

The complaint

Mrs B complains that NewDay Ltd won't refund the payment she made to a scam.

What happened

The details of this complaint are well known to both parties, so I won't repeat them again here. The facts aren't in dispute, so I'll focus on giving the reasons for my 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 agree with the conclusions reached by the investigator for these reasons:

- It's not in dispute that Mrs B authorised the payment. NewDay are expected to act on her authorised payment instructions without undue delay. So the starting position, even if Mrs B was tricked into making the payment, is that she's liable for it.
- That said, I'm conscious NewDay's anti-fraud system did flag the payment. They've explained they identified it as unusual so sought, and received, confirmation from Mrs B that it was actually her requesting the payment. I'm satisfied this was a proportionate response to the risk they identified – which was essentially that an unauthorised person may have requested the payment. It wasn't particularly high and was seemingly made via a legitimate payment processor. So I don't think NewDay had cause for further concern about the payment. I therefore consider it reasonable that, once they received confirmation from Mrs B, they processed the payment.
- By the time Mrs B called NewDay to report that she thought she'd been scammed, they'd already processed the payment on their end. I understand it may still have showed as pending, but that would have been while waiting for the merchant to collect it. NewDay can't cancel the payment at that point. So overall, I don't think they're at fault for not preventing Mrs B's loss.
- As this was a card payment, I've considered if there were grounds for Mrs B to recover her payment through a chargeback claim. This is a voluntary scheme run by the card provider, Mastercard. NewDay aren't obliged to raise a chargeback claim, and I wouldn't reasonably expect them to unless the consumer has sufficient evidence to show they likely have a valid claim in line with Mastercard's rules.
- I understand Mrs B's allegation is that the merchant claimed to offer some form of investment – but was actually a scam. MasterCard has been clear that chargeback rights for investment disputes are restricted *even if* the activity was illegal. So, even if the merchant was running a scam as alleged, that's not something the Mastercard chargeback scheme provides a dispute resolution process for. I'm therefore not persuaded NewDay ought to have raised a chargeback claim for this payment.
- I've also considered whether NewDay are liable under Section 75 of the Consumer Credit Act 1974 (s75) – which gives a debtor the right to pursue a 'like claim' against a creditor for breach of contract and/or misrepresentation by a supplier.
- I agree with the investigator that, even though the payment may have been made via a payment processor, that doesn't necessarily mean the chain between the debtor

(Mrs B), creditor (NewDay), and supplier (the merchant who Mrs B understood she was paying), as required for a s75 claim, is broken. Regardless, I'm not persuaded Mrs B has done enough to demonstrate breach of contract or misrepresentation.

- There's very little information about what the payment was actually for – and there are some discrepancies between what we've been told about this. When Mrs B spoke to NewDay, she said it related to cryptocurrency and making money on the markets. She also mentioned buying and selling shares. Her representative says it was for investment *advice*. I haven't seen any supporting evidence confirming what the payment was for – or what was meant to happen afterwards.
- On balance, there's simply not enough clear evidence to lead me to safely conclude that the merchant misrepresented themselves to induce Mrs B to make the payment – or that they breached the contract. That's because it's unclear what was agreed/promised. The fact the merchant wasn't regulated by the FCA isn't enough to demonstrate a *specific* breach of contract, nor a specific misrepresentation which induced Mrs B into the payment. I'd point out that, based on Mrs B's initial account, it's unclear the merchant would need to be FCA regulated to offer such services. Likewise, loss in itself isn't enough for the claim to succeed – investments, by their nature, involve risk of loss. In the circumstances, I don't consider it fair and reasonable to hold NewDay liable under a s75 claim.

I appreciate this will be disappointing for Mrs B. But for the reasons given above, I'm not persuaded NewDay are fairly liable for this payment or the resultant loss/impact it had.

My final decision

For the reasons given above, I've decided not to uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 31 August 2022.

Rachel Loughlin
Ombudsman