

complaint

Mr E complains that Capital One (Europe) plc won't refund money he lost on a binary options trading website.

background

In January 2017 Mr E used his Capital One credit card to make three payments totalling £4,500 to his online account with a binary options trading platform, which I will call B. Soon afterwards he asked Capital One to raise a chargeback on the ground that the services B provided were not as described. He said that B had given him financial advice when it was not allowed to, it had not told him it would charge him daily fees of £30, and it had told him that his investment was risk-free. In fact he lost all of his money, which was wiped out by the daily fees, and he was not allowed to withdraw his money when he asked for it back.

Capital One said that no chargeback reasons applied to Mr E's claim, so it couldn't raise a chargeback. It also considered whether Mr E had a claim under section 75 of the Consumer Credit Act 1974 instead, but concluded that the section did not apply, for two reasons. It said Mr E had not been paying B for its service, only depositing money in his account with B. It also said that binary options trading is a form of gambling, and under its account terms and conditions, gambling transactions are deemed to be cash transactions, not credit card payments.

Mr E accepted that section 75 did not apply. But he said that a second credit card company (with the same scheme provider) had raised a chargeback in respect of other payments he'd made to B, and that it had succeeded. So he complained to our Service.

Our adjudicator did not uphold this complaint. She said that there was not enough evidence to conclude that B had failed to provide the service it had offered. She said that B had not given Mr E financial advice, and there was no evidence that it had told him his trading would be risk-free. Rather, its website warned traders that they might lose some or all of their money. There was no evidence of the daily fees, and she invited Mr E to provide some.

Mr E did not accept this decision. He provided a screenshot which he said showed he had been charged over £3,000 in fees. He said that if Capital One had raised a chargeback, then it could have asked B to provide recordings of all the phone calls in which it had promised him that there was no risk and had given him advice. He provided an email from B which he said proved B had given him financial advice. He emphasised that another chargeback had been raised by another credit card company, and that it was likely to succeed. He asked for an ombudsman's decision.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

section 75

I agree that section 75 does not apply to the payments, for the first reason given by Capital One. They were not payments to B, but merely deposits to Mr E's account with B, which is not quite the same thing.

I don't accept the second reason. The fact that Capital One's terms and conditions may purport to treat a credit card payment as if it was a cash transaction in certain circumstances is not capable of preventing section 75 from applying to the payment. Terms which are inconsistent with that section are forbidden by section 173 of the Act. (I am not criticising Capital One for this, however, as I cannot rule out the possibility that this clause is only intended to describe the first reason.) However, I don't need to consider this issue to determine this complaint.

chargeback

Mr E made these payments in January 2017, and in March Capital One told him it would not raise a chargeback. These events occurred during a transitional period – from October 2016 to March 2017 – during which the scheme provider, Mastercard, was implementing changes in its chargeback rules. The change was that from October, new chargeback disputes would no longer be allowed if they concerned the payment of money into “an investment, foreign exchange, or similar type of account,” provided that the money did reach its destination. (Old disputes which had already started had to be concluded in April.) I think that includes payments to a binary options trading account. Under the new rules, as long as the money has been paid into the account or investment, then a chargeback should not be raised in relation to anything that happens afterwards, irrespective of what may be said in the terms and conditions concerning the transaction.

Capital One therefore did not raise a chargeback for Mr E. Mr E says that the provider of his other credit card did do so, but I note that he has also told us that the other chargeback has not yet succeeded. I won't speculate here about the prospects of that chargeback succeeding, or whether its call handler was aware of the change to the rules. But having regard to the rules, I do not think I can reasonably conclude that Capital One should have raised a chargeback dispute. The fact that another firm did so does not mean that Capital One should have done so too.

I am reinforced in that conclusion by the other reasons given by the adjudicator, with which I agree. I will deal with them briefly.

I don't accept that B gave Mr E financial advice. B's terms and conditions, which appear on its website, include the following clauses:

“We deal on an execution only basis and do not advise on the merits of particular Transactions...”

“...in asking us to enter into any Transaction, you represent that you have been solely responsible for making your own independent appraisal and investigations into the risks of the Transaction. You represent that you have sufficient knowledge, market sophistication, professional advice and experience to make your own evaluation of the merits and risks of any Transaction...”

“Where we do provide generic trading recommendations, market commentary or other information:

- i. this is incidental to your dealing relationship with us. It is provided solely to enable you to make your own investment decisions and does not amount to advice; ...

iii. we give no representation, warranty or guarantee as to the accuracy or completeness of such information or as to the tax consequences of any Transaction.”

Mr E has shown us an email he received from B, dated 30 January 2017, which he says contains financial advice. I can certainly see why he says that. If that email is read in isolation, it does read like advice. But read in the context of the terms and conditions, I don't think I could reasonably say that the email is proof that the services he obtained from B were not as described (i.e. non-advised), or that any other chargeback reason might apply to it (even if this had occurred while the old rules still applied).

I appreciate that Mr E says that he was given further advice in phone calls, and that if Capital One had raised a chargeback then it could have obtained the call recordings. But it didn't, for a reason I think is reasonable, and I won't speculate about what those recordings might have contained. I cannot safely conclude that B breached its agreement with Mr E based on his recollections of those calls.

For similar reasons, I don't think I can say that Capital One should have raised a chargeback on the ground that B told Mr E that binary options trading would be risk-free. The home page of B's website contains this warning:

“Although investing and trading in financial instruments can result in profit, there is also a potential risk of losing some or all of the invested capital.”

I don't think that the screenshot Mr E sent us proves that he was charged fees of £30 a day. The relevant figure appears under the label “Swap” and it reads “-3315.56000”, meaning a loss of £3,315.56. I would like to say here that I am genuinely sorry that Mr E lost such a large sum of money, and I well understand why he has fought so diligently to get it back. But I don't think he lost that money through daily fees – I think he lost it in the ordinary course of binary options trading. I wouldn't expect that sort of loss to be covered by a chargeback reason.

For all of these reasons, I don't think Capital One was required to raise a chargeback. If it had tried to do so, I think it is likely that it would have failed.

my final decision

So my decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 18 October 2017.

Richard Wood
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