

## **The complaint**

Mr A complains, in summary, that Metro Bank PLC did not do enough to help him recover all the money he had paid to a binary options investment scam using his Metro Mastercard debit card.

## **What happened**

After seeing an advertisement for a merchant offering binary options investment trading, Trade 24, Mr A made 14 payments to them, totalling £31,500 between October 2017 to December 2017. But by the following year, Mr A became concerned when he discovered Trade 24 was not authorised by the Financial Conduct Authority ('FCA'). That led him to approach Metro to ask the bank to retrieve his money.

Metro did not process chargeback claims because it said Mastercard's scheme rules indicated at the point funds are loaded into an investment, foreign exchange, or similar type of account, the service is considered provided as described. So it said it couldn't help him but paid £50 compensation to recognise it could have provided a better service.

Our investigator concluded, first of all, that there were circumstances where the Mastercard scheme rules would permit chargeback claims against investment merchants like Trade 24. He considered that Mr A put a persuasive case forward that Trade 24 had not loaded his funds into an investment account, so the service had not been received. He also found, in any event, that there were circumstances where Metro ought to have blocked unusual payments and payments that matched known investment fraud, to have prevented Mr A losing funds. As a result, he recommended that Metro refunds Mr A his outstanding money, plus interest.

Metro advised the transactions were reported more than 120 days after the transaction dates, which falls outside the Mastercard scheme rules. It also contacted Mastercard for further advice but did not get any response, so it asked for the complaint to be passed to an ombudsman for review. Metro did not comment on our investigator's conclusions that it could have prevented the loss with fraud monitoring.

The complaint was referred to me for determination and I issued my provisional decision upholding the complaint and invited both parties to respond.

### *Metro's response to the provisional decision*

Metro didn't agree with my provisional decision and in summary said:

- It doesn't dispute a lot of work has gone on over the years about raising awareness about potential scams and it has contributed to these efforts.
- My provisional decision failed to comment on Mr A's responsibility to have conducted his own due diligence before making his investment to mitigate any potential losses he might incur. It is not for me to comment on how a bank applies its payment monitoring systems as this is the role of the regulator.
- The FCA issued an effective warning about Trade 24 being a potential scam on 9 March 2016 and this note was updated on 27 September 2017 after the date of Mr

A's payments.

- The transactions were authorised from a business account debit card rather than a personal account and were not deemed unusual.
- Mr A received an inward payment of £20,000 on 11 October 2017, this appeared to fund the transactions.
- On 12 October 2017, Mr A made an outward payment of £90,000 to an electronic money institution offering virtual accounts. The transaction was processed in-store, and at the time it asked Mr A the purpose of making the transaction. He told it he was sending the money for share trading. In facilitating a transaction of this size to an "electronic" account designated for share trading, the bank believes Mr A was not a naïve/cautious investor when taking the decision to make the investments to the Trade 24 platform.
- It's important to recognise that banks need to strike a balance to the extent in which it intervenes in payments being made against the risk of delaying legitimate payment requests, or at risk of being seen to give investment advice. With the payment Mr A made in store the opportunity was there for Metro to question the purpose of the payment. Because it is essentially reviewing this situation with the benefit of hindsight, on the balance of probabilities it doesn't think it's realistic to expect a bank colleague to uncover a fraudulent investment over the duration of a phone call. That said, had it approached Mr A at the time to question the transactions to Trade 24, it believes he would have simply confirmed they were part of a legitimate investment.
- The website pertaining to Trade 24 didn't offer any misguidance that it was regulated by the Financial Conduct Authority, only that it was a brokerage, and Mr A had the opportunity to fully research this firm prior to committing to invest.
- Mr A is an experienced investor who was prepared to accept the associated level of risk which comes with high-risk investments into Binary Options, cryptocurrency, CFD's, etc. It shouldn't therefore be viewed that the bank is there to act as his insurance policy for the return of those funds, and with the view of trying to apply today's targeted standards to 2017.

Mr A accepted the provisional decision and provided some further comments. He said in summary:

- He was unaware the payment of £90,000 was sent to an 'electronic' account, these were the payment instructions he was given by Trade 24. Mr A said he found the junior member of staff in the store to be inexperienced and all he was asked about was the purpose of the payment. In any event, he has not complained about this transfer and rather the debit card payments alone.
- When he first spoke to Trade 24, they told him they were licensed and regulated. Their website listed their address as an address in the City of London and they would call him from a London area code telephone number. Mr A didn't think a company could operate from the City of London if they were not appropriately licensed and regulated.
- This was his first time investing and he had not previously made financial investments. Mr A says Trade 24 told him that he would be able to withdraw from his platform within a short time frame.
- Mr A says there is a difference in losing money to a high-risk investment and having money stolen as part of a scam. He would have thought Metro would be familiar with these types of scams and that they would warn him of the risks in general, which it did not do.

### **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.

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—which were not regulated by the Financial Conduct Authority (“FCA”) or its predecessor at the time—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 Trade 24 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 A. In the absence of evidence to the contrary, I have concluded this because:

- a) In 2017, binary-options traders operating in the UK were required to be licensed by the UK’s Gambling Commission — whereas Trade 24 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.
- b) On 9 March 2016, an alert about Trade 24 was published by the Financial Conduct Authority (FCA) warning that they were offering financial services in its jurisdiction without authorisation. This is a potential indicator of dishonest intentions.
- c) On 27 September 2016, Ontario Securities and Commission published a warning about Trade 24 on the investor alert portal of the International Organization of Securities Commissions (‘IOSCO’).
- d) The Swiss Financial Market Supervisory Authority also published an IOSCO warning on 19 May 2017.
- e) There are several reports in the public domain—e.g. foreign press and online forums—stating that Trade 24 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 four more issues in order to determine the outcome of the complaint:

- a) Did Metro deal with Mr A’s chargeback claim fairly?

- b) Were any of the disputed transactions so unusual or uncharacteristic for Mr A and/or his account that Metro fraud alerts ought reasonably to have triggered some sort of intervention?
- c) If triggered, would Metro's intervention have made a difference and prevented or reduced the loss?
- d) And if so, was Mr A 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 Mastercard 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. Our role in such cases is not to second-guess Mastercard's arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. Metro) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder (Mr A).

There was no chargeback claim presented in this case under any reason code. In my judgment, this omission by Metro was not an unreasonable exercise of its discretion on whether or not to pursue the matter against Trade 24.

Mastercard's 2017 chargeback rules (applicable to the time of Mr A's transactions) state:

Chargebacks are available to the issuer for transactions in which any value is purchased for gambling, investment or similar purposes. However, issuers have no chargeback rights related to the use of these chips or value, unspent chips, or withdrawal of such value, or on any winnings, gains or losses resulting from the use of such chips or value.

This supports Metro's decision not to process chargeback claims following Mr A's complaint that he was unable to withdraw his funds from his Trade 24 platform. And that's specifically because Mastercard said Metro had no right to.

Having discussed the matter of fraud and scams with Mastercard, it has explained that cardholder dispute chargeback rights are restricted regardless of whether the activity was illegal. In short, Mastercard considers the purpose of the transaction to load funds into the gambling or investment account and not what activities are subsequently done with the funds.

For the reasons set out above, I am not persuaded that Metro acted unfairly or unreasonably in connection with any rights or responsibilities under the Mastercard chargeback scheme.

### unusual or uncharacteristic activity

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 A for the purposes of the Payment Services Regulations 2009 ('the Regulations'), in force at the time. This is because they were made by Mr A using the legitimate security credentials provided to him by Metro. These must be regarded as 'authorised payments' even though Mr A was the victim of a sophisticated scam. So, although he did not intend the money to go to scammers,

under the Regulations, and under the terms and conditions of his bank account, Mr A 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 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 A’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.

In Mr A’s case, there was a warning about Trade 24 on the FCA’s published warning list and IOSCO’s Investor Alerts Portal more than one month prior to Mr A’s initial payment. 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. But given the timing of the alert relative to the first payment, I do think Metro ought to have automatically blocked it; and it had over a year to update and communicate its watch-list. 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 A before processing all the payments in order to satisfy itself that all was well.

If Metro had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that he would have explained what he was doing. After all, when Mr A was in store making an international transfer, he explained it was for share dealing. But it appears that Metro didn’t ask further probing questions around the transaction which was for £90,000,

and whilst Mr A has not complained about this transaction, I think this was a further missed opportunity for Metro to have intervened.

In such circumstances, whilst the bank had no duty to protect Mr A 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).

### causation

If Metro had asked Mr A 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'. Metro did not need to know for certain whether Mr A 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 binary options.

Metro suggested an inward payment of £20,000 funded the investment to Trade 24. I've noted that Mr A held over £80,000 in his Metro current account and had done for over six months prior to investing with Trade 24. These funds were relatively untouched and Trade 24 persuaded him to send all of the available balances he had to them over a few months.

If Metro had given a warning, I believe that Mr A would have paused and looked more closely into Trade 24 before proceeding. There is no evidence that he was willing to take high risks or had a history of speculative investments or gambling; despite Metro's suggestion. 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 Trade 24 were regulated in the UK or abroad. He could have discovered they were not and the various regulatory warnings about the risk of unregulated investment scams (see above). In other words, I am satisfied that a warning from his trusted bank would probably have exposed Trade 24's 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 A'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 A 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 A was to blame for what happened; that he did not foresee the risk of this sort of harm or any harm. At the time of his 'trading', Trade 24 was subject to an FCA warning but Mr A would have needed to know how to search for a regulator's warning. Having reviewed what information would have been available on a web search at the time of Mr A's payments, the FCA's warning did not appear with any level of prominence unless you included 'FCA' in your search. I do not place too much weight on general but arcane information in the public domain for reasons previously alluded to about the information imbalance between financial professionals and ordinary consumers.

Mr A trusted who he believed to be experienced traders and had no cause to doubt their assurances. He was persuaded they were legitimate as they were allegedly operating from an address in the City of London, called him from a London telephone number and had a legitimate looking website. Unaware of the common deceptive tactics of binary options scammers, I do not think he could earlier have foreseen the risk that the company he was dealing with was a scam and the trading account he was viewing was no more than a simulation.

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

I recognise that Metro paid Mr A £50 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 Metro Bank PLC to refund all of Mr A's stolen debit card payments (totalling £31,500).

This was a current account, so Metro should add interest to that sum (less any tax properly deductible) at our usual rate of 8% simple per year from the respective dates of loss.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 28 January 2022.

Dolores Njemanze  
**Ombudsman**