

## **The complaint**

Mrs C complains that Sainsbury's Bank Plc ("Sainsbury's Bank") has refused to refund payments she made to what she believed was a legitimate investments trading company (KayaFX). These payments were made using Mrs C's Sainsbury's Bank 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, Mrs C says she made three payments to what she thought was her trading account with KayaFX. At the time, Mrs C believed that KayaFX were a legitimate investments trading company. However, she says KayaFX scammed her which resulted in her losing her money.

Mrs C asked Sainsbury's Bank to try to recover her money. As this did not happen, Mrs C raised a complaint which she also referred to our Service.

The payments in question made using Mrs C's Sainsbury's Bank Mastercard credit card to KayaFX are as follows: £250 (9 December 2017); £3,500 (13 December 2017); and £3,000 (31 January 2018).

One of our investigators considered the complaint and upheld it. In short, she did not think Mrs C had any chargeback rights. However, she held that Mrs C did have a valid claim for misrepresentation and breach of contract under section 75 of the Consumer Credit Act 1974. Therefore, she suggested Sainsbury's Bank pay Mrs C £6,750.

Mrs C accepted the investigator's findings, but Sainsbury's Bank did not. As an agreement could not be reached, the complaint has been passed to me to make a decision.

## **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.

Having done so, I agree with the conclusions reached by the investigator for reasons I set out below.

But first, I would like to say at the outset 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.

### Chargeback

I've first considered that Mrs C had no valid chargeback rights under the Mastercard chargeback scheme.

#### Section 75 of the Consumer Credit Act 1974

I've considered whether it would be fair and reasonable to uphold Mrs C's complaint on the basis that Sainsbury's Bank is liable to her under s75. As a starting point, it's useful to set out what the 1974 Act 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);
- 2. a transaction financed by the agreement;
- 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/exclusion in turn.

#### *Debtor-creditor-supplier agreement*

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:

- 1. Mrs C (the debtor);
- 2. Sainsbury's Bank (the creditor); and
- 3. KayaFX (the supplier) – as shown on Mrs C's paperwork and on the business file submissions from Sainsbury's Bank.

#### *A transaction financed by the agreement*

Secondly, the next consideration is whether the 'transaction' is 'financed' by the agreement.

'Transaction' isn't defined by the 1974 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, Mrs C 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 she wished. The subsequent transactions were made in order to fund the growth of the investment she believed she was making. Given the exchange of money in return for certain contractual promises – I'm satisfied there were transactions (which I'll call "the deposit-transactions") as defined by s75.

Again 'to finance' is not defined under the 1974 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.*”

Applying that ordinary definition here, if Mrs C had not used her credit card she would have had to find the cash from her own resources to fund the deposit transactions and obtain the investment account this supposedly entitled her to. So, it's clear that the deposit-transactions were financed by the agreement.

#### *A claim related to that transaction*

Thirdly, the claim must relate to the transaction. It's important to consider what Mrs C's claim is here. It's evident from her testimony and correspondence she provided that she feels she was tricked into depositing the payments with the KayaFX for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Mrs C to deposit larger amounts.

Mrs C does not believe that KayaFX were operating legitimately and believes she was misled into thinking they were.

This claim – that Mrs C 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 Mrs C was told by KayaFX matters that were factually untrue in order to trick her into entering into the deposit-transactions, her claim would be for misrepresentation. Or, if the merchant made binding promises to her as part of those transactions and went on to breach these that would make his claim one for breach of contract.

#### *Cash price value*

Finally, the claim must not 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's both the consideration and subject matter of the contract.

For the reasons set out above, I'm satisfied that s75 does apply to the credit card deposit-transactions.

I'll therefore go on to consider whether Mrs C has a valid claim for misrepresentation and/or breach of contract.

#### Misrepresentation

I consider Mrs C has made a claim of misrepresentation by KayaFX – that claim being that they represented to her 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 Mrs C 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 in which Mrs C could have ever received back more money than she deposited, then it

follows that any statements made by the merchant to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Mrs C 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 Mrs C's account of events and the nature of the situation, KayaFX did claim that Mrs C could have made money from the trading platform.

*That induced her into entering the agreement*

Again, had Mrs C 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 her not investing with KayaFX. Consequently, should I be satisfied that KayaFX 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 Mrs C's account of events compelling, which is corroborated by other complaints of this nature. Because of this, I'm minded to find her account to be truthful.

Mrs C says, amongst other things:

- After some online research, she decided to invest in Bitcoin – that is when she came across KayaFX.
- Her KayaFX 'account manager' told her she would be able to login to her online account and see her profits when she wanted to. Consequently, she invested more money when she started to see a profit.
- *"My account manager did not care about my financial wellbeing and would recommend that I get a loan to pay the amounts he was requesting."*
- She was also told she would be able to withdraw her money at any time.
- However, when she tried to withdraw her money from the platform, she was unable to do so.
- She then tried to contact KayaFX about this to no avail.

Mrs C has also provided evidence of her correspondence with KayaFX.

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 KayaFX. This 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 is offering little more than a video game or simulation.

There is further evidence in the form of a warning on the Financial Conduct Authority's website dated 29 March 2018. Although this was published post the payments concerned, the warning suggests KayaFX may not have been acting legitimately:

*"We believe this firm has been providing financial services or products in the UK without our authorisation. Find out why to be especially wary of dealing with this unauthorised firm and how to protect yourself from scammers."*

Moreover, there are several negative online reviews about KayaFX; further there is a warning about KayaFX on the Alerts Portal of the International Organization of Securities

Commissions (“IOSCO”). This was placed on the Alerts Portal on 18 March 2019. This further supports that KayaFX operated fraudulently.

### *In summary*

Taking all the above points together, I don’t think it’s likely KayaFX were operating a legitimate enterprise. This means that I think they have made misrepresentations to Mrs C – specifically that they were running a genuine enterprise through which she could ever have got back more than her deposits from the platform. I’m also satisfied that if Mrs C had known this, she wouldn’t have deposited any money, so she was induced into the contract on the basis of these misrepresentations.

### Breach of contract

Here, Mrs C has deposited funds to open an account in exchange for being able to use and withdraw those funds on an investment platform as and when she 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 s75.

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

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

Mrs C was not able to use the funds from her deposits on the investment platform. Further, she says KayaFX prevented her from withdrawing funds from her trading account when she wanted to.

Taking these points together, I am satisfied that KayaFX breached the above contractual obligations.

It follows that as a breach of contract can be identified, Mrs C’s loss amounts to the full amount of each of his deposits.

### **Putting things right**

I’ve established two grounds Mrs C could have recovered her deposit-transactions:

- Misrepresentation: I’m satisfied Mrs C has a claim for misrepresentation on the grounds that KayaFX made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Mrs C access her money freely and earn a profit from her deposit-transactions.
- Breach of contract: I’m satisfied Mrs C also has a claim for breach of contract as KayaFX breached their promises to Mrs C. That is, she could use the funds from her deposits on an investment platform, and withdraw funds deposited as and when she wished. This provides another basis for recovery.

As a claim for misrepresentation gives the highest sum, Sainsbury’s Bank should put Mrs C back into the position she would have been had the deposit-transactions not been entered into. So, she should receive refunds of these amounts.

### **My final decision**

For the reasons set out above, my final decision is that I uphold this complaint. I therefore direct that Sainsbury's Bank Plc:

- Pay Mrs C all the money she lost (set out above); including any transaction fees (if applicable); plus
- Pay 8% interest on this amount from the date it was debited from Mrs C's account until the date of settlement.
- If Sainsbury's Bank Plc deducts tax in relation to the interest element of this award, it should provide Mrs C with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 5 September 2022.

Tony Massiah  
**Ombudsman**