

The complaint

Ms C complains that HSBC UK Bank Plc won't reimburse money she lost when she says she fell victim to a binary options investment scam.

What happened

Around October 2018, Ms C received a cold call from a representative of Market Trading. The representative explained how she could make some money by investing with them and she could withdraw her funds at any time. She was persuaded to open an account with them and was advised to first make smaller payments via a credit card – which she did. The representative then advised Ms C that she needed to make payments using her own money which would enable her to make more money – which she did.

The representative became aggressive with Ms C, pressuring her to add further funds to her Market Trading account and she would get upwards of 15 calls a day. Ms C did deposit further funds and noticed that Market Trading took payments without her permission. She queried this with them but they didn't want to acknowledge it. Between 23 October 2018 to 28 November 2018 payments totalling £29,234.17 and transaction fees totalling £813.44 were made from her HSBC credit card and HSBC debit card (linked to her current account). On 27 November 2018, Ms C had a number of conversations with Market Trading and insisted she wanted to withdraw her funds (as she understood she could). Market Trading's representative told Ms C that the money in her account was expected to double by 30 November 2018. Ms C was concerned that things weren't adding up so she contacted HSBC for assistance.

HSBC reviewed Ms C's claim and wrote to her on 24 January 2019. It concluded it couldn't assist with chargeback claims for her. It issued its final response shortly after giving Ms C referral rights to this office.

One of our investigators initially looked into things and thought HSBC ought to have processed chargeback claims given the nature of the scam. He recommended that HSBC refund the payments in dispute. Ms C queried with our investigator whether her credit file would be rectified.

Another one of our investigators looked into things afresh. She didn't agree that HSBC should have processed chargeback claims. But she felt that Ms C had valid section 75 rights against Market Trading in relation to her credit card payments. She also felt that HSBC could have prevented the debit card losses. She suggested that HSBC should refund the debit and credit card losses.

HSBC didn't agree. In summary it said:

- Section 75 couldn't apply because Ms C did not pay Market Trading directly and instead paid a different company, as such, there was no valid debtor-creditor-supplier relationship;
- The analysis of section 75 is wrong;

- There is no justification for the conclusion that it ought to be responsible for all of the payments when the investigator found that it should have been concerned by the fourth payment not the first. The reasoning given for there being 'fraud triggers' is wrong in principle;
- The investigator has applied a punitive level of interest of 8% to the refund, which should only be applied in exceptional circumstances. Save for the credit card payments, it is unclear how this level has been determined to be appropriate; and
- The investigator's contributory negligence assessment is fundamentally flawed and unsupportable. Ms C's losses were directly referable to her failure to carry out appropriate research and her actions were objectively careless. The general principle that consumers must take responsibility for their decisions should be applied in the present case.

The case has therefore been passed to me for determination.

On 18 February 2022, I wrote to HSBC with some comments and queries. To summarise:

- A warning had been published by the FCA about Markets Trading on 4 July 2017 and a further warning about them was published on the International Organization of Securities Commission (IOSCO) Investor Alerts Portal on 19 January 2018. I noted the discrepancy in the trading name of the company a warning was published about and the name of the merchant in dispute as there was a missing 's' in the name of the merchant Ms C was dealing with. But noted the same warning appeared under a search of either name.
- I noted that Market Trading didn't take the payments directly, rather, INTLSECLTD and INSIGHTSTRADER did. I queried whether the merchant category code used was the code commonly used for binary options dealers.
- The evidence supplied by HSBC indicated that it flagged Ms C's credit card payment on 1 November 2018 but it didn't block payments or have any meaningful conversation with Ms C about them. I thought this would have prevented further payments, especially given that the sale of binary options to retail consumers (like Ms C) was illegal in the UK at the time.
- I queried where the current account payments originated from. I proposed a different rate of interest on the debit card payments if HSBC could confirm these originated from Ms C's savings account.
- I considered that section 75 could be applied to the initial credit card payment and explained that INTLSECLTD were likely acting as a payment processor which wouldn't break the debtor-creditor-supplier chain but invited HSBC to provide further evidence as to why it felt the chain was broken.
- I explained that Ms C had complained about the impact the payments to Market Trading had on her credit file. I noted she did not formally complain about this prior to referring the matter to this office. But I explained if I thought the payments should be refunded, it would be fair and reasonable for HSBC to remove the adverse information recorded in relation to them. I asked for HSBC's permission to consider the matter of Ms C's credit file as part of this case or asked whether it would prefer to consider the matter as a new complaint issue.

HSBC replied and said in summary:

- The merchant category code used in respect of the credit card payments was 6211, which is consistent with the code used by some binary options dealers.

- The debit card payments were made as a result of funds transferred to Ms C's current account from her Savings account, which accrued interest at 0.25%.
- The bank does not intend to challenge the DCS aspect on this case.
- Ms C's current account was closed in May 2019. The account has been with HSBC's Repayment Services team since June 2019. The outstanding balance on the account is £2,091.58. The bank would be agreeable to remove all associated adverse data should this office uphold the complaint on the premise that any refund would be used to repay the outstanding balance.

I wrote to Ms C and explained what HSBC had said. I explained what HSBC had said and explained intended to propose a different rate of interest in relation to the debit card payments. I asked if Ms C had any further comments she would like to add.

Ms C replied and in summary said:

- The issue of her credit file was highlighted to both investigators early on after referring her complaint to this office;
- She's a single mother and is trying to buy a house and has not been able to do so since her credit file was impacted as a result of the fraudulent actions (HSBC);
- She was asked to repay the outstanding balance on her credit card when all of her accounts had been frozen, she paid this on 5 September 2019. She doesn't think she should have been asked to repay the balance as the account was frozen and the matter had been referred to this office;
- She should not be liable to repay the current account debt as it was the result of HSBC's fraudulent activity;
- She said its difficult for her to reconcile the amounts on her credit card and debit card as she's had no sight of these since her accounts were frozen. She said it would be useful for a breakdown of her HSBC credit and debit accounts for her reference.

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.

Having done so, I uphold Ms C's complaint and I'll explain why.

HSBC is aware of our general position on a PSP's safeguarding and due-diligence duties to protect customers from the risk of financial harm due to fraud. We have published many decisions on our website setting out these principles and quoting the relevant rules and regulations. It is unnecessary to rehearse them again here in detail.

It is common ground that the disputed payments were 'authorised' by Ms C for the purposes of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. This is because they were made by Ms C using the legitimate security credentials provided to her by HSBC. I do recognise that Ms C says some payments were made without her permission, but I think it's more likely that she did authorise the payments and grew concerned when she was unable to withdraw her available balances. So, although she did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of her bank account, Ms C is presumed liable for the loss in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider HSBC should fairly and reasonably:

- Have been monitoring accounts—and any payments made or received—to counter various risks, including anti-money-laundering, countering the financing of terrorism, and preventing fraud and scams;
- Have had systems in place to look out for unusual transactions or other signs that might indicate its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer; and
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

I am satisfied there were enough ‘triggers’ in this case to have alerted a responsible regulated bank such as HSBC that Ms C’s account was being subjected to unusual and uncharacteristic activity. There were reasonable grounds to suspect a fraud or scam, and therefore justify an intervention (such as phoning her in order to ask discreet questions about the nature and purpose of the payments).

First, regulated firms ought reasonably to take notice of common types of scams. As long ago as June 2012, the FCA’s predecessor indicated—in its consultation paper entitled *Banks’ Defences Against Investment Fraud: detecting perpetrators and protecting victims*—that it was good industry practice for firms to build up an updated watch-list of types of scams and potential perpetrators; and regularly to share “timely and detailed intelligence” with other banks, UK and overseas regulators, the police, etc. Whilst the regulator gave no specific timings, it is not unreasonable in my view to expect an international bank to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA or International Organization of Securities Commissions (IOSCO). In my judgment, such alerts should automatically trigger alarm-bells—and lead to the payment being paused—pending further enquiries (and a possible scam warning) to the payer.

In Ms C’s case, the payments didn’t go directly to Market Trading, they went via INTLSECLTD and INSIGHTSTRADER, so I don’t think the payments, on their own, ought to have automatically triggered HSBC’s fraud detection systems. However, I have noted that HSBC’s fraud detection systems were triggered by Ms C’s payment to INTLSECLTD on 1 November 2018. They tried and failed to contact Ms C but don’t appear to have blocked the use of her credit card. HSBC’s fraud department had a conversation with Ms C on 3 November 2018 and confirmed the transaction to INTLSECLTD as genuine but didn’t ask any questions other than seeking to confirm the payment was genuine. I think it would have been reasonable for it to have properly questioned Ms C before processing the payments to satisfy itself that all was well.

If HSBC had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that Ms C would have explained what she was doing. In such circumstances, whilst the bank had no duty to protect her from a bad bargain or give investment advice, it could have pointed her to the FCA’s website to check whether the merchant was regulated as they were carrying out regulated activities without permission. It could have also explained its own customer experiences with unregulated and unlicensed high-risk investment traders in that customers would often be prevented from withdrawing available balances. After all, at that time, the sale of binary options was banned by the European Securities and Markets Authority (ESMA) in the EU (including the UK). So the merchant was carrying out illegal activities.

There is no evidence that HSBC provided Ms C with any meaningful warnings or gave her other reasons to doubt the legitimacy of the payments she was making. It was a missed opportunity to intervene.

causation

If HSBC had asked Ms C what the payment was for and the basic surrounding context, it is likely she would have fully explained what she was doing and that everything had been done over the phone and online with a representative of Market Trading. HSBC did not need to know for certain whether Ms C was dealing with a fraudulent high risk investment trader or investing in a legitimate (albeit highly speculative) product; reasonable grounds for suspicion are enough to trigger a bank's obligations under the various regulations and principles of good practice. I consider there were such grounds here and, therefore, that HSBC ought reasonably to have provided a scam warning in light of all the information then known to financial professionals about the risks associated with unregulated forex and binary options dealers.

If HSBC had given a warning, I believe that Ms C would have paused and looked more closely into Market Trading before proceeding. There is no evidence that she was willing to take high risks or had a history of speculative investments or gambling. It seems more probable that she would have made further enquiries into whether or not Market Trading were regulated in the UK or abroad. She could have discovered they were not and the various regulatory warnings about them specifically and about the risk of unregulated investment scams. In other words, I am satisfied that a warning from her trusted bank would probably have exposed Market Trading's smoke and mirrors, causing her not to 'invest' and preventing any further losses.

Even if she had not worked out that this was a scam, it is likely that a warning would have alerted her to the common issues arising in relation to binary options and unregulated high risk investment dealers, which in turn would have revealed the truth behind her supposed representatives (mis)representations — i.e. that they were not really regulated UK investments but highly-risky bets more akin to a wager in which the representative must lose if she is to win. So before Ms C's payments were actually processed, she would probably have stopped in her tracks. But for HSBC's failure to act on clear triggers of potential fraud or financial harm, Ms C would probably have no more than her initial credit card payment (which didn't trigger HSBC's fraud detection systems).

contributory negligence

Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000). In this case, I do not think that Ms C was to blame for what happened.

Ms C began with smaller investments (on her credit card account), so she was cautious. She was provided a legitimate looking trading account and a representative who would trade on her behalf. She was unaware of the common deceptive tactics of scammers, as communicated by Visa to its acquirers and issuers in 2017. When she couldn't withdraw her funds, she contacted HSBC immediately to ask for its help with recovering them. I do not think she could earlier have foreseen the risk that the company she was dealing with was a scam and the trading account she was viewing was likely to be a simulation.

In the circumstances, I do not think it would be fair to reduce compensation on the basis that Ms C should share blame for what happened.

Section 75 Consumer Credit Act 1974

As Ms C's initial credit card payment on 23 October 2018 didn't trigger HSBC's fraud detection systems, I've considered whether s.75 could be applied to it. For s.75 to apply 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

HSBC now doesn't dispute that there is a valid debtor-creditor-supplier agreement here, so I don't need to consider this point further.

'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, Ms 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. Given the exchange of money in return for certain contractual promises – I'm satisfied there was a 'transaction' for the deposit-transaction as defined by the Act.

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 her purchases from suppliers, because he is given time to pay for her purchase under the terms of the credit card agreement'*.

Applying that ordinary definition here, if Ms C had not used her credit card she would have had to find the cash from her own resources to fund the deposit transaction 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 Ms C's claim is here. It's evident from her testimony and correspondence she provided that she feels she was tricked into depositing the payment with Market Trading for the dual purpose of:

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

Ms C does not believe that Market Trading was operating legitimately and believes she was misled into thinking they were.

This claim – that Ms C 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 Ms C was told by Market Trading matters that were factually untrue in order to trick her into entering into the deposit-transaction, her claim would be for misrepresentation. Or, if Market Trading made binding promises to her as part of those transactions 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.

HSBC has declined the claim under s.75 because it says that Ms C was paying into a binary options account and these are classed as a form of gambling by the UK's Gambling Commission. It said, the deposits were not for the purchase of goods/services, they were a credit to her trading account. 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 Market Trading has made contractual promises in exchange for the deposit-transaction. HSBC in its refusal to accept liability under s.75 haven't quoted the Act itself. It is important to note that s.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 s.75 does apply to the credit card deposit-transaction.

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

Misrepresentation

I consider Ms C has made a claim of misrepresentation by Market Trading – 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 Ms 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 Ms C could have ever received back more money than she deposited, then it follows that any statements made by Market Trading to the contrary are likely to be a misrepresentation.

So, the mere suggestion that Ms 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 Ms C's account of events, the nature of the situation and Ms C's communication with Market Trading's representative; they did claim that Ms C could have made money from the trading platform.

That induced her into entering the agreement

Again, had Ms 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 Market Trading. Consequently, should I be satisfied that Market Trading 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 Ms C's account of events both detailed and compelling. But more than this, it's corroborated by the testimony of

other complainants about the same merchant. Because of this I'm minded to find her account to be truthful.

So, turning to her account, I note that she mentioned coming into contact with Market Trading via a cold call. Ms C says Market Trading promised her larger returns with a dedicated representative who started off slowly then increasingly became more aggressive in his demands for further payment.

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 Market Trading. 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've noted FCA and IOSCO warnings published about Market Trading above and that they were not regulated or licensed in another jurisdiction as far as I'm reasonably aware. I've also noted that the sale of binary options was banned by ESMA at the time of Ms C entering into a contract with Market Trading.

Market Trading 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 Ms C's.

I would also question the legitimacy of any investment broker pressuring consumers into using credit - as Market Trading did here - to invest in products that *could* lose money. Next, is the refusal to allow withdrawals from the platform – again a complaint repeated across many complaints against similar firms.

Taking all of this together, I don't think it's likely Market Trading was operating a legitimate enterprise. This means that I think they have made misrepresentations to Ms C – specifically that they were running a genuine enterprise through which she could ever have got back more than her deposit from the platform. I'm also satisfied that if Ms C 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

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 Ms C to make the deposit would attach a fee for converting the payment. So, I'm satisfied Ms C's payment of the transaction fee was consequential loss in misrepresentation.

I don't need to consider whether Ms C also has a valid breach of contract claim because I'm satisfied she can claim the full amount of the loss of her deposit-transaction under a claim of misrepresentation along with the transaction fee as a claim for consequential loss.

Credit file

HSBC has said it would remove any adverse information reported on Ms C's credit file as a result of the disputed transactions, should I uphold this complaint. As I think HSBC should return all of Ms C's disputed payments, it follows that it should also remove the adverse information recorded against Ms C's credit file as a result of the disputed payments. I acknowledge this has been an extremely stressful time for Ms C given the impact this matter has had on her credit file and her financial situation. But the culprits responsible for most of this were the scammers (Market Trading). HSBC wasn't required to not request repayments, despite her referring the matter to this office as she is ultimately responsible for repaying her outstanding debts. However, the settlement will reflect an appropriate level of interest to compensate Ms C for HSBC's failings.

In relation to HSBC using part of the settlement to repay Ms C's current account debt, I don't think this is unreasonable and I'll explain why. I'm instructing HSBC to refund all the payments Ms C is disputing and some of those payments took Ms C into an unarranged overdraft causing the debt on her current account. Therefore, HSBC would be entitled to use part of the settlement to repay this particular debt as it forms part of the refund.

My final decision

My final decision is that HSBC UK Bank Plc should refund Ms C the payments in dispute, transaction fees, plus interest. HSBC should also remove all adverse information recorded on Ms C's credit file in relation to this matter.

HSBC should in relation to Ms C's debit card (linked to her HSBC current account):

1. Refund all the payments made to INTLSECLTD and INSIGHTSTRADER, less any refunds made by them or Market Trading;
2. Refund the associated transaction fees;
3. Pay 0.25% interest on those sums from the date they were paid to the date of settlement; and
4. Refund any overdraft fees, interest or charges caused applied as a result of the payments referenced at point 1.

In relation to Ms C's credit card, HSBC should:

5. Refund all the payments to INTLSECLTD;
6. Refund the transaction fees;
7. Pay 8% interest on those sums from the date they were paid to the date of settlement.

If HSBC deducts tax in relation to the interest element of this award it should provide Ms C with the appropriate tax deduction certificate.

HSBC will be entitled to use part of the above settlement to repay Ms C's current account debt linked to the above disputed payments.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 26 April 2022.

Dolores Njemanze
Ombudsman