

The complaint

Mr E complains that Tesco Personal Finance Plc (“Tesco”) have failed to refund money he paid to a fraudulent company using his credit card.

What happened

Mr E was contacted by a fraudulent merchant (“Wilkins Finance”) in June 2018 where he was encouraged to invest in cryptocurrency with the promise of a large return. Mr E was in frequent contact with account managers at Wilkins Finance who were encouraging him to increase his investment by around £4,000, which he paid using three different credit cards.

Mr E paid the following amounts from his Tesco credit card to the merchant:

Date	Payee	Amount
21/06/2018	GPay*Exchangetoyour, Shen Zhen	£196.10 (plus non-sterling transaction fee of £5.39)
25/06/2018	Fantasticzing, Shen Zhen Shigua	£801.12 (plus non-sterling transaction fee of £22.03)
25/06/2018	Fantasticzing, Shen Zhen Shigua	£747.70 (plus non-sterling transaction fee of £20.56)
	Total	£1,744.92 (plus non sterling transaction fees of £47.98)

Mr E was subsequently asked to invest further large sums after making the above payments. He started to become suspicious of the merchant after they began encouraging him to take out loans in order to make further deposits. Mr E subsequently asked to withdraw his money but was told he would need to make further deposits in order to do so, at which stage he discovered he had been scammed and that his trading account was merely a simulation.

Mr E contacted Tesco to dispute the transactions. It said there were no rights to proceed with a chargeback as Mastercard considers the service as having been provided once the funds are deposited into an investment account. It also said it couldn't consider a possible claim under section 75 of the Consumer Credit Act 1974 (“section 75”) as the funds were deposited into an account for use on a trading platform, which couldn't be considered as goods or services.

Our investigator upheld the complaint. She considered that section 75 did apply, and that each payment made by Mr E should be considered a separate deposit transaction under the Act. The investigator considered there to be strong grounds for a claim of misrepresentation (given the merchant was likely operating fraudulently) so she said Tesco should put Mr E back in the position he would've been but for the misrepresentation.

Tesco didn't agree. It didn't consider there to be a valid debtor-creditor-supplier link as required for section 75 claims as Mr E had contracted with Wilkins Finance, yet had paid a company with a different name of which there appears to be no link. Therefore, it said it could not be held liable for the misrepresentations given by Wilkins Finance as it had no

relationship with the fraudulent merchant. Tesco also said that trading was not the securing of goods. As it didn't agree, the matter has been escalated to me to decide.

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 reached much the same conclusions as our investigator for the reasons set out below, as I don't think Tesco has handed Mr E's section 75 claim fairly. I'll explain why.

In order for a section 75 claim to succeed, 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

Debtor-creditor-supplier (DCS) agreement

Tesco submit that the DCS link has been broken in this instance given that Mr E contracted with Wilkins Finance, yet the money was paid to "GPay Exchangetoyour" and "Fantasticzing". However, I'm not persuaded the chain has been broken. Mr E has provided evidence to show that Wilkins Finance sent him an email which included a payment link, which he clicked on and used to send his initial deposit to the merchant in order to set up his account.

Mr E has also provided a 'declaration of deposits' form which sets out the amounts he was paying to Wilkins Finance (including those transactions made from his Tesco credit card). So it seems most likely that the money was in fact sent to Wilkins Finance, albeit with GPay and Fantasticzing simply acting as payment processors. Tesco have not provided any evidence to demonstrate that these third parties were *not* acting as payment processors in this instance, so I'm not persuaded the DCS link has been broken here, as the involvement of a payment processor simply created a four party agreement.

As such, I'm satisfied there is nothing here that 'breaks' the debtor-creditor-supplier chain between Mr E (the debtor), Tesco (the creditor) and the merchant (the supplier) who seemingly obtained the funds by using payment processors.

A transaction financed by the agreement

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 E 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 here – I'm satisfied there was a transaction (which I'll refer to as "the deposit-transactions") as defined by section 75.

In Mr E's case, there were two further payments made to the merchant after the initial deposit transaction, which came about as a result of subsequent deceptive acts on the part of the merchant after the initial deposit, promising higher returns if Mr E made further deposits. So, I'm satisfied that the subsequent payments he made should also be considered as separate deposit transactions under section 75.

In terms of whether the transactions were 'financed' by the agreement, this term also isn't defined by 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 his purchases from suppliers, because he is given time to pay for his purchase under the terms of the credit card agreement'*.

So, applying that ordinary definition here, if Mr E had not used his credit card, he would've had to find the cash from his own resources to fund the deposit and obtain the investment account that he was seemingly entitled to. Therefore, I'm satisfied the deposit transactions were 'financed' by the agreement.

Third, the claim must relate to the transaction. So, it's important to consider what Mr E's claim is here. It's evident from his testimony that he feels he was tricked into depositing the initial and subsequent payments with the merchant for the dual purpose of:

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

Mr E does not believe that the merchant was operating legitimately and believes he was misled into thinking it was.

This claim – that Mr E 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 E was told by the merchant matters that were factually untrue in order to trick him into entering into the deposit-transaction, his claim would be for misrepresentation. Or, if the merchant made binding promises to him as part of that 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 of less than £100 or more than £30,000. Here, the 'cash price' of the deposit-transaction is the value of each deposit-transaction. It is both the consideration and subject matter of the contract.

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 the merchant has made contractual promises in exchange for the deposit. And it is important to note that section 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.

So, for the reasons set out above, I'm satisfied that section 75 does apply to the credit card deposit-transactions Mr E has made. I've therefore considered whether Mr E has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider that Mr E has made a claim of misrepresentation by the merchant – that claim being that it represented to him it was 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 E into entering into an agreement.

(i) A false statement of fact

I'm satisfied that the merchant was not likely to be operating a legitimate enterprise, i.e. one in which Mr E could have ever received back more money than he deposited. It therefore follows that any statements made by the merchant to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mr E 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 E's account of events and the nature of the situation, the merchant did claim that he could have made money from the trading platform.

(ii) That induced him into entering the agreement

If Mr E had known that the trading platform he was using was essentially a scam designed to steal the investor's money, there's little doubt that he would not have proceeded with his investment with Wilkins Finance. Tesco have questioned Mr E's testimony regarding the merchant operating a scam, so I've considered the evidence to determine whether the merchant was likely operating a scam.

Mr E has provided detailed testimony about his experience with Wilkins Finance and how he has been scammed out of his money, which I find to be plausible and compelling. And in addition to this, it is also corroborated not just by other complaints of this nature, but other specific complaints against Wilkins Finance. As a result, I find his account to be truthful.

Mr E says he was approached by Wilkins Finance with the investment opportunity, which instantly gives cause for concern as this would not be the usual practice of a legitimate and regulated broker. The tactics Mr E has described also sound typical of a scam, i.e. being told by the merchant that his investment had made profit while he was still investing money, but then suddenly disappearing when he asked for his funds to be returned.

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 same tactics used by the merchant. 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 was offering little more than a simulation.

I would also question the legitimacy of any investment broker pressuring consumers into applying for credit - as the merchant did here - to invest in highly speculative 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. Seemingly the merchant has simply stopped responding to Mr E.

So, within Mr E's account of events and the evidence he has provided, there's a strong basis for concluding that the merchant was not operating a legitimate exercise.

There is also further evidence in the form of warnings placed online by reputable 'scam watch' websites and forums that warn investors about Wilkins Finance, which includes accounts of other victims that have shared similar experiences to that of Mr E. In addition, at the time Mr E made his payments, they were required to be regulated by the Financial Conduct Authority, which they were not, and neither can I see that they were regulated or licensed in any other jurisdiction either, which is also strong evidence that they were operating fraudulently.

Having considered all of this together, I don't think it's likely the merchant was operating a legitimate enterprise. This means that I think it has made misrepresentations to Mr E – specifically that the merchant was 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 E had known this, he wouldn't have deposited any money, meaning he was therefore induced into the contract on the basis of these misrepresentations.

Consequential losses

I've also considered whether Mr E has a valid claim against Tesco for the loss he incurred through the international transaction fees that were charged as a result of the deposit transactions. Where a person has been fraudulently induced to enter into a transaction through misrepresentation, they are entitled to recover from the wrongdoer all the damage directly flowing from that transaction (so long as it was the direct consequence of said transaction).

In Mr E's case, if the deposit transactions had not occurred, the transaction fee would not have occurred. The transaction fee can therefore be considered a direct consequence of the deposit transaction. And given the payment was made outside of the UK, it's foreseeable that a bank used by Mr E to make the deposit would attach a fee for converting the payment. So, I'm satisfied Mr E's payment of the transaction fee was a consequential loss in misrepresentation.

Overall, I'm satisfied Mr E has a claim for misrepresentation on the grounds that the merchant made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Mr E could access his money freely and earn a profit from his deposit transactions. I'm also satisfied the deposit transaction fees meet 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.

Given that Mr E has a claim for misrepresentation, I don't consider it necessary to determine whether he would also have a claim for breach of contract (given the former also tends to provide the highest sum of redress with consequential losses). Tesco should therefore put Mr E back into the position he would've been had the deposit transactions of £1,744.92 not been entered into and the transaction fees of £47.98 had not been charged.

My final decision

For the reasons set out above, I uphold this complaint and direct Tesco Personal Finance PLC to refund Mr E's deposit transactions and transactions fees, plus interest. It should:

- Refund the deposit-transactions
- Refund the transaction fees;
- Pay 8% interest on those sums from the date they were paid by Mr E to the date of settlement.
- If Tesco deducts tax in relation to the interest element of this award it should provide Mr E with the appropriate tax deduction certificate.

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

Jack Ferris
Ombudsman