

The complaint

Mr H complains that Marks & Spencer Financial Services plc refuses to refund payments he made to a binary options investment scam.

What happened

Around April 2018 Mr H saw an online article about investing in Cryptocurrency with a company called Golden Markets. The article was endorsed by well-known celebrities. Mr H invested a small amount of €250 via another banking provider (Bank A). Mr H was contacted by an account manager for Golden Markets (Luke) and was told that if he invested more money he'd get better returns. Luke told Mr H that it was extremely low risk and this prompted Mr H to invest a further £2,500 (via his account with Bank A).

On 12 April 2018, Golden Markets asked Mr H to provide copies of his address and identification verification, which he duly did. He was also asked to download the programme 'AnyDesk', which would allow Luke to access his computer and show him how to trade. Luke and other account managers at Golden Markets would contact Mr H and encourage him to deposit further funds and explained the more he deposited, he'd be offered better deals and account packages.

On 23 April 2018, Mr H received an email from Golden Markets offering a 'major trading chance' on British Pound Sterling. They advised it was 'a golden opportunity to make quick market trades with substantial profits'. On Luke's advice, Mr H invested €5,800 using his Marks & Spencer Mastercard credit card. At this time, Mr H was concerned that he would be unable to get his money back, so he asked Luke if he could withdraw some of his profits and Mr H was permitted to withdraw €3,000, which was returned to his Marks & Spencer Mastercard credit card on 25 April 2018.

During the month of May 2018, Mr H was pressured by Luke to invest more money so that he could receive better returns and he duly did so using his Bank A bank account.

On 6 June 2018, Luke telephoned Mr H and promised low risk trades with high yield returns if he invested further funds. Mr H deposited €5,500 using his Marks & Spencer Mastercard credit card. Luke telephoned Mr H again and requested that he deposit further funds (again with the promise of high returns and low risk) and he duly deposited a further €2,500 from his Marks & Spencer Mastercard credit card. Shortly after this payment, Luke told Mr H he'd made significant losses and he didn't hear from Golden Markets for a month.

On 9 July 2018, another account manager for Golden Markets (Daniel) called Mr H and advised he would call him the following day to discuss some trades. Mr H heard nothing more.

Mr H emailed Luke and other account managers at Golden Markets that had contacted him in the preceding months to ask why no one had been in touch. He was concerned he'd lost everything.

Mr H was telephoned by Luke on 31 July 2018 and was told that he'd have to deposit further funds in order to recoup his losses. Mr H deposited further funds via his Bank A bank account on the instruction of Luke. Mr H heard nothing further until he contacted Luke on 14 August 2018 and he received a response from Ray at Golden Markets - who advised he was Luke's manager - letting him know that Luke was away on a personal matter. Mr H queried why particular trades that were supposed to be closed were still open and had made significant losses. Luke responded on the same email thread explaining 'Yes I'm aware and I'm already restructuring a trading plan for the entire group suffering these trades. We will advise shortly, be sure!'.

Mr H heard nothing further despite contacting Luke and Ray again. Mr H then received an email from Golden Markets to induce him to deposit further funds. Ray contacted Mr H to advise that Luke had been promoted and Vincent would be taking over his account. On 31 August 2018, Vincent called Mr H and encouraged him to deposit more funds to recoup his losses and Mr H deposited €1,900 using his Marks & Spencer Mastercard credit card, he also deposited more money via his Bank A bank account. Mr H heard nothing further and noted his Golden Markets trading account made a loss of €30,000.

Mr H deposited further funds using his Bank A bank account on Vincent's instructions that he'd recoup his losses for him.

On 14 September 2018, Mr H received an email from Vincent advising that Golden Markets trading platform was going through a major overhaul and needed everyone to close all trades until they re-opened. Mr H opted not to do this as his trades were losing a considerable amount. He asked Vincent for guarantees and this was not received, so he didn't close his trades.

Mr H lost access to his trading account and contacted Vincent to find out why he couldn't access it. Mr H received a call from Vincent asking him to invest more money and to find this anyway he could (including remortgaging his home). Mr H explained to Vincent he didn't want to close his trades but despite this, his trades were closed anyway.

On 21 September 2018, Mr H's 'new' Golden Markets account was opened with a balance of €116,850 (his previous balance transferred over). He received further calls from Vincent pressuring him to deposit more money as he was losing money. In the coming months, Mr H deposited more money using his Bank A accounts on the promise that his losses will be recouped.

Around November 2018, Mr H disputed the payments with Bank A and Marks & Spencer. In December 2018 and to support with his dispute claims, Mr H asked Golden Markets to close his account and withdraw his available balances. Golden Markets declined on the basis that Mr H hadn't met the required trading volume as his account was credited with bonus payments.

Marks & Spencer advised Mr H that no chargeback rights applied to the transactions under Mastercard's chargeback scheme. It also didn't consider that s.75 applied to the payments as the deposit of funds onto a binary options trading account was not the purchase of goods or services.

One of our Investigators reviewed the complaint. She noted that the first two payments were sent via payment processors and this didn't break the required debtor-creditor-supplier chain. She suggested that Marks & Spencer return the payments in dispute plus associated transaction fees together with interest.

Mr H accepted but Marks & Spencer did not. It said in summary:

- It is very difficult to follow the basis on which our Investigator concluded that there was a misrepresentation and/or breach of contract for the purposes of s.75;
- The assertions made in support of s.75 liability are entirely generic, and not specific to this case;
- The purported representations allegedly made to Mr H are not sufficiently clearly set out, nor is it shown that these induced Mr H to make each of the Payments; and
- It is unclear what contractual terms are said to have been breached, or how these formed part of the contractual relationship between Mr H and Golden Markets.

The case has 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 and I'll explain why.

I've first considered that Mr H had no valid chargeback rights because the Mastercard chargeback scheme significantly limits chargeback options for investment or gambling transactions.

Section 75 Consumer Credit Act 1974

I've considered whether it would be fair and reasonable to uphold Mr H's complaint on the basis that Marks & Spencer is liable to him under s.75. As a starting point, it's useful to set out what the Act actually says:

75(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 to which the supplier has attached a cash price not exceeding £100 or more than £30,000*

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. And, I'm satisfied here there is nothing that 'breaks' the debtor-creditor-supplier chain – inasmuch and whilst there are three parties involved in each of the payments:

1. Mr H (the debtor)
2. Marks & Spencer (the creditor);

3. Golden Markets (the supplier) – as shown on Mr H's Marks & Spencer statement and correspondence.

I've noted the initial two payments were sent via payment processors. Our Investigator provided evidence in support of the merchants acting as payment processors. 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.

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 H has deposited funds in exchange for being able to fund an investment 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 – I'm satisfied that payment constitutes a separate 'transaction' for each deposit (which I'll call "the deposit-transaction") as defined by the Act.

Again 'to finance' is 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 must mean "provide financial accommodation in respect of" ...A credit card issuer clearly provides financial accommodation to its cardholder, in relation to her purchases from suppliers, because he is given time to pay for her purchase under the terms of the credit card agreement'*.

Applying that ordinary definition here, if Mr H had not used his credit card he would have had to find the cash from his own resources to fund each deposit-transaction and obtain the investment this supposedly entitled him to. So, it's clear that each deposit-transaction was financed by the agreement.

Third, the claim must relate to the transaction. It's important to consider what Mr H's claim is here. It's evident from his testimony and correspondence he provided that he feels he was tricked into depositing the payments with Golden Markets for the dual purpose of:

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

Mr H does not believe that Golden Markets was operating legitimately and believes he was misled into thinking they were.

This claim – that Mr H 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 H was told by Golden Markets matters that were factually untrue in order to trick him into entering into each deposit-transaction, his claim would be for misrepresentation. Or, if Golden Markets 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 that deposit-transaction. It is both the consideration and subject matter of the contract.

Marks & Spencer said, the deposits were not for the purchase of goods/services, they were a credit to his trading account. I take this to mean that the deposits were nothing more than

transferring money onto another account, opened for the purpose of speculating with the money, rather than being a payment that was used to purchase goods.

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 Golden Markets has made contractual promises in exchange for each deposit-transaction and Mr H has provided a detailed account of what was promised in respect of each deposit-transaction. Marks & Spencer in its refusal to accept liability under s.75 haven't quoted the Act itself. It is important to note that s.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.

For the reasons set out above, I'm satisfied that s.75 does apply to each Marks & Spencer credit card deposit-transaction.

I'll therefore go on to consider whether Mr H has a valid claim for misrepresentation or breach of contract.

Misrepresentation

I consider Mr H has made a claim of misrepresentation by Golden Markets – that claim being that they represented to him that they were 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 H into entering into an agreement.

A false statement of fact

If I'm satisfied that Golden Markets was not likely to be operating a legitimate enterprise - one in which Mr H could have ever received back more money than he deposited, then it follows that any statements made by Golden Markets to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mr H 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 H's account of events, the nature of the situation and Mr H's communication with Golden Markets that they did claim that Mr H could have made money from the trading platform.

That induced him into entering the agreement

Again, had Mr H known that the trading platform was essentially a scam designed to relieve investors of their money, rather than a legitimate service, there's really little question of his not investing with Golden Markets. Consequently, should I be satisfied that Golden Markets isn't operating a legitimate enterprise then inducement will also be demonstrated.

Was the merchant operating a legitimate enterprise?

Before discussing this in more detail, I should mention that I've found Mr H's account of events both detailed and compelling. But more than this, it's corroborated not just by other complaints of this nature but specific complaints against this particular merchant. Because of this I'm minded to find his account to be truthful.

So, turning to his account, I note that he mentioned coming into contact with Golden Markets via an online advert endorsed by celebrities. Mr H says Golden Markets promised him large returns with a dedicated account manager who would guide him through his trades. When he was complying with Golden Markets' requests to fund the trading account, he was sent promotional emails with 'one time deals' or a 'huge opportunity' to earn big profits with further investments in order to induce him into making further deposits. But once Mr H used all of his savings and available credit, his trading account began to suffer losses. Golden Markets assured Mr H that they would recoup his losses if only he took out more credit to deposit onto his trading account. And once he deposited more money, he'd be able to make withdrawals. Whilst most of these representations happened mostly over the phone with Luke and Vincent (his Golden Markets account managers), Mr H has provided email evidence of the promotional offers, requests for further payments and the promise of withdrawals upon receipt of further payments.

I did find it curious that Mr H was given a refund from Golden Markets and I've considered this very carefully as it does complete the story of Mr H's overall agreement with them. I find this is a common way of merchants providing assurances to consumers that they will see returns on their investments and acts as an inducement to deposit more money. And in Mr H's case, a way of persuading him that they were legitimate – in turn encouraging Mr H to deposit more money on the belief that he would get it back.

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 tactics used by Golden Markets. Which does lead me to seriously question whether any actual trades were being placed on the outcomes of financial markets or whether in fact Golden Markets offered little more than a video game or simulation.

I've noted the following:

- The Financial Conduct Authority published a scam warning about Golden Markets on 25 May 2018.
- On 4 March 2019, the Financial Market Authority in Austria published an alert on the International Organization of Securities Commissions Investor Alerts Portal.

Golden Markets is no longer operating and has not operated for some time. There are also several online reviews from victims that share very similar experiences to that of Mr H.

I would also question the legitimacy of any investment broker pressuring consumers into using credit - as Golden Markets did here - to invest in products that *could* lose money. Next, is the wiping out of Mr H's account balances after he'd invested all his available savings and credit - again a point repeated across many complaints against similar firms. If I find that Golden Markets was not operating a legitimate enterprise, it makes no material difference that Mr H lost his available balances as it would not have been Golden Markets' intention to enable Mr H to profit from his deposit-transactions.

Taking all of this together, I don't think it's likely Golden Markets was operating a legitimate enterprise. This means that I think they have made misrepresentations to Mr H – specifically that they were running a genuine enterprise through which he could ever have got back more than his deposits or indeed recoup losses from the platform. I'm also satisfied that if Mr H had known this, he wouldn't have deposited any money, which includes each Marks & Spencer deposit-transaction, 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, 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 each deposit-transaction is 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 each deposit-transaction. As the payments were made outside of the UK, it's foreseeable that a bank used by Mr H to make the deposits would attach a fee for converting each of the payments. So, I'm satisfied Mr H's payments of the transaction fees were consequential losses in misrepresentation.

Breach of contract

Here, Mr H has deposited funds 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 – I'm satisfied there was a transaction (the deposit-transaction) as defined by s.75.

It follows, I think, that Golden Markets had contractual obligations:

- a) To enable Mr H to use the funds from his deposit-transaction on an investment platform;
and
- b) To enable Mr H to withdraw the funds deposited as and when he wished.

It would appear at the time Mr H requested his trading account be closed and a withdrawal of his money, he'd lost most of the funds on his trading account. He did have bonuses added to his trading account but these appear to have been linked to contractual conditions that had not been met. In any event, Mr H stated he had a negative account balance when he tried to withdraw his available funds, so I think it's likely he had no money left in his trading account.

Unlike our Investigator, I do not agree that a breach of contract has occurred. Whilst this differs to our Investigators initial opinion, it makes no material difference to the outcome because I agree with our Investigator that a claim for misrepresentation has been established.

Putting things right

I've established one ground Mr H could have recovered his deposit-transactions:

- Misrepresentation: I'm satisfied Mr H has a claim for misrepresentation on the grounds that Golden Markets made a series of misrepresentations, namely that they

were operating a legitimate enterprise and that Mr H could earn a profit from his deposit-transactions. I'm also satisfied that the deposit-transaction fees meet the test for consequential losses in misrepresentation as they wouldn't have been incurred "but for" each deposit-transaction. They were also direct and foreseeable losses as a result of each deposit-transaction.

Marks & Spencer should put Mr H back into the position he would have been had the deposit-transactions of £13,814.23 had not been entered into and the transaction fees totalling £413.05 had not been charged by Marks & Spencer. So, he should receive refunds of these amounts, less any amounts credited to his Marks & Spencer Mastercard credit card by Golden Markets.

My final decision

My final decision is that Marks & Spencer Financial Services plc should:

- Refund each deposit-transaction, less any amounts credited to Mr H's Marks & Spencer account by Golden Markets;
- Refund the transaction fees;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.
- If Marks & Spencer deducts tax in relation to the interest element of this award it should provide Mr H with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 22 July 2022.

Dolores Njemanze
Ombudsman