

The complaint

Mr D complains NewDay Ltd trading as Debenhams Finance (“NewDay”) failed to handle a dispute over a payment for airline flights in a fair way.

What happened

The background to this complaint is well known to all parties involved, so I will not narrate everything that has happened. However, to summarise:

- Mr D paid for flights with an airline I will call “TA” through an online travel agent I will call “TU”. The tickets cost £1,039.12 for flights due to depart and return in September 2020. Mr D used his NewDay credit card to pay for the flights, and the payment went to TU.
- Mr D needed to make some changes to the booking, which he says he found difficult due to the customer service he received from TU. In the end he was able to make the changes for a fee of £354 paid to TU on a later date.
- Due to the coronavirus pandemic, TA cancelled Mr D’s flights.¹ He has been trying to obtain a refund since but has not been able to obtain one from either TA or TU.
- In September 2020, Mr D contacted NewDay to help him get a refund. He was asked to provide details of the dispute, after which NewDay attempted what is known as a “chargeback” to reclaim the funds from TU.
- TU defended the chargeback in relation to the £1,039.12 payment, saying they were just a booking agent and not responsible for the cancellation of the flights or providing refunds. NewDay accepted TU’s defence and decided not to pursue the refund any further. It reversed a temporary refund it had given Mr D.
- TU did not defend the chargeback in relation to the £354 fee to change the booking, so this refund was not reversed.

Mr D was unhappy with how NewDay had handled the matter and made a complaint. NewDay accepted that it hadn’t communicated well and there had been some instances of poor service, for which it offered £25 compensation. However, it stood by its decision not to pursue the refund further, adding that Mr D additionally did not have a valid claim against it under section 75 of the Consumer Credit Act 1974 (“CCA”).

Dissatisfied with this response, Mr D referred the matter to the Financial Ombudsman Service for an independent assessment. One of our investigators looked into the case. He concluded NewDay hadn’t acted reasonably in deciding not to pursue the dispute further, citing guidance from the card scheme (Mastercard) which he said showed TU’s defence to

¹ This was originally disputed. However, TA has confirmed in recent correspondence with the Financial Ombudsman Service that Mr D’s flights were cancelled. TA did operate flights on or around the date Mr D had been due to fly, but they were not open to tourists.

the chargeback had been invalid. Our investigator concluded that, if it was now too late for NewDay to pursue the chargeback further, it should treat him as though it had done so successfully and pay Mr D £1,039.12 along with compensatory interest. NewDay disagreed and the case has now been passed to me to decide.

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.

When a person pays for goods or services on a credit card, their card issuer may be able to help when something goes wrong with the purchase. This may be because they have a legal obligation to consider a claim under section 75 of the CCA, or because they are able to dispute the payment via the dispute resolution mechanisms run by the card schemes.

Section 75 of the CCA

There hasn't been much focus on the question of whether Mr D could have made a successful section 75 claim against NewDay. This is because our investigator considered Mr D should have been entitled to a refund via the chargeback process. NewDay say Mr D could not have had a successful claim because he paid TU using his credit card, but the flights were to be provided by TA.

Without going into the technical detail, in most circumstances a person can only make a claim under section 75 in respect of a breach of contract or misrepresentation by the company that has been *paid* using the credit card. In Mr D's case, that's TU. NewDay appear to be saying that because the flights were cancelled by TA, there's not been a breach of contract or misrepresentation by TU in respect of which Mr D can make a claim.

I follow this logic, but I think NewDay have missed the fact that, as Mr D's booking agent, TU had contractual responsibilities to him too. TU's booking conditions at the time of Mr D's booking said, for example, that it will pass on any refunds received from airlines in the event flights are cancelled. We recently heard from TA, which said it had refunded the cost of Mr D's flights (minus change fees) to TU in September 2022. It appears Mr D has still not received a refund from TU, so I think it is at least arguable it is in breach of contract *now*.

In any event, this doesn't matter as like our investigator I think NewDay ought to have pursued the chargeback more robustly, for reasons I'll explain.

Chargeback

In certain circumstances, a card issuer can attempt to claim a refund of a payment, or part of it, under the dispute resolution process operated by the card scheme to which the card belongs (in this case, Mastercard). Disputing a payment in this way is usually known as a "chargeback".

Chargebacks are not guaranteed to succeed and can be challenged (defended) by the other side to the dispute. The other side will normally be the merchant from whom a person made their purchase. The chargeback process can go through multiple stages and ends when either side to the dispute concedes, or the card scheme itself is asked to make a ruling on the case.

A consumer cannot demand that their card issuer attempts a chargeback, and that is because it is not a consumer right. However, I would expect the card issuer to attempt a chargeback as a matter of good practice, so long as the chargeback would meet the criteria

set out by the card scheme and would have a reasonable prospect of succeeding. I would also expect a card issuer to administer the chargeback process in a competent way and not make errors.

In this case, NewDay did attempt a chargeback, and TU defended it on the basis that it was not responsible for providing the flights – it was just a booking agent. NewDay accepted this defence, so I have needed to decide whether, in accepting the defence, NewDay made an error.

Our investigator noted that TU was the “merchant of record” for Mr D’s purchase. When saying this he was referring to a document published by Mastercard on 1 May 2020. Titled “*Dispute Resolution Management During COVID-19*”, it provided guidance for participants in the Mastercard network on how to deal with common chargeback scenarios. It contained the following question, along with Mastercard’s answer:

“Question: The cardholder’s flight has been cancelled and the transaction was billed by an online travel agent (OTA). The OTA tells the cardholder that they are only responsible for making the reservation and not providing the flight. Does an issuer have chargeback rights?”

Answer: Yes. In these circumstances, Mastercard would view the OTA as the merchant of record, and an agent of the travel supplier, regardless of the terms and conditions disclosed to the cardholder. Under Mastercard Standards, the OTA, by accepting payment for the service purchased by the cardholder (e.g. flight) and not just for handling the reservation, assumes responsibility for chargebacks if the service is not provided. The OTA should work closely with its travel partners or travel suppliers to avoid a cardholder getting reimbursed twice for the same transaction.”

As a card issuer, this is guidance I would have expected NewDay to be aware of. I think it clearly applies to Mr D’s set of circumstances, and shows that the defence put forward by TU was invalid and should not have been accepted. It follows that I consider NewDay, in deciding not to pursue the chargeback further, made an error. By not doing so it wrongly deprived Mr D of the opportunity to receive a refund via this route. While it’s not possible to know for sure what the outcome of the chargeback would have been, had NewDay pursued it more robustly, I think the guidance from Mastercard is a good indication that it would have been successful.

So, like our investigator, I think NewDay should put Mr D in the position he would have been in, had the chargeback been pursued to a successful conclusion. That’s to say it will need to treat him as though it had never reversed the initial refund of £1,039.12.

Customer service

NewDay paid Mr D £25 in respect of customer service failings – specifically, providing some incorrect information on a phone call. This appears to be fair given the incorrect information had a limited impact. I note Mr D has been much delayed in receiving a refund due to NewDay’s errors, but he will receive compensatory interest to reflect that, which I will outline below.

Putting things right

NewDay must put Mr D back in the position he’d have been in, had the chargeback of £1,039.12 been successful. This will mean NewDay must do the following:

- A) Refund £1,039.12 to Mr D, backdated to the day it reversed the refund of this amount after it received the defence to the chargeback from TU.

- B) Refund any interest, fees or charges Mr D incurred as a result of it reversing the refund initially.
- C) If backdating the refund as explained in “A)” would mean Mr D would have had a credit balance on his credit card account at any point, NewDay must pay 8% simple interest per year* on this credit balance, from the date it would have come into existence to the date it would have ceased.
- D) Alternatively, if NewDay considers calculating compensatory interest as directed in “C)” would be impractical then it may instead pay 8% simple interest per year* on £1,039.12 calculated from the date it reversed the refund, to the date it reinstates the refund.
- E) Remove any negative information it may have recorded on Mr D’s credit file as a consequence of it reversing the refund of £1,039.12.

*If NewDay considers that it’s required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr D how much it’s taken off. It should also give Mr D a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

I referred earlier in this decision to TA having confirmed it paid a refund to TU in respect of Mr D’s flights in September 2022. It is possible this means TU may eventually refund Mr D.

If this happens Mr D will have been refunded twice for the same transaction and it would be fair and reasonable for him to pass on any refund he receives to NewDay. I cannot compel him to do this however, as my decision is binding only on NewDay.

My final decision

I uphold Mr D’s complaint for the reasons explained above and direct NewDay Ltd to take the steps set out in the “putting things right” section of this final decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr D to accept or reject my decision before 15 February 2023.

Will Culley
Ombudsman