

complaint

Mr E complains about a holiday product ('Product B') he bought using a credit card from NewDay Ltd. He brought his complaint to it under Section 75 of the Consumer Credit Act 1974.

background

Mr E says he bought Product B in October 2010 for £8,000 but it was mis-sold. In summary, Mr E says

- he was promised £5,750 cashback which he didn't get;
- the selection of resorts was limited;
- the discounts were not as good as he was led to believe; and
- he could've got cheaper holidays elsewhere

Our adjudicator explained that NewDay was responsible for the actions of the party Mr E had paid using his credit card – in this case the marketer of Product B.

Our adjudicator thought that the marketer had misrepresented the cashback. He recommended that NewDay refund Mr E minus the cashback he had received.

NewDay say it isn't responsible for paying compensation because the alleged misrepresentation has been made by a third party - not the supplier. And it isn't responsible for the actions of the supplier either because it didn't directly take the credit card payment.

I told Mr E that as he had taken three holidays with Product B it wasn't fair for him to get a full refund if I upheld the complaint. I told him what I thought a fair deduction would be. Mr E disagrees with this. In summary, he says that the membership didn't benefit him, the availability was poor and the discounts were not what he was expecting.

my findings

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

NewDay says it isn't responsible for what has gone wrong with Product B because of how Mr E paid for it with his credit card. I don't think that NewDay is responsible for the actions of the supplier of the membership– as it didn't directly receive his credit card payment. But, with Section 75 in mind I think it is responsible for the actions of the marketer which took his payment.

In this case I think the marketer falsely promised Mr E he would get £5,750 cashback. Mr E is insistent that he was promised the full amount of cashback and I can see from credible sales notes this figure has been written down as part of the deal – almost like it was a guaranteed discount. There didn't appear to be any doubt that Mr E would get this amount. And I can see that he received significantly less. Mr E says he would never have bought Product B if he knew this and I believe him as it really increases the overall cost.

As Product B was misrepresented Mr E should be put in a position as if he had never entered the contract. So he should get a refund, minus the cashback he has received. And he should give up the membership – which he has said he is happy to do. He says he hasn't renewed the membership but if he is currently entitled to any membership benefits then NewDay Ltd should take these.

Mr E says he took three holidays with the product. So I didn't think it's very fair that he gets a full refund. I know that Mr E is unhappy with the availability of resorts on offer and the discounts. But he still chose to confirm the bookings at those resorts and use the deals available on not only one but three occasions. He also continued to renew his membership. So I think he did find the membership useful to some extent. I don't think it would be fair to ignore this even if he then found better deals were available elsewhere.

Product B is a rolling membership so an appropriate pro rata refund was not straightforward to calculate. So I asked the adjudicator to find out the cheapest prices for three similar holidays and adjusted it a little for inflation. Mr E had to pay for flights so our adjudicator looked at the cost of accommodation only. I was happy with the rounded figure of £868 which our adjudicator came to – I think it is fair despite Mr E's recent comments. It is now up to him to decide if he wants to accept my decision.

My final decision

My final decision is to direct NewDay Ltd to:

- refund Mr E the cost of Product B (£8,000) after deducting £1,388.06 representing the cashback he received, and £868 representing the use he had of the product;
- pay interest at 8% simple per year on this figure from the date Mr E bought the product to the date of settlement.

If NewDay Ltd considers is legally obliged to deduct tax from my interest award it should provide Mr E with a certificate of tax deduction so he may claim a refund if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 8 March 2016.

Mark Lancod
ombudsman