

The complaint

Mr A complains that Nationwide Building Society has refused to refund transactions (made using his Nationwide credit card) to a fraudulent binary options company (Golden Markets).

What happened

Mr A saw an online advert for bitcoin investments provided by Golden Markets which was backed by well-known celebrities. He believed it was legitimate and so he decided to invest. Mr A was told he needed a minimum investment to give him access to a trading account but the amount he was willing to invest would only give him access to Amazon shares, so Mr A agreed to pay £249.99 on 11 April 2018. Mr A was advised by his account manager that due to a 'takeover' with Amazon, the shares were about to soar in value. On the basis of the belief that he could benefit from a lucrative opportunity, he agreed to invest larger sums and on 19 April 2018, made two payments totalling £4,385.23 for Amazon shares.

Mr A noted that half of the funds on his trading account were invested in Amazon and the other half remained on his trading platform. After a couple of days, his entire account balance was lost. Mr A questioned how all of his funds could have been lost if half weren't 'invested' at all.

Mr A contacted the Broker Complaint Registry, where he was told that a lot of people had been scammed by Golden Markets. He subsequently contacted Nationwide on 30 April 2018 for assistance with the recovery of his funds. Mr A says he was initially told that the money could be recovered but Nationwide then advised it could not refund his payments, so he complained.

Nationwide said the funds were deposited onto a trading account run by Golden Markets to then trade and invest with. It didn't believe the funds were used to pay for goods or services, so there were no s.75 rights. It also didn't agree that chargeback rights were applicable. In recognition of Mr A receiving some poor customer service, it paid £100 by way of an apology.

One of our investigators upheld the complaint on the basis that Mr A had a valid claim for misrepresentation and breach of contract and suggested that Nationwide refund Mr A's payments. Nationwide didn't agree and in summary said:

- No chargeback rights existed.
- Mr A made payments to Emexgo.com and funds were applied to a trading account with Golden Markets which subsequently supplied him with Bitcoin and that is the service he received, so no s.75 rights exist.
- There is a clear distinction between a company operating as a scam and a legitimate company which mis-sells a product or service on the basis of misleading or false promises. Only the legitimate company entering into a contract with a consumer can be caught by s.75 as the scam company had no intention of entering into a binding contract, which is the underlying requirement for a breach of contract or misrepresentation claim to succeed. If Mr A has been scammed, there can be no

s.75 liability.

- Nationwide is entitled to be indemnified by the supplier for any loss pursuant to s.75(2), if this was not a legitimate company, there would be no recourse for Nationwide to recover its loss against the supplier. The inclusion of this provision further emphasizes that s.75 was never intended to be used to protect against scams, but rather against genuine suppliers who have either misrepresented their goods or services or where a genuine contract has been breached.
- Mr A invested in Bitcoin which is a highly volatile cryptocurrency with no guarantee of return, so he must have appreciated the risk that he might not get his money back.

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 this complaint and I'll explain why.

I've first considered that Mr A had no valid chargeback rights and I agree with Nationwide's consideration that under the Visa chargeback scheme, Mr A didn't have the evidence required to satisfy the requirements of the scheme rules. So I don't think it acted unreasonably by not processing chargeback claims for him.

Section 75 Consumer Credit Act 1974

I've considered whether it would be fair and reasonable to uphold Mr A's complaint on the basis that Nationwide is liable to him 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 four parties involved:

1. Mr A (the debtor)
2. Nationwide (the creditor);
3. Emexgo.com (the e-commerce provider); and

4. Golden Markets (the supplier) – as shown on Mr A's paperwork and on Nationwide's business file submissions. The documents from Golden Markets also advise that the payee name would appear as 'Emexgo.com' on Mr A's bank statement.

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, Mr A 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 he wished. The subsequent transactions were made in order to finance the purchase of Amazon stock. Given the exchange of money in return for certain contractual promises – I'm satisfied there were transactions (which I'll call "the deposit-transactions") as defined by s.75.

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 his purchases from suppliers, because he is given time to pay for his purchase under the terms of the credit card agreement".

Applying that ordinary definition here, if Mr A had not used his credit card he would have had to find the cash from his own resources to fund the deposit transactions and obtain the investment account this supposedly entitled him 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 Mr A's claim is here. It's evident from his testimony and correspondence he provided that he feels he was tricked into depositing the payments with the Golden Markets for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Mr A to deposit larger amounts.

Mr A does not believe that Golden Markets was operating legitimately and believes he was misled into thinking they were.

This claim – that Mr A 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 Mr A was told by Golden Markets matters that were factually untrue in order to trick him into entering into the deposit-transactions, his claim would be for misrepresentation. Or, if the merchant made binding promises to him as part of those transactions and went on to breach these that would make his 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.

Nationwide has declined the claim under s.75 because it says that the deposit was a step to speculating and didn't secure any goods. 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 the broker has

made contractual promises in exchange for the deposit. Nationwide 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.

Nationwide suggests that if Golden Markets were scammers, Mr A 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 Golden Markets to have tricked Mr A into entering into an agreement they never had any ability or intention to carry out. If that occurs, Golden Markets and Mr A have entered into a contract, but it has been procured by Golden Markets' dishonest misrepresentation and Mr A has claims in law for his losses suffered as a result of having entered into the agreement.

I also take Nationwide's point that s.75(2) entitles it to be indemnified by the supplier, therefore s.75(1) cannot apply to scam merchants as it would not be able to be indemnified by a scam company. But unlike section 75(1), section 75(2) is not concerned with consumer protection. It is not to be seen as a quid pro quo for the right of recourse that is afforded to debtors by s.75(1). So I don't agree with Nationwide's suggestion that there is an implied limitation on the scope of s.75(1). Being unable to recoup losses from the supplier in accordance with s.75(2) is simply one of the risks that Nationwide (as a creditor) has to bear in its assessment of the commercial risks it enters into when it commences business as a card issuer. So I would reject the suggestion that s.75(1) cannot apply where a supplier scams a debtor.

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 Mr A has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Mr A has made a claim of misrepresentation by Golden Markets – that claim being that they represented to him 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 Mr A 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 Mr A could have ever received back more money than he 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 Mr A 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 Mr A's account of events and the nature of the situation, Golden Markets did claim that Mr A could have made money from the trading platform.

That induced him into entering the agreement

Again, had Mr A 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 him not investing with Golden Markets. Consequently, should I be satisfied that Golden Markets 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 Mr A'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 Golden Markets. Because of this I'm minded to find his account to be truthful.

So, turning to his account, I note that he's mentioned coming into contact with Golden Markets after clicking on an online advert apparently supported by well-known celebrities. I've seen what I think is likely to be the same advert and it is a fake endorsement – for which there has been significant recent press coverage, specifically by one of the celebrities appearing to endorse the merchant explicitly stating that these firms are scammers and that he has no connection with them whatsoever. So, the fact the merchant was using a faked celebrity endorsement to advertise their website immediately gives me cause for concern.

I note Mr A's description of the tactics used by Golden Markets. Mr A was told by Golden Markets that Amazon shares were about to soar and he would stand to make good profits. But when the payments were made, the balance quickly disappeared, even though half of the available balances hadn't yet been invested.

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 Golden Markets. 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.

There is further evidence in the form of a warning on the Financial Conduct Authority's website, dated 25 May 2018, which suggests the merchant may not be acting legitimately it says:

'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.'

Golden Markets 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 Mr A's.

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

Breach of contract

Here, Mr A has deposited funds to open an account in exchange for being able to use those funds on an investment platform, purchase Amazon shares and being able to withdraw them

as and when he 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 Golden Markets had contractual obligations:

- a) To enable Mr A to use the funds from his deposits on an investment platform to purchase Amazon shares;
and
- b) To enable Mr A to withdraw the funds deposited as and when he wished.

Mr A wasn't provided with Amazon shares, in that he didn't receive share certificates or confirmation that a particular amount of Amazon shares had been purchased. He might have made losses or profits from his investment – so a breach of the former term has not – on the balance of probabilities – caused him to lose trading profits and he would (on balance) been left no better or worse off than when he made the deposits.

It follows that as a breach of contract can be identified, Mr A's loss amounts to the full amount of each of his deposits.

I'm satisfied compensation of £100 already paid by Nationwide in respect of its customer service failings was reasonable and I make no further award on this matter.

Putting things right

I've established two grounds Mr A could have recovered his deposit-transactions:

- Misrepresentation: I'm satisfied Mr A has a claim for misrepresentation on the grounds that Golden Markets made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Mr A could purchase Amazon shares, access his money freely and earn a profit from his deposit-transactions.
- Breach of contract: I'm satisfied Mr A also has a claim for breach of contract as the merchant breached the verbal promises to Mr A. Namely that his deposit transactions would finance the purchase of Amazon shares. This provides another basis for recovery.

As a claim for misrepresentation gives the highest sum, Nationwide should put Mr A back into the position he would have been had the deposit-transactions totalling £4,635.22 had not been entered into. So, he should receive refunds of these amounts, less any amounts credited to him by Golden Markets.

My final decision

My final decision is that Nationwide Building Society should refund Mr A the deposit-transactions, plus interest. It should:

- Refund the deposit-transactions, less any amounts credited by Golden Markets;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.
- If Nationwide Building Society deducts tax in relation to the interest element of this award it should provide Mr A with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or

reject my decision before 28 January 2022.

Dolores Njemanze
Ombudsman