

The complaint

Mr T complains that NewDay Ltd (trading as Aqua) won't refund him for a transaction he says he didn't agree to. He would like the transaction refunded.

What happened

Mr T has an Aqua credit card. He noticed a charge of his card of £34.99 to a software merchant for a subscription that he didn't recognise. He regularly makes use of this software merchant but made sure to cancel the subscription before the end of the free trial period.

He contacted Aqua to dispute the charge. They raised a chargeback, but the merchant provided evidence that Mr T's details were used to open the account, although the email address was different. Aqua gave this information to Mr T and asked for a reason to continue the chargeback claim. Mr T provided information about his genuine account with the software merchant, which didn't include this subscription.

After consideration Aqua decided not to pursue the chargeback any further. They felt it was most likely Mr T had signed up for the subscription himself. They declined to refund the transaction. Mr T disagreed, and also asked Aqua to consider a claim under Section 75 of the Consumer Credit Act 1974. He also wasn't satisfied with the service provided to him through his claim. But this didn't change Aqua's position.

Mr T referred the complaint to our service. One of our investigators took a look at what happened, and they felt the complaint should be upheld. They thought it was more likely than not the transactions weren't carried out by Mr T. They asked Aqua to refund the transaction and pay Mr T £100 compensation for their handling of the claim.

Aqua disagreed, saying that the details of account other than the email address matched Mr T. They felt the transaction wasn't typical of how a fraudster would spend money and felt this was unlikely. They felt it was more likely carried out by Mr T or someone on his behalf.

Because no agreement was reached the complaint was passed to me to decide. I reviewed the evidence and came to a different conclusion to the investigator. I issued my provisional decision which said:

"The key consideration for me is whether I think it's likely Mr T gave consent for the merchant to debit his account, or whether it was likely done by someone else – and by extension whether it's fair for Aqua to hold him liable for the transaction.

Having done so I don't think it's likely the transaction was authorised by an unknown third party. I say this for the following reasons:

- It's unclear how Mr T's Aqua card details could have been stolen – but he has used the card for online purchases in the past, so I accept it's possible the details could have been stolen in a way he wouldn't be aware of. But then it would be unusual for a fraudster, in possession of Mr T's card details, to only use them to set up a single subscription. It would be more likely that they would try to make maximum use of the card as quickly as possible, but that's not what happened here.*

- *Mr T has made use of this merchant's services before, but has said he makes use of the free trial period and cancels before it becomes chargeable. So, it would be a very unlikely coincidence that an unknown third party would set up a subscription with the same merchant. Particularly as it then doesn't appear to have been used, so they took no benefit from it.*
- *The contact details of the subscription are the same as Mr T's, with the exception of the email address. However the email address is very similar to Mr T's, with some letters not entered in to the domain name. I can't discount the possibility this is the result of a typing error.*
- *I've considered whether the merchant themselves may have carried out the transaction using card details Mr T may have previously given them. But this seems unlikely to me, given that the merchant appears to be offering legitimate services.*

Overall then I'm not satisfied it is most likely that the transaction was authorised by an unknown third party. It's more likely than not the subscription was set up by Mr T using his card details. On that basis the transaction would be considered authorised, and Aqua wouldn't be responsible for refunding Mr T.

As the information received from the merchant seemed to contradict what Mr T was telling them, and in the absence of any compelling evidence otherwise I don't think it was unreasonable to stop pursuing the chargeback claim.

The disputed amount also doesn't reach the minimum cash price of £100 set out in Section 75 of the Consumer Credit Act 1974 for any claim against Aqua. And in any case claims along these lines have to allege that the contract was misrepresented to the buyer, or the merchant in some way breached the terms of the contract – which doesn't apply in this case as Mr T is alleging he never entered in to the contract in the first place. So, I don't think Aqua have done anything wrong by not considering this claim.

In terms of the interest charged, as this transaction was authorised, I don't see it's unreasonable for Aqua to request the money be paid to them. And it's also not unreasonable for them to apply interest to this amount, as per the terms of the account.

While I appreciate Mr T will be disappointed, I don't consider Aqua to have done anything substantially wrong here. Because of this, I'm not intending on asking them to do anything further.

I invited further comments. Aqua confirmed they had nothing to add.

Mr T disagreed with the decision to say, in summary:

- The provisional decision did not appear to be founded on evidence, or a logical counter argument to the investigator's outcome. It inferred he was a liar or forgetful.
- He would be making a submission to court based on contractual law, for Aqua failing to conduct a chargeback investigation in to whether there was a valid contract between him and the merchant.
- That the decision was dismissive of the possibility the transaction was carried out by the merchant. The timing of entering into a pandemic lockdown would be a good time to defraud customers.
- The way Aqua had handled the chargeback process didn't prove he had entered into a contract with the merchant. Instead Aqua had asked for information that the contract had been cancelled, which he wasn't in a position to provide.

After considering these points, I'm now in a position to issue my 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.

Having done so, I'm still satisfied that it's more likely than not the subscription was set up by Mr T, and as such Aqua are reasonable in treating the transaction as authorised.

It is unclear how Mr T's card details could have been compromised – but the nature of online fraud is such that you often will never know for certain. However, it still would seem highly unusual that a fraudster, in possession of valid card details, would only use them to set up a single subscription of relative low value compared to the balance available.

I'm also mindful that Mr T has made use of the merchant's services before, so it would be quite a coincidence that a fraudster would set up a payment to the same merchant. It would also be unusual that they then make no attempt to take any benefit from it – and were unlikely to ever be able to do so considering the email address doesn't appear to be valid. That the email address is invalid also explains why it wouldn't show up on Mr T's regular account with the merchant. This strongly suggests to me it's unlikely the subscription was set up by some unknown third party.

I've given consideration to what Mr T has said about the merchant potentially setting up the subscription themselves. But I still find such a scenario to be unlikely. As I mentioned in the provisional decision the merchant appears to be engaged in legitimate activity. I've not seen any credible evidence of them using Mr T's stored card details fraudulently. It would seem counterproductive to attempt to defraud potential customers in this way, whether there is a pandemic lockdown or not. Particularly as Mr T has said he had made use of their services. I'm not persuaded this is a likely explanation.

The relevant regulations in regard to payments, and the card scheme's chargeback rules, don't require Aqua to determine whether Mr T has a valid or enforceable contract with the merchant. Their role as a payment service provider is when there is an allegation of an unauthorised transaction on an account, to investigate this. And if they decide the transaction was authorised, they should be able to demonstrate why they feel this is the case.

Having reviewed the evidence available, from the technical evidence Aqua supplied, the evidence available from the merchant, and what Mr T has told us, I think they came to a reasonable conclusion. I consider it more likely than not the subscription was set up by Mr T, so the transaction would be authorised and it's fair for Aqua to hold him liable for it, along with any associated interest.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 20 July 2022.

Thom Bennett
Ombudsman