

The complaint

Ms O is unhappy Marks & Spencer Financial Services plc (M&S) hasn't reimbursed the funds she lost to two investment scams.

What happened

Ms O was contacted by two different investment firms. Ms O says she wasn't looking to gamble any money, but was advised by both firms that they could offer risk free investing, where she made profits and her money would be protected. In April 2017, Ms O invested using her M&S credit card and another credit card with a different bank.

Through M&S, Ms O sent just under £2,500 to the first firm and £2,000 to the second. She's explained they both used pressuring sales tactics to get her to invest, including repeatedly calling her. And she was given 'bonuses' on her account when she invested more funds. Ms O has been able to provide her chat messages with the second firm and in this she discusses the guarantees she was given by the firm and is then promised further security and protection of her funds. Ms O didn't receive any money back from either firm and complained to M&S that she'd been the victim of two scams.

M&S said it wasn't able to carry out a chargeback for Ms O and that she didn't have any rights under Section 75 of the Consumer Credit Act 1974 ('the Act'). It said she had deposited funds into her trading account using her card, so this was the equivalent of moving cash. This meant she hadn't paid for a specific service or goods using her card, so there was no protection under Section 75.

Ms O came to our service and our investigator upheld her complaint. She said that Ms O did benefit from Section 75 protection, as Ms O had entered into contracts with both firms namely that in exchange for making her deposits, she would be able to profitably trade and then withdraw these funds. So she concluded that Ms O had grounds for claims under both misrepresentation and breach of contract against both firms. She upheld the case in full and awarded Ms O all the money she invested on her credit card, as well as the transaction fee Ms O paid for the second payment she made.

M&S disagreed with our investigator. It didn't agree Section 75 could be applied to these type of transactions on the account. So it asked for an ombudsman to review the case.

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 M&S doesn't agree it's liable to Ms O under Section 75, I've first considered the Act. In summary, it sets out that 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

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. There are three parties involved in each of the two scams here, Ms O as the 'debtor', M&S as the 'creditor' and then each investment scam firm respectively as the 'supplier'.

The second consideration is whether the 'transaction' is 'financed' by the agreement. Ms O first 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. And then she later deposited more funds to profitably trade on that account and withdraw them as she wished. Given the exchange of money in return for certain contractual promises – I'm satisfied there was a 'transaction' for each of the deposits (the "deposit-transactions") as defined by the Act. And I'm satisfied the deposit-transactions did then finance the agreement, as it was these funds that enabled her to obtain and use the investment account.

Third, the claim must relate to the transaction and be for misrepresentation or breach of contract. Ms O's claim is that she was pressured and tricked into depositing the payments with the two firms for their purpose of stealing her funds and pressuring/encouraging her to deposit more funds. And she was misled into depositing the funds as she believed she was genuinely trading but with no risk and would be able to access these funds. She claims that both firms are in fact scams and not legitimate traders. She's also evidenced she was told she was receiving bonus funds, which she understood she could later withdraw, and made false promises around the safety of her funds. So her claim does relate to both misrepresentation by the firms as well as them breaching the contracts she agreed.

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-transactions is the value of each deposit-transaction. And in this case all are within the required bracket.

I'm satisfied that in this case Ms O deposited the funds as both firms made contractual promises to her about what would happen with these funds and what she would receive in exchange. So Section 75 does apply in this case to the four deposit-transactions Ms O made. I've therefore considered whether Ms O has a valid claim for misrepresentation or breach of contract.

Misrepresentation

Ms O claims that both firms misrepresented themselves as legitimate enterprises when this was not in fact the case. For a claim of misrepresentation to be successful it's necessary to show not just a false statement of fact was made, but that this statement induced Ms O into entering into the agreements.

I've reviewed Ms O's testimony as well as the evidence she's been able to supply of her conversations with one of the firms. Alongside this, I've looked at the Financial Conduct Authority (FCA) register and the International Organization of Securities Commissions (IOSCO) investor alerts portal. And wider information on the two firms Ms O was involved with, such as articles and reviews of them which have been published since Ms O sent her payments.

Ms O's testimony is corroborated by both other complaints of this nature and by specific complaints our service has received about the firms she dealt with. And there are now many

articles and reviews of both firms setting out that people have been scammed by them in the same way Ms O has described to us. So I find her testimony both plausible and persuasive.

The FCA and IOSCO also have both published warnings about the firms Ms O dealt with. The FCA warnings are from after Ms O invested, so not something she could've seen at the time. But both set out the firms are not regulated to act in the UK, but have been doing so. And I note the first firm Ms O dealt with gave a UK address, despite this. In terms of IOSCO, there are warnings about the first firm from late 2016 and 2017. And about the second firm from 2017 and 2018. These warnings combined with Ms O's testimony and the articles and reviews I've seen lead me to seriously question whether any actual trades were being placed for Ms O, or whether in reality this was an elaborate scam simply designed to mislead people and steal their funds. It seems highly unlikely any legitimate firm would have so many negative reviews and warnings about it; and be acting without authorisation in any jurisdiction.

Taking into account all of the above, I don't think it's likely either firm was operating a legitimate enterprise. This means that I think they have made misrepresentations to Ms O – specifically that they were running a genuine enterprise through which she could have got back more than her deposits from the platform. I'm also satisfied that if Ms O had known and understood this, she wouldn't have deposited any money. So she was therefore induced into the contracts on the basis of these misrepresentations.

Ms O paid a transaction fee on the second payment she made to the first firm. I consider this loss a direct consequence of her making this deposit-transaction, as it wouldn't have occurred had she not made the payment. And so I consider this should be included as a consequential loss of the misrepresentation.

I'm satisfied both firms misrepresented themselves to Ms O and this induced her into the contracts with them and making all the deposit-transactions she did, plus paying the associated transaction fee. This means that under a misrepresentation claim, I'm satisfied Ms O is entitled to a reimbursement of all the funds she sent from her M&S credit card due to these scams. I therefore don't consider I need to look at whether there was also a breach of contract by the firms in this case.

Putting things right

I'm satisfied Ms O has a claim for misrepresentation on the grounds that both firms made a series of misrepresentations, namely that they were operating a legitimate enterprise and that Ms O could access her money freely and earn a profit from her deposit-transactions. I'm also satisfied that the deposit-transaction fee charged meets the test for consequential loss in misrepresentation, as it wouldn't have been incurred "but for" the deposit-transactions. It's a direct and foreseeable loss as a result of the deposit-transactions.

Marks & Spencer Financial Services plc should put Ms O back into the position she would have been had the deposit-transactions of £2,494.55 to the first firm and the deposit-transactions of £2,000 to the second firm not been made; and that the transaction fee of £44.69 had not been charged by it.

My final decision

For the reasons set out above, I uphold Ms O's complaint against Marks & Spencer Financial Services plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms O to accept or reject my decision before 5 July 2022.

Amy Osborne
Ombudsman