

## **The complaint**

Mr H complains that Barclays Bank Plc trading as Barclaycard, did not refund the payments he says he didn't otherwise authorise to an investment scam company.

## **What happened**

Mr H responded to an advert posted by 23 Traders. He spoke with an account manager over the phone who set up a trading account for him and agreed to invest £500 on 3 February 2017. Mr H provided his Barclays credit card details to 23 Traders over the phone.

On 7 February 2017, Mr H received a call from his account manager who offered to guide him through trades by remotely accessing his computer. Mr H was directed to do various things on his computer screen, one of which was enter an amount for each particular trade. Five payments totalling £15,000 were subsequently debited from Mr H's credit card account. A final payment of £4,000 was attempted but this payment was declined by Barclays. Mr H told his account manager that he wasn't aware that payments were being debited from his account.

Mr H asked his account manager to cancel his trading account and return his money. He was asked to sign declaration forms and provide further identification documents, which he duly did. He subsequently lost all the available balances on his trading account, which his account manager said was lost through 'trades'. Mr H contacted Barclays for assistance in recovering his money.

Barclays said it blocked a payment on 7 February 2017 and Mr H confirmed (via text message) that he had authorised the payment, so it concluded the payments were authorised. Barclays raised chargeback claims for all the disputed payments and successfully recovered two payments totalling £1,500. The remaining transactions were defended by 23Trader's bank and Barclays concluded it had no reasonable prospect of success if it were to pursue the claims further.

Barclays paid Mr H a total of £150 compensation for customer service failings. One of our investigators upheld Mr H's complaint. Whilst she agreed with Barclays that Mr H had authorised the payments (albeit he was misled into doing so) she felt Barclays could have done more to warn Mr H that he had fallen victim to a scam. She asked Barclays to return the disputed payments, less the amounts successfully reclaimed through the chargeback scheme.

Mr H accepted the outcome.

Barclays didn't agree, it didn't think a conversation with Mr H would have uncovered the scam. It says there was no scam warnings or FCA warnings about 23 Traders, so there would not have been a need for a scam conversation. It also noted that Mr H did not properly take care of his details and gave them to 23 Traders to use.

## **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 Mr H's complaint and I'll explain why.

Not every complaint referred to us and categorised as a binary-options scam is in fact a scam. Some cases simply involve high-risk investment 'bets' on the performance of (e.g.) binary options, commodities, cryptocurrency or stocks that resulted in very disappointing returns or losses. Some binary-options traders promoted these products—without a licence from the UK's Gambling Commission—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).

Banks and other Payment Services Providers ("PSPs") have duties 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 (see below). 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 FCA has confirmed that a fraud warning would not constitute unauthorised investment advice (see its predecessor's 2012 consultation paper on investment fraud, below). So, the first question to resolve is whether this particular retailer/trader was actually a fraudster.

I am satisfied that 23 Traders were not carrying out legitimate binary options trades but were instead dishonestly defrauding customers, e.g. by not actually making trades/bets with the money received from clients but simply manipulating their online 'trading platform' to show purported gains in order to induce further 'investments' from victims such as Mr H. In the absence of evidence to the contrary, I have concluded this because:

- In 2017, binary-options traders operating in the UK were required to be licensed by the UK's Gambling Commission — whereas 23 Traders were not. Nor were they regulated in any other jurisdiction so far as I am reasonably aware. This indicates they were operating illegally, probably with dishonest intentions. Legitimate firms tend to comply with regulatory requirements.
- On 23 January 2017, an alert about 23 Traders was published by the Danish Financial Supervisory Authority on the investor alert portal of the International Organization of Securities Commissions ('IOSCO').
- There are several reports in the public domain—e.g. foreign press and online forums—stating that 23 Traders were scammers. This hearsay is not in itself sufficient evidence of fraud. But in the context of known regulatory facts, it may fairly and reasonably be regarded as circumstantial evidence that helps build an overall picture of scammers dishonestly seeking gains at the expense of others.

Having concluded that this was a scam rather than just a bad bargain or poor investment advice, I must now go on to consider whether Barclays could have done more to prevent the scam.

Barclays 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 Mr H for the purposes of the Payment Services Regulations 2009 (‘the Regulations’), in force at the time. This is because they were made by Mr H using the legitimate security credentials provided to him by Barclays. These must be regarded as ‘authorised payments’ even though Mr H was the victim of a sophisticated scam. So, although he did not intend the money to go to scammers and he was tricked into making them, under the Regulations, and under the terms and conditions of his bank account, Mr H 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 of the transactions, I consider Barclays 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 don’t need to consider whether there ought to have been fraud triggers here because Barclays’ fraud team did block an attempted payment of £1,000 on 7 February 2017.

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 Mr H’s case, there was a warning about 23 Traders published on the IOSCO’s Investor Alerts Portal from 23 January 2017, which was before the first payment on 3 February 2017 – but only by just over a week. It is not unreasonable to expect a large international bank that regularly updates its internal alerts to include information about payees who had tried to carry out regulated activities without permission. I accept the warning would not have identified what type of investment was being ‘sold’; and it did not necessarily follow from the nature of the warning in isolation that these were fraudsters. And given the timing of the alert relative to the first payment, I do not think Barclays ought to have automatically blocked it; and may not yet have had a fair chance to update and communicate its watch-list. However, in light of the odd pattern of payments that followed, Barclays did block payments to what was a new payee; also an international payee; and a payee trading in binary options without being registered with the Gambling Commission (as required at the time). The bank had constructive if not actual notice that the payee might not be a legitimate merchant – therefore, it would have been reasonable for it to have properly questioned Mr H before processing all the payments in order to satisfy itself that all was well.

But even if I were to give Barclays the benefit of the doubt and conclude that the first few payments were too close to the IOSCO alert to trigger alarm bells. It concluded the second payment on 7 February 2017 was unusual and blocked it.

This was clearly a highly unusual and uncharacteristic pattern of spending for Mr H compared with his recent history on the account – and was an indicator that something untoward might be happening (including, for example, an attempt to circumvent the anti-money laundering requirements by making a number of smaller payments in short succession to the same payee).

If, instead of merely confirming Mr H's intentions to pay, Barclays had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that he would have explained what he was doing.

In such circumstances, whilst the bank had no duty to protect Mr H from a bad bargain or give investment advice, it could have explained to him that there was a regulatory warning and invited him to look more closely into this trader. It could have also explained its own customer experiences with unregulated and unlicensed binary options traders in that customers would often be prevented from withdrawing available balances. After all, at that time, there was information in the public domain—which a bank ought to have known even if a lay consumer ought not—about the very high risks associated with binary options trading, including many warnings of potential fraud (e.g. Action Fraud's June 2016 warning; the European Securities and Markets Authority's July 2016 warning; the Financial Conduct Authority's consultation paper of December 2016; and the Gambling Commission's December 2016 scam warning that "*an unlicensed operator is likely operating illegally*"; and so forth).

There is no evidence that Barclays provided Mr H with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he was making. It was a missed opportunity to intervene.

### causation

If Barclays had asked Mr H what the payments were for and the basic surrounding context, it is likely he would have fully explained what he was doing and that everything had been done over the phone and online with his 'broker'. Barclays did not need to know for certain whether Mr H 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 Barclays ought reasonably to have provided a scam warning in light of all the information then known to financial professionals about the risks associated with unlicensed binary options.

If Barclays had given a warning, I believe that Mr H would have paused and looked more closely into 23 Traders before proceeding. There is no evidence that he was willing to take high risks or had a history of speculative investments or gambling. And the evidence suggests this was his first time putting his money into a high-risk investment. It seems more probable that he would have made further enquiries into whether or not 23 Traders were regulated in the UK or abroad. He could have discovered they were not and that they were subject to a regulatory warning. In other words, I am satisfied that a warning from his trusted bank would probably have exposed 23 Traders' smoke and mirrors, causing him not to 'invest' and preventing any losses.

Even if he had not worked out that this was a scam, it is likely that a warning would have alerted him 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 his supposed broker's (mis)representations — i.e. that they were not really licensed UK investments but highly-risky bets more akin to a wager in which the broker must lose if he is to win. So before Mr H's payments were actually processed, he would probably have stopped in his tracks. But for Barclays's failure to act on clear triggers of potential fraud or financial harm, Mr H would probably have not lost any money.

### 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 Mr H was to blame for what happened; that he did not foresee the risk of this sort of harm or any harm.

Mr H trusted who he believed to be a professional account manager and had no cause to doubt their legitimacy until after they had taken all of his payments. When he provided his card details, he did so on the belief that 23 Traders were a legitimate investment company. When he realised they were not, he promptly contacted Barclays for help.

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

I recognise that Barclays paid Mr H £150 for customer service failings. I think this was fair and reasonable and I make no further compensation award on this matter.

### **My final decision**

For the reasons set out above, I have decided to uphold this complaint. I therefore require Barclays Bank Plc trading as Barclaycard to:

1. Refund all of Mr H's stolen payments save the first two (totalling £1,500) as they were recovered through successful chargeback claims.
2. Rework Mr H's credit card account so that all interest and charges caused by the payments at point 1 are refunded.
3. Pay 8% simple interest per year on any payments made by Mr H towards the credit card balance arising from those payments, interest or charges, from the date they were made to the date of settlement.
4. Correct any adverse information recorded on Mr H's credit file in relation to the disputed payments.
5. If Barclays deducts tax in relation to the interest element of this award at point 3, it should provide Mr H with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 9 February 2022.

Dolores Njemanze  
**Ombudsman**