DRN-3136441

The complaint

Mrs W complains that HSBC UK Bank Plc ("HSBC") has refused to refund payments she made using her HSBC Visa debit card. She believed these payments were being made to *Plusoption*, which turned out to be a fraudulent binary options company.

What happened

The circumstances of this complaint are well known to both parties, so I will not repeat them all again here in detail. But I will provide an overview of events below.

Between March and October 2017, Mrs W made several payments to her 'trading account' she held with Plusoption. She used her HSBC Visa credit card to make these payments: two of which were to Plusoption and the remaining five to a company I will refer to as Company Z in this decision.

Below are the payments in dispute (transaction in red is a credit):

Date	Merchant	Payment method	Amount
28 March 2017	Plusoption	Credit Card	£200.99 (plus £6.01 transaction fee)
9 June 2017	Company Z	Credit Card	£3,955.35 (plus £118.27 transaction fee)
14 June 2017	Company Z	Credit Card	£1,965.05 (plus £58.76 transaction fee)
14 June 2017	Plusoption	Credit	£194.98 (plus £5.83 transaction fee)
16 June 2017	Company Z	Credit Card	£1,765.08 (plus £52.78 transaction fee)
26 June 2017	Company Z	Credit Card	£1,180.70 (plus £35.30 transaction fee)
19 July 2017	Company Z	Credit Card	£3,843.40 (plus £114.92 transaction fee)
26 October 2017	Plusoption	Credit Card	£7,606.70 (plus 227.44 transaction fee)

		Total amount debited:	**£21,130.75**
		Total amount less credits:	**£20,929.94**

In short, Mrs W says she has fallen victim to scam. She says Plusoption never provided her with a proper service and prevented her from withdrawing her funds. She says they are unregulated/unregistered and blacklisted by the Financial Conduct Authority ("FCA").

Mrs S asked HSBC to try to recover her money from Plusoption. As this did not happen, she raised a complaint which she later referred to our service.

One of our investigators considered the complaint and upheld it.

He issued two assessments. In his second, he said Mrs W did have a valid claim for misrepresentation and breach of contract under section 75 regarding the payments she made to Plusoption and Company Z in March, June and July 2017. Regarding Mrs W's payment to Plusoption in October 2017, the investigator said HSBC should have considered the payment unusual because a warning about Plusoption had been placed on the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"). This warning was published on 11 May 2017 (which was more than a month before Mrs W's payment to Plusoption in October 2017). The investigator argued that despite this, HSBC did not intervene, provide a warning, or ask Mrs W any appropriate or probing questions to uncover the scam concerned. He considered that this was a missed opportunity for HSBC to intervene.

Taking all these reasons together, the investigator thought HSBC should refund Mrs W her money. However, he also concluded that Mrs W did share 20% responsibility for what happened, so he directed that the refund of all the disputed transactions be reduced accordingly.

Mrs W accepted the investigator's findings, but HSBC did not. In the interest of conciseness, I will repeat HSBC's response here, which it has helpfully summarised its key points in the conclusions section of its submissions:

Overall, we consider that that the adjudicator's view is unsupportable. As such, we do not accept that we should be held responsible for [Mrs W's] loss for the following reasons:

- *There is a striking lack of detail as regards the background of this complaint and only limited information on key issues has been provided in support, which raises further concerns;*

- *The adjudicator's assessment by reference to Section 75 is fundamentally flawed and is based on the same template wording we have already addressed by the HSBC Response (with which the adjudicator has not engaged);*

- *The adjudicator has selectively quoted from the FSA Consultation Paper, and misapplies it to this opinion;*

- *The adjudicator's findings in respect of our actions in respect of transaction monitoring are unrealistic and unfair. In particular, the assertion that we were obliged to act on the IOSCO publication and block transactions as a result;*

- *The adjudicator seeks to apply retrospective regulation by the back door – that is not the purpose of your service. If the regulator intended that we be obliged to take steps to block payments to merchants one month after they were the subject of an FCA or IOSCO warning they would have made this clear. They did not; and*

- *The adjudicator's contributory negligence assessment is fundamentally flawed and unsupportable. In particular, despite finding that [Mrs W] ought to have stopped trading once her withdrawal request was denied, he still finds us 80% liable for the Payments.*

The investigator then went back to HSBC to clarify that the 20% refund deduction he recommended: only applied to Mrs W's payment to Plusoption in October 2017, rather than all the disputed payments. HSBC responded maintaining its position about section 75 and stating, amongst other things:

"If your position is that contributory negligence is only capable of applying to one transaction, there should be a greater share of liability than 20% on [Mrs W's] part for that transaction. Your view is that you would have expected [Mrs W] to stop trading when her withdrawal request was denied. On the basis that she did not, she should bear full responsibility for the transaction following that refusal, or at the very least 50%."

As an agreement could not be reached, the complaint has been passed to me to make a decision.

What I have 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 the conclusions reached by the investigator for reasons I set out below.

Section 75 of the Consumer Credit Act 1974

In this section I will deal with Mrs W's payments to Plusoption and Company Z made in March, June and July 2017 only. Under the heading *Unusual or uncharacteristic activity*, I will deal with Mrs W's payment to Plusoption in October 2017.

I have considered whether it would be fair and reasonable to uphold Mrs W's complaint on the basis that HSBC is liable to her under section 75. As a starting point, I think it would be helpful if I set out what the section 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 will deal with each requirement or exclusion in turn.

Debtor-creditor-supplier agreement ("DCS")

First, there does not seem to be any dispute that a credit card account is a relevant DCS agreement under the 1974 Act. And, I am satisfied here there is nothing that 'breaks' the DCS chain – insomuch as there are three parties involved:

1. Mrs W (the debtor);
2. HSBC (the creditor); and
3. Plusoption (the supplier) – as shown on Mrs W's paperwork and on HSBC's business file submissions.

I have noted that Company Z were the payment processors for the purposes of five out of the seven payments concerned. HSBC has not disputed that this breaks the DCS chain, presumably because it recognises they were used as the payment processors for Plusoption – creating a four-party agreement. I have further noted that Mrs W's paperwork shows several Plusoption declaration of deposits.

For these reasons, I am persuaded, on balance, that Company Z were payment processors for the purposes of the disputed payments they processed – creating a four-party agreement.

A transaction financed by the agreement

Secondly, the next consideration is whether the 'transaction' is 'financed' by the agreement.

'Transaction' is not defined in the 1974 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 W 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 am satisfied there were transactions (which I will call "the deposit-transactions") as defined by section 75.

Again, 'to finance', is not defined in the 1974 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 W 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 is clear that the deposit-transactions were financed by the agreement.

A claim related to that transaction

Thirdly, a claim for misrepresentation or breach of contract must relate to the transaction. It is important to consider what Mrs W's claim is here. It is evident from her testimony and correspondence she provided that she feels she was tricked into depositing the payments with Plusoption for the dual purpose of:

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

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

This claim, that Mrs W 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 W was told by Plusoption 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.

Cash price value

Finally, the claim must not 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.

For the reasons set out above, I am satisfied that section 75 does apply to the credit card deposit-transactions in this case.

I will therefore go on to consider whether Mrs W has a valid claim for misrepresentation and/or breach of contract.

Misrepresentation

I consider Mrs W has made a claim of misrepresentation by Plusoption – 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 is necessary to show not just a false statement of fact, but also that the statement induced Mrs W into entering into an agreement.

A false statement of fact

If I am satisfied that Plusoption were not likely to be operating a legitimate enterprise – one in which Mrs W could never have received back more money than she deposited – then it follows that any statements made by Plusoption to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mrs W 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 am satisfied that based on Mrs W's account of events and the nature of the situation, Plusoption did claim that Mrs W could have made money from the trading platform.

That induced her into entering the agreement

Again, had Mrs W known that the trading platform was essentially a scam, designed to relieve investors of their money, rather than a legitimate service – there is really little question, to my mind, of her not investing with Plusoption. Consequently, should I be satisfied that Plusoption is not 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 have found Mrs W's account of events both detailed and compelling. But more than this, it is corroborated not just by other complaints of this nature, but specific complaints against Plusoption. Because of this I'm minded to find her account to be truthful.

So, turning to Mrs W's account. I note she says Plusoption offered to teach and guide her about the financial market, which she believed and paid them money to invest. I also note she says Plusoption never allowed her to withdraw her money from the platform nor did she receive a proper service from them – despite signing several declarations of deposits for the payments concerned. I have had sight of several emails Mrs W sent to Plusoption in August and September 2017 requesting withdrawal of her funds; requests which do not appear to have been actioned by Plusoption.

There is 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 Plusoption. This does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact Plusoption offered little more than a video game or simulation.

There is further evidence in the form of a warning on the FCA's website dated 12 March 2018. Although this warning was published post the payments concerned, it nonetheless suggests Plusoption may not have been acting legitimately:

"We believe this firm may be providing financial services or products in the UK without our authorisation. Find out why you should be wary of dealing with this unauthorised firm and how to protect yourself."

I have also noted further regulator warnings about Plusoption placed on the IOSCO's Investor Alerts Portal on 11 May 2017 (published by the Australian Securities and Investments Commission).

Plusoption no longer appear to be 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 W's.

In summary

Taking all the above together, I do not think it is likely Plusoption were operating a legitimate enterprise. So, I am persuaded they made misrepresentations to Mrs W. That is, that they were running a genuine enterprise through which she could never have got back more than her deposits from the platform. I am also satisfied that if Mrs W had known this, she would not have deposited any money, so she was induced into the contract on the basis of these misrepresentations.

Breach of contract

Here, Mrs W 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 am satisfied there was a transaction (the deposit-transaction) as defined by section 75.

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

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

Mrs W was not able to use the funds from her deposits on the investment platform, nor was she able to withdraw them. So, I am satisfied that Plusoption breached the above contractual obligations.

It follows that as a breach of contract can be identified, Mrs W's loss amounts to the full amount of each of her deposits.

Unusual or uncharacteristic activity

Under this section, I will deal with Mrs W's £7,606.70 (plus a £227.44 transaction fee) payment to Plusoption in October 2017.

HSBC is aware of our general position on PSPs' safeguarding and due-diligence duties to protect customers from the risk of financial harm due to fraud. We have published many decisions on our website setting out these principles and quoting the relevant rules and regulations. It is unnecessary to rehearse them again here in detail.

It is common ground that the disputed payment was 'authorised' by Mrs W for the purposes of the Payment Services Regulations ("the Regulations"), in force at the time. This is because they were made by Mrs W using the legitimate security credentials provided to them by HSBC. These must be regarded as 'authorised payments' even though Mrs W was the victim of a sophisticated scam. So, although she did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of her bank account, she is presumed liable for the loss in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider HSBC should fairly and reasonably:

- Have been monitoring accounts – and any payments made or received – to counter various risks, including anti-money-laundering, countering the financing of terrorism, and preventing fraud and scams;

- Have had systems in place to look out for unusual transactions or other signs that might indicate its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer; and

- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

First, regulated firms ought reasonably to take notice of alerts about traders published by the FCA and/or IOSCO. As long ago as June 2012, the FCA's predecessor indicated – in its consultation paper entitled Banks' Defences Against Investment Fraud: detecting perpetrators and protecting victims – that it was good industry practice for firms to build up an updated watch-list of types of scams and potential perpetrators; and regularly to share "timely and detailed intelligence" with other banks, UK and overseas regulators, the police, etc. Whilst the regulator gave no specific timings, it is not unreasonable in my view to expect an international bank to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA and/or IOSCO. In my judgment, such alerts should automatically trigger alarm-bells – and lead to the payment being paused – pending further enquiries (and a possible scam warning) to the payer.

In Mrs W's case, there was a warning about Plusoption placed on the IOSCO's Investor Alerts Portal on 11 May 2017 – this warning was published more than a month before Mrs W's payment to Plusoption in October 2017. It is not unreasonable to expect a bank the size of HSBC that regularly updates its internal alerts to include information about payees who had tried to carry out regulated activities without permission. I accept that the warning did not specifically relate to binary-options trading; and it did not necessarily follow from the nature of the warning in isolation that these were fraudsters. Given the timing of the alert relative to the first payment, I think HSBC ought to have automatically blocked it; as it had a fair chance to update and communicate its watch-list between the warning being published and the payment being made. The bank had constructive if not actual notice that the payee might not be a legitimate merchant – therefore, it would have been reasonable for it to have properly questioned Mrs W before processing all the payments in order to satisfy itself that all was well.

If HSBC had fulfilled its duties and carried out due diligence by contacting Mrs W and asking suitably probing questions, there is no reason to doubt that they would have explained what they were doing. In such circumstances, whilst the bank had no duty to protect them from a bad bargain or give investment advice, it could have invited them to check whether the payee was registered with the UK's Gambling Commission. It could have also explained its own customer experiences with merchants like Plusoption in that customers would often be prevented from withdrawing available balances. After all, at that time, there was information in the public domain – which a bank ought to have known even if a lay consumer ought no – about the very high risks associated with binary options including many warnings of potential fraud (e.g. Action Fraud's June 2016 warning; the European Securities and Markets Authority's July 2016 warning; the FCA's consultation paper of December 2016; and the Gambling Commission's December 2016 scam warning that "an unlicensed operator is likely operating illegally", and so forth).

There is no evidence that HSBC provided Mrs W with any meaningful warnings or gave them other reasons to doubt the legitimacy of the payments they were making. It was a missed opportunity to intervene.

Causation

If HSBC had asked Mrs W what the payments were for and the basic surrounding context, it is likely they would have fully explained what they were doing and that everything had been done over the phone and online with the merchant. HSBC did not need to know for certain whether Mrs W was dealing with a fraudulent binary options trader or investing in a legitimate (albeit highly speculative) product; reasonable grounds for suspicion are enough to trigger a bank's obligations under the various regulations and principles of good practice. I consider there were such grounds here and, therefore, that HSBC ought reasonably to have provided a scam warning in light of all the information then known to

financial professionals about the risks associated with unregulated, overseas binary options.

If HSBC had given a warning, I believe that Mrs W would have paused and looked more closely into Plusoption before proceeding. She had previously experienced problems with withdrawal requests being processed, so I think a warning would have likely prompted her to have made further enquiries into binary-options scams and whether or not Plusoption regulated in the United Kingdom or abroad. She could have discovered they were not and the various regulatory warnings about the risk of binary-options/forex scams (see above). In other words, I am satisfied that a warning from her trusted bank would probably have exposed Plusoption's false pretences, causing them to stop 'trading' and preventing the losses.

As I think the HSBC ought to have blocked all of the transactions, I don't need to conclude whether or not the bank did enough to attempt or pursue chargeback claims.

Contributory negligence

Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000). I do not place too much weight on general but arcane information in the public domain for reasons previously alluded to about the information imbalance between financial professionals and ordinary consumers.

I can see there is a significant gap between the last two disputed payments in this case: July and October 2017. Based on the evidence before me, I can see that Mrs W contacted Plusoption in August and September 2017 asking – on several occasions – to withdraw her funds: to no avail. Despite this, Mrs W made a further (final) payment to Plusoption for £7,606.70 (plus a £227.44 transaction fee). To my mind, as Mrs W's withdrawal requests were not being met – she should have realised that something was not quite right, rather than make a further significant payment.

For these reasons, I do think that Mrs W should bear some responsibility for what happened. The investigator recommended 20%. HSBC argues Mrs W should bear full responsibility for the transaction concerned, or at the very least 50%.

Having considered this carefully, I think it would be fair to reduce compensation by 20% for the payment Mrs W made in October 2017 only.

Why I have not considered the October 2017 payment under section 75

I am not of the view that Mrs W's payment in October 2017 attracts rights under section 75. I say this because Mrs W acknowledged that she was unable to withdraw funds from her trading platform prior to the October 2017 payment. Moreover, she has not given an explanation as to what was promised in exchange for the payment. For these reasons, I am not persuaded a valid claim for misrepresentation or breach of contract has been established. It follows that section 75 would not apply to the October 2017 payment.

Putting things right

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

- Misrepresentation: I am satisfied Mrs W has a claim for misrepresentation on the grounds that Plusoption made a series of misrepresentations, namely that it was

operating a legitimate enterprise and that Mrs W could access her money freely and earn a profit from her deposit-transactions.

- Breach of contract: I am satisfied Mrs W also has a claim for breach of contract as Plusoption breached their verbal promises to Mrs W. Namely, that she could use the funds from her deposits on an investment platform, and withdraw funds deposited as and when she wished. This provides another basis for recovery.

As a claim for misrepresentation gives the highest sum, HSBC should put Mrs W back into the position she would have been had the deposit-transactions (totalling £13,296.61) not been entered into. So, she should receive refunds of these amounts, less any amounts credited to her by Plusoption.

Further, Mrs W should be refunded the payment she made to Plusoption in October 2017.

My final decision

For the reasons set out above, my final decision is that I uphold this complaint. I therefore direct HSBC UK Bank plc to:

- Refund to Mrs W the deposit-transactions – including applicable transaction fees – less any credits (that would mean £13,296.61);
- Refund to Mrs W the payment – including applicable transaction fee – she made to Plusoption in October 2017 (totalling £7,834.14) – but subject to a 20% deduction for contributory negligence;
- Pay 8% interest on the above amounts from the date they were debited from Mrs W's account until the date of settlement; and
- If HSBC UK Bank plc deducts tax in relation to the interest element of this award it should provide Mrs W with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 18 March 2022.

Tony Massiah
Ombudsman