

The complaint

Mrs T complains that Marks & Spencer Financial Services plc ("M&S") has refused to refund payments she made to what she believed was a legitimate binary options trading company (CFD1000). These payments were made using Mrs T's M&S Mastercard credit card.

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, in January 2016, Mrs T made several payments to what she thought was her trading account with CFD1000. At the time, Mrs T believed that CFD1000 were a legitimate binary options trading company. However, she later discovered that they were operating a scam.

Mrs T asked M&S to try to recover her money. As this did not happen, she raised a complaint. In short, M&S said that Mrs T had no section 75 rights under the Consumer Credit Act 1974. Unhappy with this, Mrs T referred her complaint to our service.

Based on Mrs T's statements, she made the following payments to CFD1000 using her M&S Mastercard credit card (transaction fees in italics):

Date	Merchant	Amount
6 January 2016	Cfd1000.com	£1,364.07
	<i>Non-sterling transaction fee</i>	<i>£40.79</i>
6 January 2016	Cfd1000.com	£1,364.07
	<i>Non-sterling transaction fee</i>	<i>£40.79</i>
6 January 2016	Cfd1000.com	£2,728.14
	<i>Non-sterling transaction fee</i>	<i>£81.57</i>
8 January 2016	Cfd1000.com	£3,418.34
	<i>Non-sterling transaction fee</i>	<i>£102.21</i>

One of our investigators considered the complaint and upheld it. In short, she did not think Mrs T had any chargeback rights. However, she held that Mrs T did have a valid claim for misrepresentation and breach of contract under section 75. Therefore, she suggested M&S refund to Mrs T all the payments she made to CFD1000, plus transaction fees; and rework her account so that all interest and charges caused by those payments are refunded.

Mrs T accepted the investigator's findings, but M&S did not. Its position, broadly, is that:

- Mrs T was careless because she only researched CFD1000 after she lost her money.
- There is only Mrs T's testimony of the key facts, rather than any documents or contracts.
- It took Mrs T a significant amount of time to raise this matter.

- The points the investigator raised are generic and do not apply to the specific facts of Mrs T's case.
- There is no identifiable action for misrepresentation or breach of contract.

As an agreement could not be reached, the complaint has been passed to me to make a decision.

On 18 May 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 agree with the investigator that this complaint should be upheld on the basis that M&S is liable to Mrs T under section 75. However, I do not agree with the way in which the investigator dealt with redress in her findings. I will come back to this point at the end of my provisional decision after addressing liability under section 75.

Chargeback

I have first considered that Mrs T had no valid chargeback rights under the Mastercard chargeback scheme. I say this because she did not have the evidence needed to satisfy the requirements of the scheme rules.

Section 75 of the Consumer Credit Act 1974

I would like to say that I have summarised this complaint in far less detail than the parties involved. I want to stress that no discourtesy is intended by this. If there is a submission I have not addressed, it is not because I have ignored the point. It is simply because my findings focus on what I consider to be the central issues in this complaint.

Moreover, M&S is more than familiar with this service's approach to these types of complaints.

In very broad summary:

- *There is a debtor-creditor-supplier agreement falling under section 75:*
 - *Mrs T (the debtor);*
 - *M&S (the creditor); and*
 - *CFD1000 (the supplier).*
- *The transactions Mrs T made were financed by her agreement with M&S ("the deposit-transactions").*
- *Mrs T's claim does not relate to a single item to which the seller has attached a cash price of less than £100 or more than £30,000.*

For the reasons set out above, I am satisfied that section 75 does apply to the credit card deposit-transactions in this case.

I will now turn to whether Mrs T has a valid claim for misrepresentation and/or breach of contract.

Misrepresentation

In Mrs T's submissions, she has said, amongst other things:

- *In January 2016, CFD1000 contacted her about moving her 'small Option Acct' to them as this would be more profitable.*
- *"Initially I put about £5000 into their trading acct. Within a few days they were trading very recklessly and my acct went down considerably. I contacted them and spoke to [Ray] the main trader and he said if I put in a certain amount of money the trades would be guaranteed and this I did."*
- *Ray then started to give her reasons to doubt his credibility.*
- *Because of this, she started to do some research and discovered her trading platform was not real.*
- *She went to CFD1000's purported London office only to discover it did not exist.*
- *"I had \$9000 in my acct and phoned them to close the acct. [W]ithin a couple of hours they had made 16 trades all unprofitable and the acct went down to \$45000. I phoned to ask them to stop all trades and they said if I wanted to close the ac[c]t I would have to pay another \$25000. At this point I knew it was all a scam and quite frankly I had been a fool."*
- *She dealt with CFD1000 over the telephone, so she does not have any emails.*
- *"The company had an address in London and like everyone else I thought I was dealing with a London based company."*

There is a body of external information available through various regulators, law enforcement agencies, government agencies, press cuttings and the card schemes that repeat the tactics of investment trading scammers that match those used by CFD1000. This does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact CFD1000 offered little more than a video game or simulation.

Moreover, there are several negative online reviews about CFD1000; further, the Financial Conduct Authority published a warning about them on 20 June 2016. I acknowledge this warning was published about five months after Mrs P made her final payment to CFD1000. However, taking this (and everything I have set out above) together – further supports that CFD1000 operated fraudulently.

I have also noted that CFD1000 was not regulated (as required) in the UK or abroad (as far as I'm reasonably aware). And it would be reasonable for me to conclude that a legitimate company would comply with regulatory requirements.

So, for the above reasons, I do not think it is likely CFD1000 were operating a legitimate enterprise. Therefore, I am persuaded they made misrepresentations to Mrs T. That is, that they were running a genuine enterprise through which she could never have got back more than her deposits from the platform. I am also satisfied that if Mrs T had known this, she would not 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

In this case, the transaction fees linked to the deposit-transactions are somewhat straight forward to cover off. Had the deposit-transactions not occurred, the transaction fees would not have come about. The transaction fees were a “direct” consequence of each deposit-transaction. As the payment was made outside of the UK, it is foreseeable that a bank used by Mrs T to make the deposit would attach a fee for converting the payment. So, I am satisfied Mrs T’s payments of the transaction fees were consequential losses in misrepresentation.

Breach of contract

Here, Mrs T has deposited funds to 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 am satisfied there were transactions (the deposit-transactions) as defined by section 75.

It follows, I think, that CFD1000 had contractual obligations:

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

Mrs T was not able to use the funds from her deposits on the investment platform. Further, she says CFD1000 prevented her from withdrawing funds from her trading account when she wanted to. Taking these points together, I am satisfied that CFD1000 breached the above contractual obligations.

It follows that as a breach of contract can be identified, Mrs T’s loss amounts to the full amount of each of her deposits.

Transaction fee

I need to consider how much better off Mrs T would have been if the merchant had fulfilled their contractual obligations to her. Applying that test to each deposit-transaction, it is clear that each transaction fee was not a recoverable consequence of the deposit-transaction. I say this because allowing Mrs T 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-transactions.

In summary

I have established two grounds Mrs T could have recovered her credit card deposit-transactions: misrepresentation and breach of contract. As a claim for misrepresentation gives the highest sum, M&S should put Mrs T back into the position she would have been had the deposit-transactions not been entered into. So, she should receive refunds of these amounts.

Redress

As mentioned at the outset of my provisional findings, whilst I agree with the investigator that this complaint should be upheld – I do not agree with the way she dealt with redress. I say this because the investigator asked M&S to, amongst other things: ‘Refund [Mrs T] £8,874.62 and rework [her] account so that all interest and charges caused by those payments are refunded’ (emphasis added). However, section 75 requires payment of the damages for which the supplier is liable, plus 8% interest from the date of Mrs T’s losses (i.e. the date the sum was repaid). In this instance, that’s the deposit-transactions. Therefore, I have set out the correct approach to redress below.

Responses to my provisional decision

Mrs T responded to say she had nothing further to add. However, M&S 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 T has nothing further to add and M&S 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 direct that Marks & Spencer Financial Services plc:

- Pay Mrs T all the money she lost, including applicable transaction fees (set out above); plus
- Pay 8% interest on this amount from the date it was debited from Mrs T’s account until the date of settlement.
- If Marks & Spencer Financial Services plc deducts tax in relation to the interest element of this award, it should provide Mrs T with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs T to accept or reject my decision before 3 July 2022.

Tony Massiah
Ombudsman