

The complaint

Mrs B complains about a credit card account she has with NewDay Ltd and in particular, the way that NewDay has dealt with a claim made under Section 75 of the Consumer Credit Act (S75).

Mrs B is represented in the complaint by Mr S but for ease I have referred to all submissions from Mr S and Mrs B as if made by Mrs B.

What happened

Mr S and Mrs B were undertaking some home improvements and arranged for a double-glazing supplier, who I shall refer to here as A, to carry out some work. The work included, amongst other things, the supply and fit of windows, a bi-fold door and replacement soffits and fascias. The total cost of the work was in the region of £15,000 and Mrs B has paid approximately £8,000 towards the cost of the work. Mrs B used her NewDay credit card to pay A.

Work began on the property but in summary, Mrs B says the work was not completed and the work that was completed was not all done to the required standard. Mrs B took legal action against A through the courts and also raised a claim under S75 CCA with NewDay. NewDay responded to Mrs B's claim and said that as there was a legal claim against A it could not decide the S75 claim until a decision had been reached in the court proceedings against A. Discussion continued between Mrs B and NewDay alongside the court proceedings. In July 2022 the court issued its judgment in the claim against A and the court broadly found against A. The judgment awarded approaching £4,000 to Mr S, which included an amount for court fees and witness expenses.

The court did not however find in favour of Mrs B in all elements of the claim and explained that certain issues were outside of the court's remit as, for example, allegations of fraud are a criminal matter and as such are for the Police to consider.

A was given a certain amount of time to comply with the judgment and make payment to Mr S. Engagement continued between Mrs B and NewDay and I understand that A did not actually make the payment to Mr S as required by the court judgment. NewDay did then make payment to Mrs B and the amount paid was the sum awarded by the court. NewDay explained that it had equal liability under S75 and it was for this reason that it agreed to make the payment.

Mrs B remained unhappy as she considers that NewDay are still liable for certain things that the court did not find on. The complaint was progressed through our service where it was considered by one of our investigators. Having considered what the parties had set out the investigator explained that under certain specific circumstances the rules which our service adhere to allow complaints to be dismissed without consideration of the merits of the complaint. The investigator felt that as Mrs B's claim against A had been considered in court this was essentially the same complaint that we were being asked to consider. And as such, the investigator felt it appropriate to dismiss the complaint without considering the same

issues afresh, which is permitted under our rules.

Mrs B did not accept the investigator's findings and as the complaint could not be resolved informally it was referred to me for consideration. I issued a provisional decision in which I said:

What I've provisionally 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 would first like to acknowledge that I am very aware that I have summarised the circumstances surrounding this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

I would also like thank Mrs B for the detailed submissions presented in this case and I appreciate the time and effort taken in bringing this complaint, in addition to the work already involved in successfully obtaining a judgment against A through the courts.

The first consideration for me is whether this is a complaint our service should deal with. It's not appropriate for this service to consider the merits of every complaint that's brought to us. Our service's powers are set out in the DISP section of the Financial Conduct Authority's Handbook. The DISP rules allow me to dismiss a complaint in certain circumstances where I consider it appropriate. DISP rule 3.3.4A says:

'The Ombudsman may dismiss a complaint referred to the Financial Ombudsman Service on or after 9 July 2015 without considering its merits if the Ombudsman considers that:

...

(3) the subject matter of the complaint has been the subject of court proceedings where there has been a decision on the merits;

...'

Mr S's case in court was against A and the subject matter of the court proceedings was in respect of breach of contract, relating to the quality of the goods supplied and work carried out when undertaking the home improvements. As already referred to above, judgment was issued in favour of Mr S.

The complaint against NewDay is however different. Firstly, it's against NewDay and not A, and Mr S, not Mrs B, was the claimant. And the NewDay complaint relates to the handling of the claim under S75 and not specifically whether there has been a breach of contract by A. I appreciate that when considering the S75 claim it may be necessary to consider whether there has been a breach of contract by A, but this is again a slightly different issue to whether or not NewDay dealt fairly and reasonably with Mrs B when considering her S75 claim.

Having considered all that has been presented by the parties so far in this complaint I do not consider the subject matter of the complaint, which is how NewDay has dealt with Mrs B's S75 claim, has actually been the subject of court proceedings. I do not therefore consider this complaint should be dismissed and have gone on to consider the merits of the

complaint.

Although I have considered the merits of the complaint, I do not however consider the complaint should be upheld and I have explained why I have reached this conclusion.

I'll again reiterate that the complaint presented here is about the way that NewDay dealt with Mrs B's S75 claim. The general effect of S75 is that if a consumer has a claim for misrepresentation or breach of contract against the supplier, they can also bring a like claim against the finance provider, provided certain conditions are met.

In considering a complaint about a financial services provider, I'm not determining the outcome of a claim that a party might have under S75. Rather, in deciding what's a fair way to resolve this complaint, I have to take account of relevant law. Since S75 is relevant law I've thought about it when looking at this complaint.

When Mrs B brought the S75 claim to NewDay to consider around early May 2022 court action had already been started by Mr S against A. NewDay acknowledged the S75 claim and set out to Mrs B a list of things that would be helpful when considering the claim. On 17 May 22 NewDay explained that it was unable to determine if a breach of contract had occurred. This is because NewDay was of the view that as the breach of contract claim was being defended by A there were no grounds for Mrs B to make a like claim under S75.

Mrs B remained unhappy with this response and despite further exchanges in correspondence NewDay maintained its position that it would not consider a S75 claim while the court proceedings were taking place.

Having considered the specific circumstances of this case I'm not persuaded that NewDay acted unreasonably by explaining to Mrs B that it would not be considering the S75 claim while the court proceedings were taking place. I appreciate at that time in around mid May 2022 the court hearing hadn't yet been held. Proceedings were however underway with Mr S's claim submitted and A setting out its position in defence of the claim.

Subject to certain conditions, S75 does indicate that if a debtor has any claim against the supplier in respect of a misrepresentation or breach of contract, they shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.

S75 would usually allow a debtor to bring a claim against the finance provider and therefore avoid the need to take legal action through the courts. However, in this instance Mr S had already begun proceedings against A. While there was already an existing court claim in progress I don't think it was unreasonable for NewDay to not consider Mrs B's S75 claim when it was first submitted, at the same time that court proceedings were underway. By considering the S75 claim alongside the court case there would be the possibility of duplication with NewDay and the court considering similar, or the same, issues. There is also the chance of double recovery, with the court and NewDay potentially making the same, or similar, award. Any award would look to reimburse Mrs B for any losses incurred but not enrich her with excessive sums or by duplicating any award.

There is also the possibility that the court and NewDay reached different conclusions, perhaps because of different evidence or arguments being presented during the different claim processes. This would have complicated matters further if, for example, it was legally found that no breach of contract or misrepresentation had occurred, but NewDay had already agreed to settle a claim. Ultimately, it is for these reasons that I think it was not unreasonable for NewDay to not investigate the S75 claim when it was first raised by Mrs B in early May.

I appreciate that further discussion took place between Mrs B and NewDay as Mrs B remained unhappy with NewDay's position, but I don't think it was unreasonable for NewDay to maintain that position until the hearing had taken place in court.

I understand the court hearing took place in early July 2022 and NewDay were informed on 13 July 2022 that the hearing took place the previous week. The judgment was issued by the court on 21 July 2022, and I understand the deadline for A to settle the judgment was on 28 July 2022. NewDay indicated on 1 August 2022 that as A had not settled the judgment it was willing to do so and agreed to pay the £3,833.04 amount in the judgment.

In my view, NewDay has acted reasonably here in agreeing to make the settlement when informed that A had not already done so. I appreciate Mrs B may have been unhappy with the pace of progress. However, I think NewDay acted swiftly after being informed that A had not settled the judgment after the expiration date and it was a matter of days before NewDay agreed to settle the judgment.

I have considered what Mrs B has said about the court's award and understand why she may not have been completely happy with the award. Not all elements of the claim were successful and I understand that Mrs B feels some of this was because of procedural issues she and Mr S were unaware of when representing themselves through the court process. I also note that certain issues were outside the court's remit and again were not considered by the court. One example of this was in relation to allegations of fraud, which it was explained is a criminal matter and not something that could be considered in the civil claim between Mr S and A.

Mrs B believes that as these issues were not considered by the court it would be reasonable to expect NewDay to consider these matters afresh, now that the court has concluded its process. NewDay disagrees and does not consider it should now be required to consider these points.

As previously referred to, S75 allows a debtor to claim against the supplier in respect of a misrepresentation or breach of contract, if they have a like claim against the creditor. In the circumstances of this case, Mrs B would therefore need to be able to bring a new claim against A to be able to bring a like claim against NewDay under S75. But as the claim has been considered and I understand concluded in court, with settlement being paid by NewDay, there is no ability to bring a further claim in court against A for the issues that were included in Mr S's court claim. And as there is no ability now to bring a claim against A for the issues previously raised, any like claim against NewDay under S75 would also not be permitted.

I should also add that any allegations of criminality through fraud would not be considerations under S75 and would not therefore be for NewDay to investigate. Any allegations of fraud would need to be referred to the Police so that any criminal investigation could be considered.

Ultimately, I do not consider NewDay acted unfairly or unreasonably by not considering the issues which the court did not find in Mr S's favour. And as the breach of contract claim against A, for the quality of the home improvements and any related issues, has been concluded through the court I find there are no grounds for NewDay to consider anything further under S75.

Finally, I've noted what Mrs B has said about the delay in receiving the copy account statements that were requested from NewDay. Mrs B believes the delay in receiving the statements is a further attempt to delay the overall claim process and for NewDay to simply

be difficult to deal with. It is not entirely clear if there was a delay in sending the statements or if Mrs B was incorrectly informed about the timescales when requesting the statements. NewDay says that no timescale was given in the initial call and the statements were sent within the required timescales when dealing with a data subject access request. I have not listened to the actual call recording from the time of the request so I cannot be certain exactly what was said. However, even if there was a delay, I don't believe this is because NewDay were looking to be difficult or delay the overall claim process.

I appreciate that Mrs B will remain unhappy with the conclusions I have reached here but I do not consider NewDay has acted unreasonably or unfairly here by not initially considering Mrs B's S75 claim or by not considering any outstanding issues the court did not find in Mr S's favour.

NewDay responded to my provisional decision and said that it agrees with the decision and has nothing further to add.

Mrs B responded to the provisional decision and also copied our service into an email that had been sent to other parties. This email reiterated the circumstances of the dispute with A and refers to what Mrs B believes to have been unreasonable behaviour from A and NewDay. Mrs B believes NewDay's behaviour has been *utterly disrespectful and disgraceful*.

Mrs B has referred to the Financial Conduct Authority's Principles for Businesses and in particular Principle 6 – *Customers' interests* and that *A firm must pay due regard to the interests of its customers and treat them fairly*. Mrs B believes that I have not considered the requirements of the Financial Conduct Authority's Principles. Mrs B believes that NewDay's profiteering from A's illegal behaviour is a separate issue to that of S75.

So, I now have to make 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 considered the complaint afresh, I believe my final decision will come as further disappointment to Mrs B as I have come to the same overall conclusions as set out in my provisional decision, for what are broadly the same reasons.

Mrs B has reiterated much of what has been set out before about the failings of A and how she believes NewDay has treated her unfairly. No new evidence about the events has been submitted and I have nothing to add to what I have already set out in my provisional decision. I am still of the view that NewDay has not acted unreasonably or unfairly in its dealings with Mrs B by explaining that it will not consider the S75 claim at the same time the court case was in place. NewDay did settle the amount awarded in the court judgment and did so shortly after being told A had not made the payment. This again is reasonable in the circumstances of this complaint.

I can assure Mrs B that I am well aware of the FCA's Principles for Businesses and these were considered before issuing my provisional decision. But for the reasons previously set out, I do not consider NewDay has not treated Mrs B unfairly.

Mrs B believes that NewDay has profited from the illegal behaviour of A and that this is a separate issue to that of the S75 claim. I am unaware of any prior criminal proceedings or findings against A. And as previously set out, any claims of fraud, illegality or criminality, would need to be considered by the Police and would not be something that I am able to

make a finding on here.

I again appreciate the frustrations Mrs B will have and that there may be some issues still outstanding. But this complaint is not about the actions of A, and is about the responsibilities and actions of NewDay when considering its obligations under S75. I have seen nothing that persuades me to alter the conclusions I reached in my provisional decision, and it is for the reasons set out above that I don't consider Mrs B complaint should be upheld.

My final decision

My final decision is that I do not uphold Mrs B's complaint against NewDay Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 15 December 2022.

Mark Hollands
Ombudsman