

## **The complaint**

Ms S complains that Tesco Personal Finance PLC (trading as Tesco Bank) refuses to refund payments she made to an investment scammer.

## **What happened**

Ms S came across Xtraderfx via a social media advert and left her contact details on their webform. Around August 2018, she was contacted by an account manager for Xtraderfx who persuaded her to give access to her computer via the software 'AnyDesk'. She initially agreed to deposit £250 for Amazon shares but was advised to increase her initial deposit to £1,000.

The account manager contacted Ms S again in October 2018 and sold her the opportunity to invest in the oil and petroleum industry. She was asked to invest £1,000 but when she said she didn't have funds available, she was asked to use a credit card. Ms S was asked to deposit £2,000 on 5 October 2018 and was told she'd receive more than her investment back by the end of the month. The account manager told Ms S she'd be able to withdraw funds as soon as there was a profit.

Between 5 October 2018 to 8 October 2018 Ms S deposited £6,000 across four payments with Xtraderfx. She incurred transactions fees totalling £239.40.

On 15 October 2018 Ms S tried to withdraw £2,500 (as she understood she could) but Xtraderfx debited four payments totalling £3,999 instead of processing her withdrawal. She incurred further transaction fees totalling £159.58.

Ms S complained to Tesco bank. It concluded she had no chargeback or section 75 rights. But it acknowledged it should have raised her complaint sooner and paid £50 compensation to recognise this.

Ms S referred her complaint to this office. One of our Investigators concluded first of all that Xtraderfx had operated a scam. He felt a claim under section 75 for misrepresentation and breach of contract had been established and suggested that Tesco Bank refunds the payments, together with associated fees and interest. Tesco Bank did not respond and our Investigator let it know he would pass the case to an Ombudsman and provided a deadline for a response. Our Investigator further clarified that Tesco Bank ought to have suspected that Ms S was paying a scammer at the point of her second payment. Tesco Bank replied only to say it was reviewing the case and still has not provided any response and it is past the deadline Tesco were given to provide a response if it wished to.

The complaint has therefore 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 uphold this complaint for largely the same reasons as that of our Investigator.

Tesco Bank is aware of our general position on a PSP's safeguarding and due-diligence duties to protect customers from the risk of financial harm due to fraud. We have published many decisions on our website setting out these principles and quoting the relevant rules and regulations. It is unnecessary to rehearse them again here in detail.

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 Tesco Bank 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 am satisfied there were enough 'triggers' in this case at the point of the second payment to have alerted a responsible regulated bank such as Tesco Bank that Ms S' account was being subjected to unusual and uncharacteristic activity. There were reasonable grounds to suspect a fraud or scam, and therefore justify an intervention (such as phoning her in order to ask discreet questions about the nature and purpose of the payment).

First, regulated firms ought reasonably to take notice of common types of scams. As long ago as June 2012, the FCA's predecessor indicated—in its consultation paper entitled *Banks' Defences Against Investment Fraud: detecting perpetrators and protecting victims* ('the 2012 paper')—that it was good industry practice for firms to build up an updated watch-list of types of scams and potential perpetrators; and regularly to share "timely and detailed intelligence" with other banks, UK and overseas regulators, the police, etc. Whilst the regulator gave no specific timings, it is not unreasonable in my view to expect an international bank to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA or International Organization of Securities Commissions (IOSCO). In my judgment, such alerts should automatically trigger alarm-bells—and lead to the payment being paused—pending further enquiries (and a possible scam warning) to the payer.

At the time of Ms S' first payment to Xtraderfx, the FCA had published a scam warning a few months earlier on 6 July 2018. A warning about their parent company was published by the FCA on 14 May 2018. The reason I don't think the first payment of 5 October 2018 ought to have triggered Tesco Bank to intervene is because it was paid via a payment processor. The payment was £2,000 so not particularly large and I don't think it would have been reasonable for Tesco Bank to have intervened at this point.

However, the second payment on 8 October 2018 was sent directly to Xtraderfx and it's not unreasonable to expect a large bank like Tesco Bank that regularly updates its internal alerts to include information about payees who had tried to carry out regulated activities without permission. I accept the warning would not have identified what type of investment was being 'sold'; and it did not necessarily follow from the nature of the warning in isolation that

these were fraudsters. But given the timing of the alert relative to the second payment, I do think Tesco Bank ought to have automatically blocked it; and it had several months to update and communicate its watch-list. The bank had constructive if not actual notice that the payee might not be a legitimate merchant – therefore, it would have been reasonable for it to have properly questioned Ms S before processing all the payments in order to satisfy itself that all was well.

If Tesco Bank had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that she would have explained what she was doing. In such circumstances, whilst the bank had no duty to protect her from a bad bargain or give investment advice, it could have explained to her that there was a regulatory warning and invited her to look more closely into this trader. It could have also explained its own customer experiences with unregulated and unlicensed high-risk investment traders in that customers would often be prevented from withdrawing available balances. After all, at that time, there was information in the public domain—which a bank ought to have known even if a lay consumer ought not—about the very high risks associated with binary options trading, including many warnings of potential fraud (e.g. Action Fraud’s June 2016 warning; the European Securities and Markets Authority’s July 2016 warning; the Financial Conduct Authority’s consultation paper of December 2016; and the Gambling Commission’s December 2016 scam warning that “an unlicensed operator is likely operating illegally”; City of London Police’s October 2017 report noting victims had lost ‘over £59m’ to binary options fraud; and so forth). After all, Xtraderfx isn’t new to regulated firms and we’ve seen several Tesco Bank customer complaints about this particular ‘dealer’. It seems likely that Tesco Bank would’ve seen a number of consumer complaints prior to Ms S’ disputed payments to have been familiar enough with binary options scammers like Xtraderfx’s deceptive trading practices.

There is no evidence that Tesco Bank blocked any of the payments to have a conversation with Ms S and it was a missed opportunity to intervene.

#### causation

If Tesco Bank had asked Ms S what the payments were for and the basic surrounding context, it is likely she would have fully explained what she was doing and that everything had been done over the phone and via AnyDesk with her ‘broker’. Tesco Bank did not need to know for certain whether Ms S was dealing with a fraudulent high risk investment trader or investing in a legitimate (albeit highly speculative) product; reasonable grounds for suspicion are enough to trigger a bank’s obligations under the various regulations and principles of good practice. I consider there were such grounds here and, therefore, that Tesco Bank ought reasonably to have provided a scam warning in light of all the information then known to financial professionals about the risks associated with unregulated binary options.

If Tesco Bank had given a warning, I believe that Ms S would have paused and looked more closely into Xtraderfx before proceeding. There is no evidence that she was willing to take high risks or had a history of speculative investments or gambling. It seems more probable that she would have made further enquiries into whether or not Xtraderfx were regulated in the UK or abroad. She could have discovered they were not and the various regulatory warnings about the risk of unregulated investment scams (see above). In other words, I am satisfied that a warning from her trusted bank would probably have exposed Xtraderfx’s smoke and mirrors, causing her not to ‘invest’ and preventing further losses.

#### contributory negligence

Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000). In this case, I do not think that Ms S was to blame for what

happened; that she did not foresee the risk of this sort of harm or any harm. At the time of her 'trading', Xtraderfx was subject to an FCA warning. Having carried out a historic web search, relevant to the time of Ms S' payments, to note what information would have been available had Ms S researched them, I've noted there was no obvious adverse information published about them clearly available in a web search until 2019. Therefore, I don't think Ms S would have reasonably seen any adverse information about Xtraderfx at the time of her payments.

It was only until Ms S requested a withdrawal that she suspected something wasn't right as they debited payments from her credit card rather than crediting her. She promptly contacted Tesco Bank to notify them what had happened on the same day. I do not think she could earlier have foreseen the risk that the company she was dealing with was a scam and the trading account she was viewing was likely to be a simulation.

In the circumstances, I do not think it would be fair to reduce compensation on the basis that Ms S should share blame for what happened.

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

I'm satisfied the first payment to Xtraderfx via a payment processor is recoverable via a claim under section 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 first deposit transaction. Ms S paid Xtraderfx via a payment processor. 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'm satisfied Ms S' payment to Xtraderfx financed their agreement – which was that Xtraderfx would invest £2,000 into oil and petroleum and Ms S would earn back more by the end of the month. Xtraderfx told Ms S that she could withdraw funds as soon as she turned a profit.

I'm further satisfied that Ms S' claim relates to the transaction in that she feels she was tricked into depositing the payment with Xtraderfx for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Ms S to deposit larger amounts.

Ms S does not believe that Xtraderfx was operating legitimately and believes she was misled into thinking they were.

This claim – that Ms 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 Ms E was told by Xtraderfx matters that were factually untrue in order to trick her into entering into the deposit-transaction, her claim would be for misrepresentation. Or, if Xtraderfx 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-transaction is the value of that deposit-transaction. It is both the consideration and subject matter of the contract.

I'm satisfied Xtraderfx told Ms S they operated a legitimate enterprise and that she could achieve returns of more than her deposit. Ms S was induced into entering into an agreement with Xtraderfx on the basis of these claims. There is supporting evidence in the form of regulator warnings which I commented on above. Xtraderfx's parent company was wound up in the public interest in June 2020 by the UK High Court. The Chief Investigator for the Insolvency Service noted: *'This was nothing but a scam as GPay tricked their clients to use their online platform under false pretences and no customer has benefited as their investments have been lost.'*

There are also negative reviews online that echo Ms S' testimony. Xtraderfx was also not regulated by the FCA (as required) or any other jurisdiction as far as I'm reasonably aware at the time of Ms S' deposit.

Taking all of this together, I don't think it's likely Xtraderfx was operating a legitimate enterprise. This means that I think they have made misrepresentations to Ms S – 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 Ms S 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 fee linked to the 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 each deposit-transaction. As the payment was made outside of the UK, it's foreseeable that a bank used by Ms S to make the deposit would attach a fee for converting the payment. So, I'm satisfied Ms S' payment of the transaction fee was consequential loss in misrepresentation.

### **Breach of contract**

Here, Ms S has deposited funds with Xtraderfx 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-transaction) as defined by s.75.

It follows, I think, that Xtraderfx had contractual obligations:

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

Ms S wasn't permitted to withdraw the funds from her trading account. She might have made losses or profits from her investment – so a breach of the former term has not – on the balance of probabilities – caused her to lose trading profits and she would (on balance) have been left no better or worse off than when she made the deposit-transaction.

It follows that as a breach of contract can be identified, Ms S' loss amounts to the full amount of the deposit-transaction.

#### Transaction fee

I need to consider how much better off Ms S would have been if Xtraderfx had fulfilled their contractual obligations to her. Applying that test to the deposit-transaction, it's clear that the transaction fee was not a recoverable consequence of the deposit-transaction. I say this because allowing Ms S 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 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 Ms S could have recovered her initial deposit-transaction:

- Misrepresentation: I'm satisfied Ms S has a claim for misrepresentation on the grounds that Xtraderfx made a series of misrepresentations, namely that they were operating a legitimate enterprise and that Ms S could earn a profit from her deposit-transaction. I'm also satisfied that the deposit-transaction fee meets the test for consequential loss in misrepresentation as it wouldn't have been incurred "but for" the deposit-transaction. It was also a direct and foreseeable loss as a result of the deposit-transaction.
- Breach of contract: I'm satisfied Ms S also has a claim for breach of contract as Xtraderfx breached the verbal promises to her. Namely that she would be able to use the funds from her deposit-transaction on an investment platform and access them freely – once she reached a profit. This provides another basis for recovery of the deposit-transaction but not the deposit-transaction fee.

As a claim for misrepresentation gives the highest sum, Tesco Bank should put Ms S back into the position she would have been had the deposit-transaction of £2,000 not been entered into and the transaction fee of £79.80 had not been charged by Tesco Bank. So, she should receive refunds of these amounts, less any amounts credited to her by Xtraderfx.

Tesco Bank should refund the remaining payments totalling £7,999 along with the transaction fees totalling £319.16 on the basis that I think it could have likely prevented the losses had it intervened (as I think it should have). It should also refund any interest and charges applied to these amounts. I haven't needed to conclude on Ms S' claims that some of these payments were taken without her permission as I've already decided that Tesco Bank could have likely prevented them.

I'm satisfied the £50 paid by Tesco Bank's to recognise its delay in logging Ms S' complaint is fair and reasonable in the circumstances and I make no further award on this point.

### **My final decision**

My final decision is that Tesco Personal Finance PLC (trading as Tesco Bank) should refund Ms S all the payments in dispute and transaction fees, plus interest. It should:

- Refund the payments to Xtraderfx totalling £9,999, less any amounts credited to her Tesco Bank credit card account by Xtraderfx;
- Refund the transaction fees;
- Refund any interest and charges applied to the account as a result of payments two to seven.
- Pay 8% interest on the total loss (payments one to eight) 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 Ms S with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 10 June 2022.

Dolores Njemanze  
**Ombudsman**