

The complaint

Mrs A complains that HSBC UK Bank Plc (HSBC) hasn't refunded credit card payments she says she lost to an investment scam.

What happened

Mrs A has explained that in 2018 she received an email about an 'investment opportunity', and she decided to enter her phone number on the accompanying website so she would be contacted further about it. She says that shortly afterwards she was called by a very charming representative of Greenfields Capital, who explained the 'opportunity' to her.

Mrs A says she told the representative she didn't know anything about investing and wouldn't know what to do, and the representative reassured her that she'd be guided through everything and helped with the process. She says, after reassuring and persuading her, the representative proceeded to remotely take control of her computer and look through her banking details; and when Mrs A explained that she didn't have any money in her current account to invest, the representative suggested she use her credit card.

Mrs A says she wasn't sure about using her credit card but the representative reassured her that she'd be able to earn the money back right away before the transactions showed on her credit card statement; and that they had a failsafe in place, so she wouldn't be able to lose the funds. Mrs A says she was also told she'd be able to withdraw the funds at any time.

Mrs A made the following payments:

Date	Supplier	Amount (£)
09 January 2018	GREENFIELDSCAPITAL	370.19
10 January 2018	Non-Sterling Transaction Fee	11.07
12 January 2018	GREENFIELDSCAPITAL	1,477.83
12 January 2018	GREENFIELDSCAPITAL	2,438.41
12 January 2018	GREENFIELDSCAPITAL	2,438.41
12 January 2018	GREENFIELDSCAPITAL	1,108.37
13 January 2018	Non-Sterling Transaction Fee	44.19
13 January 2018	Non-Sterling Transaction Fee	72.91
13 January 2018	Non-Sterling Transaction Fee	72.91
13 January 2018	Non-Sterling Transaction Fee	33.14
Total		8,067.43

Mrs A says that when she tried to withdraw funds, she was told that she'd have to give certain details. The representative then reassured her that there would be no problem with its compliance team (behind this) and to ignore their emails. He then showed Mrs A, by releasing a small amount back to her credit card, that she could withdraw funds – but he wouldn't return all of the funds Mrs A had requested withdrawal of.

Greenfields Capital trading screens subsequently showed all of Mrs A's money had been lost to trades, and Mrs A came to realise she had been scammed. So she got in touch with HSBC to recover her lost funds through chargeback and/or section 75 of the Consumer Credit Act 1974. Ultimately, HSBC didn't refund the lost payments and so Mrs A referred her complaint about HSBC to us. As our investigator 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.

Having done so, I've decided to uphold this complaint for materially the same reasons as our investigator. I'll explain why.

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

I've considered whether it would be fair and reasonable to uphold Mrs A's complaint on the basis that HSBC is liable to her 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 that 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, there doesn't seem to be any dispute that a credit card account is the relevant debtor-creditor-supplier agreement under the Act. And I'm satisfied here there is nothing that 'breaks' the debtor-creditor-supplier chain – inasmuch as and whilst there are three parties involved:

1. Mrs A (the debtor);
2. HSBC (the creditor);
3. Greenfields Capital (the supplier).

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, Mrs A 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. Each subsequent deposit was made as a way of Mrs A earning more profits, with a view to withdrawing each subsequent deposit-transaction as and when she wished. Given the exchange of money in return for certain contractual promises – I’m satisfied there was a *“transaction”* for each of the deposits (which I’ll call *“the deposit-transactions”*) 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 Mrs A 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’s clear that the deposit-transactions were financed by the agreement.

Third, the claim for misrepresentation or breach of contract must relate to the transaction. It’s important to consider what Mrs A’s claim is here. It’s evident from her testimony and correspondence that she feels she was tricked into depositing the payments with Greenfields Capital which had the dual purpose of:

- a) stealing the deposit money; and
- b) encouraging Mrs A to deposit further amounts.

Mrs A does not believe that Greenfields Capital was operating legitimately and believes she was misled into thinking it was.

This claim, that Mrs 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 Mrs A was told by Greenfields Capital matters that were factually untrue to trick her into the deposit-transactions, her claim would be for misrepresentation. Or, if Greenfields Capital 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.

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.

HSBC declined Mrs A’s claim under s.75 on the basis that Mrs A was paying into a binary options trading account, classed as a form of gambling by the UK’s Gambling Commission, and that deposits into these types of accounts are not for the purchase of goods or services, but are simply the transfer of funds. I take this to mean that HSBC thinks the deposits were 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 deposits may also have been made in return

for something. And in this case, I am satisfied Greenfields Capital made contractual promises in exchange for the deposit-transactions. HSBC in its refusal to accept liability under s.75 hasn't quoted the Act itself. And 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 Mrs A has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Mrs A has made a claim of misrepresentation by Greenfields Capital – that claim being that it represented to her 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 Mrs 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 through which Mrs A could have ever received back more money than she deposited – then it follows that any statements made by Greenfields Capital to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mrs 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, based on Mrs A's account of events and the overall circumstances, that Greenfields Capital did state that Mrs A could make money from the trading platform.

...that induced Mrs A into entering the agreement

Again, if Greenfields Capital was essentially a scam designed to relieve investors of their money, rather than a legitimate service – and if Mrs A had known this – there's really little question: she would not have 'invested' with Greenfields Capital. Consequently, should I be satisfied that Greenfields Capital wasn't 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 Mrs A's account of events plausible and persuasive.

I've noted regulators published warnings about Greenfields Capital as follows:

- On 13 March 2018 (after Mrs A's payments), Superintendence of the Securities Market of the Republic of Panama published an alert on the International Organization of Securities Commissions (IOSCO) investor alerts portal – warning that Greenfields Capital was carrying out activities without authorisation related to the securities market, including business of intermediation, investment advice, intermediation in forex, securities investment manager, inside or from the Republic of Panama.

- On 14 April 2018 (after Mrs A's payments), an alert about Premium Peak Ltd trading as Greenfields Capital was published by the Financial Conduct Authority (FCA) warning that it was offering financial services in its jurisdiction without authorisation.

HSBC has said that these warnings aren't evidence that Greenfields Capital 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 Mrs A's payments, and Greenfields Capital wasn't. Nor was Greenfields Capital licensed or regulated abroad as far as I'm reasonably aware. There are also several online reviews from victims that share very similar experiences to that of Mrs A.

I would also question the legitimacy of any investment broker recommending consumers use credit – as Greenfields Capital did here – to invest in products that could lose money.

Next, is the refusal to allow withdrawals from the platform – again a complaint repeated across many complaints against similar firms.

I note that most of the communications Mrs A had with Greenfield Markets were over the phone but they did have some email communication.

On 12 January 2018, Mrs A said:

"I am concerned as I do not know what to do now and if the compliance department are not satisfied that means that all the money that I have deposited with you is not safe in terms that I have no way of getting it back! I keep telling them I do not have what they want and they keep sending me the same emails."

In relation to which, Mrs A's 'account manager' said:

"Don't worry my dear, I will fix everything with compliance. Don't even open emails from them. You did great one more time. Have a nice weekend."

Also, the screenshot of the 'Withdrawal History' both parties have seen, shows a number of 'cancelled' withdrawals, dated 9 January 2018, 10 January 2018, 17 January 2018 and 25 January 2018. And I am persuaded by Mrs A's submissions that this is likely to be as a result of Mrs A's 'account manager' engineering cancellation of the withdrawals – and that, as Mrs A has said, the small withdrawals he 'allowed' (on 12 January 2018) are likely to have been a ploy to keep Mrs A sufficiently satisfied for the time being, to potentially induce her into making further deposits.

HSBC has said withdrawals could not take place if Mrs A's money had already been lost trading. But given Mrs A's testimony (which as I've said, I find plausible and persuasive) and the fact that the 'account manager' did 'allow' some limited withdrawals on 12 January 2018, I am satisfied that Mrs A did make withdrawal requests at times when she had a credit balance which were effectively prevented by Greenfields Capital, albeit in a way to try to placate her and continue the scam. Mrs A has explained that after her withdrawal requests, the 'account manager' started to make trades she didn't agree with, in her view, knowing they'd lose, and so the account balance then dropped. So I don't find any inconsistency here.

HSBC has referred to the restrictions on withdrawing bonuses contained with the bonus terms and conditions, but any terms relating to the withdrawal of bonuses relate to the withdrawal of bonuses alone, not a customer's own capital payments. Mrs A's complaint

here is not about the withdrawal of bonuses, but about her own capital payments themselves. I also haven't seen any restrictions within the terms and conditions relating to Mrs A's own capital payments that persuade me Mrs A's withdrawal requests were legitimately delayed or cancelled, as distinguished from this being a normal part of the scam (and a typical tactic in these types of cases) to prevent withdrawals, or to minimise them to keep the customer placated so they could potentially be induced into further deposits.

Taking all of this together, I don't think it's likely Greenfields Capital was operating a legitimate enterprise. This means that I think it made misrepresentations to Mrs A – specifically that it was a genuine enterprise through which she could have got back more than her deposits from the platform. I'm also satisfied that if Mrs A 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, 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 of the deposit-transactions are somewhat straightforward 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 Mrs A's payment of the transaction fees was consequential loss in misrepresentation.

Breach of contract

Here, Mrs A 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'm satisfied they were transactions (the deposit-transactions) as defined by s.75.

It follows, I think, that Greenfields Capital had contractual obligations:

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

For the reasons I've already mentioned, I don't think Mrs A was properly permitted to withdraw the funds from her trading account.

It follows that as a breach of contract can be identified, Mrs A's loss amounts to the full amount of each of the deposit-transactions.

Transaction fees

I need to consider how much better off Mrs A would have been if the merchant had fulfilled its contractual obligations to her. Applying that test to the first deposit-transaction, it's clear that the transaction fee was not a recoverable consequence of the deposit-transaction. I say this because allowing Mrs A to trade on the account and withdraw the deposit as and when she wished would not have prevented her from having to pay the transaction fee.

So, the transaction fees should not be held as a recoverable loss in connection with the breach of contract claim relating to the deposit-transactions.

Putting things right

I've established two grounds under which Mrs A could have recovered her deposit-transactions:

1. Misrepresentation: I'm satisfied Mrs A has a claim for misrepresentation on the grounds that Greenfields Capital made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Mrs A could access her money freely and earn a profit from his deposit-transactions.
2. Breach of contract: I'm satisfied Mrs A also has a claim for breach of contract as Greenfields Capital breached the promises to Mrs A. Namely that she would be able to use the funds from her deposit-transactions on an investment platform and access them freely – when she wished. This provides another basis for recovery of the deposit-transactions.

As a claim for misrepresentation gives the highest sum, HSBC should put Mrs A back into the position she would have been in had the deposit-transactions totalling £8,067.43 (including the transaction fees) not been entered into. From this amount HSBC is entitled to deduct the amount Mrs A had credited back to her from Greenfields Capital. HSBC should also pay Mrs A interest on the refunds, from the date the payments were made until the date of settlement, calculated at 8% simple per year.

My final decision

My final decision is that I uphold this complaint and I direct HSBC UK Bank Plc to:

- pay Mrs A the total amount of deposit-transactions paid to Greenfields Capital, plus the accompanying transaction fees, less the amount credited back to her from Greenfields Capital; and
- pay Mrs A interest on these amounts, from the date of the payments to the date of settlement, calculated at 8% simple per year. If HSBC deducts tax in relation to this interest element of the award, it should provide Mrs A with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 28 June 2022.

Neil Bridge
Ombudsman