

## **The complaint**

Mr L complains that Marks & Spencer Financial Services Plc won't reimburse money he lost when he fell victim to a scam.

## **What happened**

Mr L says after completion of an application to obtain bitcoins he was approached by a firm providing financial services. I'll refer to the firm as 'R'. Mr L informed R that he was an inexperienced investor. R assured Mr L that he would have a financial advisor who would guide him with his investment and teach him about the financial markets. Mr L says he was persuaded into thinking R was a reputable firm. Across September and October 2019, Mr L made several payments towards what he believed was a legitimate investment. Relevant to this complaint are two payments totalling £3,202.50 that were made in September 2019 using his M&S Mastercard credit card. These payments were made to a cryptocurrency exchange called 'T'.

When Mr L realised he'd likely fallen victim to a scam he asked M&S to cancel the transactions, raise a chargeback claim and credit his account. He said he was not a party to the contract and no service or investment had been provided to him. He told M&S that he believes R is purporting to be an investment firm but are in fact a scam. For these reasons he doesn't think it can be said that a service was provided, or that an investment was made. Mr L said he was manipulated into investing into the trading platform and had been prevented from withdrawing the money he'd invested. He also told M&S that R had provided his personal details to T and purchased cryptocurrency in his name without his approval. He also raised points about M&S being jointly and severally liable for a breach of contract or misrepresentation by the supplier.

M&S explained due to the nature of the transactions there were no chargeback rights available under Mastercard's scheme rules. And the criteria required to establish a valid claim under section 75 of the Consumer Credit Act 1974 had not been met. Mr L complained to M&S. And whilst it sympathised with the situation Mr L found himself in, it maintained its position and said it was unable to agree with his request for a refund.

Unhappy with its response Mr L referred his complaint to our service. One of our investigators considered the complaint but didn't recommend it should be upheld. In summary she didn't think M&S had acted unfairly when concluding Mr L didn't have a valid chargeback or section 75 claim. Mr L disagrees and has asked for an ombudsman to review his 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.

Having done so, I've reached the same outcome as the investigator, for broadly the same reasons. I'll explain why.

Firstly, I'm sorry to hear that Mr L has been the victim of a cruel scam. Understandably this has impacted him, both personally and financially. So I appreciate why he feels strongly about what has happened. I note he complains that R used his personal details to open an account and purchase cryptocurrency with T; used bullying, manipulation and scare tactics to draw money from investors; and believes it to have violated many regulatory rules. I know he would like R to be investigated and fined accordingly. But I want to be clear that my decision here only concerns the actions of M&S and whether it acted fairly and reasonably when declining Mr L's reimbursement claim.

### *Chargeback*

Chargeback is a voluntary scheme. M&S are bound by the card scheme provider's rules which in this case is Mastercard. It is Mastercard – not M&S, who will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Mastercard's arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. M&S) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.

Our service has clarified this matter with Mastercard directly, it explained that if a cardholder authorised and engaged in a transaction with the intent to participate in gambling, investment or similar services, then cardholder-dispute chargeback rights are restricted regardless of whether the activity was illegal or brand damaging. It went on to explain that issuers have no chargeback rights related to the use of these chips or value, unspent chips, or withdrawal of such value, or on any winnings, gains or losses resulting from the use of such chips or value. In short, Mastercard consider the purpose of the Mastercard transaction to load funds into the gambling or investment account and not what activities are subsequently done with the funds.

However, there is limited protection for payments of this nature under the scheme if it can be evidenced that the merchant didn't make available on its platform funds transferred to it. But this was not the nature of Mr L's claim. His claim was that he'd fallen victim to a scam and was unable to withdraw his funds.

I appreciate Mr L feels that both the investigator and M&S have failed to understand the crux of his claim – which is that he didn't receive the services he'd paid for. He has argued that R were purporting to be an investment firm. He provides evidence of a warning that was published by the Financial Conduct Authority (FCA) which states that R is not allowed to provide financial services in the UK. He believes this supports that there was no real trading platform and no actual investment was ever provided to him. So R never 'made available' his funds for trading purposes nor did they provide him with any guidance or education about the financial markets as promised. I'm sympathetic to Mr L's situation, but ultimately alleging that there was no real investment is saying that R was operating a scam. And this isn't something that the Mastercard chargeback scheme provides a dispute resolution process for.

So, based on the above I don't think that M&S acted unfairly or unreasonably in reaching the conclusion that Mr L's claim didn't have a reasonable prospect of succeeding and consequentially deciding not to raise a chargeback claim.

## *Section 75 of the Consumer Credit Act 1974*

Section 75 gives a debtor the right to pursue a 'like claim' for a breach of contract and/or misrepresentation against a creditor as they would have against the supplier of goods or services. For a section 75 claim to apply there are a number of criteria that need to be met, one of which is a valid debtor-creditor-supplier (DCS) agreement between the parties.

I've seen a copy of Mr L's credit card statement which shows two payments totalling £3,202.50. Mr L was therefore responsible for repaying the amount owed to his credit card provider and so he is the 'debtor'. As Mr L's M&S credit card was used to make these payments, M&S was the 'creditor'. And from everything I've seen it is clear R was the 'supplier'. However, the payments Mr L disputes weren't made to R – they were made to T.

For Mr L's claim to be covered under the joint liability provision of the Act I would need to see evidence that would satisfy me that T were a party to the contract between Mr L and R. There could still be a DCS agreement in place if there was a pre-existing arrangement between T and R and that they were linked such that they were "associates" as defined by section 184 of the Consumer Credit Act (CCA).

I appreciate Mr L has shared an email from R providing him with login details for T, which he strongly believes establishes and evidences a link between T and R. And whilst I understand this may show that T and R were involved in some way, it isn't enough for me to conclude that the two firms were linked as associates as required by the CCA. The email also doesn't explain what role, if any, T played in the contractual agreement between Mr L and R.

As I've not seen sufficient evidence linking T to the supplier – R, Mr L doesn't have the required DCS agreement in place to make a section 75 claim.

Mr L's submissions are not entirely clear on how the events unfolded. But what I consider has happened here from what I've seen is that R tricked Mr L into making payments to a cryptocurrency exchange, T.

T didn't defraud Mr L nor steal his money and it did not pass it onto a third party without his consent. It seems to me that T simply did what was asked of it; in return for Mr L's Mastercard payments, it exchanged his payment for cryptocurrency and sent it to the wallet details it had been provided with. So even if I were to consider T as the 'supplier', as it did nothing wrong, as appears to be the case, there could not reasonably be a successful 'like claim' against M&S.

In short, a claim against T would fail as it appears it did nothing wrong and a claim against R would fail as there is no DCS agreement. So, as with the chargeback issue above, I can see no viable grounds under section 75 for upholding the complaint. So it follows that I don't think M&S acted unfairly in declining Mr L's claim.

## *Intervention*

It is common ground that the disputed payments were 'authorised' by Mr L for the purposes of the Payment Services Regulations 2017 (PSRs). This is because they were made by Mr L using the legitimate security credentials provided to him by M&S. These must be regarded as 'authorised payments' even though Mr L feels he was the victim of a scam and R had tricked him into making the payments. So, although he did not intend the money to go to scammers, under the PSRs, and under the terms and conditions of his account, Mr L is presumed liable for the loss in the first instance.

Nevertheless, M&S does have a duty to protect customers against the risk of financial loss due to fraud. So for completeness I've also thought about whether I think M&S could've reasonably done anything more to prevent Mr L's loss at the time the payments were processed. And I don't think it could have. Looking at Mr L's prior spending and the payments in question, I don't think they would have stood out to M&S as being particularly unusual where I'd have expected it to intervene.

I understand Mr L will be very disappointed with my conclusions however, for the reasons I've outlined above I can't fairly ask M&S to refund his loss and I won't be asking it to do anything further here.

### **My final decision**

Despite my natural sympathy for Mr L's loss my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 22 February 2022.

Sonal Matharu  
**Ombudsman**