

The complaint

Ms J complains that Marks & Spencer Financial Services plc refuses to refund transactions made using her Mastercard credit card to a fraudulent binary options trading company.

What happened

On 4 May 2017, Ms J was cold called by a broker representing Stern Options. He offered her an investment opportunity where an experienced trader would guide her through trading and she stood to earn a lot of money. She was told she needed a minimum investment of £10,000 to open the account and Ms J proceeded to make payments from three cards, two of those payments came from Ms J's Marks & Spencer Mastercard credit card. I've listed the transactions in dispute below:

Date	Supplier	Payment Method	Amount
4 May 2017	Stern Options	Marks & Spencer Mastercard credit card	£3,895.27 (Transaction fee £116.47)
4 May 2017	Stern Options	Marks & Spencer Mastercard credit card	£1,558.11 (Transaction fee £46.59)
			Total: £5,453.38 (Transaction fees £163.06)

After signing her deposit declaration, Ms J called her broker and asked for her money back as she realised the terms of her employment would not allow her to have this type of investment. Ms J's broker said she couldn't have her money back and the only way to get it back would be to trade. On 9 May 2017, Ms J's broker told her that her account was activated and that Stern Options had added a bonus to help get her money back quickly. Ms J's broker told her which trades to place and shortly after doing as she was advised, she was pressured to put more money onto her trading account. Ms J told her broker that she didn't have anymore money and he suggested that she should take out more credit card lending, which she did. She invested so much that she couldn't keep up with her credit card payments and the broker suggested she takes out a loan. When Ms J was unable to withdraw her money from her Stern Option trading account, she realised something was wrong.

Ms J realised that she was not given a genuine trading account and was rather given a video game or simulation. She cancelled her trading account in October 2017 and asked for her money back. Her broker stopped responding to her.

Ms J contacted Marks & Spencer for assistance with recovering her money. It concluded she had no chargeback options or section 75 rights. Ms J referred her complaint to this service. One of our investigators suggested that Marks & Spencer returns Ms J's money. She felt a claim under section 75 had been established as Stern Options was operating a scam and misrepresented themselves to Ms J. Marks & Spencer disagreed. It said in summary:

- There was no specific instruction of Ms J not being able to withdraw her funds. It therefore appears that there was no specific discussion between Ms J and Stern Options of this issue and not one which amounted to a false statement of fact.

- Failure to mention something relevant cannot amount to misrepresentation and any statement of fact must also have been made prior to the payments she made. Much of the events surround events that took place after the payments.
- It's unclear why Ms J continued using Stern Options if this was contrary to her employment.
- Ms J claims to not have signed terms and conditions but it doesn't mean they didn't apply to the account. It's common for a business to operate on standard terms and conditions. It is clear Ms J did have access to an online trading platform.
- There is no explanation as to the delays between the payment and Ms J reporting the matter to Marks & Spencer.
- The wording in the opinion appears in numerous opinions it has received from this service in relation to section 75 and binary trading complaints. It acts as a tick-box approach to determining the case rather than what is fair and reasonable in the circumstances of the complaint.
- There is no explanation of what the representation was, who it was made by, or when it was made. To state you might make money is not a statement of fact but rather of possibility.
- No breach of contract or clear misrepresentation has been identified as Ms L did not sign any terms and conditions.
- We mention the BSI code but it was not introduced at the time of the payments.

Our investigator clarified that she did not reference the BSI code in her view. Marks & Spencer asked for the complaint to be considered by an ombudsman. The case has therefore been passed to me for determination.

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 first considered that Ms J had no valid chargeback rights because the Mastercard chargeback scheme significantly limits any chargeback options related to investments or gambling.

I also don't think some of the dispute points made by Marks & Spencer are relevant to the outcome of Ms J's s.75 claim, so I don't intend to comment on them all.

Section 75 Consumer Credit Act 1974

I've considered whether it would be fair and reasonable to uphold Ms J'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 – inasmuch and whilst there are three parties involved:

1. Ms J (the debtor)
2. Marks & Spencer (the creditor);
3. Stern Options (the supplier) – as shown on Ms J's paperwork and on Marks & Spencer's business file submissions.

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, Ms J 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 Ms J 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 Ms J'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 Stern Options for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Ms J to deposit larger amounts.

Ms J does not believe that Stern Options was operating legitimately and believes she was misled into thinking they were.

This claim – that Ms J 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 Ms J was told by Stern Options matters that were factually untrue in order to trick her into entering into the deposit-transactions, her claim would be for

misrepresentation. Or, if Stern Options 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 Ms J 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 Stern Options 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 Ms J has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Ms J has made a claim of misrepresentation by Stern Options – 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 Ms J 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 Ms J could have ever received back more money than she deposited, then it follows that any statements made by Stern Options to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Ms J 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 Ms J's account of events, the nature of the situation and Ms J's communication with her Stern Options broker that they did claim that Ms J could have made money from the trading platform.

That induced her into entering the agreement

Again, had Ms J 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 Stern Options. Consequently, should I be satisfied that Stern Options 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 Ms J'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 Stern Options after receiving a cold call. Ms J says Stern Options promised her large returns with a dedicated account manager who would guide her through her trades. When Ms J tried to have her money returned, the adviser told her she couldn't until she traded. When she tried to withdraw her money after she traded, she was unable to.

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 Stern Options. 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 regulators published warnings about Stern Options as follows:

- On 2 June 2017, an alert about Stern Options was published by the Financial Conduct Authority (FCA) warning that they were offering financial services in its jurisdiction without authorisation.
- On 28 May 2018 (after Ms J's payments), the Financial Market Authority in Austria published an alert about Stern Options on the International Organization of Securities Commissions (IOSCO) investor alerts portal.
- On 18 June 2018 (after Ms J's payments), the Australian Securities and Investments Commission published an investor alert about Stern Options on the IOSCO.

I've also noted that binary options traders offering services in the UK were required to be regulated by the UK's Gambling Commission at the time of Ms J's payments and Stern Options were not. Nor were they licensed or regulated abroad as far as I'm reasonably aware.

Stern Options 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 Ms J's.

I would also question the legitimacy of any investment broker pressuring consumers into applying for credit - as Stern Options 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 most of the communication Ms J had with Stern Options was over the phone but when she attempted to cancel her account and retrieve her funds in October 2017 in writing, Stern Options didn't reply.

Taking all of this together, I don't think it's likely Stern Options was operating a legitimate enterprise. This means that I think they have made misrepresentations to Ms J – 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 Ms J 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 Ms J to make the deposit would attach a fee for converting the payment. So, I'm satisfied Ms J's payment of the transaction fees was consequential loss in misrepresentation.

Breach of contract

Here, Ms J 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-transaction) as defined by s.75.

It follows, I think, that Stern Options had contractual obligations:

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

Ms J wasn't permitted to withdraw the funds from her trading account. She might have made losses or profits from her investment – so a breach of the former term has not – on the balance of probabilities – caused her to lose trading profits and she would (on balance) have been left no better or worse off than when she made the deposit-transactions.

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

Transaction fee

I need to consider how much better off Ms J would have been if the merchant had fulfilled its 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 Ms J 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 Ms J could have recovered her deposit-transactions:

- **Misrepresentation:** I'm satisfied Ms J has a claim for misrepresentation on the grounds that Stern Options made a series of misrepresentations, namely that they were operating a legitimate enterprise and that Ms J 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 Ms J also has a claim for breach of contract as Stern Options breached the verbal promises to Ms J. 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 Ms J back into the position she would have been had the deposit-transactions of £5,453.38 had not been entered into and transaction fees of £163.06 had not been charged by Marks & Spencer. So, she should receive refunds of these amounts, less any amounts credited to her by Stern Options.

My final decision

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

- Refund the deposit-transactions, less any amounts credited to her Marks & Spencer credit card account by Stern Options;
- 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 Ms J with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms J to accept or reject my decision before 6 April 2022.

Dolores Njemanze
Ombudsman