

The complaint

Miss H complains that Tesco Personal Finance PLC (trading as Tesco Bank) refuses to refund payments she made to a binary options investment scammer.

What happened

Miss H was searching for investment opportunities online and was telephoned by a representative of CFD Corporate. She was sold an online trading account which would be managed by one of the CFD Corporate account managers. She was advised that she'd be able to access her trading account and withdraw her profits as and when she wished. Miss H proceeded to make payments via a different banking provider (Bank A) and then CFD Corporate encouraged her to use her available credit to make further payments. They also showed her how to increase her credit limit with Tesco Bank so that she could pay them more. Miss H says CFD Corporate promised her increased profits with each subsequent payment.

Between 5 July 2018 to 19 July 2018 – Miss H made 12 payments to CFD Corporate (with transaction fees attached to each payment) totalling £3,768.74. She made these payments from her Tesco Bank Mastercard credit card.

Once Miss H had deposited all her available credit balance, her account manager began to invest all of the funds on her trading account at a loss. She asked them to stop but they didn't and eventually lost all of her available balances.

She contacted Tesco and Bank A to help recover her payments. Bank A advised Miss H that CFD Corporate were scammers. Bank A processed chargeback claims on her behalf and successfully recovered all of her deposit transactions.

Tesco Bank advised Miss H it had no Mastercard chargeback dispute options for her. It also advised that s.75 wasn't an option because Miss H funded her binary options trading account and therefore it didn't apply.

One of our Investigators felt that Miss H had established a valid s.75 claim and that Tesco Bank should refund her disputed payments and transaction fees. Tesco Bank didn't dispute that CFD Corporate were scammers but it highlighted that the payments didn't go to CFD Corporate directly and instead went to two different merchants I'll call 'H' and 'P'. It said it couldn't see a link between them and CFD Corporate. Because of this Tesco Bank said the necessary debtor-creditor-supplier chain (required for s.75 claims) was broken.

The case was passed to me for determination.

I requested evidence from Tesco Bank to demonstrate why it felt H and P were doing more than just processing the payments on behalf of CFD Corporate as a payment processor wouldn't break the debtor-creditor-supplier chain. Tesco couldn't provide any further evidence and instead felt the onus was on Miss H to provide this evidence.

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 Miss H had no valid chargeback rights because Mastercard significantly limits chargeback options for payments towards investments or gambling.

Section 75 Consumer Credit Act 1974

I'm satisfied the payments to CFD Corporate via H and P are recoverable via a claim under s.75.

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.

I'm also satisfied that there is nothing that 'breaks' the debtor-creditor-supplier chain in relation to the deposit transactions. Miss H paid CFD Corporate via H and P which appeared to be acting in the capacity of payment processors. Where a payment processor is used in a credit card transaction, it doesn't break the debtor-creditor-supplier chain, it just creates a four-party agreement. We've published final decisions on this issue.

I've noted Tesco Bank's suggestion that Miss H ought to be able to establish that H and P operated in the capacity of payment processors, I don't agree. Miss H has provided receipts from CFD Corporate acknowledging receipt of the payments and explained her trading account with CFD Corporate was credited after each payment to H and P. She's provided as much evidence as she reasonably can. Tesco Bank on the other hand operated within the same payment network as H and P and are better placed to provide further information if it didn't agree that H and P were simply processing payments on behalf of CFD Corporate.

I'm satisfied Miss H's payments to CFD Corporate financed their agreement – which was that CFD Corporate would invest her deposits and Miss H would earn profits. CFD Corporate told Miss H that she could withdraw funds as soon as she turned a profit.

I'm further satisfied that Miss H's claim relates to the transaction in that she feels she was tricked into depositing the payment with CFD Corporate for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Miss H to deposit larger amounts.

Miss H does not believe that CFD Corporate was operating legitimately and believes she was misled into thinking they were.

This claim – that Miss H 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 Miss H was told by CFD Corporate matters that were factually

untrue in order to trick her into entering into the deposit-transaction, her claim would be for misrepresentation. Or, if CFD Corporate made binding promises to her as part of that transaction 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-transactions is the value of each deposit-transaction. It is both the consideration and subject matter of the contract.

I'm satisfied CFD Corporate told Miss H they operated a legitimate enterprise and that she could achieve returns of more than her deposit-transactions. Miss H was induced into entering into an agreement with CFD Corporate on the basis of these claims. Once Miss H exhausted her available funds with Bank A, I'm persuaded CFD Corporate instructed her to use her available credit to pay them. They also advised her to increase her available credit limit with Tesco Bank – which I've noted she did in order to facilitate the payments.

There is supporting evidence in the form of regulator warnings, including one published by the FCA on 26 June 2018 (prior to all of Miss H's Tesco Bank payments). The FCA also uploaded this warning to the International Organization of Securities Commissions Investor Alerts Portal on the same day.

There are also negative reviews online that echo Miss H's testimony. CFD Corporate was also not regulated by the FCA (as required) or any other jurisdiction as far as I'm reasonably aware at the time of Miss H's payments to them.

Taking all of this together, I don't think it's likely CFD Corporate was operating a legitimate enterprise. This means that I think they have made misrepresentations to Miss H – specifically that they were running a genuine enterprise through which she could ever have got back more than her deposit from the platform. I'm also satisfied that if Miss H 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 each deposit-transaction is somewhat straight forward to cover off. Had each deposit-transaction not have occurred the transaction fee attached to them couldn't have occurred. The transaction fees were a "direct" consequence of each deposit-transaction. As the payment was made outside of the UK, it's foreseeable that a bank used by Miss H to make the deposit would attach a fee for converting the payment. So,

I'm satisfied Miss H's payments of the transaction fees were consequential losses in misrepresentation.

Breach of contract

Here, Miss H has deposited funds with CFD Corporate in exchange for being able to use those funds on an investment platform and being able to withdraw them once she reached a profit. Given the exchange of money in return for certain contractual promises – I'm satisfied there was a transaction (the deposit-transactions) as defined by s.75.

It follows, I think, that CFD Corporate had contractual obligations:

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

It would appear that Miss H lost the funds in her trading account before she could make a withdrawal.

Unlike our Investigator, I do not agree that a breach of contract has been established. Whilst this differs to our Investigators initial opinion, it makes no material difference to the outcome because I agree with our Investigator that a claim for misrepresentation is the most appropriate in this instance.

Putting things right

I've established one ground Miss H could have recovered her deposit-transactions:

- Misrepresentation: I'm satisfied Miss H has a claim for misrepresentation on the grounds that CFD Corporate made a series of misrepresentations, namely that they were operating a legitimate enterprise and that Miss H could earn a profit from her deposit-transactions. I'm also satisfied that the deposit-transaction fees meet the test for consequential losses in misrepresentation as they wouldn't have been incurred "but for" the deposit-transactions. They were also direct and foreseeable losses as a result of the each deposit-transaction.

Tesco Bank should put Miss H back into the position she would have been had the deposit-transactions had not been entered into and the transaction fees had not been charged by Tesco Bank. So, she should receive refunds of these amounts, less any amounts credited to her Tesco Mastercard credit card by CFD Corporate.

My final decision

My final decision is that Tesco Personal Finance PLC should:

- Refund the deposit-transactions, less any amounts credited to Miss H's Tesco Bank credit card account by CFD Corporate;
- Refund the transaction fees;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.
- If Tesco Bank deducts tax in relation to the interest element of this award it should provide Miss H with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss H to accept or reject my decision before 22 July 2022.

Dolores Njemanze
Ombudsman