

The complaint

Mr H seeks to complain about the way in which NewDay Ltd dealt with a claim he has made against it in connection with a contract he entered into with a third party “B” for work carried out on his property. NewDay provided credit towards the financing of the work. Mr H is assisted in bringing the complaint by a claims management company “C”.

What happened

In 2013 Mr H was contacted by B in relation to a wall coating product that B said would improve the condition of his home. As a result of further discussions, Mr H entered into a contract with B to supply and apply the wall coating to his property at a total cost a little over £20,000. He paid for the work by different means, including use of a NewDay credit card.

A few years later Mr H began to notice problems with the wall coating, which had started to deteriorate. In 2019 he obtained an independent report into the property condition, which indicated that the wall coating was not applied correctly and recommended remedial action. It's unclear whether he did so in pursuance of a claim he had made to B, who had in any event by January 2017 ceased trading. Mr H subsequently instructed C to act on his behalf.

C contacted NewDay in 2021 detailing a claim it was looking to bring against the card provider under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 (“section 75”). C’s letter detailed a number of perceived failings on B’s part for which it considered NewDay was liable. In summary, these were:

- the work B carried out didn’t meet a suitable standard. The wall coating was mis-applied leading to problems and property damage
- B’s sales representative made misleading and/or false statements that induced Mr H to enter into the contract, and failed to assess product suitability for his property
- B’s sales practices involved pressurising Mr H into entering into the agreement without being afforded the opportunity to read or understand it, and preventing him from making an informed decision

C said Mr H had been caused loss due to B’s negligence, misrepresentation and breach of regulatory and/or statutory duty, for which it held NewDay responsible pursuant to section 75. It asked NewDay to reimburse payments made under the credit agreement, to restore Mr H’s property to the condition it was in prior to application of the wall coating product, pay interest and cover out of pocket costs such as the independent report.

NewDay declined to do so. It took the view that it was not liable to Mr H, on the basis that the Limitation Act 1980 afforded a complete defence to the claim due to the time passed since the cause for action arose. It also said that the negligence claim fell outside the parameters of section 75 as that provided only for claims in misrepresentation or breach of contract.

NewDay acknowledged it had taken some time to provide its response and paid Mr H £45 in recognition of this. Responding through C, Mr H was unhappy with NewDay’s position and ultimately, the matter was referred to us for review.

The complaint has been reviewed by two of our investigators, neither of whom considered NewDay was acting unreasonably in defending the claim. On behalf of Mr H, C has asked for this review, which represents the final stage in our process for dealing with the complaint.

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.

I shall deal firstly with the issue of B's sales practices. It's possible NewDay might have responsibility for B's actions prior to Mr H's entry into the wall coating contract due to the 'antecedent negotiations' provision in section 56 of the Consumer Credit Act ("section 56"). This has the effect that B is deemed to be the agent of NewDay in respect of discussions about the wall coating transaction.

C has said that B used high-pressure sales techniques, saying that B's representative remained at Mr H's property until he signed the contract and didn't give him the opportunity to read and understand it. In her initial assessment our investigator felt this was something Mr H ought reasonably to have been aware of at the time he signed up, and that it was therefore time-barred under our rules.

C disputed this, suggesting a significantly later point when Mr H started to have concerns about the damage to his property. I don't find what C has said to be particularly persuasive in terms of the point at which someone in Mr H's position might reasonably have had cause to be unhappy about B's sales techniques. Someone that was genuinely unhappy about feeling pressurised into entering an agreement on the basis of the time the sales representative was in their home ought reasonably to have known they were unhappy about that matter at that point, and been on notice to make reasonable enquiries about making a complaint.

So under our rules, Mr H would need to have raised that aspect of the complaint with us or NewDay by 2019. This didn't happen until 2021, and I see no reason to conclude that there were exceptional circumstances at play that explain the failure to comply with that time limit. I therefore find that I have no power to deal with those aspects of Mr H's complaint that relate to NewDay's responsibility for B's sales techniques.

I now turn to the matter of the section 75 claim. It's important to note that I'm not making a finding in respect of NewDay's potential liability to Mr H under the various heads of claim that have been referenced. I'm dealing with a complaint about NewDay's handling of the claim made to it, not the claim itself.

I'm satisfied NewDay understood and had due regard for its obligations under section 75 when it considered the claim C brought to it on behalf of Mr H. Its response to the claim makes that clear. I appreciate that C doesn't agree with the stance NewDay has taken. But that isn't in itself indicative that NewDay is acting unfairly in seeking to defend the claim.

I appreciate the arguments C has made in relation to its claim of negligence and, effectively, latent damage; that is, that – for England and Wales – the Limitation Act does not prevent such a claim being made within the timescale from when Mr H had the requisite knowledge and right to bring such an action. However, as NewDay pointed out, section 75 provides for connected lender liability only in cases of breach of contract or misrepresentation. The argument has not been made out as to how Mr H might be able to bring a negligence claim in tort against NewDay for alleged transgressions by B in applying the wall coating product.

I'm conscious our investigation contemplated whether, while defining the claim as one of negligence, the claim could also be considered as one of breach of contract. This would be

on the grounds that the failings described amount to a failure by B to exercise due skill and care, as would have been required under relevant consumer protection legislation applicable at the time.

However, that would mean the date of cause for action would have arisen at the point that duty to exercise due skill and care was breached, not the point at which it was realised it might have been breached. And that means such an argument would thus fall within the ambit of the defence NewDay has sought to make.

I can see a similar situation applying to the claim of misrepresentation, whether brought against NewDay under the provisions of section 75 or indeed, the antecedent negotiations provisions of section 56 of the same Act. The allegations made by C on Mr H's behalf would appear to suggest negligent misrepresentation by B; that is, that B made statements without reasonable belief in their accuracy that induced Mr H to enter into the contract.

Actions founded on tort generally require the claim to be brought within six years of the date on which cause for action accrued. In this scenario, that would be 2013, being the point at which the representations were made. I don't consider it apparent from the claim description that it is founded on any other reason under which a longer limitation period might apply.

That is not to say that Mr H's claim is bound to fail. Whether the defence NewDay has raised would be successful should Mr H pursue the claim through legal proceedings is by no means guaranteed. The position here is that I'm not persuaded it would be fair for me to say it's an argument NewDay shouldn't be entitled to make in the event of such proceedings.

If NewDay had failed to have regard for its potential liability, or had put forward an argument that clearly has no reasonable prospect of success or is without foundation, I would be minded to conclude that it hasn't dealt with the claim properly. Here, I don't consider that to be the case. Rather, I find NewDay has received the claim and offered a defence based on the facts of the case, as it is entitled to do. I find it has not acted unreasonably by offering what might well be a defence to the claim.

I note the argument C has put to us citing a High Court decision¹ and the possibility of an action arising under s140A to 140C of the Consumer Credit Act. That was not something it raised in its claim to NewDay other than in the context of an enquiry as to any commission NewDay might have paid B. So I don't find NewDay remiss in not addressing those particular points in its response to the claim. It is, of course, open to Mr H to make further arguments to NewDay, and for NewDay to respond to them. But it isn't for me to consider them in the context of a complaint about how NewDay dealt with the claim Mr H actually made.

Finally, there were acknowledged delays in NewDay providing its response to Mr H's claim. I don't consider they caused material loss or harm to Mr H such that it would be appropriate to increase the amount NewDay paid him in compensation.

My final decision

For the reasons I've set out here, my final decision is that I don't uphold those aspects of Mr H's complaint that fall within my power to deal with.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 23 February 2023.

¹ *Patel v Patel* [2009] EWHC 3264 (QB)

Niall Taylor
Ombudsman