

The complaint

Miss N complains that HSBC UK Bank Plc did not do enough to help her recover the money she paid to a scam investment company.

What happened

The circumstances of this complaint are well known to both parties, so I will not repeat them all again here in detail. But I will provide an overview of events below.

Between March 2018 to July 2018, Miss N was a customer of Wise Trader (a brand of F1 Markets Ltd). They rebranded as Stratton Markets around July 2018. Miss N says she was unhappy with Wise Trader because they lost some of her money and illegally used her credit card. She says F1 Markets Ltd compensated her for this, fired the account manager and also promised to recover her losses. Miss N felt confident to continue a relationship with the new brand.

Miss N's Wise Trader account was closed (with a credit balance) and a new account was opened with Stratton Markets in July 2018. The credit balance was transferred over to her new account.

Between August 2018 to December 2018 Miss N deposited just over £107,000 into her Stratton Markets trading account using her HSBC current and credit card accounts. Miss N says Stratton Markets misrepresented themselves which led to her not having an appropriate account for her level of experience. She also says they manipulated the trading software she used.

During her time with Stratton Markets, Miss N had different account managers and she says they put pressure on her to invest more funds and in risky products. She says they didn't act in her best interests. Miss N complained to Stratton Markets in December 2018 and she was offered a £15,000 settlement which she declined as she says it was a small fraction of the losses she suffered.

In January 2019, Miss N approached Stratton Markets' regulator – the Cyprus Securities and Exchange Commission (CySEC) to review her complaint. Miss N withdrew her complaint with CySEC after she appointed a law firm to assist her. The law firm turned out to be a scam and CySEC refused to re-open her complaint.

Miss N contacted HSBC in August 2019 to assist her with chargeback claims. HSBC processed chargeback claims for Miss N and say it took them as far as it could and managed to recover £7,000. Miss N says HSBC mishandled her chargeback claims and didn't robustly pursue them in accordance with her instructions and delayed things. HSBC acknowledge Miss N received poor customer service and paid her a total of £200 compensation by way of an apology.

One of our investigators didn't uphold Miss N's complaint. She didn't think HSBC acted unreasonably by not taking her chargeback claims further and she also didn't think an intervention from HSBC would have made a difference to the outcome. Miss N disagreed

and provided further evidence to explain why. She asked for an ombudsman to review her complaint, so it has been passed to me to decide.

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.

Banks and other Payment Services Providers ("PSPs") do have a duty to protect customers against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering. But when simply executing authorised payments, they do not have to protect customers against the risk of bad bargains or give investment advice – and the Financial Conduct Authority ("FCA") has confirmed that a fraud warning would not constitute unauthorised investment advice.

So, the first question to resolve is whether this particular trader was a fraudster.

were the disputed payments fraudulent?

Not every complaint referred to us and categorised as a binary options, CFD or forex scam is in fact a scam. Some cases simply involve high-risk investments that resulted in disappointing returns or losses.

Certain high-risk investment traders may have promoted these products using sales methods that were arguably unethical and/or misleading. However, whilst customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud; i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself, or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

In simpler terms, some merchants may have used sales and promotional methods that could be seen to be unfair by consumers considering the losses they've incurred – but this does not always amount to *fraud*.

When considering this for Miss N's case, I've paid particular attention to the official organisations that publish warnings about merchants that operate in the UK and abroad. I've searched the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"), the international body that brings together the world's securities regulators. And the FCA (as the UK regulator) also has its own warning list, which is in place to share alerts and insight about merchants that have been identified as potentially being fraudulent.

Upon checking both of these, it's my understanding that Stratton Markets had no adverse information reported about them at the time Miss N authorised her payments. What I have noted is that they were regulated by CySEC at the time of Miss N's payments with passporting rights through the FCA - which meant they could offer services to UK customers.

In May 2020, the FCA issued a supervisory notice to Stratton Markets where it noted concerns about their practices and the complaints received by UK customers. In June 2020, Stratton Markets' FCA registration was cancelled and they could no longer provide investment services to UK customers. But it's important to note that these notices were published by the FCA after Miss N made all of her payments.

I must therefore take into account that there's strong evidence here – particularly because there are no regulator warnings that were published at the material time that Stratton Markets hadn't been identified as a fraudulent company when these payments were made.

I must follow the evidence and, essentially, I have no credible evidence to persuade me with any degree of certainty that Stratton Markets was operating a scam at the time it offered services to Miss N. The evidence I do have shows that Stratton Markets were indeed regulated at the time it offered services to Miss N. So, taking everything into consideration, I'm not persuaded that Stratton Markets was in fact a fraudulent company.

Having concluded that this was not a fraudulent company and was potentially a bad bargain, misleading/poor investment advice, I need to consider the following:

1. Did HSBC deal with Miss N's chargeback claims fairly?
2. If so, were any of the disputed transactions still so unusual or uncharacteristic for Miss N and/or her account that HSBC fraud alerts ought reasonably to have triggered some sort of intervention?
3. If triggered, would HSBC's intervention have made a difference and prevented or reduced the loss?
4. And if so, was Miss N partly to blame for what happened such that it would be fair and reasonable to reduce compensation proportionately?

Chargeback

Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed or be deemed a 'valid claim'. Our role in such cases is not to second-guess Visa's arbitration decisions or scheme rules, but to determine whether the regulated card issuer (i.e. HSBC) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.

Visa expanded its rules to cover situations whereby binary options/investment traders prevented cardholders from withdrawing their available balances from 14 October 2017.

Effective 14 October 2017, issuers may use Reason Code 53 to address cases whereby a binary options (or forex) merchant has imposed obstacles to prevent cardholders from withdrawing funds. This chargeback right is limited to the amount available in the binary option account at the time funds are requested. Issuers cannot charge back more than the original transaction amount, so capital gains from binary options trades cannot be paid out via the chargeback process.

However, Reason Code 53 (later re-coded by Visa to 13.5) required HSBC to present dated evidence that Miss N had an available balance (in the form of a screenshot or confirmation from the merchant) and that she tried to withdraw sums equal to, or less than, her available balances on the same day.

It's clear that by March 2019 (prior to Miss N contacting HSBC) she had a small balance of £325.79 which was returned to her by Stratton Markets. So by the time she contacted HSBC in August 2019, it's likely she would have had no available balances left in her account, not least because she was blocked from accessing her trading account. Whilst I appreciate Miss N clearly spent a lot of time and effort in preparing her chargeback claim submissions, I don't find that HSBC had any valid grounds to attempt to recover her losses under the Visa chargeback scheme rules.

I've noted the substantial information provided by Miss N to demonstrate how she felt Stratton Markets misrepresented themselves but this would have had no bearing on the outcome of her chargeback claims. Visa have been clear that without the card issuer (HSBC) presenting the required evidence of the particular 'reason code' - in this case reason 13.5 – any claim would be deemed 'invalid' at its arbitration stage, regardless of the evidence, (or lack of evidence) presented by the acquirer (Stratton Markets' bank). And Visa would not have taken verbal misrepresentations into account when making this decision.

I acknowledge that four chargeback claims totalling £7,000 appear to have 'succeeded' as this money was returned to Miss N following HSBC's chargeback attempts. But this success was the result of Stratton Markets not defending these claims within the required time limit. It was not the result of Visa making a determination.

I find that HSBC was trying to assist Miss N by pursuing chargeback claims on her behalf when it stood no reasonable prospect of success at arbitration and it's clear Stratton Markets intended to defend the claims. In my judgment, it was not unreasonable of HSBC not to take Miss N's chargeback claims any further.

I do agree that HSBC provided poor customer service during the chargeback process and given Miss N's distress at the situation she found herself in, I think HSBC ought to have handled things better. I agree that £200 (in total) was a fair and reasonable way to compensate Miss N for its failings. But I do find that HSBC was trying to help Miss N recover her losses by attempting chargebacks for her.

I've not considered whether Miss N has a valid claim under section 75 of the Consumer Credit Act 1974 in respect of her credit card transactions. This is because she has made no such claim to HSBC and it would be obliged the opportunity to first consider a claim and any subsequent complaint before this service can get involved.

unusual or uncharacteristic activity

HSBC is aware of our general position on a PSPs' 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 Miss N for the purposes of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. This is because they were made by Miss N using the legitimate security credentials provided to her by HSBC. These must be regarded as 'authorised payments' even though Miss N feels she was the victim of a scam. So, although she did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of her account, Miss N 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 and building societies 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.

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 a large firm to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA or 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.

But in Miss N's case, in 2018, there were no warnings from the FCA or IOSCO that indicated Stratton Markets were scammers. And rather the evidence does suggest they were registered with the FCA. If HSBC had intervened and carried out further checks to ensure Miss N was not the victim of a scam, I would have expected it to direct Miss N to check the firm was registered with the FCA, inform her of any regulator warnings that it was aware of and inform her to carry out her own due diligence checks.

From Miss N's own testimony by July 2018, she trusted F1 Markets Ltd as they had put right some of the failings of Wise Trader, so she felt comfortable to continue a relationship with them as Stratton Markets. So whilst I do think some of the transactions to Stratton Markets were unusual and ought to have prompted further checks from HSBC (particularly in October 2018). I don't think any intervention from HSBC would have made a difference to Miss N's decision to invest with Stratton Markets.

In other words, I am satisfied that a warning from HSBC in October 2018 probably would have made no difference to Miss N. Any failings by HSBC were not the dominant, effective *cause* of her losses; they were just part of the background history or occasion that led up to them.

In light of my conclusions above on causation, it is unnecessary for me to go on to consider whether Miss N was herself partly to blame for what happened (contributory negligence). Indeed, I have already concluded that she was responsible for her own investment decisions, and that such choices were the proximate cause of her losses.

My final decision

For the reasons set out above and despite my natural sympathies for Miss N, I am not persuaded that HSBC UK Bank Plc acted unfairly or unreasonably with regard to Miss N's disputed transactions to Stratton Markets, so I am unable to uphold this complaint or make any award against the bank.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss N to accept or reject my decision before 2 December 2021.

Dolores Njemanze
Ombudsman

