unsuccessfully to book a holiday after he travelled in 2018, until he got paid. Mr O said on 10 June 2019 that he had unsuccessfully tried to book a holiday shortly before then, so I thought interest should run from 1 June 2019.

Mr O responded to my provisional decision to say he broadly agreed with what I said, however he noted that he bought seven weeks of holidays but had taken two short breaks totalling six days. So Mr O asked if compensation should be higher at 6/7 of the contract price.

NewDay didn't respond to my provisional 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.

As neither party has given me anything further to consider about my provisional findings, save for my proposed award amount, I see no reason to depart from what I previously said. So for the reasons set out above, I uphold Mr O's complaint against NewDay.

I've again thought about the amount of compensation Mr O should get. I've seen that he bought "*7 Separate Break/s of Accommodation*". Further, in the travel company's terms it says:

"We primarily deal with one-week stays in one-bedroom self-catering apartments, except for UK destinations which are short breaks.."

So I think Mr O bought seven separate trips, not seven full weeks of accommodation. And each of the two trips he took within the UK would be one of those seven trips, meaning he had five unused trips when the contract came to an end. It follows I think he would be entitled to a payment for 5/7 of the contract price.

Putting things right

I direct NewDay to pay Mr O:

1. £438.46; and

2. interest at 8% per annum, simple, from 1 June 2019 to the date of payment. HMRC may require NewDay to take tax off this interest. If so, NewDay must tell Mr O how much tax was deducted.

My final decision

I uphold Mr O's complaint against NewDay Ltd, trading as Aqua, and direct it pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 4 May 2022.

Mark Hutchings
Ombudsman