

## The complaint

Mr S complains that Marks & Spencer Financial Services Plc ("M&S") didn't do enough to protect him from losing money to an investment scam.

## What happened

Mr S has explained that he was looking to invest and a merchant by the name of Kruger Exchange was the first to get back to him – and he was persuaded to make payments to Kruger Exchange towards an 'investment' with Kruger Exchange. He made the following payments using his M&S Mastercard credit card.

Transaction no.	Date	Merchant	Amount (£)	Fee (£)	Total (£)
1	26 February 2019	Wall-it	1,740.87	52.05	1,792.92
2	26 February 2019	Wall-it	191.50	5.73	197.23
3	07 March 2019	Wall-it	1,550.21	46.35	1,596.56
4	07 March 2019	Wall-it	3,444.90	103.00	3,547.90
5	07 March 2019	Wall-it	2,153.35	64.39	2,217.74
6	12 March 2019	Wall-it	2,643.90	79.05	2,722.95
7	30 March 2019	Wall-it	2,508.56	75.01	2,583.57
<b>Total</b>			<b>14,233.29</b>	<b>425.58</b>	<b>14,658.87</b>

Mr S has said he also made a further payment of £2,500 via Transferwise on 26 March 2019 but I can see this payment was returned to his account the following day, so I've not included this payment (and its return) in the list above for the sake of simplicity.

Mr S subsequently reported to M&S that he'd been scammed. M&S didn't reimburse Mr S. And Mr S remained unhappy. So he referred his complaint about M&S to us. As our investigator (who recommended that the complaint be upheld) was unable to resolve matters informally, the case has been passed to me for a decision.

## 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.

### Section 75 of the Consumer Credit Act 1974 ("s.75")

I've considered whether it would be fair and reasonable to uphold this complaint about all of the payments (which were all credit card payments) on the basis that M&S is liable under s.75. As a starting point, it's useful to set out what s.75 actually says:

- "(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 which the supplier has attached a cash price not exceeding £100 or more than £30,000”

To summarise, there must therefore 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 the transaction;
4. but not a claim which relates to any single item to which the supplier attached a cash price not exceeding £100 or more than £30,000.

I’ll deal with each of these requirements in turn.

First, I’m satisfied here there is nothing that ‘breaks’ the debtor-creditor-supplier chain of Mr S (the debtor), M&S (the creditor), and Kruger Exchange (the supplier).

I’ve noted that Mr S paid “Wall-it” using his credit card, which corresponds with other information this service has seen where Kruger Exchange is listed as the supplier in dispute. Mr S has also provided screenshots of the payments, which correspond with the dates and amounts paid, on which the merchant is named as Kruger Exchange. This suggests to me that Wall-it was doing no more than processing the payments on behalf of Kruger Exchange.

But where a payment processor is used in a credit card transaction, it doesn’t break the DCS chain, it just creates a four-party agreement. We’ve published final decisions on this issue.

Here Wall-it (and any Merchant Acquirer present) appears to be in the business of providing financial transactional services for Kruger Exchange. The transactional services provided here by these parties are in effect those that have been outsourced to them by the parties. And clearly the network in this case had arrangements with Wall-it (and any Merchant Acquirer) and M&S would be able to know of the parties within the arrangement here and the respective offerings provided prior to the transaction in this case by dint of Wall-it and any Merchant Acquirer being users of the network used here. In absence of any evidence M&S holds to demonstrate that M&S was doing more than just processing payments in this agreement, I’m satisfied that there is no break in the DCS chain.

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 the deal. Here, Mr S deposited funds for use on an investment platform and to be 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*” for this deposit (which I’ll call “the deposit-transaction”) as defined by the Act.

“To finance” (or “*financed by the agreement*”) is also 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, the phrase 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 purchases under the terms of the credit card agreement”.*

Applying this ordinary definition here, if Mr S had not used his credit card he would have had to find the cash from his own resources to fund the deposit-transaction. So, it's clear that the deposit-transaction was financed by the agreement.

Third, the claim for misrepresentation or breach of contract must relate to the transaction. It's important to consider what Mr S's claim is here. It's evident from his testimony and correspondence that he feels he was tricked into depositing the payments with Kruger Exchange which had the dual purpose of:

- a) stealing the deposit money; and
- b) encouraging Mr S to deposit further amounts.

Mr S does not believe that Kruger Exchange was operating legitimately and believes he was misled into thinking it was.

This claim, that Mr S was misled into depositing funds, is clearly a claim in relation to the deposit-transaction. The claim must also be one for misrepresentation or breach of contract. In this case, if Mr S was told by Kruger Exchange matters that were factually untrue to trick him into the deposit-transaction, his claim would be for misrepresentation. Or, if Kruger Exchange made binding promises to him as part of the transaction 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 not exceeding £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.

M&S seems to take the position that the deposit was nothing more than transferring money onto another account, opened for the purpose of speculating with the money, rather than being payments for the purchase of goods or services. However, when funds are deposited onto a trading account this isn't necessarily just a transfer of money between accounts; the deposit may also have been made in return for something. And in this case, I am satisfied Kruger Exchange made contractual promises in exchange for the deposit-transaction. It's 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 transactions.

For the reasons set out above, I'm satisfied that s.75 does apply to these credit card deposit-transactions. I'll therefore go on to consider whether Mr S has a valid claim for misrepresentation or breach of contract.

### Misrepresentation

I consider Mr S has made a claim of misrepresentation by Kruger Exchange – that claim being that it represented to him that it was a legitimate enterprise when this was not the case.

For a claim of misrepresentation to be successful it's necessary to show a false statement of fact and that this induced Mr S 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 through which Mr S could have ever received back more money than he deposited – then it follows that any statements made by Kruger Exchange to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mr S 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, based on Mr S's account of events and the overall circumstances, that Kruger Exchange did state that Mr S could make money from the trading platform.

*...that induced Mr S into entering the agreement*

Again, if Kruger Exchange was essentially a scam designed to relieve investors of their money, rather than a legitimate service – and if Mr S had known this – there's really little question: he would not have 'invested' with Kruger Exchange. Consequently, should I be satisfied that Kruger Exchange wasn't a legitimate enterprise then inducement will also be demonstrated.

*Was the merchant operating a legitimate enterprise?*

I've found Mr S's account of events persuasive.

On 13 March 2019 (so after transaction 6 but before transaction 7), the Financial Conduct Authority (FCA) published an alert about Marketing Essentials trading as Kruger Exchange Ltd, warning that it was offering financial services in its jurisdiction without authorisation.

I understand M&S has said this FCA warning isn't evidence that Kruger Exchange was operating a scam, but merely that it wasn't regulated and customers should proceed with caution. However, binary options/forex traders offering services in the UK were required to be regulated by the FCA at the time of Mr S's payment, and Kruger Exchange wasn't. Nor was Kruger Exchange licensed or regulated abroad as far as I'm reasonably aware. There are also many online reviews from victims that share similar experiences to that of Mr S.

Taking everything together, I think it's most likely that Kruger Exchange was not operating a legitimate enterprise. This means that I think it made misrepresentations to Mr S – specifically that it was a genuine enterprise through which he could have got back more than his deposits from the platform. I'm also satisfied that if Mr S had known this, he wouldn't have deposited any money, so he 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, is that they are 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 fees*

The transaction fees linked to each credit card deposit-transaction are somewhat straight forward to cover off. Had the deposit-transactions not have occurred, the transaction fees couldn't have occurred. The transaction fees were a "direct" consequence of the deposit-transactions. So, I'm satisfied Mr S's payment of the transaction fees was consequential loss in misrepresentation.

### Breach of contract

I've not considered breach of contract because I'm satisfied Mr S can claim back the full amount taken from his credit card through a claim under misrepresentation.

### **Putting things right**

I've explained, in relation to these credit card payments, why I'm satisfied Mr S has a claim for misrepresentation, on the basis that Kruger Exchange misrepresented matters, namely that it was operating a legitimate enterprise and he could earn a profit from his deposit-transactions. M&S should pay Mr S £14,658.87 (the payments plus the fees), plus interest from the date of the payments to the date of settlement calculated at 8% simple per year.

### **My final decision**

For the reasons I've explained, I uphold this complaint and I direct Marks & Spencer Financial Services Plc to pay Mr S £14,658.87, plus interest calculated at 8% simple per year from the date of the payments to the date of settlement. If M&S deducts tax from this interest, it should provide Mr S with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 15 September 2022.

Neil Bridge  
**Ombudsman**