DRN-4193000

The complaint

Ms R complains NewDay Limited trading as Aqua has declined claims she brought under section 75 of the Consumer Credit Act 1974 ("CCA").

What happened

I made a provisional decision on this complaint on 26 May 2023, in which I said I was minded to uphold Ms R's complaint in part and asked both parties to let me have any new submissions by 9 June 2023. Ms R has responded with some additional points and information. NewDay has not replied, nor has it asked for further time to reply, so I have decided to proceed with this final decision.

Due to the length of the provisional decision and the amount of important information contained within it, I have included its contents more or less in full in this final decision. In my provisional decision, I described the background which had led up to Ms R's complaint as follows:

"I will not go into great detail about the events leading to this complaint. Our investigator has already outlined what happened and all parties are well aware of the background. But in brief, Ms R visited a well-known online marketplace I'll call "AB" and purchased a laser machine which she says was for personal cosmetic use, from a seller I'll call "S1", in March 2021. Ms R had discussed the price and other matters with S1 prior to committing to the purchase. In the end what she agreed to pay came to £1,784.08, split across two payments on her NewDay credit card.[1] The payments appeared in the name of AB on her credit card statement.

The machine was shipped to Ms R from China, and Ms R needed to pay import duties when it arrived later the same month. The machine turned out to have been broken during transit.

When Ms R switched it on, she says water began to pour out of the casing and an electrical explosion occurred. She contacted S1, who suggested a glass tube inside the machine had been broken in shipping. S1 wanted to guide Ms R through the process of diagnosing and fixing the fault, but she didn't think this was appropriate and she was concerned about being electrocuted as S1 insisted she open the machine's casing, to which various warning stickers were attached. She requested a refund instead, but this came to nothing.

Next, Ms R contacted NewDay for help. NewDay processed what are known as "chargebacks" against the two credit card payments and credited the amounts to Ms R's account. Ms R says she believed these refunds were permanent and went on to buy a replacement laser machine from another supplier ("S2") on the AB marketplace. This machine cost £2,055.79, which was split across three payments on Ms R's NewDay credit card.

[1] Ms R has two NewDay credit cards with different branding and she used both at different times when making her purchases. I have not differentiated between them in this decision because it is not material which card was used to make a specific payment.

Ms R again paid import duties, and unfortunately the second machine, which arrived from China in April 2021, was broken as well. Ms R says that there was water leaking inside the box and the machine had obvious damage. Ms R was originally content to receive a replacement part from S2, but S2 was sceptical that the machine in Ms R's photos was the one it had sent her. Ms R then requested a refund but S2 was unwilling to give her this either.

In the meantime, NewDay had received a defence to the chargebacks in relation to the first machine. S1 didn't deny that the machine was damaged, but said this had happened in shipping, and the machine had been at Ms R's risk during the shipping process. NewDay decided it couldn't proceed further with the chargebacks and took the amounts out of Ms R's account again on 11 May 2021. Ms R asked NewDay to dispute the payments for the second machine too, but these chargebacks were also defended and NewDay again decided not to proceed further with them, reversing further temporary refunds it had made in respect of this purchase.

Ms R was unhappy with NewDay's decisions on her claims, and the financial situation she'd been left in when the temporary refunds had been reversed, and complained. NewDay would not change its position in response to the complaint, but told Ms R that it was going to consider whether she might have a claim in respect of the machines under section 75 of the CCA. Dissatisfied with this response, Ms R referred to the Financial Ombudsman Service for an independent assessment.

One of our investigators looked into the complaint and came to the following conclusions:

- *NewDay had raised chargebacks in respect of both machines, and each chargeback had been defended by either S1 or S2. It wasn't clear if the reasons NewDay had given for not proceeding further with the chargebacks (that Ms R hadn't tried to resolve things with S1 or S2, or tried to return the machines), were good reasons. But ultimately this didn't matter because she felt Ms R's complaint should be upheld for another reason.*

- *NewDay had not provided an answer on any potential section 75 claim Ms R might have, although it had said it would do so, so she had gone on to consider the merits of such a claim.*

- *She considered the technical criteria for Ms R to make section 75 claims in respect of the machines were in place. Specifically, the price of the goods was within the range to which section 75 applied, and although AB had acted as a payment processor in passing Ms R's credit card payments to S1 and S2, this didn't mean that an important requirement – the debtor-creditor-supplier agreement – was not in place.*

- *It appeared likely both machines had been broken during the process of shipping from China. Section 29 of the Consumer Rights Act 2015 ("CRA") made it clear that goods remained at the risk of the trader until a consumer physically takes possession of them, so the damage had been the responsibility of S1 and S2 respectively.*

- *The machines had not been satisfactory quality on delivery, meaning S1 and S2 had breached their contracts with Ms R for the supply of the machines. She considered Ms R would have been entitled to receive refunds of the amounts paid for the machines, along with a refund of the import duties she'd paid to receive them.*

- *It wasn't clear that NewDay had misled Ms R into believing the temporary*

refunds were permanent. There was no documentary evidence to show this, and it followed that she couldn't hold NewDay responsible for Ms R having financial difficulties after the temporary refunds were reversed.

Concluding, our investigator recommended NewDay refund all of the payments Ms R made towards the two machines on her NewDay card, reworking the interest and charges on the account as though the temporary refunds had remained permanent and removing any adverse information recorded on her credit file. Our investigator also recommended NewDay refund the import duties Ms R had paid, and pay compensatory interest on these duties and on any credit balance which would have arisen on the card.

Ms R said she was happy with this outcome. NewDay said it disagreed – it didn't think there was a valid debtor-creditor-supplier agreement which would allow Ms R to make a claim against it under section 75 of the CCA. It said this was because AB had acted as an agent for S1 and S2 in accepting the payments for the machines. AB's responsibility to Ms R had been to pass on her payments, which it had done.

Our investigator considered NewDay's points but remained of the view that there was a valid debtor-creditor-supplier ("DCS") agreement. She made the following observations about AB's involvement in a letter to NewDay:

- *AB was an online marketplace and it recruited sellers to its platform, passing on credit card payments to them. All sellers had to sign up to a "transaction services agreement" with AB, under which it provided a payment facilitation service. S1 and S2 had been sellers on the AB marketplace.*

- *For there to be a valid DCS agreement there needed to be arrangements between NewDay and S1/S2 for NewDay to finance the purchases Ms R made from S1/S2. The card scheme (Mastercard) was there to put these arrangements in place between those participating in the scheme.*

- *Paying suppliers by credit card, using the services of a marketplace like AB, was a widespread and accepted commercial practice which had developed over time and was accommodated by the card scheme. The scheme itself had developed in a way which brought transactions to suppliers via online marketplaces like AB within its arrangements.*

- *NewDay would have contemplated, when it granted a credit card to Ms R, that the card would be used to pay suppliers in any way accommodated by the card scheme.*

The method used to purchase the laser machines – i.e. via AB – was one such method and there was therefore a valid DCS agreement.

NewDay responded that its position was unchanged, but it didn't offer any additional reasoning or comments on our investigator's analysis. The case has now been passed to me to decide."

I then went on to make my provisional findings. These read as follows:

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

Neither party has disagreed with the conclusions reached by our investigator on the question of the chargebacks. For reasons which will become apparent in this provisional

decision, I have needed to look more closely at NewDay's actions surrounding the chargebacks relating to S1. However, in general I agree with our investigator that there's not enough evidence that NewDay misled Ms R over the temporary nature of the credits she received when she disputed the payments for the machines. I will return to the matter of the chargebacks relating to S1 later, after first considering section 75 of the CCA.

Section 75 of the CCA gives credit card account holders a degree of protection when they purchase goods or services using a credit card. So long as certain technical criteria are met, the account holder can hold their credit card provider liable for any breach of contract or misrepresentation by the supplier of the goods or services.

While I am unable to decide a section 75 claim in itself, as that is a matter for a court, when deciding whether NewDay treated Ms R fairly and reasonably in declining to refund her disputed payments to S1 and S2 and refusing to honour a claim under section 75, I've naturally had to consider what a court would likely have decided, had it been presented with such a claim.

Was there a valid DCS agreement?

In Ms R's case the disagreement between our investigator and NewDay has focused on whether all of the technical criteria have been met for a section 75 claim to be valid, and in particular whether there is a valid DCS agreement, so I will cover this point in some detail, starting with the relevant sections of the CCA.

Section 75(1) of the CCA states the following:

"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."

Sections 12(b) and (c), referred to above, read as follows:

"(b) a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier, or

(c) an unrestricted-use credit agreement which is made by the creditor under pre-existing arrangements between himself and a person (the "supplier ") other than the debtor in the knowledge that the credit is to be used to finance a transaction between the debtor and the supplier."

A credit card agreement, when used to purchase goods or services using the card itself, operates as a restricted-use credit agreement.[2] Section 11(1)(b) of the CCA defines such an agreement as:

"A restricted-use credit agreement is a regulated consumer credit agreement— …

(b) to finance a transaction between the debtor and a person (the "supplier") other than the creditor…"

Section 12(b) of the CCA refers to the important concept of "pre-existing arrangements".

[2] Confirmed in Example 16 of Schedule 2, Part II of the Consumer Credit Act 1974

It makes it clear that for there to be a DCS agreement for a particular purchase, the payment needs to have been made under pre-existing arrangements or in contemplation of future arrangements with the supplier. I will simply refer to these as "arrangements" in this decision.

In Ms R's case, both her laser machine purchases were transactions financed by her credit card with NewDay. The suppliers of the machines were S1 and S2 respectively. So long as there were arrangements between NewDay and those suppliers then there will have been a valid DCS agreement for the purchases and NewDay could be found liable for the suppliers' breaches of contract or misrepresentations.

Although I don't think NewDay has articulated its arguments very clearly, it has said that AB collected Ms R's payments as agent for the suppliers, and that AB's role was to pass on those payments. It says AB did this correctly and therefore Ms R can't make any claim against NewDay under section 75. What NewDay appears to be arguing is that there is a DCS agreement between it, Ms R and AB, because the credit card payments were accepted directly by AB. But there's no DCS agreement between it, Ms R, and S1 or S2. And that's because the payments were not accepted by S1 or S2 directly.

In a roundabout way, I think NewDay is saying that the payments were not made under arrangements it had with S1 or S2. Therefore, it thinks there is not a valid DCS agreement for Ms R to be able to make a section 75 claim against it for breach of contract or misrepresentation by S1 or S2.

Like our investigator, I take a different view. I think that the way in which the payments landscape has evolved over the years, significantly broadening the range of suppliers which accept payment by credit card and the number of intermediaries involved in the processing and settlement of these payments, is not incompatible with there being arrangements between a creditor and supplier. I'll explain further, first covering some of the relevant background.

The historical context

Credit cards traditionally operated according to a three-party structure. The card issuer (creditor) and the cardholder (debtor) entered an agreement whereby the card issuer would extend credit to the cardholder for purchases of goods or services made by the latter, from suppliers who had agreed to accept the card.

Under this structure, the card issuer would have an agreement with each individual supplier under which the supplier agreed to accept the card and the card issuer agreed to pay the supplier promptly. The cardholder would also have an agreement with the supplier – to purchase the goods or services that were the subject of the transaction.

This tripartite structure began to give way over time to a four-party structure involving a new type of entity known as a "merchant acquirer". In such a structure the merchant acquirer would have an agreement with the supplier under which the latter agreed to accept certain types of card, and the former agreed to pay the supplier. The merchant acquirer would also have an agreement with the card issuer, under which the acquirer agreed to pay the supplier and the issuer undertook to reimburse the acquirer.

The Court of Appeal considered the appearance of this four-party structure, and its impact on claims brought under section 75 of the CCA, in the case of Office of Fair Trading v Lloyds & others [2006] ("the OFT case"). The court made a number of key findings. Firstly, it concluded that the introduction of a four-party structure had not meant the system had evolved significantly beyond the scenarios to which section 75 had been directed:

“From the customer’s point of view…it is difficult to see any justification for drawing a distinction between the different [three-party and four-party] situations. Indeed, in the case of those card issuers such as Lloyds TSB, who operate under both three-party and four-party structures, the customer has no means of knowing whether any given transaction is conducted under one or the other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same: each benefits from the involvement of the other in a way which makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure.” And: “It is clear that, whether the transaction is entered into under a three-party or four-party structure, the purpose of the credit agreement is to provide the customer with the means to pay for goods or services. It follows that in both cases the card issuer finances the transaction between the customer and the supplier by making credit available at the point of purchase in accordance with the credit agreement. The fact that it does so through the medium of an agreement with the merchant acquirer does not detract from that because it is the card issuer’s agreement to provide credit to the customer that provides the financial basis for the transaction with the supplier.”

The Court of Appeal concluded that arrangements did not need to be direct between the creditor and the supplier, for them to be of the kind required to bring a section 75 claim against the creditor. The Court considered the word “arrangements” as used in section 12 of the CCA was to be construed loosely, observing that not to do so would result in some consumers being disadvantaged:

“…we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct.”

An appeal in the same case was later considered by the House of Lords. Lord Mance said the following when commenting on the recruitment of overseas suppliers to the card scheme/network:

“That, in today’s market, arrangements between card issuers and overseas suppliers under schemes such as Visa and Mastercard are indirect (rather than pursuant to a direct contract as is still the case with American Express and Diners Club) is a consequence of the way in which the Visa and Mastercard networks have developed and operate. Likewise, the fact that the rules of these networks give card issuers no direct choice as to the suppliers in relation to whom their cards will be used. The choice of suppliers is, in effect, delegated to the merchant acquirers in each country in which these networks operate, and provision is made, as one would expect, to ensure and monitor the reliability of such suppliers in the interests of all network members. That network rules may not provide all the protections that they might, e.g. by way of indemnity and/or jurisdiction agreements, is neither here nor there.

They could in theory do so, and it is apparent that there are some differences in this respect between different networks. The Crowther Report and 1974 Act proceed on the basis of a relatively simple model which contemplated that card issuers would have direct control of such matters. A more sophisticated worldwide network, like Visa or Mastercard, offers both card issuers and card holders considerable countervailing benefits. Card issuers make a choice, commercially inevitable though it may have become, to join these networks, for better or worse.”

Lord Mance made these comments many years ago, but I think they are still relevant today in the context of further developments in how credit card payments are made to suppliers.

It's clear that even by the mid-2000s commercial practices were evolving and suppliers were beginning to be recruited to the card schemes by intermediaries. Card issuers were faced with a commercial decision of participating in the schemes and therefore accepting the benefits and drawbacks of having their cards accepted by suppliers who had been recruited to the scheme by others, or of not participating in the schemes. Since the mid-2000s there has been further development catalysed by the growth of new technologies and the increasing popularity of e-commerce, and new ways of recruiting suppliers to the card schemes have appeared. Payment facilitators, for example, are now an established part of the payments industry. The rules of the card schemes have changed to adapt to and accommodate these developments.

Recent developments

The recent High Court case of Steiner v National Westminster Bank [2022] EWHC 2519 *("the Steiner case") has provided further comment on the issue of "arrangements" and the DCS agreement in the context of a section 75 claim. The case involved the purchase of a kind of timeshare product using a credit card. The credit card payment was not made to the timeshare provider, it was made instead to a trustee company.*

The High Court decided to dismiss the section 75 claim on the basis that the purchase was not made under a DCS agreement, citing the fact the credit card payment had been made to the trustee company and not the timeshare provider.

The judge stated the central question was not whether arrangements existed between the creditor and the supplier at the time the purchase had been made and the credit card had been used to pay the trustee company. Rather, it was whether the debtor's credit card agreement with the creditor was made by the creditor "under pre-existing arrangements, on in contemplation of future arrangements", between the creditor and the timeshare provider.

The judge reasoned that when a creditor made an agreement with a customer in relation to a card issued by the creditor to that customer, then the agreement was made under the card scheme, and this constituted "arrangements" between the creditor and the other members of the scheme. Therefore, if a supplier was already a member of the card scheme, the agreement was made "under pre-existing arrangements…between the [creditor] and the supplier". The creditor was also aware that other suppliers were likely to join the card scheme in the future, so the agreement was also made "in contemplation of future arrangements", between the creditor and any supplier who subsequently joined the card scheme.

However, the judge also concluded that in the absence of specific factual evidence as to the creditor's state of mind, it was difficult to envisage that a creditor which had issued a card to its customer and made a credit card agreement in relation to that card, had made any agreement under, on in contemplation of, any arrangements other than the card scheme.

And, as the timeshare provider had been outside *the card scheme in the Steiner case, it had meant the timeshare had not been supplied under a DCS agreement.*

Principles to consider in Ms R's case

I think it is possible to draw some general facts and principles out of the analysis above which can be applied to Ms R's case:

- *While Ms R's transactions with S1 and S2 were financed by her NewDay credit cards, for section 75 to apply to those transactions there also needs to have*

been a DCS agreement in place.

- *This means there need to have been "arrangements" between NewDay and S1 and S2.*

- *The arrangements do not need to have been direct between NewDay and S1/S2, as the courts have decided that such arrangements can be indirect, and that the way in which suppliers are paid will evolve over time as a consequence of how the card schemes have developed and operate. The card schemes mediate and make possible the arrangements between the various participants within the schemes through their technologies and their setting of comprehensive rules which all scheme participants must follow.*

How did Ms R's payments to S1/S2 work in practice?

In order to buy or sell items on AB's marketplace, it's necessary to set up an account with it and agree to terms and conditions relating to various matters including how business is to be transacted between buyers and sellers, the limits of AB's liability if things go wrong, payment arrangements, and so on.

AB's rules regarding payments are governed by a "Transaction Services Agreement". These outline how AB, or an associated company or "registered third party service provider", acts as a payment intermediary for transactions between buyers and sellers. Payment is received by the intermediary and then passed on to the seller. So when Ms R used her NewDay credit cards to pay for the machines, her payments went to AB (or an associate/third party service provider) and those funds were then transferred to S1 and S2 respectively.

Were there arrangements of the required kind between NewDay and S1/S2?

AB is a large, well-known online marketplace on which buyers are able to pay for goods or services using various payment methods, from suppliers AB has recruited to its platform.

Paying suppliers via online marketplaces is a method of payment which has evolved over the years and become a widespread commercial practice which is clearly accommodated by the card schemes. It is known to all participants within the schemes that, when a card payment is made via an online marketplace, the ultimate recipient will be a supplier which has been recruited to that marketplace and, indirectly, to the card scheme itself.

Online marketplaces are a specifically recognised type of participant under the rules of the Visa card scheme. Ms R's credit cards belonged to the Mastercard scheme, and based on my reading of its scheme rules, Mastercard does not appear to recognise online marketplaces as a unique, named type of participant in its scheme. However, I think it is apparent that their participation is accommodated and indeed encouraged by Mastercard based on the promotional material it has directed at them.[3]

Given the size of AB, the amount of Mastercard transactions it generates must be very large and so I also think the scheme must have decided that paying suppliers in this way is acceptable. This is supported by the fact it allows AB to bear the Mastercard logo/mark to advertise the acceptance of its cards on the platform. I would also note that, as the Court of Appeal found in the OFT v Lloyds case, card issuers such as NewDay and suppliers on platforms such as AB, each benefit from the involvement of the other in a transaction. The

[3] https://developer.mastercard.com/solutions/online-marketplaces/

suppliers are able to benefit from the credit extended by NewDay in the form of payment for the goods or services they have agreed to sell, while the card issuers are able to benefit from any interest, fees or charges payable on the transaction.

I think it is likely that NewDay has always understood that the Mastercard scheme would be operated in accordance with evolving rules and commercial practices, and that this evolution was likely to bring in new groups of scheme participants. I think NewDay would also have appreciated that its credit card holders would, irrespective of when they entered their credit agreements, have the ability to use their credit cards to pay the same suppliers – suppliers who were accommodated under the Mastercard scheme. So I think NewDay would have contemplated, when agreeing to give Ms R her credit cards, that those cards would be used to finance purchases from whatever suppliers the scheme's changing rules and practices accommodated at the time of any given purchase. I think that included S1 and S2 at the time Ms R made her purchases from them.

In light of my conclusions above, I think there were the necessary arrangements in place between NewDay and S1 and S2 for there to be a DCS agreement between Ms R, NewDay and S1/S2 for the relevant purchases. This means NewDay would need to honour a section 75 claim brought by Ms R in respect of those purchases, so long as she meets the other conditions for making a valid claim. The prices of the goods Ms R purchased fall within the range of values allowed under section 75 of the CCA, so the purchases meet that criterion too. What is less clear in my view is whether S1 or S2 breached their contracts[4] with Ms R.

I will take each purchase in turn, but there are some general points I need to cover before I do so.

Ms R appears to have held herself out as being a business purchaser

It's notable in Ms R's communications with S1 and particularly S2, that she refers to needing the laser machines for what she describes as her business. For example, she refers to being unable to provide treatments to clients due to the machines being broken. It's also notable that AB's terms and conditions which Ms R agreed to, stated that she agreed to use the platform for business purposes only.

We've questioned Ms R about this and she says that she was, essentially, holding herself out to be a business buyer because she thought it would enable her to get more favourable treatment from the suppliers. She says the machines were for personal use which I won't go into the details about, but she also mentioned that depending on how that went she had some vague plans to perhaps make a business of it in the future.

Whatever Ms R's actual intentions were for the machines, I think she made the purchases on a business basis. I think S1 and S2 would certainly have believed that she was entering into the purchases on a business basis, as opposed to a consumer basis, based on the things she'd said and the fact she was transacting on a business to business marketplace.

This is important because it means Ms R would not benefit from the same level of protection when things went wrong, as a consumer would. I don't think it would be fair that Ms R could hold herself out as a business buyer to gain a commercial advantage, and then also claim the benefits of being a consumer when problems arose with the contract.

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[4] It hasn't been alleged that S1 or S2 misrepresented the machines to Ms R, so I have focused only on breach of contract in this decision.

What was Ms R entitled to expect from S1 and S2?

A person dealing as a consumer when purchasing goods, enjoys the protections of the Consumer Rights Act 2015 ("CRA"). Where a person does not deal as a consumer, as I think is the case here, the Sale of Goods Act 1979 ("SGA") would apply instead.

One of the relevant effects of the SGA is that it became an implied term of the contracts that S1 and S2 needed to supply Ms R with goods which were of "satisfactory quality" and fit for the purpose for which such goods were normally supplied. If the goods were broken they could not be said to be satisfactory quality or fit for purpose.

However, unlike the CRA, which makes the seller responsible for any damage which occurs to goods until they come into the physical possession of the consumer, the SGA allows a buyer and seller to come to their own agreement on who will take on the risk for damage during transit. This is important because, if it's correct that both machines were damaged during shipping, whether there has been a breach of contract by S1 or S2 will depend on the terms agreed between them and Ms R.

The purchase from S1 – was there a breach of contract?

When responding to NewDay's chargebacks in respect of this purchase, S1 argued that Ms R had entered into the contract on the basis of what it referred to as "Incoterms".

Incoterms are sets of standardised international terms on which goods can be purchased and shipped. S1 provided evidence, in the form of a contract of sale between it and Ms R, that the purchase of the first laser machine had been made on what were called "EXW" or "Ex Works" terms. Under such terms, the buyer takes all risk for damage to the goods as soon as they are made available for pick up at the seller's premises. In Ms R's case this means that any damage that occurred to the first machine after it had been packaged ready for pick-up at S1's premises in China, was her responsibility.

I've no reason to believe that the contract supplied by S1 is not genuine, and that Ms R had therefore agreed to take on the risks associated with the Ex Works terms. And I think it's most likely that the damage to the machine occurred during shipping itself, given the length of time it spent in transit and its fragile nature (containing a glass tube).

What all of this means is that although Ms R received a broken machine from S1, that was not a breach of contract by S1, because the machine was broken while it was, according to the terms agreed between Ms R and S1, at Ms R's risk. It follows that I don't think Ms R had a valid claim against NewDay under section 75 in respect of this machine.

The purchase from S2 – was there a breach of contract?

S2 also responded to the chargebacks initiated by NewDay. As part of its defence it submitted that Ms R had agreed to "DAP" or "Delivered at Place" terms. Under this set of terms any damage to the machine was S2's responsibility, up the point it was delivered to the place Ms R had specified (a local self-storage facility). This means that if the second machine was damaged between leaving S2's premises and arriving at the self-storage facility, the damage would be the responsibility of S2 and it would be in breach of contract for supplying goods which were not satisfactory quality or fit for purpose.

The damage to the second machine was disputed by S2, which said the machine in Ms R's photos could not have been the one it sent to her, and that some of the damage was unlikely to have been caused during shipping (for example, a broken cable). S2 noted that the courier company had recorded the second machine as having been delivered the day

after *Ms R complained about it, increasing its suspicions that the complaint did not relate to the machine it had shipped to her.*

Ms R has provided evidence from the courier and the self-storage company which confirms the package was delivered to the facility on 13 April 2021, which was the same day Ms R complained machine 2 was broken. This doesn't necessarily mean that Ms R opened the package that day, and the courier's tracking information states Ms R in fact signed for it at about 2pm on 14 April 2021. The courier has confirmed however, that this date and time could simply be when the storage facility logged this event on their systems, rather than it being when the event actually happened. I think this is likely to be the case, as Ms R has supplied photos of the package from which I've been able to extract the metadata showing when they were taken. This was approximately 9:40am on 14 April 2021, several hours before the courier's tracking information states she signed for it. I think on balance Ms R had received and inspected the second machine on 13 April 2021, and the courier's tracking information stating she signed for it the following afternoon must be incorrect.

Ms R has said the second machine's box had water inside, and the machine was cracked on the side and had a broken cable. I've seen photos which appear to show dampness inside the box and an obviously broken cable lying on top of a machine still wrapped in plastic packaging. I'm unable to see a crack in the photos I've viewed. S2 has said the cable could not have been broken during shipping and that they think it was broken due to "incorrect use". I'm inclined to give Ms R the benefit of the doubt here. I think the fact she reported the damage immediately indicates the machine arrived damaged, rather than being damaged due to something she did. This means there was a breach of contract as the machine was not supplied in a satisfactory state. Ms R is able to make a claim in respect of this against NewDay under section 75 of the CCA.

What remedy would Ms R be entitled to in relation to the second machine?

There are a number of different remedies which Ms R could have claimed in relation to S2's breach of contract. The remedy Ms R ultimately sought when it became apparent that S2 was unwilling to send a replacement part, was to reject the machine and receive a full refund.

Section 14 of the SGA states that the implied term that goods will be of satisfactory quality is a condition as opposed to a warranty. This means that a breach of that term is a breach of condition for which the buyer is entitled to reject the goods in question. So I think Ms R was entitled to reject the machine from S2 and receive a full refund of what she had paid for it along with the cost of shipping. She can ask the same of NewDay. I think it's also fair that Ms R is able to reclaim the customs duties she paid, as part of her claim, as this was part of the cost to her of receiving the goods.

Should NewDay have persevered with the chargebacks in relation to S1?

Earlier in this decision I said I would need to look more closely at NewDay's handling of the chargebacks in relation to S1. That is because I have been unable to conclude Ms R is entitled to redress from NewDay through section 75 of the CCA, in relation to the purchase from S1.

Chargebacks are a mechanism for resolving disputes over card payments. The system is run by the relevant card scheme – Mastercard in this case – and the scheme has set various rules concerning the chargeback process which NewDay and other card issuers and acquirers must follow. The rules cover, among other things, the types of disputes which can be pursued through the chargeback process, the evidence required to prove someone's case, and how long the parties involved have to make their submissions.

A chargeback is not guaranteed to succeed and can be challenged or defended by the other side to the dispute. Ultimately, the card scheme itself can be asked to rule on a dispute in which neither side is willing to concede, though a process called arbitration.

I would expect a card issuer like NewDay, when faced with a customer asking to dispute card payments, to consider whether chargebacks were an appropriate mechanism for recovering the funds. I would expect the card issuer to proceed with the chargebacks if this would be compliant with the card scheme rules and the chargebacks would have at least a reasonable prospect of succeeding. I would not necessarily expect the card issuer to persevere with the chargeback process (potentially to the point of asking the card scheme to make an arbitration decision) if it receives a defence from the other side to the dispute which appears to be valid.

Under the Mastercard rules which were current at the relevant time, a valid chargeback could be raised where "When delivered from the merchant, the goods arrived broken or could not be used for the intended purpose". *In terms of supporting evidence, a person looking to raise a chargeback would need to send an email, letter or a specific form* "describing…the complaint in sufficient detail to enable all parties to understand the dispute" *and documenting the following relevant matters:*

- *That the cardholder had contacted the merchant, or attempted to contact the merchant, to resolve the dispute.*
- *The merchant refused to adjust the price, repair or replace the goods or other things of value, or issue a credit.*
- *The cardholder returned the goods or informed the merchant the goods were available for pick-up.*

When Ms R attempted to dispute the transactions to S1, NewDay asked her to fill out a form to which it was possible to attach supporting evidence. On her form, Ms R said the following:

"They have not provided me with a [return] label. I have been in contact with the supplier but still, [they have not] issued me with a refund and she had not committed to refund me in the PDF is a screenshot of the complaint to AB but they said to resolve this with the seller."

Ms R did attach the screenshot to the form, which was of a complaint raised with S1 via AB's platform. It described the problem with the laser machine, what had happened in her discussions with S1, and that she was looking for a refund and to return the machine.

I think Ms R had "ticked the boxes" for NewDay to be able to attempt the chargebacks on the S1 transactions, and this is what it did.

However, S1 submitted a defence to the chargebacks raised by NewDay. Part of the defence was focused on Ms R apparently not having tried to resolve the matter with S1, or not having tried to return the machine. It appears NewDay was persuaded by these arguments as, in internal notes, it said:

"CUSTOMER FAILED TO PROVIDE EVIDENCE TO SHOW REQUEST TO RETURN GOODS TO THE MERCHANT AS SUCH CUSTOMER STILL IN POSSESSION OF THE GOODS MAKING [CHARGEBACK] INVALID…"

I think it was incorrect of NewDay to have come to this conclusion, as Ms R had attached the evidence to her initial dispute form that she had requested a return of the goods. It

appears she had further evidence as well, which NewDay could have asked for to support taking her case to the next chargeback stage (known as "pre-arbitration"). This doesn't necessarily mean NewDay should have persevered however, as they may have made the right decision for the wrong reasons.

Another part of S1's defence was that Ms R had entered into the contract on the "Ex Works" terms mentioned above and the fact the machine was damaged was therefore her responsibility. While I have not been able to find specific *mention within the Mastercard rules or other guidance documents I have seen from the card scheme, that this would be a valid defence to chargebacks of the type raised on behalf of Ms R, I think it is likely that it would represent a significant obstacle to the chargebacks succeeding if NewDay had pursued them further.*

There are certain passages in the card scheme rules and associated guidance which have led me to this conclusion. Firstly, the scheme rules say that where "proper disclosure of the conditions of the goods is made at the time of sale"*, then a chargeback will not be valid. The rules go on to say that this would cover when goods are sold on an "as is" basis. It's apparent from this that the conditions attached to a sale are relevant, and I think this would include the "Ex Works" conditions Ms R agreed to with S1. Secondly, in guidance issued by Mastercard during the COVID-19 pandemic, it noted that it would* "honor merchant terms and conditions properly disclosed to the cardholder"*. I think this reinforces the fact that the terms of the sale would be relevant to the card scheme's decision if the chargebacks had been escalated further.*

Ultimately I can't be certain what decision Mastercard would have reached if NewDay had pursued the chargebacks further, but I think there was good reason for NewDay to doubt that the chargebacks would be successful and so I don't think it would be fair in the circumstances for me to say that it acted unreasonably in declining to take them further, even if they gave the wrong reasons for doing so.

Overall Conclusions

I appreciate this has been a lengthy decision, so I have summarised my key findings below:

- *NewDay did not act unfairly or unreasonably in deciding not to pursue the chargebacks in relation to the first machine further, after receiving a defence from S1 which threw significant doubt on the prospect of the chargebacks succeeding.*

- *NewDay did not act unfairly or unreasonably in declining to honour a claim under section 75 of the CCA from Ms R in relation to the first machine. This is because Ms R had agreed to shipping terms which meant damage during shipping was her responsibility. There was no breach of contract by S1.*

- *It would have been fair and reasonable of NewDay to have honoured a claim under section 75 of the CCA from Ms R in relation to the second machine. The technical criteria for a section 75 claim had been met and the evidence suggested, on balance, that the second machine had arrived broken as well. Under the terms of Ms R's contract with S2, damage prior to delivery was the responsibility of S2, and the failure to deliver the goods in a satisfactory state was a breach of a condition which Ms R was entitled to terminate the contract for and receive a full refund including reasonable additional losses – namely the shipping and customs duties she paid."*

Having concluded, I said I was minded to direct NewDay to take the following actions to put things right:

A) *"Treat Ms R as though it had honoured a claim under section 75 of the CCA in relation to the second machine. This should involve refunding in full the amounts Ms R paid for the second machine. It would be pragmatic of NewDay to deal with this in the following way: by treating the credit card account(s) as though the temporary refunds in relation to the chargebacks had never been reversed, reimbursing any interest, fees and charges which resulted from the refunds being reversed, and correcting any negative impact on Ms R's credit file which can be attributed to the refunds being reversed.*

B) *If taking the actions in A) would have caused a credit balance to arise on Ms R's account(s) at any point, 8% simple interest per year* must be paid to her on this balance, from the date the credit balance would have arisen to the date it would have ceased.*

C) *Reimburse Ms R the amount she paid in customs duties for the second machine, adding 8% simple interest per year* calculated from the date it informed Ms R that it would not be taking the chargebacks any further for the second machine, to the date this amount is reimbursed to her."*

Responses to the provisional decision

As I've indicated already, NewDay has not responded to the provisional decision and has not been in contact with me to, for example, ask for additional time.

Ms R has, however, responded to the provisional decision. She didn't agree with some of the things I'd said and made the following points:

- She had applied for credit with NewDay as a consumer, not a business. When she opened her account with AB she had done so as an individual rather than a business, and she had purchased both laser machines as a consumer, not a business.

- Anyone could open an account with AB, not just businesses. No proof of being a business was requested by AB and the machines had been sent to her under her own name rather than a business brand.

- She accepted that she had referred to needing the machines for business purposes when communicating with the suppliers, but this had been because she wasn't getting any help from them and she believed that if they thought there was a prospect of further sales they'd be more helpful.

- She didn't recognise the contract with S1 which said delivery was on an Ex Works basis, and she hadn't agreed to it. Nobody had mentioned these terms to her and she believed they had been added after the sale. She would never have accepted such terms had she known about them.

- She had been assured by NewDay the chargeback was irreversible for the first machine. She had asked for a recording of the phone call but this had not been provided.

Ms R also gave some further detail of the personal circumstances which had led to her wanting to buy a laser machine, which I won't detail here but which she noted meant she'd never have agreed to Ex Works terms.

In the last couple of days Ms R has also provided screenshots from two websites which say

that anyone (i.e. not just businesses) can sign up to an account on AB.

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.

NewDay hasn't responded to the provisional decision so, if it does disagree with the provisional decision, I am not aware of the reasons why.

Ms R's disagreement with my provisional decision is on three essential points. Firstly, Ms R maintains that she was dealing as a consumer when purchasing the machines from S1 and S2. Secondly, she states that the contract which said she was agreeing to the delivery from S1 on an Ex Works basis, was not something she had seen or agreed to. Thirdly, she maintains NewDay influenced her into buying the second machine because one of its staff incorrectly told her the chargeback in relation to the first machine was permanent.

I've carefully considered Ms R's points and, having done so, I would first of all refer back to a finding I made in my provisional decision, which was that whatever Ms R's underlying intentions were with regard to the machines and the purchases, she had held herself out to S1 and S2 as being a business purchaser.

This was important, because I considered Ms R couldn't claim the protection of the Consumer Rights Act 2015 if she held herself out as being a business buyer in order to secure better treatment. I think Ms R does accept that she gave that impression to the suppliers. I acknowledge her reasons for doing so but I remain of the view that it means she should be treated as a business or trader for the purposes of her transactions with S1 and S2, as opposed to a consumer.

I've thought about Ms R's point that AB allows anyone to sign up to its platform. That may be the case. But its terms, which anyone signing up must agree to, do state that its platform must only be used for business purposes. S1 and S2 would have been aware of this and it would have added to the impression that Ms R was a business customer.

Regarding Ms R's point that she'd not seen or agreed to the Ex Works terms, it appears NewDay sent Ms R a copy of the terms which had been sent to them by AB as part of its defence to the chargebacks in relation to the payments to S1. It was attached to a letter which said NewDay couldn't help further.

Ms R did not, to my knowledge, question the terms at that point or say she had not seen or agreed to them. On the balance of probabilities, I think it's more likely that Ms R saw the terms of the contract with S1 during the process of making her purchase, although she may not recall doing so now and may not have appreciated the significance of the "trade terms" being "EXW" on the contract. I don't think it's likely these terms were inserted later to prevent Ms R from being able to enforce her rights in respect of faulty goods. S1 was still willing to work with her to find a solution at the point the chargebacks were made and after, which isn't what I'd have expected to see if it had falsified documents to frustrate her attempts to seek redress.

I've also considered Ms R's point about the conversation she had with NewDay on the phone. She insists she was told the refunds for the payments to S1 would not be reversed. There appears to be no copy of the call recording available, so it's not possible for me to know what was said. Ms R did electronically sign declarations however which acknowledged that if AB provided "evidence showing the transaction to be valid the credit to your account could be reversed", and NewDay's notes, although rather sparse, don't seem to indicate that

a conversation of this type occurred.

However, even if I been able to conclude that NewDay *did* give Ms R incorrect information on this phone call, the impact of that incorrect information was that Ms R went out and bought the second machine. The most I could have directed NewDay to do in the circumstances would have been to refund the amounts Ms R had paid for the second machine as a result. I am already doing that in this decision, albeit for different reasons, so in my view the content of the phone call doesn't make a significant difference to the outcome of this complaint.

I thank Ms R for her submissions, however my findings remain as they were in my provisional decision quoted above.

My final decision

For the reasons explained in this final decision and in the quoted extracts from my provisional decision, which should be treated as being a part of this final decision, I uphold Ms R's complaint in part and direct NewDay Ltd to take the following actions:

A) Treat Ms R as though it had honoured a claim under section 75 of the CCA in relation to the second machine. This should involve refunding in full the amounts Ms R paid for the second machine. It would be pragmatic of NewDay to deal with this in the following way: by treating the credit card account(s) as though the temporary refunds in relation to the chargebacks had never been reversed, reimbursing any interest, fees and charges which resulted from the refunds being reversed, and correcting any negative impact on Ms R's credit file which can be attributed to the refunds being reversed.

B) If taking the actions in A) would have caused a credit balance to arise on Ms R's account(s) at any point, 8% simple interest per year* must be paid to her on this balance, from the date the credit balance would have arisen to the date it would have ceased.

C) Reimburse Ms R the amount she paid in customs duties for the second machine, adding 8% simple interest per year* calculated from the date it informed Ms R that it would not be taking the chargebacks any further for the second machine, to the date this amount is reimbursed to her.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 14 July 2023.

Will Culley
Ombudsman