DRN-3025999

The complaint

Mrs S complains that Marks & Spencer Financial Services plc refuses to refund payments she made to a binary options investment scammer.

What happened

Mrs S was contacted by a Senior Account Manager ('Shaun') from a company I'll call 'E', who persuaded her to invest with them. Shaun promised Mrs S large returns which would be risk free and assured her she'd be able to easily withdraw her funds. Shaun told Mrs S she needed to pay a registration fee to give her access to her trading account and she agreed and paid €250 over the phone plus a transaction fee of £6.73 (using her Marks & Spencer Mastercard credit card) on 22 August 2018.

Mrs S was given access to a trading account with E and Shaun explained that he'd show her how to trade. Mrs S made a further payment of €2,000 plus a transaction fee of £53.78 upon Shaun's request to finance her investment with E. Shaun let Mrs S know she'd made a profit of €200 in one day and she would receive this money but he didn't contact her again.
On 10 October 2018, Mrs S received a call from another Senior Account Manager at E, 'Julia', who informed her she was her new account manager. Julia persuaded Mrs S to invest a further €3,000 plus a transaction fee of £78.84 paid on 12 October 2018. This was paid on the promise that the money would be returned to the card within the same week. Mrs S received an email from E confirming receipt of the payment dated 12 October 2018.
Julia called Mrs S on 23 October 2018 to let her know that she'd made €10,000 profit on the account and she'd receive the money by the end of the week. Mrs S said the calls then stopped. Mrs S attempted to make a withdrawal from her trading account with E but this was declined because they said her account hadn't been fully verified. Mrs S took steps to verify her account with E by signing declarations of deposits for each of her deposit transactions and providing proof of her identity. Once E confirmed verification of her account, they stopped responding to her withdrawal requests.

On 22 November 2018, Mrs S received a withdrawal request confirmation of €1 from E but doesn't know why as she'd requested a full refund. Mrs S provided a screenshot of her account balance with E on 22 November 2018 which showed an available balance of €10,422.33. She continued to request a refund of her available balance but received no further response.

Mrs S contacted Marks & Spencer for assistance with recovering her payments on 23 January 2019 on the basis that she was unable to withdraw her funds and E weren't answering her calls or responding to her emails.

Marks & Spencer confirmed it blocked an attempted transaction of €3,000 on 12 October 2018 and contacted Mrs S to confirm the transaction was genuine. It concluded it had no chargeback or section 75 options.

One of our Investigators concluded first of all that E had operated a scam. She noted that each of Mrs S' payments was sent to what appeared to be payment processors; Finmarket.Tradefinmark, Finproduct.Tradefinpro and Fxplace.Trade rather than E directly.

But noted that there was evidence to support that E used these merchants as their payment processors and was satisfied the payments were sent directly to Mrs S' trading account with E. She felt that whilst a claim under the Mastercard scheme rules wouldn't have succeeded, a claim for misrepresentation and breach of contract had been established for section 75. She suggested that Marks & Spencer return the disputed transactions plus interest.
Marks & Spencer didn't agree. It said in summary:

- The payments individually went to three separate companies, none of which were E and they appear to be separate organisations and unrelated to E.
- It is not relevant that E accepted it received the payments if Mrs S' investment account was funded via different companies. The payments did not go to E and therefore there is no DCS.
- The payments were made to Fintech, Finmarket and Fxplace, not E. There is no evidence that they made any representations and there can have been no breach of contract.
- It is familiar with the wording used (by the Investigator) which appears verbatim in numerous opinions it has received from this service which consider liability under section 75 in the context of complaints relating to trading platforms. It is a tick-box, formulaic approach to determining such cases, not one that can be decided by what is fair and reasonable in all circumstances of the case.
- To succeed on a section 75 claim founded on misrepresentation there must have been an identifiable false statement of fact. It is not sufficient to establish liability for misrepresentation to simply assume that it is likely that a false statement of fact was made by someone at some point. For instance, the description of the background suggests that Mrs S was told that she would make a 'big profit' – that is not only a vague phrase not capable of amounting to a misrepresentation, but there is no specific information as to when it was allegedly said and the words that were used. The suggestion that Mrs S was told she could 'easily withdraw the money when she wanted' is equally insufficient. Aside from there being no evidence other than Mrs S' verbal say so, Mrs S did not apparently request withdrawals until she asked for a refund in or around November 2018. By that time, it was entirely possible that she had lost funds in her account – regardless of that the Investigator simply has no knowledge about the merchant's reasons for refusing a withdrawal, if indeed they did.
- A mere suggestion that Mrs S could make money from the platform does not equate to a statement of fact by E that it operated a legitimate business. The Investigator has not identified who made such alleged representation. To state 'you might make money' is not a statement of fact but rather of possibility.
- It has not seen E's terms and conditions and alternative contractual terms should not be imputed unless there is clear evidence that those terms were agreed as between the parties.
- No clear explanation as to how liability arises has been provided.

As Marks & Spencer didn't agree, the complaint was passed to me for determination.
I wrote to Marks & Spencer to ask what it believed Fintech, Finmarket and Fxplace's role in the transactions were if it doesn't agree they were simply acting as payment processors. I also asked Marks & Spencer to provide the evidence it relied upon to conclude that Fintech, Finmarket and Fxplace were doing more than just processing the payments. Marks & Spencer replied to say they found the questions confusing and it is not its role to prove there is a link between E and Fintech, Finmarket and Fxplace. It invited me to provide a detailed report and any evidence I wished to rely on for it to review its position again.

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 uphold the complaint and I'll explain why.
I've first considered that Mrs S had no valid chargeback rights because the Mastercard chargeback scheme significantly limits any chargeback options related to investments or gambling.

Section 75 Consumer Credit Act 1974

I've considered whether it would be fair and reasonable to uphold Mrs S' complaint on the basis that Marks & Spencer is liable to her under s.75. As a starting point, it's useful to set out what the Act actually says:

75(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…(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

To summarise there must be:

1. a debtor-creditor-supplier agreement falling under section 12(b) or 12(c); and
2. a transaction financed by the agreement; and
3. a claim for misrepresentation or breach of contract related to that transaction;
4. but not a claim which relates to any single item which the supplier has attached a cash price below £100 or in excess of £30,000

I'll deal with each requirement or exclusion in turn. First, there doesn't seem to be any dispute that a credit card account is a relevant debtor-creditor-supplier agreement under the Act. And, I'm satisfied here there is nothing that 'breaks' the debtor-creditor-supplier chain – insomuch and whilst there are four parties involved in each of the payments:

1. Mrs S (the debtor)
2. Marks & Spencer (the creditor);
3. Finmarket.Tradefinmark (payment processor for payment 1); Finproduct.Tradefinpro (payment processor for payment 2); Fxplace.Trade (payment processor for payment 3)
4. E (the supplier) – as shown on Mrs S' payment receipts and correspondence.

Marks & Spencer doesn't appear to dispute that the involvement of a payment processor doesn't break the debtor-creditor-supplier agreement. But I've covered this off in the event that it does. Based on the evidence I've seen which includes; payment receipts from E for each of the payments, evidence the payments directly credit Mrs S' trading platform with E and all communication surrounding each payment being between Mrs S and E, I find that Finmarket, Finproduct and Fxplace were doing no more than simply processing the payments for E. I've also noted the same merchants are used across multiple similar complaints at this service and appear to act as payment processors only. Marks & Spencer were unable to evidence why they concluded Finmarket, Finproduct and Fxplace were

unrelated to E. Mrs S has gone to lengths to provide as much evidence as she reasonably can and on balance, I'm persuaded that Finmarket, Finproduct and Fxplace were acting in the capacity of payment processors to process the payments on behalf of E.
Where a payment processor is used in a credit card transaction, it doesn't break the debtor-creditor-supplier chain, it just creates a four-party agreement. We've published final decisions on this issue.

The impact of this development on the four party agreement on s.75 was considered by the Court of Appeal in the case of Office of Fair Trading v Lloyds & others [2006] ("the OFT case"). The Court of Appeal first considered whether the introduction of the four-party structure meant that the system had evolved significantly beyond the state of affairs to which s.75 had been directed. They concluded that it had not, stating at paragraph 55 of their judgment:

"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 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 that 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."

They went on to say;

"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."

In order for s.75 to apply there has to have been 'arrangements' between Marks & Spencer and the Supplier (E) to finance transactions between Marks & Spencer's cardholder (Mrs S) and E. It's clear that there was no direct arrangement between them, but this isn't necessarily fatal to the application of s.75. I say this because the Judge who heard the OFT case at first instance ([2005] 1 All ER 843) had also considered the meaning of the word "arrangements", as used in section 12, and whether there existed relevant arrangements between creditors and suppliers (the scam here) in the four-party situation. He said that the use of the word showed a deliberate intention on the part of the draftsman to use broad, loose language, which was to be contrasted with the word "agreement". In the Court of Appeal, the creditors argued that arrangements should be given a narrower meaning that took the four-party structure outside the definition. But the Court of Appeal agreed with the Judge that "arrangements" had been used to embrace a wide range of commercial structures having substantially the same effect. They held it was difficult to resist the conclusion that such arrangements existed between credit card issuers and suppliers who agreed to accept their cards, and stated;

"Moreover, 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."

Here Finmarket, Finproduct and Fxplace are specifically referenced as payment processors in multiple complaints involving trading platforms at this service. They appear to be in the business of providing financial transactional services. The transactional services provided here by these parties are in effect those that have been outsourced to them by E. And clearly the network in this case had arrangements with Finmarket, Finproduct and Fxplace (and any Merchant Acquirer) and Marks & Spencer would be able to know of the parties within the arrangement here and the respective offerings provided prior to the transactions in this case by dint of Finmarket, Finproduct and Fxplace and any Merchant Acquirer being users of the network used here.

I'm therefore satisfied that Finmarket, Finproduct and Fxplace were acting in the capacity of payment processors on behalf of E and I've seen no other such evidence from Marks & Spencer that refutes this.

The second consideration is whether the 'transaction' is 'financed' by the agreement. 'Transaction' isn't defined by the Act, but it has generally been given a wide interpretation by the courts – to include whatever bilateral exchanges may be part of a deal. Here, Mrs S has deposited funds to open an account in exchange for being able to use those funds on an investment platform and being able to withdraw them as and when she wished. Given the exchange of money in return for certain contractual promises – I'm satisfied there was a 'transaction' for each of the deposits (which I'll call "the deposit-transactions") as defined by the Act.

Again 'to finance' is not defined under the Act. An ordinary definition would be to provide funds to do something. In Office of Fair Trading v Lloyds TSB Bank plc [2004] Miss Justice Gloster said in a passage with which the Court of Appeal agreed '*The phrase 'to finance'… approaching the matter in a common sense way must mean "provide financial accommodation in respect of" …A credit card issuer clearly provides financial accommodation to its cardholder, in relation to her purchases from suppliers, because he is given time to pay for her purchase under the terms of the credit card agreement*".

Applying that ordinary definition here, if Mrs S had not used her credit card she would have had to find the cash from her own resources to fund the deposit transactions and obtain the investment account this supposedly entitled her to. So, it's clear that the deposit-transactions were financed by the agreement.

Third, the claim must relate to the transaction. It's important to consider what Mrs S' claim is here. It's evident from her testimony and correspondence she provided that she feels she was tricked into depositing the payments with E for the dual purpose of:

a) Stealing the deposit money; and
b) Encouraging Mrs S to deposit larger amounts.

Mrs S does not believe that E was operating legitimately and believes she was misled into thinking they were.

This claim – that Mrs S was misled into depositing funds is clearly a claim "in relation to" the deposit-transactions. The claim must also be one for misrepresentation or breach of contract. In this case, if Mrs S was told by E matters that were factually untrue in order to trick her into entering into the deposit-transactions, her claim would be for misrepresentation. Or, if E made binding promises to her as part of those transactions and went on to breach these that would make her claim one for breach of contract.

Finally, the claim mustn't relate to a single item to which the seller has attached a cash price of less than £100 or more than £30,000. Here, the 'cash price' of the deposit-transaction is

the value of that deposit-transaction. It is both the consideration and subject matter of the contract.

Marks & Spencer has declined the claim under s.75 because it says that Mrs S was paying into a binary options account and these are classed as a form of gambling by the UK's Gambling Commission. It said, the deposits were not for the purchase of goods/services, they were a credit to her trading account. I take this to mean that the deposits were nothing more than transferring money onto another account, opened for the purpose of speculating with the money, rather than being a payment that was used to purchase goods.

When funds are deposited onto a trading account this isn't necessarily just a transfer of money between accounts, it may also have been paid in return for something. In this case E has made contractual promises in exchange for the deposit-transactions. Marks & Spencer in its refusal to accept liability under s.75 haven't quoted the Act itself. It is important to note that s.75 doesn't use the term 'purchase of goods or services' nor is there anything within the Act that would exclude the present type of transaction.

For the reasons set out above, I'm satisfied that s.75 does apply to the credit card deposit-transactions.

I'll therefore go on to consider whether Mrs S has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Mrs S has made a claim of misrepresentation by E – that claim being that they represented to her that they were a legitimate enterprise when this was not the case.

For a claim of misrepresentation to be successful it's necessary to show not just a false statement of fact but also that the statement induced Mrs S into entering into an agreement.

A false statement of fact

If I'm satisfied that the merchant was not likely to be operating a legitimate enterprise - one in which Mrs S could have ever received back more money than she deposited, then it follows that any statements made by E to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mrs S could make money from the platform is likely to suffice as entailing, by necessary implication, a statement of fact by the merchant that it operated a legitimate business, i.e. a legitimate trading platform on which investors could profitably trade. And, I'm satisfied that based on Mrs S' account of events, the nature of the situation and Mrs S communication with her E broker that they did claim that Mrs S could have made money from the trading platform.

That induced her into entering the agreement

Again, had Mrs S known that the trading platform was essentially a scam designed to relieve investors of their money, rather than a legitimate service, there's really little question of her not investing with E. Consequently, should I be satisfied that E isn't operating a legitimate enterprise then inducement will also be demonstrated.

Was the merchant operating a legitimate enterprise?

Before discussing this in more detail, I should mention that I've found Mrs S' account of events both detailed and compelling. But more than this, it's corroborated not just by other

complaints of this nature but specific complaints against this particular merchant. Because of this I'm minded to find her account to be truthful.

So, turning to her account, I note that she mentioned coming into contact with E after receiving a cold call. Mrs S says E promised her large returns with a dedicated senior account manager who would guide her through her trades. When Mrs S tried to withdraw her money, she was told that she first had to verify her account. When she indeed verified her account (as confirmed by E), E failed to reply to any further requests from her to withdraw her available balances – despite there being an available balance on her trading account. I've noted this evidence was provided to Marks & Spencer by Mrs S - despite its suggestion that such evidence may not exist.

There's a body of external information available through various regulators, law enforcement agencies, government agencies, press cuttings and the card schemes that repeat the tactics used by E. Which does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact the merchant is offering little more than a video game or simulation.

I've noted the following:

- E was not regulated with the FCA (as required) at the time it offered its services to Mrs S – or any other jurisdiction as far as I'm reasonably aware. In a press release on 12 January 2018, the FCA said: '*Since January 3rd 2018, firms involved in binary options trading in the UK have been required to be authorised by the FCA. Firms that are not authorised by the FCA and continue with binary options activities beyond that date will be acting in breach of section 19 of the Financial Services and Markets Act 2000 (FSMA), which is a criminal offence.'* Given that E were selling binary options in the UK without the required authorisation, the FCA clarified it was committing a criminal offence by doing so.

- On 26 October 2017, Visa - in a global publication to its merchant acquirers and card issuers – issued the following statement explaining why it introduced a misrepresentation chargeback option specific to binary options dealers: *'Binary options merchants typically operate in a card-absent environment and market their products in the form of a wager where consumers bet on the price of an asset that may involve a currency, a commodity, a stock index or a stock share. These merchants may operate unregulated trading platforms prone to manipulation by the controlling entities. Binary options are also referred to as all-or-nothing options, digital options, fixed-return options and one-touch options. To gain consumer confidence, binary options merchants may use sophisticated terminology to emulate legitimate broker / dealers, but are often unlicensed to operate in the countries they target. Law enforcement has informed Visa that certain binary options merchants have imposed obstacles to prevent cardholders from withdrawing funds from their accounts by:*

    - *Placing calls to deceive the cardholder into believing cash payouts will be forthcoming from their accounts, so that they will continue trading.*
    - *Requiring additional personal information (e.g., photocopy of utility bill, driver's license, passport or credit card) under the pretense of validating cardholder's identity before account proceeds can be refunded. This practice exposes the cardholder to identity theft.*
    - *Imposing additional ad-hoc requirements that prevent cardholders from withdrawing funds.'*

  I've noted that Visa's insight of the deceptive conduct for unregulated binary options

merchants matches Mrs S' interactions with E.

E is no longer operating and has not operated for some time. There are also several online reviews from victims that share very similar experiences to that of Mrs S.

I would also question the legitimacy of any investment broker pressuring consumers into using credit - as E did here - to invest in products that *could* lose money.

Next, is the refusal to allow withdrawals from the platform – again a complaint repeated across many complaints against similar firms. I note Mrs S has provided evidence of her multiple attempts to withdraw the money from her trading platform and E didn't reply – other than to obtain personal sensitive information from her in order to 'verify her account'. Mrs S also provided evidence to this office and Marks & Spencer (which it provided as part of its business file) that she had available balances at the point of her withdrawal requests.

Taking all of this together, I don't think it's likely E was operating a legitimate enterprise. This means that I think they have made misrepresentations to Mrs S – specifically that they were running a genuine enterprise through which she could ever have got back more than her deposits from the platform. I'm also satisfied that if Mrs S had known this, she wouldn't have deposited any money, so she was induced into the contract on the basis of these misrepresentations.

What damage was caused by the misrepresentation

The legal test for consequential loss in misrepresentation, where a person has been fraudulently induced to enter into a transaction, he is entitled to recover from the wrongdoer all the damage directly flowing from the transaction: *Smith New Court Securities v Scrimgeour Vickers (Asset Management)* [1997] AC 254. This implies two hurdles that must be surmounted before any item of loss becomes recoverable from the wrongdoer:

a) The loss would not have been suffered if the relevant transaction had not been entered into between the parties. This is the factual "but for" test for causation. And
b) The loss must be the "direct" consequence of that transaction (whether or not it was foreseeable) or be the foreseeable consequence of the transaction.

Transaction fee

The transaction fees linked to the deposit-transactions is somewhat straight forward to cover off. Had the deposit-transactions not have occurred the transaction fees couldn't have occurred. The transaction fee was a "direct" consequence of each deposit-transaction. As the payment was made outside of the UK, it's foreseeable that a bank used by Mrs S to make the deposit would attach a fee for converting the payment. So, I'm satisfied Mrs S's payment of the transaction fees was consequential loss in misrepresentation.

Breach of contract

Here, Mrs S has deposited funds to open an account in exchange for being able to use those funds on an investment platform and being able to withdraw them as and when she wished. Given the exchange of money in return for certain contractual promises – I'm satisfied there was a transaction (the deposit-transactions) as defined by s.75.

It follows, I think, that E had contractual obligations:

a) To enable Mrs S to use the funds from her deposit-transactions on an investment platform;
and
b) To enable Mrs S to withdraw the funds deposited as and when she wished.

Mrs S wasn't permitted to withdraw the funds from her trading account, she provided evidence of her communication with E where she made multiple requests to withdraw her available balances and they imposed obstacles (similar to that described by Visa) to prevent her from doing so. E ultimately stopped responded to Mrs S once she 'fully verified' her account with them.

It follows that as a breach of contract can be identified, Mrs S's loss amounts to the full amount of each of the deposit-transactions.

Transaction fee

I need to consider how much better off Mrs S would have been if the E had fulfilled their contractual obligations to her. Applying that test to each deposit-transaction, it's clear that each transaction fee was not a recoverable consequence of the deposit-transaction. I say this because allowing Mrs S to trade on the account and withdraw the deposit as and when she wished would not have prevented her from having to pay the transaction fee.

So, the transaction fee should not be held as a recoverable loss in connection with the breach of contract claim relating to the deposit-transactions.

Putting things right

I've established two grounds Mrs S could have recovered her deposit-transactions:

- Misrepresentation: I'm satisfied Mrs S has a claim for misrepresentation on the grounds that E made a series of misrepresentations, namely that they were operating a legitimate enterprise and that Mrs S could access her money freely and earn a profit from her deposit-transactions. I'm also satisfied that the deposit-transaction fees meets the test for consequential loss in misrepresentation as they wouldn't have been incurred "but for" the deposit-transactions. They were also a direct and foreseeable loss as a result of the deposit-transactions.

- Breach of contract: I'm satisfied Mrs S also has a claim for breach of contract as E breached the verbal promises to Mrs S. Namely that she would be able to use the funds from her deposit-transactions on an investment platform and access them freely – when she wished. This provides another basis for recovery of the deposit-transactions but not the deposit-transaction fees.

As a claim for misrepresentation gives the highest sum, Marks & Spencer should put Mrs S back into the position she would have been had the deposit-transactions of €5,250 (£4,660.24 as debited from Mrs S' Marks & Spencer Mastercard credit card) had not been entered into and transaction fees of £139.35 had not been charged by Marks & Spencer. So, she should receive refunds of these amounts, less any amounts credited to her by E.

My final decision

My final decision is that Marks & Spencer Financial Services plc should refund Mrs S the deposit-transactions and transaction fees, plus interest. It should:

- Refund the deposit-transactions, less any amounts credited to Mrs S' Marks & Spencer credit card account by E;
- Refund the transaction fees;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.
- If Marks & Spencer deducts tax in relation to the interest element of this award it should provide Mrs S with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 17 June 2022.

Dolores Njemanze
Ombudsman