

The complaint

Mr K complains that HSBC Bank UK Plc did not do enough to recover the money he lost to an investment scammer.

What happened

In April 2018, Mr K came across 365 Markets after looking into forex trading online. He found an advert about them which stated consumers could earn significant returns on their investment with a minimum deposit of £250. After visiting 365 Market's website, he received a call the same day from one of their representatives who was keen to sign him up to their trading platform.

Mr K was given an account manager and started with smaller investments which he paid using his HSBC credit card and his HSBC Visa debit card (which is being considered as a separate complaint). The account manager regularly contacted him to show him how his account was making profits and increasing in value. Mr K said the account manager would contact him from time to time to sell what he would call 'big events', telling Mr K he needed to invest large sums of money in order to benefit from them. Mr K felt pressured into making payments to 365 Markets, so that he did not miss out on these big events as the account manager said they could change his life. He says the account manager called him often to encourage him to take out credit cards and personal loans so that he could find more money to invest.

In August 2018 (after making all of his payments to 365 Markets), Mr K wanted to withdraw some money. He said he felt uneasy about having invested so much money and wanted some funds to be returned into his account. However, when he tried to withdraw money, 365 Markets continuously rejected his requests and he became concerned.

Mr K spoke with his account manager who tried to convince him to keep his money on his trading account. Mr K did receive one withdrawal request in September 2018 which was paid to his HSBC Visa debit card, but he grew more concerned when he couldn't get anymore back. This prompted him to contact HSBC.

Mr K disputes the following payments:

Date	Supplier	Payment method	Amount
18 April 2018	365 Markets	Mastercard credit card	£825.64 (Transaction fee £5.59)
25 April 2018	365 Markets	Mastercard credit card	£1,000
11 May 2018	365 Markets	Mastercard credit card	£750
			Total: £2,581.23

Mr K asked HSBC to refund the payments in accordance with section 75 Consumer Credit Act 1974. HSBC declined to do so. It said binary options was a form of gambling regulated by the UK's Gambling Commission and were the transfer of funds, not the purchase of goods or services. So it concluded s.75 couldn't apply to the disputed payments.

Mr K referred his complaint to this service.

One of our investigators concluded first of all, that 365 Markets were scammers. He thought s.75 could apply to the disputed transactions and suggested that HSBC refund them, along with the transaction fee.

HSBC didn't respond, so the case has been passed to me for determination.

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 agree with our investigator that this complaint should be upheld and I'll explain why.

I've first considered that Mr K had no valid chargeback rights because the Mastercard chargeback scheme significantly limits any chargeback options related to investments or gambling.

Section 75 Consumer Credit Act 1974

I've considered whether it would be fair and reasonable to uphold Mr K's complaint on the basis that HSBC is liable to him 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

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:

1. Mr K (the debtor)
2. HSBC (the creditor);
3. 365 Markets (the supplier) – as shown on Mr K's paperwork and on HSBC's business file submissions.

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 a deal. Here, Mr K 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 he wished. Each subsequent deposit was made as a way of Mr K earning more profits, with a view of withdrawing each subsequent deposit-transaction as and when he 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.

Again ‘to finance’ is 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 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 Mr K had not used his credit card he would have had to find the cash from his own resources to fund the deposit transactions and obtain the investment account this supposedly entitled him to. So, it’s clear that the deposit-transactions were financed by the agreement.

Third, the claim must relate to the transaction. It’s important to consider what Mr K’s claim is here. It’s evident from his testimony and correspondence he provided that he feels he was tricked into depositing the payments with 365 Markets for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Mr K to deposit larger amounts.

Mr K does not believe that 365 Markets was operating legitimately and believes he was misled into thinking they were.

This claim – that Mr K 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 Mr K was told by 365 Markets matters that were factually untrue in order to trick him into entering into the deposit-transactions, his claim would be for misrepresentation. Or, if the 365 Markets made binding promises to him as part of those transactions 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 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.

HSBC has declined the claim under s.75 because it says that Mr K was paying into a binary options account and these are classed as a form of gambling by the UK’s Gambling Commission. It said, the deposits were not for the purchase of goods/services, they were a credit to his trading account. I take this to mean that the deposit was nothing more than transferring money onto another account, opened for the purpose of speculating with the money, rather than being a payment that was used to purchase goods.

When funds are deposited onto a trading account this isn’t necessarily just a transfer of money between accounts, it may also have been paid in return for something. In this case 365 Markets has made contractual promises in exchange for the deposit-transactions. HSBC

in its refusal to accept liability under s.75 haven't quoted the Act itself. It is 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 transaction.

For the reasons set out above, I'm satisfied that s.75 does apply to the credit card deposit-transactions.

I'll therefore go on to consider whether Mr K has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Mr K has made a claim of misrepresentation by 365 Markets – that claim being that they represented to him that they were a legitimate enterprise when this was not the case.

For a claim of misrepresentation to be successful it's necessary to show not just a false statement of fact but also that the statement induced Mr K 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 in which Mr K could have ever received back more money than he deposited, then it follows that any statements made by 365 Markets to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mr K 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 that based on Mr K's account of events, the nature of the situation and Mr K's communication with his account manager that 365 Markets did claim that Mr K could have made money from the trading platform.

That induced him into entering the agreement

Again, had Mr K known that the trading platform was essentially a scam designed to relieve investors of their money, rather than a legitimate service, there's really little question of him not investing with 365 Markets. Consequently, should I be satisfied that 365 Markets isn't 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've found Mr K's account of events both detailed and compelling. But more than this, it's corroborated by his email contact with 365 Markets. Because of this I'm minded to find his account to be truthful.

So, turning to his account, I note that he mentioned coming into contact with 365 Markets after clicking on an online advert offering large returns. Mr K says 365 Markets promised him larger returns with a dedicated account manager and that before each deposit transaction, the account manager would actively contact him ahead of a 'big event' to earn more money.

There's 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 365 Markets. Which does lead me to seriously question whether any actual trades

were being placed on the outcomes of financial markets or whether in fact the merchant is offering little more than a video game or simulation.

I've noted regulators published warnings about 365 Markets as follows:

- On 25 May 2018, an alert about Golden Markets was published by the Financial Conduct Authority (FCA) warning that they were offering financial services in its jurisdiction without authorisation.
- On 20 February 2019 (after Mr K's payments), Financial Services and Markets Authority in Belgium published an alert on the International Organization of Securities Commissions (IOSCO) investor alerts portal. Warning about Binary options and forex products.

I've also noted that binary options/forex traders offering services in the UK were required to be regulated by the FCA at the time of Mr K's payments and 365 Markets were not. Nor were they licensed or regulated abroad as far as I'm reasonably aware.

365 Markets is no longer operating and has not operated for some time. There are also several online reviews from victims that share very similar experiences to that of Mr K's.

I would also question the legitimacy of any investment broker pressuring consumers applying for credit - as 365 Markets 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 most of the communication Mr K had with 365 Markets was over the phone but he did have some email communication with them and I've included an extract of some of that communication here.

On 12 June 2018, Mr K's account manager said:

'we're not dealing with 2.5K anymore mate and this event is a gamechanger with different rules:

- 1. You will be able to squeeze in a portion of your existing balance alongside your ad-hoc investment!*
- 2. You can withdraw the profits at the same day the trades close, if you want, or any part of them.*

10K will get you:

10K + 22.5% of your balance + bonus of 15% of the 10K = £18,987.34 going into this event, guaranteed to yield a minimal return of 25% = £4,746.84 net profit and an endin balance of £57,011 your return on investment will be 51.07%

...I've got people scrambling to push as much of their money as they can into this, the guy who took your spot? Threw in 25K.

25K gets you:

25K + 35% of your balance+30% bonus of the 25K = £44,146.97 going into this trade, guaranteed min' return of 35% = £15,451.44 net profit (61.81% ROI) and an ending b £92,875.49.

See what I mean when I say this one counts?'

I've also seen evidence that Mr K made multiple withdrawal attempts when he had a balance of over £100,000 and 365 Markets declined those withdrawal attempts for various reasons – sighting non-compliance with identification verification and non-compliance with bonus conditions. But I've also read the terms of his agreement with 365 Markets and any terms relating to the withdrawal of bonuses relate to the withdrawal of bonuses alone, not a customer's own capital payments.

Taking all of this together, I don't think it's likely 365 Markets was operating a legitimate enterprise. This means that I think they have made misrepresentations to Mr K – specifically that they were running a genuine enterprise through which he could ever have got back more than his deposits from the platform. I'm also satisfied that if Mr K 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, 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 fee linked to the first deposit-transaction is somewhat straight forward to cover off. Had the deposit-transaction not have occurred the transaction fee couldn't have occurred. The transaction fee was a “direct” consequence of the deposit-transaction. As the payment was made outside of the UK, it's foreseeable that a bank used by Mr K to make the deposit would attach a fee for converting the payment. So, I'm satisfied Mr K's payment of the transaction fee was consequential loss in misrepresentation.

Breach of contract

Here, Mr K 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 he wished. Given the exchange of money in return for certain contractual promises – I'm satisfied there was a transaction (the deposit-transaction) as defined by s.75.

It follows, I think, that 365 Markets had contractual obligations:

- a) To enable Mr K to use the funds from his deposit-transactions on an investment platform;
and
- b) To enable Mr K to withdraw the funds deposited as and when he wished.

Mr K wasn't permitted to withdraw the funds from his trading account. He might have made losses or profits from his investment – so a breach of the former term has not – on the balance of probabilities – caused him to lose trading profits and he would (on balance) have been left no better or worse off than when he made the deposit-transactions.

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

Transaction fee

I need to consider how much better off Mr K would have been if the merchant had fulfilled its contractual obligations to him. 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 Mr K to trade on the account and withdraw the deposit as and when he wished would not have prevented him from having to pay the transaction fee.

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

Putting things right

I've established two grounds Mr K could have recovered her deposit-transactions:

- **Misrepresentation:** I'm satisfied Mr K has a claim for misrepresentation on the grounds that 365 Markets made a series of misrepresentations, namely that they were operating a legitimate enterprise and that Mr K could access his money freely and earn a profit from his deposit-transactions.
- **Breach of contract:** I'm satisfied Mr K also has a claim for breach of contract as 365 Markets breached the verbal and written promises to Mr K. Namely that he would be able to use the funds from his deposit-transactions on an investment platform and access them freely – when he wished. This provides another basis for recovery of the deposit-transactions.

As a claim for misrepresentation gives the highest sum, HSBC should put Mr K back into the position he would have been had the deposit-transactions totalling £2,575.64 had not been entered into. So, he should receive refunds of these amounts, plus the transaction fee of £5.59. Making the total amount due back to Mr K £2,581.23

My final decision

My final decision is that HSBC UK Bank Plc should refund Mr K the deposit-transactions, transaction fee, plus interest. It should:

- Refund the deposit-transactions,
- Refund the transaction fee;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.

If HSBC deducts tax in relation to the interest element of this award it should provide Mr K with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 4 March 2022.

Dolores Njemanze
Ombudsman