

The complaint

Mr P complains about a claim NewDay Ltd ('NewDay') handled for him in relation to a transaction on his credit card.

What happened

Mr P bought an annual membership to a gym ('the supplier') in 2019 using his credit card. However, because of the restrictions put in place as a result of the global Covid-19 pandemic the gym closed from March 2020 and Mr P was unable to attend until late July 2020. Mr P says that when the gym opened up again there were restrictions on classes and opening times which were unacceptable to him. In summary, he says the membership was no longer fit for purpose and flexible like he signed up for (with 24/7 access). He says the gym has broken its contract with him and he wants a refund.

Mr P was unable to get a refund from the gym so he approached NewDay for help. It considered his claim under Section 75 of the Consumer Credit Act 1974 ('Section 75') but it concluded the supplier did not breach its contract with Mr P. So it wouldn't pay him the refund he wanted.

Mr P brought his complaint to this service about the outcome of the claim. He also said that NewDay's handling of the claim was poor. Our investigator did not uphold the complaint. In summary, he concluded there was no breach of contract by the supplier as it did not promise features like 24/7 access in the contract. He noted that Mr P was offered an extended membership to early 2022 to make up for the time out – which he appeared to have used several times.

Mr P disagrees. He says the gym is advertised as 24/7 access and that the operating model changed after lockdown which is a fundamental breach of contract even with the extension of membership.

I issued a provisional decision on this case. In this I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I can see Mr P feels he has been treated unfairly by the supplier due to circumstances out of his control. I am sorry to hear about how he feels as a result of the events triggered by the global pandemic. However, it is important that I emphasise why NewDay is involved here. It is not the supplier of the membership service so any potential liability it has for the agreement between Mr P and the supplier is strictly limited to the specific card protections which are available. In this case these are chargeback and Section 75.

So in order to decide what is fair and reasonable for NewDay to do as a third party to the agreement between Mr P and the supplier, I have to take into account what the chargeback rules say, and what the law says about Section 75.

Chargeback

Chargeback is a way NewDay are able to attempt to claim a refund for Mr P. However, this dispute method is limited to the particular rules set by the relevant chargeback scheme. I have carefully considered the rules of the scheme governing Mr P's card, alongside any specific guidance issued from the scheme holder in light of the pandemic.

From what I understand NewDay did not raise a chargeback. However, in the circumstances I don't think this is unreasonable because under the relevant code relating to the interruption of ongoing services it appears NewDay had 120 calendar days to raise the claim from when Mr P became aware the service had ceased. I understand the gym closed on 20 March 2020 but Mr P did not raise the claim with NewDay until 6 August 2020 which means the claim was out of time.

Even if the chargeback claim had not been out of time I think it is difficult for me to say that it would likely have succeeded in any event. From what I have seen I think it likely the supplier would have defended the dispute on the basis that Mr P was offered and used a reasonable alternative. I note the card scheme in their pandemic guidance specifically state that where a customer accepts a reasonable alternative - even if they change their mind later – they will not have a chargeback right for the non-provision of the service. I acknowledge that Mr P argues he didn't accept this extension as a resolution to the interruption to the membership and his claim for a refund. But had this matter eventually reached arbitration I am unable to reasonably conclude the card scheme would likely have interpreted its limited rules and additional guidance in such a way as to award Mr P a refund here.

Section 75

Section 75 allows Mr P in certain circumstances to make a claim against NewDay for any breach of contract or misrepresentation by the supplier paid using the credit card. Certain technical criteria need to be met in order for a Section 75 claim to be valid – in this case I am satisfied those criteria are met.

The focus of this complaint has been whether the supplier is in breach of contract. But for the sake of completeness I don't consider there to have been a misrepresentation by the supplier. I don't see evidence that it made false claims when the contract was entered into which caused Mr P to buy the membership when he otherwise would not have done– I also think this would be particularly difficult to conclude considering the evolving and unexpected events of the pandemic later on. So I move on to now consider breach of contract.

Firstly, based on the information Mr P has provided I don't disagree with him that despite the written terms of the contract not being specific about 24/7 access he was likely sold the membership based on advertising around this feature. Under the Consumer Rights Act 2015 things said or shown to him about a service that he has relied on can be implied into the contract even if they are not specifically written into it. So I do think the contract was likely originally entered into based on 24/7 access.

What occurred after the closure of the gym resulting from the pandemic appears to be an effort by the gym to continue to serve customers affected by extending memberships – even if that meant these would continue with modified opening hours and class times. In doing so the service was different to what Mr P signed up to.

One way of looking at what happened is the supplier offered and Mr P accepted a variation of the contract as a way of resolving the problem with its performance as presented by the

government restrictions put in place due to the global pandemic. I think whether the parties came to a mutual agreement here is debatable– as although Mr P is said to have used the extended membership and is said to have signed a new agreement – there is communication indicating that he is not happy with the new arrangements at the gym. He also indicates he didn't sign a new agreement. But whether he did or didn't accept the proposal (and whether the supplier was truly intending to vary the original contract or simply offer a goodwill gesture) it doesn't result in a breach of the original terms of the contract paid for using the credit card.

If Mr P is seen to have accepted the variation it follows there is no breach. However, even if I were to accept that Mr P did not mutually agree to a contract variation here I don't think that leaves me in a position to conclude the supplier is in breach of contract in any event. I say this because the supplier was practically prevented from opening the gym specifically due to government restrictions put in place as a result of the global pandemic. I note there is nothing in the agreement for sale or implied into the agreement by law that persuades me that in this particular situation Mr P would contractually be entitled to a refund. And essentially, the supplier was unable to provide the service not because of a breach of contract, but as a likely result of the contract being frustrated. When a contract is frustrated it effectively comes to an end.

So while Mr P might have a certain civil remedy against the supplier directly (which he can get independent legal advice on if he wishes) in these particular circumstances I am unable to reasonably conclude there is a breach of contract which NewDay is liable for via its obligations under Section 75. Therefore, I do not consider it fair and reasonable to direct NewDay to pay Mr P a refund of his membership fees.

I know Mr P is likely to be unhappy with this outcome. However, it is important to underline the particular role NewDay has – which is limited by the chargeback scheme and the law of Section 75.

It is also worth noting that even if I were persuaded there had been some kind of breach of contract here (which I am not) it is unlikely I would conclude that Mr P is fairly entitled to the full refund of his membership fees he seeks (due to the use he had of the membership to date) in any event.

Mr P has also mentioned the customer service of NewDay and has indicated it was unresponsive. From what I can see NewDay's customer service was not exceptionally quick – but it appeared to respond to his initial claim (made in early August 2020) reasonably promptly (by the end of September 2020). Mr P also says NewDay prematurely closed his claim – but it appears that this was a result of some confusion and rectified quickly. I can also see that when Mr P demonstrated that he was unhappy with the claim outcome NewDay issued a final response letter fairly promptly in October 2020. Overall, I don't think the customer service I have seen from NewDay here would fairly warrant compensation.

My provisional decision

I don't uphold this complaint.

I asked the parties for their responses. NewDay said it had nothing further to add. However, Mr P disagreed with the decision. In summary, he says:

- He did not use the gym several times and he was misled by the gym owner as he thought he was signing for a new security pass not a whole new contract; and

- It is irrelevant that the gym extended the membership – the way it operated no longer worked for him and the changes which limited the facilities represents a breach of contract under the Consumer Rights Act 2015 and a full refund becomes due.

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.

Mr P has made it quite clear he disputes ever using the gym once it re-opened after the lockdown. And that he signed a contract under false pretences. However, as I have already said in my provisional findings - even if I were to accept that Mr P didn't accept a variation of contract as a way of resolving things I am still not able to fairly conclude there is a breach of contract which NewDay is responsible for (via Section 75) in any event or that a chargeback would likely have succeeded.

My provisional findings on chargeback remain the same. Regarding chargeback I noted that the claim was out of time – but in any event I didn't think it would likely succeed notwithstanding the dispute about whether Mr P did in fact accept the extension of membership:

'I acknowledge that Mr P argues he didn't accept this extension as a resolution to the interruption to the membership and his claim for a refund. But had this matter eventually reached arbitration I am unable to reasonably conclude the card scheme would likely have interpreted its limited rules and additional guidance in such a way as to award Mr P a refund here.'

Regarding Section 75 my key findings remain the same. I refer back to the following passage in my provisional decision in particular:

'even if I were to accept that Mr P did not mutually agree to a contract variation here I don't think that leaves me in a position to conclude the supplier is in breach of contract in any event. I say this because the supplier was practically prevented from opening the gym specifically due to government restrictions put in place as a result of the global pandemic. I note there is nothing in the agreement for sale or implied into the agreement by law that persuades me that in this particular situation Mr P would contractually be entitled to a refund. And essentially, the supplier was unable to provide the service not because of a breach of contract, but as a likely result of the contract being frustrated. When a contract is frustrated it effectively comes to an end.'

So ultimately, the inability of the gym to provide the service Mr P signed up for was not in my view as the result of a breach of contract. And for completeness - I know Mr P has referred to the Consumer Rights Act 2015 (which I have already considered). However, in light of what occurred here when the gym was unable to provide the service due to the government restrictions specifically down to the global pandemic, I don't think this legislation implies terms that would cover what has happened in this particular situation.

I think it also useful to specifically refer back to what I said in my provisional decision as follows:

So while Mr P might have a certain civil remedy against the supplier directly (which he can get independent legal advice on if he wishes) in these particular circumstances I am unable to reasonably conclude there is a breach of contract which NewDay is liable for via its

obligations under Section 75. Therefore, I do not consider it fair and reasonable to direct NewDay to pay Mr P a refund of his membership fees.

So while I thank Mr P for his further submissions on the matter they do not change the key finding of my provisional decision (as incorporated above) which is there is no breach of contract that NewDay is fairly liable for via Section 75 and that it didn't make a mistake regarding the chargeback that deprived Mr P of a refund. I also have not seen anything that would change my provisional findings on the customer service of NewDay. I still consider my decision on all these issues to be fair and reasonable in the circumstances.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 9 January 2023.

Mark Lancod
Ombudsman