

Complaint

Miss A complains that Tesco Personal Finance PLC ('Tesco') has refused to refund a transaction (made using her Tesco credit card) to a fraudulent company ('the merchant').

Background

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought best to resolve it. I've attached a copy of my provisional decision, which forms part of this final decision.

I invited both parties to let me have any further comments they wished to make in response to my provisional conclusions.

My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Response to my provisional findings

Miss A responded to my provisional conclusions accepting them in full.

On 13 October 2020, Tesco requested that the Financial Ombudsman Service provide it with the contract or invoice and terms and conditions that Miss A had supplied for the provisional decision to have been reached. Our investigator contacted Tesco and said Miss A hadn't supplied this service with any additional information that Tesco hadn't already seen, including her testimony and complaint letter.

On 28 October 2020, Tesco responded to the provisional decision and in summary said:

My provisional conclusions represented a significant departure from many previously published decisions.

Tesco's response to Chargeback:

- Chargeback rights were not available to it through the Mastercard scheme because Miss A's complaint related to withdrawals. It was satisfied Miss A's funds were credited to her account and she was able to make some withdrawals suggesting the account was being traded satisfactorily.
- Bank B considerations ought to be considered differently because it was subject to a different chargeback scheme that handles these types of claims differently to Mastercard.
- It doesn't think that it is advisable for the Financial Ombudsman Service to say that chargebacks should be processed on the chance it may not be disputed by the merchant and merchant acquirer and such approach could amount to an abuse of the scheme rules which could have serious implications.

Tesco's response to section 75:

- It didn't think it possible to analyse either a breach of contract or misrepresentation claim without a copy of the contract or terms and conditions and without knowing what Miss A agreed to or was told at the time of contracting.
- There may have been legitimate restrictions placed on the withdrawal of funds.
- It would be grateful if the Financial Ombudsman Service could request documents from Miss A, and that it will take these into account when making a final decision as it did not request such documents from Miss A when it considered her claim as it thought there was no basis for section 75 at all.

Our investigator contacted Miss A to confirm whether she had any documents from the merchant, she confirmed and reiterated that she hadn't received anything relating to the deposit transaction with Tesco. Our investigator confirmed this with Tesco before this case was returned to me to make a final decision.

Tesco says my provisional decision is inconsistent with some ombudsman decisions issued in the past. However, I cannot comment on other cases. My role here is to decide the case before me by reference to what is, in my opinion fair and reasonable in all the circumstances of the case, and that is what I have done.

Chargeback

I agree that chargeback rights are limited through the Mastercard chargeback scheme, but I don't agree they are prohibited altogether. I consider there are chargeback rights available where; the merchant has disappeared, or access to a platform is blocked whereby a cardholder cannot use their available funds. In this case, whilst Miss A did receive credits back to her Tesco account, she has explained that she was not given access to her investment with the merchant. Miss A further explained the merchant disappeared when she asked for her money back. So, I'm satisfied chargeback was an option.

I had highlighted in my provisional decision that Bank B considerations were subject to a different chargeback scheme. That scheme did not make the final decision on liability in the Bank B case. Miss A succeeded in her chargeback claim on the basis that the merchant or merchant acquirer did not respond to Bank B's presentment. And that claim was made with the same evidence presented to Tesco. So, I consider that had Tesco attempted a chargeback, the merchant or merchant acquirer would more than likely, have not responded, which would have resulted in Miss A recovering the deposit transaction.

Tesco's suggestion that a chargeback shouldn't be attempted where a consumer has been the victim of fraud on the grounds that such an approach could result in abuse of the scheme rules is unusual. I do not consider it would be an abuse of the scheme rules for Tesco to pursue a claim through a scheme set up to resolve disputes between card issuers and merchant acquirers. Tesco may consider which claims it takes forward to arbitration based on the strength of the case before it. But I consider it to be a matter of good practice to process a chargeback claim, where rights exist and there is some prospect of success.

Section 75 Consumer Credit Act 1974

My provisional decision set out why I was satisfied Miss A could recover her money through a claim for misrepresentation and breach of contract under section 75 based on the available evidence.

Tesco hasn't disputed Miss A's testimony of her interactions with the merchant. I found Miss A's testimony to be both detailed and compelling. Tesco hasn't disputed that the merchant was likely not operating a legitimate enterprise. Tesco has suggested there may have been legitimate reasons for the merchant placing restrictions on withdrawals but has not expanded on whether it believes that to have applied in Miss A's case or why such terms would be legitimate. I don't dispute the merchant may have restricted withdrawals but what I've concluded is whether such terms were made clear, at the point of sale and in exchange for Miss A's deposit.

I'm not persuaded that Miss A would have proceeded with the deposit transaction, had the merchant explained, at the point of sale, that she would not be able to access her full deposit transaction again.

Putting things right

I've established three grounds Miss A could have recovered her deposit-transaction:

- **Chargeback:** I'm satisfied that Miss A would've had recourse to recover her deposit-transaction through the chargeback scheme had Tesco processed a chargeback claim. But this would limit the amount Miss A could recover to the deposit alone, less the amounts credited to her by the merchant.
- **Misrepresentation:** I'm satisfied Miss A has a claim for misrepresentation on the grounds that the merchant made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Miss A could access her money freely and earn a profit from her deposit-transaction. I'm also satisfied that the deposit-transaction fee meets the test for consequential loss in misrepresentation as it wouldn't have been incurred "but for" the deposit-transaction. It was also a direct and foreseeable loss as a result of the deposit-transaction.
- **Breach of contract:** I'm satisfied Miss A also has a claim for breach of contract as the merchant breached the verbal promises to Miss A. Namely that she would be able to use the funds from her deposit-transaction on an investment platform and access them freely – when she wished. This provides another basis for recovery of the deposit but not the deposit-transaction fee.

As a claim for misrepresentation gives the highest sum, Tesco bank should put Miss A back into the position she would have been had the deposit-transaction of £3,903.87 had not been entered into and transaction fee of £107.35 had not been charged by Tesco. So, she should receive refunds of these amounts, less the amounts credited to her by the merchant.

My final decision

My final decision is that Tesco Personal Finance PLC should refund Miss A the deposit-transaction and transaction fee, plus interest. It should:

- Refund the deposit-transaction, less the amounts credited by the merchant;
- Refund the transaction fee;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.
- If Tesco deducts tax in relation to the interest element of this award it should provide Miss A with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss A to accept or reject my decision before 17 December 2020.

Dolores Njemanze
ombudsman

Copy of provisional decision

Complaint

Miss A complains that Tesco Personal Finance PLC ('Tesco') has refused to refund a transaction (made using her Tesco credit card) to a fraudulent company ('the merchant').

Background

Miss A saw an advert on her social media platform for a company offering investment products - endorsed by well-known celebrities. She left her contact details on the merchant's webform and was subsequently contacted by a broker working for the merchant.

Miss A says the broker conducted himself professionally and appeared to have a good financial background – stemming from working in the banking industry. The broker guaranteed profits and high returns if Miss A invested with the merchant.

The broker said that Miss A's initial lump sum payment would be used as a deposit to open the account and she'd be able to freely access her funds. She was never given access to an investment platform and the broker took complete control over what would happen with the funds but made it clear he'd return funds to her credit card account. The transaction below came from Miss A's Tesco credit card:

| Date | Supplier | Payment method | Amount |
|--------------|--------------|------------------------|---|
| 29 May 2017 | the merchant | Mastercard Credit card | £3,903.87 (Transaction fee £107.35) |
| Total | | | £4,011.22 |

Miss A was verbally told by the broker that her investment was doing well and her account with Tesco was credited with the following transactions:

- 1 June 2017 – Miss A receives a credit onto her Tesco credit card of 194.75 from the merchant. A separate foreign exchange fee of £5.35 was also credited to her account;
- 13 June 2017 – Miss A receives a credit onto her Tesco credit card of £395.49 from the merchant. A separate foreign exchange fee of £10.87 was also credited to her account.

Some months went by and the broker told Miss A that his mother was unwell which was why he had not been in regular contact with her.

The broker gave Miss A assurances that her investment was still doing very well and encouraged her to apply for credit to make further deposits towards a new investment as a way of obtaining higher returns. Miss A did apply for credit with another banking provider (bank B) and made a new series of payments towards a different merchant (merchant 2). I've set out the subsequent sequence of events below:

- 13 September 2017 – Miss A draws down a loan of £9,600 from bank B and the loan funds credit her account with bank B
- 14 September 2017 – Miss A pays £5,000 from her bank account with bank B using her VISA debit card to merchant 2
- 15 September 2017 – Miss A pays £4,800 from her bank account with bank B using her VISA debit card to merchant 2
- 20 September 2017 – Miss A receives a credit into her bank B account from merchant 2 of £400
- 25 September 2017 – Miss A receives a credit into her bank B account from merchant 2 of £303.57
- 29 September 2017 – Miss A pays £1,000 from her Mastercard credit card account with bank B to merchant 2
- In November 2017 – Miss A draws down an overdraft of £2,400 from bank B – which was an increase to her existing limit of £700
- 8 November 2017 – Miss A pays £2,000 from her newly increased overdraft limit with bank B via an online international bank transfer to merchant 2

The broker told Miss A the payments to merchant 2 would be linked to her original investment with the merchant. He also advised she would be able to access her funds freely. This time, Miss A was given access to an investment platform but was unable to see the investment made to the merchant.

Miss A realised there was a problem when she asked to withdraw her funds and the broker stopped taking her calls. She was then blocked from accessing her platform. As she had only spoken with the broker by phone – which appeared to be a London based telephone number – she had no alternative way to get in touch with him or the merchant.

In January 2018, Miss A told Tesco and bank B that she had fallen victim to investment fraud and asked them to refund her money.

Bank B processed chargebacks for the debit card payments of 14 September 2017 and 15 September 2017. The chargeback claims succeeded due to merchant 2 or the merchant acquirer not defending the claim. Bank B did not process a chargeback for the credit card transaction of 29 September 2017 and were unable to recover the international payment of 8 November 2017 from the recipient bank. Tesco informed Miss A that it didn't have any chargeback rights through the Mastercard chargeback scheme.

It told Miss A that because she had gambled her money in binary options, it was unable to help. Tesco said that since April 2017 Mastercard had denied chargeback rights in cases involving binary options.

Tesco acknowledged a chargeback could be attempted but as the decision to attempt a chargeback was discretionary on its part, it decided not to on the grounds that the claim would likely fail. Tesco also said that Section 75 Consumer Credit Act 1974 (section 75) didn't apply to Miss A's transaction or indeed transactions to trading accounts in general.

Tesco acknowledged Miss A was given some incorrect information about how she could complain and offered her £25 compensation to recognise this.

Miss A says she was never told the merchant would be gambling her money in binary options and believed it had safely invested it at the time. She acknowledged the limitations within the chargeback scheme but felt more could be done because she had been defrauded. Miss A referred her complaint to this service.

One of our investigators felt that Section 75 liability extended to Miss A's deposit transaction and thought there were strong grounds for a claim under misrepresentation. This was on the basis that the merchant was likely operating fraudulently. He suggested that Miss A's money be returned, along with any interest and charges implications.

Tesco disagreed. It said our investigator had misunderstood Section 75. It also said binary trading isn't the securing of goods and rather it's the beginning of speculating in trading markets. Tesco said our investigator's view departed from previous decisions issued by our service and asked for an ombudsman to review the case.

My provisional findings

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've reached much of the same conclusions of our investigator but I've included some further reasoning. I did want to make it clear that I cannot comment on other cases. My role here is to decide the case before me by reference to what is, in my opinion fair and reasonable in all the circumstances of the case, and that is what I have done.

In this decision I'll explore whether any credit card protection options were available to Miss A in order to bring a claim against the merchant and specifically:

- Whether a chargeback ought to have been processed by Tesco in relation to the disputed transaction.
- Whether Miss A has any rights to bring a claim under section 75 dealing in turn with:
 - Breach of contract in relation to the disputed transaction and whether the transaction fee and bank B loss could be claimed as recoverable losses.
 - Misrepresentation in relation to the disputed transaction and whether the transaction fee and bank B loss could be claimed as consequential losses.

As Miss A has raised no further concern as to Tesco misinforming her about how she could complain following its offer of £25 compensation, I've made no finding on this point.

Chargeback

The chargeback process is relevant here. A chargeback is the process by which payment settlement disputes are resolved between card issuers and merchants, under the relevant scheme rules. What this means is that Tesco can in certain circumstances ask for a payment made to be refunded. One of those circumstances is where the goods or services aren't supplied or as described by the merchant.

A chargeback isn't guaranteed to result in a refund. There needs to be a right to a chargeback under the scheme rules. And under those rules the merchant or merchant acquirer can defend a chargeback if it doesn't agree with the request. If a chargeback is defended, the card issuer (in this case Tesco) can make a second presentation of the chargeback by providing further supporting evidence. If it is still defended by the merchant, it can ask the card scheme provider to decide whether a refund should be given. This final part of the chargeback process is called arbitration.

There is no obligation for a card issuer to raise a chargeback when a consumer asks for one. But we would consider it good practice for a chargeback to be attempted where the rights exist and there is some prospect of success.

The Mastercard chargeback rules relevant to the date of Miss A's transaction state that chargebacks are available to the card issuer (Tesco) for transactions in which any value is purchased for gambling, investment or similar purposes. However, issuers have no chargeback rights related to the use of these chips or value, unspent chips, or withdrawal of such value, or on any winnings, gains or losses resulting from the use of such chips or value.

I'm satisfied that chargeback rights are limited through the Mastercard scheme rules when it comes to claims relating to gambling, investment or similar. But they aren't excluded altogether. Having clarified this point with Mastercard, I'm satisfied there would be an appropriate chargeback route if a merchant does not make funds transferred to it available for use in the type of transactions for which it received them.

So, I disagree with Tesco's assertion that there was no prospect of success through the Mastercard chargeback scheme. I think it should have attempted a chargeback – based on Miss A's claim that the broker had disappeared and she was provided no access to her investment with the merchant.

Based on Miss A's claim, I'm satisfied Tesco had grounds to process a chargeback on the basis that Miss A was unable to use the funds credited to her investment platform – as she was never provided access to one. I've also considered that chargebacks were successfully processed by bank B in relation to the debit card transactions - with the same broker representing both the merchant and merchant 2. Whilst bank B operated under a different card scheme, the chargebacks succeeded because neither the merchant or merchant acquirer defended them. Had Tesco properly pursued a chargeback claim for Miss A, I'm satisfied (on balance) it would've succeeded on a similar basis. I'm persuaded Miss A would've been able to recover the full amount paid to the merchant.

I'm not satisfied the Transaction fee of £107.35 could be recoverable through the chargeback scheme because this was the cost Tesco applied to converting Miss A's transaction into its intended currency.

Section 75 Consumer Credit Act 1974

I've also considered whether it would be fair and reasonable to uphold Miss A's complaint on the basis that Tesco is liable to her under section 75, because this might give her additional rights. 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 – insomuch as there are three parties involved:

1. Miss A (the debtor)
2. Tesco (the creditor); and
3. The merchant (the supplier) – as shown on Miss A's paperwork *and* Tesco's business file submissions.

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, Miss A 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. Given the exchange of money in return for certain contractual promises – I'm satisfied there was a transaction (which I'll call "the deposit-transaction") as defined by section 75.

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 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 Miss A had not used her credit card, she would have had to find the cash from her own resources to fund the deposit and obtain the investment account this supposedly entitled her to. So, it's clear that the deposit-transaction was financed by the agreement.

Third, the claim must relate to the transaction. It's important to consider what Miss A's claim is here. It's evident from her testimony and the correspondence she provided that she feels she was tricked into depositing the initial payment with the merchant for the dual purpose of:

- a) Stealing the deposit money; and
- b) Encouraging Miss A to deposit larger amounts.

Miss A does not believe that the merchant was operating legitimately and believes she was misled into thinking it was.

This claim – that Miss A 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 Miss A was told by the merchant matters that were factually untrue in order to trick her into entering into the deposit-transaction, her claim would be for misrepresentation. Or, if the merchant made binding promises to her as part of that transaction and went on to breach these that would make her 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.

Tesco has declined the claim under Section 75 because it says that the deposit was a step to speculating and didn't secure any goods. I take this to mean that the deposit was 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 the broker has made contractual promises in exchange for the deposit. Tesco in its refusal to accept liability under Section 75 haven't quoted the Act itself. It is 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 transaction.

For the reasons set out above, I'm satisfied that section 75 does apply to the credit card deposit-transaction.

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

Misrepresentation

I consider Miss A has made a claim of misrepresentation by the merchant – that claim being that it represented to her it was 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 Miss A 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 Miss A 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 Miss A 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 Miss A's account of events and the nature of the situation, the merchant did claim that Miss A could have made money from the trading platform.

That induced her into entering the agreement

Again, had Miss A 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 the merchant. Consequently, should I be satisfied that the merchant 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 Miss A'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 her account to be truthful.

So, turning to her account, I note that she's mentioned coming into contact with the merchant after clicking on an advert apparently supported by well-known celebrities. I've seen what I think is likely to be the same advert and it is a fake endorsement – for which there has been significant recent press coverage, specifically by one of the celebrities appearing to endorse the merchant explicitly stating that these firms are scammers and that he has no connection with them whatsoever. The matter was also subject to a legal battle over the unauthorised use of the celebrity's face and name. So, the fact the merchant was using a faked celebrity endorsement to advertise its website immediately gives me cause for concern.

I note Miss A's description of the tactics used by the merchant. Miss A was told by the merchant that her investment had made profits whilst she was compliant and happy for it to keep 'investing' her money but when she grew impatient and asked for her funds to be returned, the merchant disappeared.

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 the merchant. Which 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.

I did find it curious that Miss A was given small refunds from the merchant and merchant 2 and I've considered this very carefully as it does complete the story of Miss A's overall agreement with the merchant.

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 Miss A's case, a way of persuading her the merchant and merchant 2 were legitimate – in turn delaying any attempt Miss A should make in taking action against the merchant and merchant 2.

I would also question the legitimacy of any investment broker pressuring consumers into applying for credit - as the broker did here - to invest in products that *could* lose money. Next, is the refusal to allow withdrawals from the platform – again an issue repeated across many complaints against similar firms. Seemingly the merchant has simply stopped responding to Miss A despite a verbal agreement to return the funds.

So, within Miss A's account of events and the evidence she's provided there's a strong basis for concluding that the merchant is not operating a legitimate enterprise.

There is further evidence in the form of a warning on the Financial Conduct Authority's website, dated 4 July 2017, which suggests the merchant may not be acting legitimately. It says:

'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.'

The merchant 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 Miss A.

Taking all of this together, I don't think it's likely the merchant was operating a legitimate enterprise. This means that I think it has made misrepresentations to Miss A – specifically that the merchant was 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 Miss A had known this, she wouldn't have deposited any money, so she was induced into the contract on the basis of these misrepresentations.

What damage was caused by the misrepresentation

Whilst this complaint centres on the transaction Miss A made using her Tesco credit card. I've also considered whether Miss A has a valid claim against Tesco for the loss incurred with bank B and whether this loss can be considered as recoverable damages or consequential loss flowing from the misrepresentation and/or breach of contract in relation to the Tesco deposit-transaction. Bank B was able to recover the majority of Miss A's loss with it, so when I later refer to the 'bank B contribution' I'm referring only to the unrecoverable loss and to be specific - £2,675.43.

There are three issues to be considered here:

1. Did Miss A lose the deposit as a direct result of having entered into the deposit- transaction?
2. Was that loss mitigated?
3. Did Miss A lose the transaction fee attached to the deposit-transaction and her subsequent bank B contribution because of the deposit transaction?

Miss A did receive two credits from the merchant but was unable to recover the remaining loss on her Tesco credit card through the merchant, and it's reasonable to conclude that the loss of the remainder of this deposit was a result of having entered into the deposit- transaction with the merchant.

In relation to mitigation, Miss A did also receive two credits from merchant 2 and recovered most of the losses incurred with bank B. But this was in relation to her subsequent transactions with bank B. There's no direct link between any recoveries made and the deposit-transaction with Tesco. So, there was a small mitigation of the loss in question with Tesco as a result of the credits from the merchant.

In relation to the transaction fee and the bank B contribution, I'll need to set out the test for establishing consequential loss in 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 the deposit-transaction is somewhat straight forward to cover off. Had the deposit-transaction not have occurred the transaction fee couldn't have occurred. The transaction fee was a "direct" consequence of the deposit-transaction.

As the payment was made outside of the UK, it's foreseeable that a bank used by Miss A to make the deposit would attach a fee for converting the payment. So, I'm satisfied Miss A's payment of the transaction fee was consequential loss in misrepresentation.

Bank B contribution

In relation to the “but for” test, if Miss A had not made the initial deposit and had therefore not entered into the transaction relating to that deposit, it is conceivable that she wouldn’t have made the bank B contribution.

The key question I’ve considered is whether; if the initial deposit-transaction hadn’t taken place, would that have meant that Miss A would never have opened the supposed binary options account (and therefore not have gone on to lose the bank B contribution).

The bank B contribution occurred several months after the deposit-transaction and from the evidence I’ve considered, was made off the basis of a set of new misrepresentations made by the broker to induce Miss A into opening a new account with merchant 2. So, I don’t find it likely that the bank B contribution occurred as a result of the misrepresentations made at the initial deposit-transaction.

I find that “but for” Miss A’s entry into the initial deposit-transaction, Miss A was likely still to have fallen victim to the fraud with merchant 2. So, this test for causation isn’t met.

Even if I were to be satisfied that the ‘but for’ test for causation has been met, I’d also need to be satisfied that the bank B contribution was a “direct” (foreseeable) consequence of the Tesco deposit-transaction.

I’m not persuaded that the bank B contribution was a “direct” consequence of the deposit- transaction. I say this because:

- At the time of the deposit-transaction there was no discussion of Miss A applying for credit with bank B;
- There was no discussion of the merchant investing with merchant 2.

I think the bank B contribution occurred as a result of an elaborate course of deceptive conduct (on the part of the merchant), subsequent to the initial deposit-transaction. This was aimed at convincing Miss A that she was profiting from her investment and had reason to expect even better returns if only she contributed more money.

As both strands of the test for consequential loss haven’t been met, I’m unable to agree that Tesco should be liable for the bank B contribution caused by the misrepresentation of the merchant.

Breach of contract

Here, Miss A 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. Given the exchange of money in return for certain contractual promises – I’m satisfied there was a transaction (the deposit-transaction) as defined by section 75.

It follows, I think, that the merchant had contractual obligations:

- a) To enable Miss A to use the funds from the initial deposit on an investment platform; and
- b) To enable Miss A to withdraw the funds deposited as and when she wished.

Miss A was not given access to the credit balance created by her Tesco deposit-transaction, so I’m satisfied both terms were breached by the merchant. She might have made losses or profits from her investment – so a breach of the former term has not – on the balance of probabilities – caused her to lose trading profits and she would (on balance) been left no better or worse off than when she made the deposit.

It follows that as a breach of contract can be identified, Miss A’s loss amounts to the full amount of the deposit-transaction.

But the question again arises as to whether the transaction fee and the bank B contribution can be considered as recoverable losses under a breach of contract claim.

Transaction fee

I need to consider how much better off Miss A would have been if the merchant had fulfilled its contractual obligations to her. Applying that test to the deposit-transaction, it's clear that the transaction fee was not a recoverable consequence of the deposit-transaction. I say this because allowing Miss A 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-transaction.

Bank B contribution

Turning to the loss of the Bank B contribution, the question is whether this loss was too remote a consequence of the merchant's breaches to be recoverable.

The leading textbook, Chitty on Contracts, defines the test for remoteness of loss in cases of breach of contract (i.e. limits of which losses are recoverable from a contract-breaker) as follows:

A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not likely result of that breach. [paragraph 26-121]

Applying that test to the deposit-transaction, it's unlikely the loss of the bank B contribution was a recoverable consequence of the breach of the deposit-transaction. I say this because:

- a) At the time of the deposit-transaction the bank B contribution seems not to have been in Miss A's contemplation. So, the deposit-transaction's terms must have been silent about Miss A's rights in respect of any subsequent deposit.
- b) If, at the time of the initial deposit, Miss A had foreseen that the merchant would breach the deposit transaction, as it did, she would certainly have contemplated losing the initial deposit; but I can't see it would have been in her contemplation that she would've made, and lost, further deposits. They arose from subsequent dealings.

So, I find that under her claims for breach of contract Miss A cannot claim the transaction fee or the bank B contribution.

Putting things right

I've established three grounds Miss A could have recovered her deposit-transaction:

- Chargeback: I'm satisfied that Miss A would've had recourse to recover her deposit-transaction through the chargeback scheme had Tesco processed a chargeback claim. But this would limit the amount Miss A could recover to the deposit alone, less the amounts credited to her by the merchant.
- Misrepresentation: I'm satisfied Miss A has a claim for misrepresentation on the grounds that the merchant made a series of misrepresentations, namely that it was operating a legitimate enterprise and that Miss A could access her money freely and earn a profit from her deposit-transaction. I'm also satisfied that the deposit-transaction fee meets the test for consequential loss in misrepresentation as it wouldn't have been incurred "but for" the deposit-transaction. It was also a direct and foreseeable loss as a result of the deposit-transaction.

- Breach of contract: I'm satisfied Miss A also has a claim for breach of contract as the merchant breached the verbal promises to Miss A. Namely that she would be able to use the funds from her deposit-transaction on an investment platform and access them freely – when she wished. This provides another basis for recovery of the deposit but not the deposit-transaction fee.

As a claim for misrepresentation gives the highest sum, Tesco bank should put Miss A back into the position she would have been had the deposit-transaction of £3,903.87 had not been entered into and transaction fee of £107.35 had not been charged by Tesco. So, she should receive refunds of these amounts, less the amounts credited to her by the merchant.

My provisional decision

My provisional decision is that Tesco Personal Finance PLC should refund Miss A the deposit-transaction and transaction fee, plus interest. It should:

- Refund the deposit-transaction, less the amounts credited by the merchant;
- Refund the transaction fee;
- Pay 8% interest on those sums from the date they were paid to the date of settlement.
- If Tesco deducts tax in relation to the interest element of this award it should provide Miss A with the appropriate tax deduction certificate.

Dolores Njemanze
ombudsman