

The complaint

Mrs M complains that John Lewis Financial Services (trading as John Lewis Card Services) didn't do enough to recover money nor protect her from the financial harm caused by a binary options trading scam company.

What happened

Mrs M was looking for part-time work online when she came across an advert on a well-known recruitment website. The advert was looking for someone to become a trader who could spare a few hours each week. Mrs M clicked on the advert and 365 Binary Options explained it was an investment opportunity to invest in protected trades and she could withdraw her money when she wishes. Mrs M was asked to provide her ID documents as part of what she believed to be an investment opportunity.

Mrs M says an adviser for 365 Binary Options told her that she would need to start with her own investment capital but they advised they would match her investment with a bonus. Between 8 August 2017 to 17 August 2017, Mrs M made five payments totalling £7,400 (using her John Lewis Mastercard credit card) to 365 Binary Options.

Mrs M said all of the communication at the point of each payment was done with 365 Binary Options over the phone. She says they reassured her she would be able to make an income. Mrs M tried to withdraw all her money but 365 Binary Options didn't allow her to do so. They told her she first had to trade 40 times the bonus amount applied to her account. Mrs M didn't understand why as she didn't want to withdraw the bonus funds, just her own investment. She made attempts to contact 365 Binary Options and did not receive any satisfactory responses. By January 2018, Mrs M realised she'd fallen victim to a scam and approached John Lewis for assistance with recovering her funds.

John Lewis looked into things and concluded Mrs M had no chargeback or s.75 options. It also didn't flag any of the transactions as unusual. Unhappy with its response, Mrs M referred her complaint to this service.

One of our investigators concluded first of all, that 365 Binary Options was a scam company. And Mrs M had valid s.75 claims. John Lewis didn't agree. It said in summary:

- The investigators view lacked clarity and made it difficult to understand what happened between Mrs M's final payment and approaching John Lewis in January 2018.
- In regards to the s.75 conclusions, the assertions made are generic and it is familiar with the wording contained in numerous opinions it has received from this service relating to trading platforms. They do not apply specifically to the facts of this matter and is an unhelpful tick-box, formulaic approach, not one that is decided on what is fair and reasonable.
- A warning from the FCA and negative reviews and testimonies available online do not support a false statement of fact in the present case is evidenced. To state you might make money is not a statement of fact but rather a possibility. We have not

established that it was demonstrably false (i.e. that there was no possible chance that one might make money on the platform), or when it was made (it must have been made before Mrs M's first payment).

- There's no evidence the merchant breached contractual obligations.

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.

Having done so, I agree with our investigator that this complaint should be upheld and I'll explain why.

I've first considered that Mrs M 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 M's complaint on the basis that John Lewis 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. Mrs M (the debtor)
2. John Lewis (the creditor);
3. 365 Binary Options (the supplier) – as shown on Mrs M's paperwork and on John Lewis' 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, Mrs M 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. Each subsequent deposit was made as a way of Mrs M earning more profits, with a view of withdrawing each subsequent deposit-transaction 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 M 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 M’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 365 Binary Options for the dual purpose of:

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

Mrs M does not believe that 365 Binary Options was operating legitimately and believes she was misled into thinking they were.

This claim – that Mrs M 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 M was told by 365 Binary 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 the merchant 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.

John Lewis has declined the claim under s.75 because it says that Mrs M was paying into a binary options account and these are classed as a form of gambling by the UK’s Gambling Commission. The deposits were not for the purchase of goods/services, they were a credit to their trading account. I take this to mean that the deposit was 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 365 Binary Options has made contractual promises in exchange for the deposit. John Lewis 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.

John Lewis suggests that if 365 Binary Options were scammers, Mrs M couldn't benefit from s.75 protection. Whether there was a contract for the supply of services depends on the dealings between the supplier and the consumer, seen objectively, not on either party's subjective intentions or the honesty/dishonesty of their motivation. In other words, it is perfectly possible for 365 Binary Options to have tricked Mrs M into entering into an agreement they never had any ability or intention to carry out. If that occurs, 365 Binary Options and Mrs M have entered into a contract, but it has been procured by 365 Binary Options' dishonest misrepresentation and Mrs M has claims in law for her losses suffered as a result of having entered into the agreement.

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 M has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Mrs M has made a claim of misrepresentation by 365 Binary 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 Mrs M 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 M could have ever received back more money than she deposited, then it follows that any statements made by the merchant to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mrs M 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 M's account of events and the nature of the situation, 365 Binary Options did claim that Mrs M could have made money from the trading platform.

That induced her into entering the agreement

Again, had Mrs M 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 365 Binary Options. Consequently, should I be satisfied that 365 Binary 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 Mrs M'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 365 Binary Options. Because of this I'm minded to find her account to be truthful.

So, turning to her account, I note that she's mentioned coming into contact with 365 Binary Options after clicking on an online advert apparently supported by a well-known recruitment website. I've seen many similar adverts that are seemingly supported by either well-known celebrities or advertised on trusted websites – for which there has been significant press coverage. So, the fact 365 Binary Options was using a recruitment website to advertise their services as a potential job opportunity immediately gives me cause for concern.

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 365 Binary 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 365 Binary Options as follows:

- On 11 May 2017, Australian Securities and Investments Commission
- On 11 October 2018, Central Bank of Ireland
- On 14 August 2018, the FCA who noted - *'We believe this firm has been providing financial services or products in the UK without our authorisation. Find out why to be especially wary of dealing with this unauthorised firm and how to protect yourself from scammers.'*

I've also noted that binary options traders offering services in the UK were required to be licensed by the UK's Gambling Commission, it said in 2016 that *'an unlicensed operator is likely acting illegally'*. I've noted 365 Binary Options were not licensed in the UK or abroad as far as I'm reasonably aware.

365 Binary 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 Mrs M's.

I would also question the legitimacy of any investment broker pressuring consumers into using credit - as 365 Binary 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 Mrs M's was verbally told by 365 Binary Options that her funds would be matched with bonus funds from the companies own reserves; that she'd be investing in 'protected' trades; and that she'd be able to withdraw her funds as and when she wishes. But when the payments were made, 365 Binary Options moved the goal post of being able to withdraw funds as and when she wished to only once she had traded 40 x the bonus. I've seen many similar clauses in contracts and whilst the inclusion of such a clause is linked to the bonus funds, this often does not apply to the consumer's own capital. Seemingly 365 Binary Options has simply stopped responding to Mrs M despite a verbal agreement that she could withdraw funds whenever she wished. I've noted John Lewis' concerns about the time gap between Mrs M requesting to withdraw all of her funds to realising she'd fallen victim to a scam. But I don't think this is material to my findings on s.75 and what the parties agreed to in exchange for Mrs M's deposit-transactions.

Taking all of this together, I don't think it's likely 365 Binary Options was operating a legitimate enterprise. This means that I think they have made misrepresentations to Mrs M – 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 M had known this, she wouldn't have deposited any money, so she was induced into the contract on the basis of these misrepresentations.

Breach of contract

Here, Mrs M 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 365 Binary Options had contractual obligations:

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

Mrs M 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, Mrs M's loss amounts to the full amount of each of the deposit-transactions.

To briefly address John Lewis' comments on receiving the same outcomes on numerous occasions from this service on binary trading cases. It shouldn't be surprised to receive similar outcomes on cases with similar features. As it knows these scams broadly follow the same pattern to lure people into what they are led to believe is a genuine investment. Where we find a credit card has been used to pay the scammers directly, we will consider whether misrepresentation or a breach of contract has occurred in accordance with s.75. We have found that in a number of cases, the outcomes will invariably be the same, bar some individual circumstances.

It is reminded of its obligations to comply with DISP 1.4.2G – to appropriately analyse Ombudsman decisions concerning similar complaints it receives and DISP 1.3.2A – to ensure that lessons learned as a result of determinations by the Ombudsman are effectively applied in future complaint handling.

Putting things right

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

- Misrepresentation: I'm satisfied Mrs M has a claim for misrepresentation on the grounds that 365 Binary Option made a series of misrepresentations, namely that they was operating a legitimate enterprise and that Mrs M could access her money freely and earn a profit from her deposit-transactions.
- Breach of contract: I'm satisfied Mrs M also has a claim for breach of contract as the merchant breached the verbal promises to Mrs M. 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.

I'm satisfied a claim under misrepresentation ought to succeed here so John Lewis should put Mrs M back into the position she would have been had the deposit-transactions totalling £7,400 had not been entered into. So, she should receive refunds of these amounts.

My final decision

My final decision is that John Lewis Financial Services (trading as John Lewis Card Services) should refund Mrs M the deposit-transactions, plus interest. It should:

- Refund the deposit-transactions, less any amounts credited by 365 Binary Options;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.

If John Lewis deducts tax in relation to the interest element of this award it should provide Mrs M with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 25 February 2022.

Dolores Njemanze
Ombudsman