

## **The complaint**

Ms O complains that Marks & Spencer Financial Services Plc won't refund the money she lost to an investment scammer.

## **What happened**

Ms O explains that between 2016 to 2018, she made payments from various sources, to fund what she thought was a legitimate investment with a company I'll call 'B'. She made 29 payments totalling £52,217.40 using her Marks & Spencer Mastercard credit card. When Ms O got subsequently got in touch with Marks & Spencer to explain she'd been scammed, Marks & Spencer didn't reimburse her lost funds. Remaining unhappy, Ms O referred her complaint about Marks & Spencer to this office. Our investigator didn't think Marks & Spencer should refund Ms O's loss and Ms O didn't agree. She asked that an Ombudsman review the complaint and the complaint has therefore been passed to me for determination.

Prior to issuing this decision, I wrote to Marks & Spencer with my provisional thoughts. I explained that I thought Ms O's direct payments to B could be covered under s.75 but the payments that were made to a different company couldn't be. I agreed with our investigator that I didn't think an intervention and warning from Marks & Spencer could have prevented Ms O from making the payments.

Marks & Spencer responded and agreed. It said it would refund £31,006.40 and would also add 8% simple interest totalling £11,674.62 to that amount. It explained Ms O has a credit card balance of £11,964.42 (which would fluctuate) and it offered to repay this amount from the settlement.

Ms O has not responded to my provisional decision, chaser emails or calls. I will now proceed with my determination in absence of a response from her.

## **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 see no reason to depart from my provisional decision. That is, I've decided to partially uphold this complaint. I'll explain why.

### *Recovery*

After the payments were made, I couldn't reasonably expect Marks & Spencer to have done anything further until Ms O notified it of the scam. Then, because these were credit card payments, the only avenue for potential recovery of the payments would have been through the chargeback scheme.

Our service has clarified the position with Mastercard themselves who have confirmed there are very limited options for payments that have gone to any type of investment. The only

possible avenue for success would be if funds aren't credited from the card to the investment account. That isn't the argument here as Ms O saw her payments reflected on her trading account. Her complaint is that she was the victim of a scam and the scenario she found herself in gave no rise to any valid Mastercard chargeback dispute grounds. So I don't think these payments were recoverable via the chargeback scheme once they had been made.

#### *Section 75 Consumer Credit Act 1974*

I've considered whether it would be fair and reasonable to uphold Ms O'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

#### *Payments directly to B*

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 in each of the payments:

- 1. Ms O (the debtor)
- 2. Marks & Spencer (the creditor);
- 3. S (the supplier) – as shown on Ms O's Marks & Spencer statement and correspondence.

I'm further satisfied that the payments to B were financed by the agreement; that B misrepresented to Ms O that they were a legitimate company when they were operating a scam and she relied on these misrepresentations to enter into an agreement with them. I'm further satisfied that no single payments to them were below £100 or in excess of £30,000.

As a result of this, I'm satisfied these payments totalling £31,006.40 should be refunded.

The remaining payments were sent to a merchant I'll call E. I'm satisfied the payments to E break the required debtor-creditor-supplier agreement required for s.75 to apply. Whilst I've noted B asked Ms O to make these payments, Ms O's disagreement and contractual relationship was with B, not E. And B, rather than E, misrepresented their services to Ms O. I'm therefore satisfied s.75 does not apply to Ms O's payments to E.

## *Prevention*

Having decided the above, I can only uphold Ms O's s.75 complaint in part, I've also thought about whether Marks & Spencer could reasonably have prevented all of Ms O's payments in dispute (including her payments to E).

It's common ground that Ms O authorised the scam payments in question here. She was tricked by the scammer into instructing Marks & Spencer to make the payments. I accept these were "authorised payments" even though Ms O was tricked. So although she didn't intend the money to go to a scammer, Ms O 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 Lloyds 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.

I agree with our investigator that the payments between 6 July 2016 and 13 October 2016 weren't all that unusual when considering the normal operation of Ms O's account. These were single, monthly payments and didn't deplete Ms O's credit limit. I do also have to take into account that this was a credit card account and it isn't uncommon for customers to make larger one-off payments than perhaps with their debit cards, so I don't think there was cause for Marks & Spencer to have intervened.

However, Ms O's payment of £10,000 on 15 January 2017 was for a substantial amount. And I'm satisfied taken by itself, this payment instruction was sufficiently unusual and uncharacteristic, such that, Marks & Spencer reasonably ought to have called and spoken to Ms O before allowing this payment through, to check everything was in order, to protect her against the risk of financial harm.

During such a conversation with Ms O, I would reasonably expect Marks & Spencer to have asked her who the payment was for, what it was for, and for basic surrounding context, and to have then proceeded appropriately from there with the intention to disturb or unearth a potential fraud or scam. I've not seen evidence that satisfies me Marks & Spencer did this, in circumstances where I think it should have.

I can't be certain – if Marks & Spencer had done this as I think it reasonably ought to have – whether this would have made a difference. Where I can't be certain about something like this, I need to make my decision based on the balance of probabilities – in other words, based on what I think most likely would have happened, bearing in mind all the available evidence. And here, I think if Marks & Spencer had appropriately spoken to Ms O before allowing this payment through, it most likely would not have made a difference. I say this because Ms O confirmed she researched B prior to investing with them and had seen no

bad reviews. By the time of her January 2017 payment, she had been trading with them for six months without concern and appears to have been satisfied with her investment.

I've also noted that Ms O was given a warning by another bank (Bank B) about payments it suspected were going towards a scam company in 2019. Here Ms O wasn't honest with Bank B when it questioned her about the purpose of her payments. But in any event, Bank B gave Ms O a very clear warning that she had likely fallen victim to a scam, refused to make the payment and she was still adamant about making the payment and became frustrated by Bank B's decision.

I appreciate Bank B intervened in 2019 and the payment here was in 2017 and I appreciate what Ms O said about her state of mind at the time and why she believes an earlier intervention would have made a difference but I'm not persuaded of this. By 2019, she'd already lost a substantial sum of money to B and explained she was 'coached' by someone who had contacted her to offer help with recovering her money.

I've taken what Ms O has said into consideration. But I'm not persuaded that any meaningful warning from Marks & Spencer would have prevented the transaction (or subsequent transactions). And I don't think it would have reasonably refused her instruction altogether. I think Ms O would have likely alleviated any of Marks & Spencer's concerns and proceeded with her payment.

It follows that I don't think any reasonable intervention would have made a difference here.

I appreciate Ms O may be disappointed with this outcome. But I can only uphold this complaint in full if I'm satisfied Marks & Spencer did something wrong that caused her loss. And in this case, whilst I sympathise with Ms O's position, for the reasons I've explained, I'm not persuaded Marks & Spencer can fairly be held responsible for all of Ms O's losses.

### **My final decision**

For the reasons I've explained, I uphold this complaint in part.

Marks & Spencer Financial Services Plc should:

- Refund Ms O's payments to B totalling £31,006.40
- Pay 8% simple interest per year, totalling £11,674.62 (lawfully deductible tax already discounted)

Should Ms O wish to repay the balance on her credit card with this payment, she should instruct Marks & Spencer to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms O to accept or reject my decision before 9 December 2022.

Dolores Njemanze  
**Ombudsman**