

## **The complaint**

Mr S says NewDay Limited, has treated him unfairly in relation to a transaction on his credit card which paid for flights for him and others.

## **What happened**

In February 2021 Mr S used his NewDay credit card to make a payment for flight tickets for him and his family to fly internationally in late July 2021. He bought the tickets from a company (which I'll call 'Firm T') which arranged the flights with a separate airline ('the Airline'). Due to the Pandemic Mr S says he contacted Firm T to move his flights in early July 2021. He points to emails and phone records to support this. He says that he wanted to move the flights to 2022 but he was told he couldn't do that because flight itineraries for 2022 hadn't been published at that point by the Airline. Mr S says he agreed with Firm T to place some 'placeholder' bookings later in 2021 which, when the 2022 flights were published, would then be moved to the applicable dates in 2022.

Mr S sent an email on 15 July 2021 to Firm T and asked it to re-book his family's flights for 9 July to 11 August 2022 as '*they'd discussed*'. He also provided passport copies to facilitate the booking change. On 27 September 2022, Mr S emailed Firm T again to slightly revise his requested travel dates to 4 July to 3 August 2022.

On 2 October 2021, Mr S and his family were classed as 'no shows' by the airline on the booking that Mr S says was a placeholder booking. He says he doesn't think this is fair as this isn't what he'd agreed with Firm T. He also told our service that he and his family had no intention of travelling in October 2021-that was just a placeholder. So he complained to Firm T but without success.

So he complained to NewDay who raised a chargeback, but which was defended by Firm T, so NewDay didn't take it forward. And latterly NewDay has said the pre-requisite conditions for a Section 75 claim under the Consumer Credit Act 1974 are not in place. So it hasn't refunded Mr S. Feeling this to be unfair Mr S has brought his complaint to this Service.

Our investigator felt NewDay should refund Mr S the money paid in full. In response NewDay has reiterated its position that the pre-requisite requirement for a successful claim under S75 are not met. It said "*that as (Firm T) is a third party, it would be considered a break in the chain and not covered under Section 75.*" NewDay chose not to comment on Mr S' arguments about the placeholder booking.

## **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 S used his NewDay credit card to pay Firm T for the flights. This means that Section 75 of the Consumer Credit Act ('s.75') can apply to the transaction. This provides that where Mr S has a claim against a supplier of goods or services (in this case Firm T and/or the Airline) in respect of a misrepresentation or breach of contract he will have a 'like claim' against NewDay as creditor subject to the provisions of s.75.

This decision is solely about NewDay in relation to whether it did what it should have, and whether it treated Mr S fairly in consideration of his dispute with Firm T. This decision isn't directly about either the Airline or Firm T, neither of which are within this Service's jurisdiction for complaints regarding chargeback and s.75.

### *Section 75*

Before deciding on whether there is breach or misrepresentation here by Firm T there are some requirements set out in s.75 which have to be met before these issues can be considered. One of these tests is around financial limits and having considered these I think that Mr S's claim meets the financial limits criteria as it was above the minimum threshold and below the maximum threshold.

S.75 also requires there must be a Debtor-Creditor-Supplier arrangement in place (often referred to as a 'DCS arrangement'). NewDay has noted that there is a third party here (Firm T) which means that there isn't such a Debtor Creditor Supplier arrangement in place in its view. This is a very disappointing argument from NewDay bearing in mind that since the case of the Office of Fair Trading v Lloyds & others [2006] ("the OFT case") it has been clear that the mere presence of another party doesn't necessarily mean the DCS arrangement isn't in place.

Furthermore the evidence makes clear that there are two contracts in play here. There is the contract Mr S has with Firm T to provide booking services of flights which is central to this complaint. And then Mr S has a contract with the airline for the provision of flights. Mr S isn't complaining about flights he never boarded. He's complaining about the service of booking and amending the tickets that Firm T provides. And Firm T's terms and conditions make clear that those booking with it have a contract with Firm T and that "*we facilitate bookings*" and it also says "*To request a change of date to your booking please contact our call centre.*" So clearly in relation to the service Firm T provides of booking, facilitating, and amending flights there is the Debtor (Mr S), the Creditor (NewDay) and the Supplier of this service (Firm T).

So I'm satisfied the DCS arrangement is in place and that NewDay can be held liable under S75 for any breach of contract or misrepresentation by Firm T as a 'like claim'. NewDay's comments are far from persuasive.

### *The evidence I have relied upon*

Mr S has provided phone records showing he talked with Firm T on the 8 July 2021 and 12 July 2021. He has also provided an email he sent to a named individual at Firm T dated 15

July 2021 which states “*as previously agreed*” to book for 2022. He’s also provided later emails showing that Firm T has told him that its representative with whom Mr S names as being the person he had spoken to, no longer worked for Firm T. Mr S has also provided detailed testimony as to what happened and when. He’s also provided postal records of contact he made to Firm T in terms of the evidence of Firm T receiving his post that he sent it. Mr S has been consistent and detailed in his testimony. I find it persuasive.

NewDay has not provided any evidence to counter what Mr S has said in terms of what happened when Mr S spoke with the named individual at Firm T. And it hasn’t provided any persuasive arguments on what happened in these calls and emails, despite having had opportunities to do so. I note Firm T hasn’t provided persuasive comment on what Mr S says happened in his conversations with the representative of Firm T. NewDay has chosen not to provide information on the facts of the matter when it received the Investigator’s assessment. It also chose to provide no legal analysis of the DCS issue, further evidence of what happened here or even any significant arguments on the matter after the assessment of the investigator. It has done little to properly consider S75 and its related obligations properly to my mind.

Considering Mr S significant evidence both in terms of testimony and supporting contemporaneous evidence and NewDay’s unpersuasive position and negligible arguments on the matter, on balance, I’m satisfied Mr S spoke to Firm T and it arranged such ‘placeholder’ booking with the Airline, and this was based on what Firm T’s representative told him including that he could later move it to 2022. So I’m satisfied that Firm T breached the agreement Mr S had with it by not making the booking for 2022 when he agreed to the placeholder booking with it in July 2021 and from then on when it didn’t alter the placeholder booking as he subsequently requested.

It appears that Firm T decided not to liaise with Mr S from July 2021 onwards or honour Mr S’ agreement to book for 2022 even though it received his emails, correspondence and calls and had time to do so (the placeholder booking was October 2021). So it seems likely that what he was told on that call wasn’t in line with Firm T’s processes. So, on balance, I’m satisfied he reasonably relied on misrepresentations by Firm T’s representative when booking for October 2021 and was entitled to reasonably do so based on what he was told and that the representative being a legitimate representative of Firm T. Accordingly I’m satisfied that NewDay should be liable for a like claim under S75 and it should redress the matter accordingly.

NewDay has not properly engaged with this matter throughout this case. As such it isn’t clear what Firm T should have done when Mr S’ flights became unavailable in July 2021 (they didn’t take place). But as he was treated as a ‘no show’ for the flights he booked as a placeholder (and thus has lost the value of them due to this misrepresentation and because Firm T didn’t address this misrepresentation/breach of agreed terms between July and October 2021) it is my decision that it is fair that he is refunded the amount he paid originally for these tickets. And that NewDay pays interest, as he’s been without these funds since the point it should have properly addressed his S75 claim. Mr S was in regular contact with Firm T through a number of different means and it has not engaged with him. So all the failings here flow from the misrepresentation and breach that happened here by Firm T’s

representative and how Firm T treated Mr S from then. And under S75 NewDay is equally liable to this 'like claim'.

Mr S has made arguments about the amounts he's had to pay on his account with NewDay during this process. Mr S has always had the option of paying more than the minimum amount and clearing the amount owed. Mr S has always been liable for paying a monthly amount and just because NewDay has a like claim against it doesn't mean it's done anything wrong in asking Mr S to make his payments on his outstanding balance. How Mr S manages his account sits with him.

### **Putting things right**

NewDay must refund £2,021.46 to Mr S along with 8% simple interest from the date he asked it to consider his Section 75 claim (15 December 2021) to the date of settlement.

### **My final decision**

For the reasons set out above, I uphold the complaint against NewDay Limited. It should pay Mr S as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 28 November 2023.

Rod Glyn-Thomas  
**Ombudsman**