

The complaint

Mr C complains that Marks & Spencer Financial Services plc (M&S) won't refund the money he lost when he fell victim to a scam.

What happened

The details of this complaint are well known to both parties, so I won't repeated them all again here. But in summary, the scam unfolded as follows:

- Mr C was looking online for trading opportunities. He decided to investment with a merchant, F, after speaking to them via online chat and over the phone.
- Mr C made the following payments to F in May 2018 from his M&S credit card:

Date	Amount
4 May 2018	£2,500
16 May 2018	£2,500
23 May 2018	£2,000
Total	£7,000

- In June 2018, Mr C called M&S to raise his credit limit from £7,400 to £11,400. He specifically told M&S this was so he could keep paying F – but he made no further payments to them following this.
- Shortly after, Mr C tried to withdraw some funds. F said he couldn't do so until he reached a certain level of trading. He says this was never set out to him verbally or in writing before he started trading. And the trading threshold was so high, he was unlikely to ever reach it. He contacted M&S to raise a dispute about F. But it said it wasn't liable, and that neither a chargeback claim nor a Section 75 claim would cover these types of transactions. It did pay £75 compensation for failing to call Mr C back promptly during the claim. I've not weighed in on the compensation as I've seen no suggestion there's an outstanding dispute about it.
- Unhappy with M&S's response, Mr C referred the matter to our service. The investigator upheld the complaint, but M&S disagreed. So the matter was escalated to me to determine.
- I issued my provisional decision in March 2022 explaining why I was minded to uphold the complaint. Mr F has responded to confirm that he's never received any funds back from F. M&S has responded that it will accept my proposed settlement as a gesture of goodwill.

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.

As neither party has disagreed with my provisional decision, I see no reason to depart from that. I therefore uphold this complaint for the following reasons:

M&S's actions at the point of the transactions

- Regardless of whether Mr C was tricked into making these payments, the starting position is that he's liable for them – as, in line with the Payment Service Regulations, firms are expected to process payments authorised by their customers.
- There are some situations where we believe firms—taking into account relevant rules, codes and best practice—ought to have identified a fraud risk, so should have looked at the wider circumstances surrounding the transaction before making the payment.
- I'm not persuaded M&S ought to have identified a fraud risk. I don't consider the level of the payments high enough to have warranted further questioning. Particularly as they were spread apart over several weeks, showing Mr C wasn't being *immediately* pressured into paying F, and were within his credit limit. I've not found any reason why M&S ought to have been concerned about the merchant he paid either. Although the FCA did go on to issue a warning about F, this happened several months later.
- I've seen a suggestion from Mr C that M&S may have flagged one or some of these payments. But I've not got enough to support that.
- Overall, I'm not persuaded M&S ought to have identified the fraud risk at the point Mr C made these payments. So I don't hold it responsible for failing to stop the scam.

Section 75 Consumer Credit Act 1974

When Mr C reported this scam, M&S says it considered a section 75 claim – but the transactions weren't covered as they were classified as gambling transactions. But I think section 75 does apply. The 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*

In summary, for M&S to be liable under a section 75 claim, 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 address each requirement or exclusion in turn:

- *a debtor-creditor-supplier agreement falling under section 12(b) or 12(c)*

This point doesn't seem to be in dispute. Mr C is the debtor; M&S is the credit and F is the supplier – as shown on the statements.

- *a transaction financed by the agreement*

Transaction isn't defined in the Act, but it's generally been given a wide interpretation by the courts – to include whatever bilateral exchanges may be part of a deal. Here, Mr C has deposited funds to open an account in exchange for being able to use those funds on an investment platform and, in turn, being able to withdraw from that platform. On this basis, I'm satisfied this was a transaction in line with section 75. There was an exchange of money in return for certain contractual promises.

Finance also isn't defined in 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 Mr C hadn't used his credit card agreement to pay for these transactions, he would have had to find cash from his own resources to fund them. So, it's clear that the transactions were financed by the agreement.

- *a claim for misrepresentation or breach of contract related to that transaction;*

Mr C's claim is that F was a scam which tricked him into depositing these funds by misleading him about how/whether he could withdraw his funds.

If F gave Mr C untrue information to trick him into making the transactions, his claim would be for misrepresentation. Or, if they made binding promises to him as part of the transactions and went on to breach these, that would amount to a claim for breach of contract. I'm satisfied there is a relevant claim to be considered here, which clearly relates to the transactions Mr C made.

- *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*

The cash price here is the value of the deposit-transaction; it's both the consideration and subject matter of the contract. And each transaction falls within the values set out above.

I'm aware M&S says section 75 doesn't apply as the transactions funded Mr C's account rather than paying for the services of F, so they're more akin to cash withdrawals on the card. But I don't agree that loading funds onto a trading account is necessarily just a transfer of money between accounts. It may also have been paid in return for something. In this case F has made contractual promises in exchange for the deposit. 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.

Each payment was made as a result of an elaborate deception that occurred subsequent to simply the initial deposit-transaction. F was trying to convince Mr C that he was profiting from the investment and therefore had reason to expect better returns if he paid more. So, I'm satisfied each deposit should be considered as a separate deposit-transaction under section 75. Overall, for the reasons set out above, I'm satisfied that section 75 applies to these transactions. I'll therefore go on to consider whether Miss A has a valid claim for misrepresentation and/or breach of contract.

Misrepresentation

For the claim to succeed on this basis, it needs to be shown that F made a false statement of fact which induced Mr C into entering the agreement.

Mr C says he was told he'd be able to withdraw his money easily and quickly, within a few weeks of starting trading. But when he tried to do so, he was then told he'd only be able to make a withdrawal when he reached a certain trading turnover. And this hadn't been put to him previously, verbally or in writing.

Having reviewed Mr C's written submissions and calls with out service, I find his account of what he was told to be credible and persuasive. He's provided a detailed account along with records from F to support this. And I've found further evidence which backs this up.

F seem to no longer exist, but I've been able to access a historic version of the website from around when Mr C made the payments. The terms relating to withdrawing funds refer to it being a "fast" process, which can take "up to 3 business days to approve and process the request", and "up to 5 business days for the funds to show in your account". This supports the account Mr C has given about what he was told, which I've found to be plausible and persuasive.

When Mr C requested the withdrawal, he says this was the first time he was told about the required trading turnover. F said there were terms connected to the bonuses they paid when he made his deposits. According to the account information Mr C has provided from F, he deposited £10,000 (£7,000 from his M&S credit card) and they paid bonuses totalling £16,271.

I've checked this against F's historic website. Whilst this requirement isn't set out in the standard terms and conditions, or the section titled "withdrawal methods", I've found a separate section for terms and conditions for bonuses. This sets out that when a bonus is paid, an amount of points must be accrued, calculated in relation to trading volume, before any withdrawals can be made. It gives the example that if a bonus of €100 is paid, a trading volume of €1,250,000 must be reached. Given the bonuses Mr C received, he'd need to reach a trading volume exceeding €200,000,000 before *any* withdrawals could be made.

On this basis, I'm persuaded that what F told Mr C about his ability to make withdrawals was false. And I'm persuaded that this induced him into making the deposits. Had he been told about the actual withdrawal terms, I consider it very unlikely he would have made these payments, given how much he'd need to trade before any possibility of withdrawing.

I'd also point out that there is a wider misrepresentation F may well have made: that they were a legitimate trading platform. The way in which they conducted themselves calls this into question. I base this not only on what Mr C has told us about his experience, but on further information I've found about F. This includes the warning issued by the FCA that F was operating within the UK without being regulated as required. This is a sign it was acting with dishonest intentions.

Additionally, I'm mindful that the account information suggests F paid a substantial £16,721 on top of the £10,000 Mr C paid into the account. And also that, within around six weeks, he was able to generate a balance exceeding £40,000 (albeit a balance that F wouldn't allow him to withdraw). This seems an unlikely amount of profit to be able to generate given the amount Mr C paid in.

I've seen some limited information from M&S suggesting Mr C was offered a £3,000 refund by F – far less than he deposited, and far less than the balance F allegedly held for him. It also appears this wasn't paid, so I don't know if it was a genuine offer. I'm therefore not persuaded this is enough to suggest F was in fact operating legitimately, given the evidence to the contrary. And it doesn't detract from my findings about F's misrepresentation of the withdrawal terms.

I've also found reviews online for F of other customers reporting issues similar to those Mr C experienced – i.e. being prevented from using or withdrawing their funds. All of this, along with the stringent terms for withdrawing funds (which I've found were misrepresented), strongly suggests that, in practical terms, Mr C would never have been able to make money. Whereas F represented itself as company offering the *opportunity* to make money through investing. Again, if Mr C had realised that F weren't operating legitimately, there seems little doubt that he wouldn't have paid these funds. So F's misrepresentation about this inducted him into the contract.

Breach of contract

On similar grounds, it seems there may well have been a breach of contract compared to F's contractual and written promises, as it's unclear that it ever legitimately traded Mr C's funds. That said, I'm mindful that the onerous withdrawal term was set out within the wider terms and conditions F had on its website which could reasonably be seen to form part of the contract. So, as the grounds for a misrepresentation claim are stronger, my conclusion is that M&S should meet Mr C's claim for misrepresentation.

Putting things right

I'm satisfied Mr C has a claim for misrepresentation on the grounds that F misrepresented that he could readily access the money he deposited and earn a profit from his deposit transactions. And that, but for these misrepresentations, he wouldn't have made these deposits. So M&S should put him back in the position he would have been in had he not made these payments. As I've seen no credits from F into Mr C's credit card account, and he's confirmed that he's not received anything back from F, it appears he's due a full refund of his payments.

My final decision

For the reasons given above, I uphold this complaint. To put things right, Marks & Spencer Financial Services plc should refund Mr C's payments to F (less any amounts he's received directly from F), plus 8% simple interest per year from the dates of payment to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 1 June 2022.

Rachel Loughlin
Ombudsman