

The complaint

Mr G complains NewDay Limited has not met its obligations in regard to a transaction he made on his credit card to have an extension and associated works.

What happened

In November 2022 Mr G used his NewDay credit card to pay £1000 to an entity I'll call 'SDW'. He later made bank transfers to an individual I'll call 'CT' for a total of £21,000. Mr G says he has a contract for kitchen and kitchen extension and points to text messages with someone called "Mick" as evidence of the contract. The undated text message conversation says:

Mr G *"So that's all the kitchen and kitchen extension finished so we can just paint it for 30k?"*
Mick *"31 with floor tiles yes" "got to be careful floor tiles are through the roof"*
Mr G *"30 if you cannot match the tiles we would go for wood, and I will provide the under floor heating kit?"*
Mick *"lol your (sic) a hard negotiator (thumbs up emoji)"*

Mr G has said in an email to this service:

"We agreed the scope of works and price by text. Mick confirmed he was now working as (SDW), with his partner, and wanted all payments to go through them. A £1000 deposit was made to (SDW) using my Credit Card, and the balance stage payments made direct to (CT), the listed owner of (SDW). My contract was therefore with (SDW). Unfortunately, the standard of work is unacceptable, changes to the specification have been made without my agreement and I have paid directly for some items just to get the job finished but work still remains outstanding." "My case remains I have a contract with (SDW) as discussed and agreed with their agent, Mick the Builder. All payments have been made to (SDW) as requested by Mick, their employee/agent/representative. As work is still outstanding and damage caused by the builders while on site needs to be rectified, I am looking to NewDay to pay for this as the have joint liability and I am unable to obtain any response or assistance from Mick/(SDW)."

Mr G says there are a number of outstanding issues including damage to existing driveway kerbs, light fitting holes are too big for the fittings, misaligned floor levels, end window size is incorrect and not central and garden flagstones have been used instead of coping stones. So once he couldn't get any further with Mick/SDW he took his complaint to NewDay.

NewDay considered his dispute and didn't agree to refund Mr G. It pointed to a number of issues including no clear contract as to what was to be done, who Mr G was contracting with, that part of the evidence Mr G provided showed that Mick was willing to return to address issues that Mr G was pointing to, lack of clarity as to what the payments were for and why to different parties and no persuasive evidence of a breach of contract or misrepresentation. So Mr G brought his complaint to this service.

Our Investigator considered the matter and felt that NewDay had treated Mr G fairly in its reasons for not refunding him or taking further action. But Mr G didn't agree so this decision came to me to decide.

In May 2024 I issued a provisional decision setting out my reasons why I thought NewDay had treated Mr G fairly. Both parties have acknowledged receipt of my provisional 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.

I've considered both parties responses and I'm not persuaded to change my position as articulated in my provisional decision which I shall repeat now. I'll deal with the comments of the parties in response to my provisional decision in the paragraph headed 'further arguments.'

I should make it very clear that this decision is not about SDW, CT or Mick the builder. This is because these parties are not within the jurisdiction of this service for these types of complaints. This decision is solely about what NewDay did or didn't do in relation to its obligations in relation to Mr G. And it should be remembered that NewDay is only involved in this issue as a result of its managing Mr G's credit card account which he used to make this transaction to SDW, it wasn't the party contracted to do the work on the house. However it does have obligations here and in essence the tests I must consider in relation to NewDay are whether the transaction itself was made correctly and whether NewDay's position in regard to Chargeback and Mr G's Section 75 claim to it under the Consumer Credit Act 1974 was fair.

Mr G doesn't contest that he made the transaction originally, or that it was applied incorrectly to his account. Mr G accepts he authorised and consented to the transaction being made at the time it was made. I've considered the transaction itself and I'm satisfied NewDay didn't do anything wrong in processing it or allocating it to his account.

could NewDay challenge the transaction through a chargeback?

In certain circumstances, when a cardholder has a dispute about a transaction, as Mr G does here, NewDay can attempt to go through the chargeback process. Chargeback isn't a right, but this Service does consider it good practice to raise a chargeback, if within the time limits and there is a reasonable prospect of success. I don't think NewDay could've challenged the payments on the basis Mr G didn't properly authorise the transaction, given what I've already set out.

Chargeback would only be able, if successful, to refund the £1000 paid on Mr G's card. It seems clear that Mr G seeks a remedy considerably in excess of this bearing in mind the issues he points to with the works done. So I don't think NewDay did anything wrong by considering this dispute under the Consumer Credit Act 1974. And in any event, for the same broad reasons I'll now explain I don't think such a chargeback would have been successful. So having considered the relative positions of the parties and the scheme rules and what we know now, I'm not persuaded Mr G has lost out due to NewDay not taking the matter further under chargeback.

how about the Consumer Credit Act 1974?

Section 75 of the CCA says:

(1) 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.

(2) Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under subsection (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor.

(3) Subsection (1) does not apply to a claim—

(a) under a non-commercial agreement,

(b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000”

(4) This section applies notwithstanding that the debtor, in entering into the transaction, exceeded the credit limit or otherwise contravened any term of the agreement.

(5) In an action brought against the creditor under subsection (1) he shall be entitled, in accordance with rules of court, to have the supplier made a party to the proceedings.”

It is clear that Mr G's case has a substantial number of challenging issues for NewDay to have considered. Although NewDay is obliged to consider Mr G's s75 claim to it fairly, it must be remembered NewDay is liable to a 'like claim' as to that Mr G has against the supplier here. So Mr G has responsibility to make out his case at least to some extent to NewDay in a like manner as to how he would have to in court against the supplier. NewDay's only obligation here is to consider his claim fairly, it is not obliged to build the case against itself on behalf of Mr G. So Mr G has to evidence his case to at least such a degree that NewDay can consider the matter fairly.

Mr G has done little to explain who the supplier is here and this is important as S75 enables NewDay to make the supplier a party to the claim. It also has the right to be indemnified by the supplier for any remedy it provides to Mr G. In short if I were to find against NewDay and direct to pay Mr G, S75 enables it to be able to recover that amount from the supplier. So clarity around the supplier is important here.

Who is the supplier?

The 'contract' Mr G points by way of the text message conversation quoted is with Mick. Mr G paid SDW using his credit card and paid CT by way of bank transfer. Mr G has said these parties are one and the same, but I note none are limited companies. I've seen no evidence of a partnership agreement here but Mr G has said that Mick/SDW/CT are one and the same. I've seen evidence which suggests that SDW and Mick are separate sole traders. I appreciate Mr G says that Mick joined SDW but I've not seen any persuasive evidence of them being a partnership. Bearing in mind NewDay is entitled to be indemnified for any such claim by Mr G against the supplier here I don't think it has treated Mr G unfairly by asking him to show who the supplier is. Mr G hasn't been able to any paperwork at all from the supplier here. As I've described this is a 'like claim' so if Mr G were to go to a court to raise a claim here I'm not persuaded he's got sufficient evidence to show a court who he contracted with and how to contact them in order to bring them before a court. Mr G doesn't seem to have anything but a name of one party (CT) and the phone details of another (Mick) who maybe partners but could be in some form of other working relationship or indeed employees of another currently unknown entity. So I don't think NewDay has treated Mr G unfairly by pointing to this significant issue and asking for more evidence on the matter before it can uphold his claim.

DCS arrangement

S75 sets out that there is requirement that there be a Debtor Creditor Supplier (DCS for short) arrangement in place. There clearly is a significant problem here in that the only

payment that NewDay financed was paid to SDW but the only evidence of a contract is with Mick. And Mr G hasn't shown how Mick and SDW and CT are linked. Section 187 of the CCA sets out that if one party is paid but a separate party is responsible for the fulfilment of the contract then Mr G needs to show that they are 'Associates' as per the strict definition set out in the CCA. For example (and in very broad terms) this means there is a common director between the legal entities (not shown here), blood relatives (not shown here), shared controllers of the entities (not shown here). I've researched the individuals named in this case and none are directors of limited companies. Other than profiles on a well-known website for finding traders (where they are shown to be separate sole traders) these individuals have negligible internet presence. So I'm not satisfied that Mr G has done enough to show that there is a DCS arrangement in place here. And if it cannot be shown that there is a DCS arrangement in place a S75 claim cannot be successful in any event.

The contract

Mr G is entirely correct in stating that a contract can be verbal. But just because that can be the case it doesn't mean it is clear what the terms of this contract was. I've seen insufficient evidence of what the contract was to even begin to try to surmise its terms. It is not clear who was responsible for the design of the works, what that design was, who was responsible for the supply of the goods, and what those goods were nor what the terms of the contract were in relation to the works to be done. For example Mr G says the window was not central, well it maybe that the contract said it wasn't to be central, or that Mr G was responsible for the design or that those doing the work were responsible for the measurements or Mr G was. So it is very unclear here what caused the window to not be central or even if that is a breach of the contract. And that is one example amongst a significant number of issues regarding the terms of the contract. Bearing in mind Mr G hasn't even set out the broadest of terms of the agreed contract I cannot conclude that NewDay has treated him unfairly by asking him for this evidence so it could then try to ascertain if the works had been done with reasonable care and skill and the goods provided were of satisfactory quality.

Breach of contract

In order for NewDay to have a fair opportunity to establish whether there was a breach of contract here it has to have some idea of the terms of the contract. In such works there are generally three elements to such works, the service of the design and measure up, the supply of the goods/materials installed and the service of the installation/building/fitting of those materials/goods. Mr G hasn't described what was agreed in these three elements nor who was responsible for what and nor what the agreed terms were to each of those elements. So I don't think NewDay has done anything wrong by trying to establish these facts. However Mr G has provided very little to help NewDay on this point either.

Misrepresentation

Mr G hasn't described what was said during these events which was a false statement of fact which he reasonably relied upon, which turned out to be untrue and which led to his detriment. It's clear that Mr G has provided very little description of what was said and what was agreed and particularly what was untrue which led to detriment. So I don't think NewDay treated him unfairly by not considering there was a material misrepresentation here.

Variation of contract

Not only is what the contract was very unclear but it is clear whatever the contract stated there was an attempt to vary it during the course of the works. Mr G has provided text messages which show that there was discussion of a price reduction and this appears to have been close to agreement. However other than the price reduction it is unclear what was

changed about the contract other than it was to be changed. It's also clear that Mr G was involved in the negotiation of the price change but other than reference to "*jobs not done as promised*" and "*the works I need to fix*" it is very unclear as to what terms of the contract were varied. So not only do we not know the terms of the original contract we don't know what the varied terms were and whether they were actually agreed to be varied or not. So I don't think NewDay has anything wrong by pointing to this issue.

Non-compliance with the contract

The text messages show that Mr G was offered a price reduction but it's not clear whether he accepted it. What is clear is that the payments Mr G has evidenced he made don't appear to add up to the price reduced amount. So either Mr G didn't accept the price reduction variation in contract or didn't pay the agreed amount. As there is no evidence of further negotiation I'm left with the only conclusion that can be reached that Mr G didn't pay the full amount nor the offered price reduction amount. So it is clear Mr G is in breach of contract for paying whatever the required amount was. As we've no discernible terms of the contract then it is unclear what the consequence of this. But I can appreciate why suppliers providing such services as is the case here might wish to stop working when not being paid. Just because Mr G didn't pay doesn't mean that Mick/SDW/CT hadn't breached the contract as well. But without at least the basic framework of the terms agreed it means NewDay has negligible opportunity to consider and apply implied terms such as those in the Consumer Rights Act 2015 (CRA) and other legislation.

remedy

Under the CRA there are described a number of options for different types of remedy in the circumstance of breaches of contract. One of these is price reduction. It seems Mr G has withheld £5000 of payment (and possibly more). I'm not persuaded that Mr G has demonstrated any breach of contract here. However I've considered the issues he's pointed to as outstanding or not done. Bearing in mind some of these are not substantial to my mind in terms of the cost to remedy, such as the coping stones and the light fittings, such a price reduction as the amount Mr G has withheld could potentially be a fair and reasonable price reduction. And so it could well be possible that had NewDay considered such a price reduction to be fair and reasonable on the (minimal) facts put to it. And similarly I could be so minded. So even if Mr G was to be able to address every single substantial flaw in his claim with sufficiently persuasive evidence at any point I might decide that the price reduction/amount withheld is a fair solution to this complaint leaving NewDay nothing further to do.

Observations

Mr G's claim to NewDay to my mind suffers from substantial evidential flaws. I should note that this service is designed to be a quick, informal dispute resolution service. It is not designed to summon witness statements, test evidence through cross examination in an adversarial manner such as the courts do. Bearing in mind the deficiencies in Mr G's case such powers that courts have to compel witnesses and cross examine them to construe terms of the verbal contract that Mr G says was made, it would appear that such legal process maybe a better avenue for considering this dispute between Mr G and the parties he's named. And as I've described although NewDay has to consider his claim fairly it isn't obliged to construct the entire case against itself when doing so. And crucially for me to uphold this complaint I'd have to be satisfied NewDay has done something wrong. I'm far from establishing this here.

Further arguments

NewDay has accepted my provisional decision and said it has nothing further to add. Mr G, despite my setting out the plethora of issues with his claim, has simply asked a question about the evidence relied upon in relation to the payments he made. I can confirm that I've seen the appropriate evidence about the payments made. However Mr G's two sentences of response to my provisional decision fall short of supplying all the missing evidence I've pointed to that is needed to begin to start to piece together a cogent understanding of what happened here, by a substantial margin. So I see no reason to deviate from my findings in my provisional decision.

Having considered all of Mr G's arguments and evidence provided it's my decision that he's not lost out because of how NewDay treated him. I don't think there was a breach of contract or material misrepresentation it can be fairly held responsible for. And I don't think Mr G lost out due to NewDay's approach to chargeback either.

My final decision

I do not uphold this complaint against NewDay Limited. It has nothing further to do with this matter.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 10 July 2024.

Rod Glyn-Thomas
Ombudsman