

The complaint

Mrs F complains that Tesco Personal Finance PLC (“Tesco”) has refused to refund a payment she made using her Tesco Mastercard credit card. She believed this payment was being made to *2dots*, which she says turned out to be operating a scam.

What happened

The circumstances of this complaint are well known to both parties, so I will not repeat them all again here in detail. But I will provide an overview of events below.

In short, Mrs F says she opened a ‘trading account’ with 2dots and had a ‘broker’ called *Mark*. She says she did this because of the success her late husband was having with 2dots. In September 2019, Mrs F made a £5,000 payment to her 2dots’ trading account using her Tesco Mastercard credit card. Mrs F says her account was making a profit and she was given two bonuses. However, when she wanted to make a withdrawal, Mark informed her to wait. Thereafter, “... *I waited. After that advice, we heard no more from [Mark]. We tried to contact both him and 2 Dots by email, phone and online without success. Nobody got back to us and we have heard nothing from him since.*”

Mrs F asked Tesco to try to recover her money. As this did not happen, Mrs F raised a complaint.

In response, Tesco considered Mrs F liable for the payment. It said Mrs F knowingly made the payment to a legitimate trading platform. It argued that what happened to her funds thereafter was not its responsibility. Tesco added that it allowed the payment under Mrs F’s instruction and had already declined it once prior to her confirming she wanted it processed.

Unhappy with Tesco’s position, Mrs F referred her complaint to our service.

One of our investigators considered the complaint and didn’t uphold it. He said that Mrs F’s payment was made to a legitimate third-party merchant, Jubiter. Because of this, he argued that Mrs F did not have any rights under the Mastercard chargeback scheme, so he could not conclude Tesco acted unfairly by not raising a claim on her behalf. The investigator also thought that because Mrs F made her payment to Jubiter, rather than 2dots – this broke the debtor-creditor-supplier chain, which meant she had no rights under section 75 of the Consumer Credit Act 1974. For these reasons, the investigator did not ask Tesco to refund Mrs F’s money.

Mrs F did not accept the investigator’s findings. In short, she argued that Tesco could have done more to prevent the fraud – such as contacting her at the time to find out more about the payment.

The investigator responded stating that Mrs F’s initial £5,000 payment was blocked by Tesco. He went on to say he had listened to a telephone call between Mrs F and one of Tesco’s agents. In that call, the investigator says the agent told Mrs F that her payment had been blocked because it was linked to cryptocurrency; he provided her with a warning stating that the cryptocurrency company may not be legitimate; and said that if a payment is

made, and something went wrong – Mrs F would not be able to make a fraud claim. Despite this warning, Mrs F asked for the payment to be processed, as she was satisfied the company was legitimate. For these reasons, the investigator thought Tesco had followed the correct steps he would expect to see from a credit provider – that is, blocking the payment and providing a sufficient scam warning.

As an agreement could not be reached between the investigator and Mrs F, the complaint has been passed to me to make a decision.

On 24 February 2022, I issued a provisional decision upholding this complaint. For completeness, I repeat my provisional findings below:

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 am minded to uphold this complaint on the basis that I am not persuaded Tesco gave Mrs F a sufficient and meaningful scam warning in the circumstances. I set out my reasons why below.

It is common ground that the disputed payment was 'authorised' by Mrs F for the purposes of the Payment Services Regulations 2017 (PSRs), in force at the time. This is because it was made by Mrs F using the legitimate security credentials provided to her by Tesco. These must be regarded as 'authorised payments' even if Mrs F believes she was the victim of a sophisticated scam.

As a starting position, banks are under an obligation to follow their customers' instructions. Banks have a duty to make payments or accommodate cash withdrawal requests correctly and promptly so that legitimate payments are made correctly. So, consumers who authorise a payment, even where that turns out to be fraud related or they were tricked into doing so, start off on the 'back-foot' when it comes to getting that payment returned to them because the bank was following a valid instruction.

There are some situations where we believe that banks – taking into account relevant rules, codes and best practice – ought to have been on alert or notice that something was not right or should have looked at the wider circumstances surrounding the transaction before making the payment. So, I have looked into what this means for this case and whether Tesco should have done more here to prevent the payments in dispute.

Unusual or uncharacteristic activity

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 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.*

First, regulated firms ought reasonably to take notice of alerts about traders published by the Financial Conduct Authority ("FCA") and/or placed on the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"). 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 – 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 and/or 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.

Presumably, Tesco considered that all the above applied at the time. And that is why it blocked Mrs F's first attempted payment of £5,000.

Our investigator concluded that Tesco provided Mrs F with a sufficient scam warning when she called it about the payment. Mrs F argues that it was not sufficient. Therefore, I have listened carefully to the telephone call concerned – particularly to the warning Tesco's agent gave Mrs F. In that call, after security checks and the agent explaining that the payment was blocked because it was for cryptocurrency, he said, amongst other things:

"You are well aware that some of these sites are not secure ... You are aware if it does go wrong, then [sic] we obviously blocked it and advised you that it is a cryptocurrency and that it may not be, kosher, and you're quite happy to proceed ... If it does go wrong they'll be no claim."

Having considered the above, I do accept that Tesco provided Mrs F with a scam warning. However, I am not persuaded that it was a sufficient or meaningful one.

During the course of the telephone call, Tesco's agent did not ask Mrs F any probing questions about the payment. I do appreciate Mrs F confirmed she was making it to a legitimate company which her late husband had been dealing with. However, she did not say the actual name of the company she was making payment to/dealing with; nor, more importantly, did Tesco's agent ask for this information. In my view, on balance, had the agent asked Mrs F this information, she would have mentioned 2dots (notwithstanding the fact the payment was made to Jubiter).

I can see that there was a warning published about 2dots on the FCA's website on 17 July 2018 – so more than a month before Mrs F made her payment in September 2019. Further, there are warnings which were placed on IOSCO's Investor Alerts Portal about 2dots on 7 May and 20 August 2019. These were published by Comisión Nacional del Mercado de Valores (Spain); and Commission de Surveillance du Secteur Financier (Luxembourg), respectively.

These warnings are important. I say this because it is not unreasonable to expect a bank the size of Tesco that regularly updates its internal alerts to include information about payees who had tried to carry out regulated activities without permission – such as 2dots. Therefore, had Tesco's agent asked Mrs F the name of the company she was making payment to – I would have expected the warnings about 2dots to have become apparent. It

was reasonable for Tesco to have properly questioned Mrs F before processing her payment in order to satisfy itself that all was well. I am not satisfied this happened here.

Had the warnings about 2dots come to light during the telephone call, I would have expected Tesco's agent to put them to Mrs F. I am persuaded that had this happened, it is likely that Mrs F would not have made the payment and would have spoken to her late husband first.

I am of the view that had she heard about the FCA warning and those on the IOSCO's Investor Alerts Portal, this would have dissuaded her from continuing with the payment – outweighing her late husband's dealings with 2dots at the time. I am particularly persuaded by the fact that Mrs F said during the call that she had been 'sceptical' at first – which further supports the argument that had the regulator warnings been put to her at the time, she would likely not have made the payment.

Further, as these events took place in September 2019, I would have expected Tesco's warning to have gone a step further, rather than simply telling Mrs F about the regulator warnings. That is, I would have expected it to also inform Mrs F that it is common practice in these types of scams for the scammers to make token credits to induce the innocent victim into making further payments. This, including the regulator warnings: amount to a meaningful and robust scam warning – which to my mind, should have been put to Mrs F at the time for the reasons I have already given.

If Tesco had fulfilled its duties and carried out due diligence by contacting Mrs F and asking suitably probing questions, there is no reason to doubt that she would have gone into greater detail about what she was doing and who her payment was intended for. In such circumstances, whilst Tesco had no duty to protect Mrs F from a bad bargain or give investment advice, it could have invited her to check whether the payee was registered with the FCA, or at the very least, invited her to check that there were no existing warnings about them. It could have also explained its own customer experiences with merchants like 2dots 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 no – about the very high risks associated with binary options 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 FCA's consultation paper of December 2016; and the Gambling Commission's December 2016 scam warning that "an unlicensed operator is likely operating illegally", and so forth).

So, taking all the above factors together, I am not persuaded Tesco provided Mrs F with a sufficient or meaningful warning; or gave her reasons to doubt the legitimacy of the payment she was making. Tesco missed an opportunity to do so.

Chargeback and section 75 of the Consumer Credit Act 1974

For completeness, I have considered whether Mrs F had any chargeback or section 75 rights regarding her payment. Having done so, I am not satisfied she did. I say this because her payment was made to Jubiter, a legitimate cryptocurrency exchange, which provided the service it was meant to. So, I do not consider that it was unreasonable of Tesco not to pursue a chargeback or section 75 claim on Mrs F's behalf.

Responses to my provisional decision

Mrs F responded to say she agreed with my provisional findings and was happy with the outcome. However, Tesco did not respond.

What I have 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.

Given that Mrs F agreed with my provisional findings, but Tesco did not respond – I see no reason to depart from my provisional findings.

My final decision

For the reasons set out above, my final decision is that I uphold this complaint. I therefore propose Tesco Personal Finance PLC:

- Pay Mrs F all the money she lost; including any associated transaction fees (if applicable), less any credits (if applicable); plus
- Interest (less any tax properly deductible) – either (i) at the simple rate of 8% per year on the payment(s) from the date they were paid to the date of settlement; *or* (ii) if the account accrued interest because the relevant statement balances were not paid in full, interest should be paid at the rate actually charged for the payment(s) from the date Mrs F reported the fraud to Tesco Personal Finance PLC.
- Should an outstanding balance be owed on Mrs F's credit card account relating to the disputed payment(s) and/or interest on the disputed payment(s), Tesco Personal Finance PLC is entitled to repay this balance first from the settlement outlined in the bullets above.
- If Tesco Personal Finance PLC deducts tax in relation to the interest element of the award, it should provide Mrs F with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or reject my decision before 11 April 2022.

Tony Massiah
Ombudsman