

The complaint

Mr W complains that Metro Bank Plc refuses to refund payments he lost to an investment scammer.

What happened

In October 2017, Mr W was cold called by a representative of 72 Option and was sold an investment opportunity with them. He agreed to invest £250 and was provided with a trading platform. Mr W suspected 72 Option might be a scam so he says he contacted Metro but it couldn't recover his money. An account manager from 72 Option subsequently contacted Mr W and went through trades with him and he won them all, which gained his trust, so he agreed to deposit further funds.

Within a short time, Mr W was cold called by another company called 53 Capital. After seeing success with 72 Option, he was persuaded to investment with them too. Between 25 October 2017 to 1 November 2017, Mr W invested around £48,000 with 72 Option and 53 Capital using his Metro Visa debit card – linked to his current account. Mr W quickly realised he was unable to withdraw profits from his trading accounts. He carried out some research and saw reviews highlighting that 72 Option were scammers. He then realised that 53 Capital were also scammers.

Mr W appointed a company to assist him with recovering his money. He was able to obtain some refunds from 72 Option. He subsequently called Metro for assistance with recovering his remaining payments via the Visa chargeback scheme.

Metro processed chargebacks for Mr W for his remaining loss and most of the chargeback claims were defended by 72 Option and 53 Capital. Mr W complained and Metro advised it was unable to do anymore to assist.

Mr W referred his complaint to this office and requested that Metro returns his remaining loss. One of our investigators felt that Metro could have done more to prevent Mr W's losses and suggested that Metro refund some of Mr W's payments, together with interest. Mr W agreed but Metro didn't, so the case was passed to me to decide.

On 26 August 2022, I issued a provisional decision upholding this complaint in part. For completeness, I repeat my provisional findings below:

Metro 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 W for the purposes of the Payment Services Regulations ('the Regulations'), in force at the time. This is because they were made by Mr W using the legitimate security credentials provided to him by Metro. So, although Mr W did not intend the money to go to scammers, under the Regulations, and

under the terms and conditions of his bank account, Mr W 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 Metro 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 Metro that Mr W’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 him 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.

Having looked over this complaint, I think there ought to have been fraud triggers from the point of Mr W’s first payment of £250 on 25 October 2017 to 72 Option. I say this because IOSCO had published the following Investor Alert warnings about 72 Option:

- 13 December 2016 - British Columbia Securities Commission*
- 4 August 2017 – Securities and Futures Commission (Hong Kong)*
- 6 September 2017 – Australian Securities and Investments Commission*

If Metro had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that Mr W would have explained what he was doing. In such circumstances, whilst the bank had no duty to protect him from a bad bargain or give investment advice, it could have advised that there were several credible regulator warnings about 72 Option that indicated they could be operating a scam. It could have pointed Mr W to the UK Gambling Commission’s website to check whether 72 Option 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.

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

causation

If Metro had asked Mr W what the payment was 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 a representative of 72 Option. Metro did not need to know for certain whether Mr W 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 Metro 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 Metro had given a warning, I believe that Mr W would have paused and looked more closely into 72 Option before proceeding. It seems more probable that he would have made further enquiries into whether or not 72 Option were regulated in the UK or abroad. He 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 his trusted bank would probably have exposed 72 Option's smoke and mirrors, causing him not to 'invest' and preventing any further 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 brokers (mis)representations — i.e. that they were not really regulated 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 W's payments were actually processed, he would probably have stopped in his tracks. But for Metro's failure to act on clear triggers of potential fraud or financial harm, Mr W would probably have lost no money.

I've noted that Mr W had a bad feeling that 72 Option could be a scam after his initial £250 payment. But I've also noted that his broker at 72 Option was able to persuade him that he should continue trading and they would earn him a lot of money. This was a very sophisticated scam with believable trading platforms and unless Mr W was prompted, I don't think he could reasonably have known that what he was likely seeing was no more than a simulation. He was also permitted to withdraw £100 on 29 October 2017 as a way of 72 Option proving the account was legitimate. Though banks ought to be familiar that token withdrawals in the early stages are common with binary options scams.

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 think that Mr W should share some blame for what happened.

I've noted that when Mr W realised this was a scam (quite early on) he carried out further checks into 72 Option and found adverse information about them. It's clear he didn't carry out these checks prior to investing with them and I think if he had, he would have likely seen the credible adverse information.

In the circumstances, I do think it would be fair to reduce compensation by 25% on the basis that Mr W should share blame for what happened. I've not placed too much weight on Mr W's expected returns because binary options trades can generate significant profits (which is associated with the level of risk involved). I don't think Mr W could reasonably have known that the profits he saw on his trading platforms were no more than a video game/simulation.

Whilst I've not set this out above, I think it's likely that 53 Capital Trade (warning published by the FCA on 4 July 2017) were likely run by the same individuals as 72 Option as he was cold called by them shortly after he started investing with 72 Option. In any event, I'm satisfied that if Metro had provided a meaningful warning about 72 Option as I've concluded it should have, Mr W wouldn't have also fallen victim to 53 Capital Trade and so these payments have formed part of my consideration when concluding Metro's responsibility.

Responses to my provisional decision

Metro confirmed it had nothing more to add to my provisional decision.

Mr W explained in summary that he could have carried out his own research but he was sold an opportunity that he believed in by sophisticated scammers. He explained he'd already lost a lot and asked that I reconsider the contributory negligence reduction. He also queried the interest.

I replied to Mr W and acknowledged the ordeal he'd been through. But I explained that I had to consider whether he did anything to mitigate his losses and I thought 25% in the circumstances were fair. I clarified the interest and Mr W thanked me for my response.

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 Metro didn't have any further comments to add to my provisional decision and Mr W had no further comment after my reply to him, I see no reason to depart from what I've said.

My final decision

My final decision is that Metro Bank Plc should refund the remaining payments in dispute. It should add 8% simple interest per year, from the respective dates of loss to the date of refund.

Metro is entitled to first deduct credits Mr W received from 72 Option and 53 Capital Trade (BO Trader) when calculating Mr W's settlement.

And Metro should deduct 25% for contributory negligence.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 12 October 2022.

Dolores Njemanze
Ombudsman