

The complaint

Mr N complains that Barclays Bank UK PLC didn't do enough to protect him from the loss of credit card payments to an investment scam.

What happened

Mr N has explained that in 2016 he made the following payments using his Barclays credit card to a merchant going by the name of TorOption, which he later realised was an investment scam.

Transaction number	Date	Amount (£)
1	06 September 2016	300
2	08 September 2016	10,000
4	24 October 2016	8,170.60
5	11 November 2016	4,091.15
6	11 November 2016	5,105.27
7	15 December 2016	6,713.46
Total		34,380.48

Mr N received a credit from TorOption to his Barclays credit card account on 10 October 2016 for £10,000. He also incurred some non-Sterling transaction fees in relation to transactions 4 to 7 above but these are included in the total amounts above, not just for simplicity, but also because this is the way they are presented on Mr N's Barclays credit card account statements.

Mr N got in touch with Barclays to report he'd been scammed. When Barclays said it wouldn't reimburse his losses, Mr N referred his complaint about Barclays to this service. As our investigator (who recommended that the complaint be upheld) was unable to resolve the matter informally, the case has been passed to me for a decision.

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.

I've decided to uphold this complaint, for materially the same reasons as the investigator, as explained further in my email to Barclays dated 16 September 2022. I'll explain why.

Section 75 of the Consumer Credit Act 1974 ("section 75")

I've considered whether it would be fair and reasonable to uphold this complaint about all the payments (which were all credit card payments) on the basis that Barclays is liable under section 75. As a starting point, it's useful to set out what section 75 actually says:

"(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 which the supplier has attached a cash price not exceeding £100 or more than £30,000”

To summarise, there must therefore 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 the transaction;
4. but not a claim which relates to any single item to which the supplier attached a cash price not exceeding £100 or more than £30,000.

I'll deal with each of these requirements in turn.

First, there doesn't seem to be any dispute that a credit card account is the relevant debtor-creditor-supplier agreement under the Act. And I'm satisfied here there is nothing that 'breaks' the debtor-creditor-supplier chain – inasmuch as and whilst there are three parties involved:

1. Mr N (the debtor);
2. Barclays (the creditor);
3. TorOption (the supplier).

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 the deal. Here, Mr N deposited funds for use on an investment platform and to be 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*” for this deposit (which I'll call “the deposit-transaction”) as defined by the Act.

“To finance” (or “*financed by the agreement*”) is also 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, the phrase 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 purchases under the terms of the credit card agreement”.

Applying this ordinary definition here, if Mr N had not used his credit card he would have had to find the cash from his own resources to fund the deposit-transactions. So, it's clear that the deposit-transactions were financed by the agreement.

Third, the claim for misrepresentation or breach of contract must relate to the transaction. It's important to consider what Mr N's claim is here. It's evident from his testimony and correspondence that he feels he was tricked into depositing the payments with TorOption which had the dual purpose of:

- a) stealing the deposit money; and
- b) encouraging Mr N to deposit further amounts.

Mr N does not believe that TorOption was operating legitimately and believes he was misled into thinking it was.

This claim, that Mr N 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 N was told by TorOption matters that were factually untrue to trick him into the deposit-transactions, his claim would be for misrepresentation. Or, if TorOption made binding promises to him as part of the transaction(s) 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 not exceeding £100 or more than £30,000. Here, the 'cash price' of each deposit-transaction is the value of that deposit-transaction. It is both the consideration and subject matter of the contract.

Barclays seems to have taken the position that section 75 doesn't apply because the deposits were nothing more than transferring money onto another account, opened for the purpose of speculating with the money, rather than being payments for the purchase of goods or services. However, when funds are deposited onto a trading account this isn't necessarily just a transfer of money between accounts; the deposits may also have been made in return for something. And in this case, I am satisfied TorOption made contractual promises in exchange for the deposit-transactions. It's 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 transactions.

For the reasons set out above, I'm satisfied that section 75 does apply to these credit card deposit-transactions. I'll therefore go on to consider whether Mr N has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Mr N has made a claim of misrepresentation by TorOption – that claim being that it represented to him that it was a legitimate enterprise when this was not the case.

For a claim of misrepresentation to be successful it's necessary to show a false statement of fact and that this induced Mr N 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 through which Mr N could have ever received back more money than he deposited – then it follows that any statements made by TorOption to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mr N 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, based on Mr N's account of events and the overall circumstances, that TorOption did state that Mr N could make money from the trading platform.

...that induced Mr N into entering the agreement

Again, if TorOption was essentially a scam designed to relieve investors of their money, rather than a legitimate service – and if Mr N had known this – there's really little question: he would not have 'invested' with TorOption. Consequently, should I be satisfied that TorOption wasn't a legitimate enterprise then inducement will also be demonstrated.

Was the merchant operating a legitimate enterprise?

Taking everything together I think it is most likely that TorOption was not operating a legitimate enterprise. I say this because:

- Before January 2018 (i.e. at the time of Mr N's payments to TorOption), and reflecting the risky nature of such products, binary-options traders operating in the UK were required to be regulated by the Gambling Commission – whereas, from what I can see, TorOption was not. Nor were they regulated in any other jurisdiction so far as I am reasonably aware. This indicates they were operating illegally, probably with dishonest intentions. Legitimate firms tend to comply with regulatory requirements.
- There is an FCA warning about TorOption dated 7 March 2018, at a time when binary-options traders operating in the UK were required to be regulated by the FCA – stating the FCA believed TorOption to be providing financial services or products without FCA authorisation. Whilst this warning post-dates Mr N's payments to TorOption, it adds weight to the likelihood that TorOption was not operating a legitimate enterprise.
- There are a number of other warnings about TorOption in the public domain. The International Organization of Securities Commissions (IOSCO) is an international body that brings together the world's securities regulators. The IOSCO's Investor Alerts Portal shows a number of warnings about TorOption which, whilst all post-dating Mr N's payments, indicate to me TorOption was most likely not a legitimate enterprise.
- There is also a wealth of reviews online about TorOption being a scam. And I have found Mr N's account of events persuasive.
- I understand Mr N received a credit of £10,000 back from TorOption to his Barclays credit card account (which is the only credit relevant to this case). But there is nothing unusual about this. Typically, it's done to hook the victim in and to keep them sufficiently satisfied and placated, to potentially induce them into further deposits.

This means I think it is most likely TorOption was not operating a legitimate enterprise, and I think it made misrepresentations to Mr N – specifically that it was a genuine enterprise through which he could have got back more than his deposits from the platform. I'm also satisfied that if Mr N 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, is that they are 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 fees

The transaction fees linked to the credit card deposit-transactions are somewhat straight forward to cover off. Had the deposit-transactions not have occurred, the transaction fees couldn't have occurred. The transaction fees were a “direct” consequence of the deposit-transactions. So, I'm satisfied Mr N's payment of the transaction fees was consequential loss in misrepresentation.

Breach of contract

I've not considered breach of contract because I'm satisfied Mr N can claim back the full amount taken from his credit card through a claim under misrepresentation.

Putting things right

I've explained, in relation to these credit card payments, why I'm satisfied Mr N has a claim for misrepresentation, on the basis that TorOption misrepresented matters, namely that it was operating a legitimate enterprise and he could earn a profit from his deposit-transactions. Barclays should pay Mr N £24,380.48 (this is the total of the payments less the £10,000 credit), plus interest from the date of loss to the date of settlement calculated at 8% simple per year.

My final decision

For the reasons I've explained, I uphold this complaint and I direct Barclays Bank UK PLC to pay Mr N £24,380.48, plus interest calculated at 8% simple per year from the date of loss to the date of settlement. If Barclays deducts tax from this interest, it should provide Mr N with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 15 November 2022.

Neil Bridge
Ombudsman