DRN-3264122

The complaint

Mr W complains that Nationwide Building Society won't reimburse money he lost when he fell victim to a scam.

What happened

I'm aware that I've condensed events in less detail than they were presented. I hope Mr W and Nationwide won't take it as a discourtesy that I've done that. Ours is an informal dispute resolution service, and I've concentrated on what I consider to be the crux of the complaint – our rules allow me to do that. If I don't mention something, it won't be because I've ignored it. It'll be because I didn't think it was material to the outcome of the complaint.

In summary, Mr W was convinced by what he thought was a legitimate trading company, operating as RB Options. He made two payments using his Nationwide credit card to this firm, on the basis that he would be trading in financial instruments such as binary options. Unbeknown to Mr W at the time, this was a fictitious trading merchant designed to scam people into sending money across – there were in fact no trades being made at all.

In the end, Mr W lost these two payments to RB Options. Then, later on in 2017, he was approached by a firm operating under a different name, Wilkins Finance. Under false pretences, Mr W was duped into making three credit card payments to facilitate online trades. Again, this turned out to be a scam and there were actually no trades made. So overall, Mr W lost a total of five payments:

Date	Merchant	Amount
26 May 2015	RB Options	£163.02 ($250)
22 June 2015	RB Options	£1,006.11 ($1,580)
6 December 2017	Wilkins Finance	£241.25 (€250)
12 December 2017	Wilkins Finance	£1,340.12 (€1,500)
5 February 2018	Wilkins Finance	£2,912.96 (€3,250)
	Total	£5,663.46

Where Mr W's money was stolen by these seemingly genuine merchants, he asked Nationwide to recover the payments – but this turned out to be unsuccessful. In light of this, he brought a complaint to our service. One of our investigators considered everything and thought that Nationwide should refund part of the payments; those being, the two payments made to RB Options. Mr W accepts this – but Nationwide does not agree.

Because Nationwide is not in agreement, the matter has been escalated 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.

Having done so, I agree with the investigator that it should be upheld in part. I'll explain why.

relevant considerations

Not every complaint referred to us about investing in binary options, or CFDs is in fact a scam. Some complaints simply involve high-risk investment 'bets' on the performance of a share price, or commodity that has resulted in disappointing returns or substantial losses. Banks and other Payment Services Providers (PSPs) have duties to protect customers against the risk of financial loss due to fraud – but they are not expected to guard against poor investment choices or give investment advice, when executing customer payments.

Here, its common ground that Mr W was the victim of a fraudulent scheme perpetrated by RB Options and then also by Wilkins Finance. Where this has been accepted by both parties, I do not see the need to further question whether this was a scam.

Accordingly, when determining this complaint, I'm left to consider:

1. Whether Nationwide has fairly dealt with Mr W's claims to recover the money lost;
2. If Nationwide's transaction monitoring systems ought to have triggered an intervention for any of these disputed payments on the grounds of suspected fraud;
3. And if it these fraud alerts ought to have 'triggered', whether any intervention from Nationwide would've prevented Mr W's loss;
4. Finally, was Mr W in any way partly to blame for what happened such that any compensation should be reduced to reflect that?

recovery

Mr W made all of these payments using his Nationwide credit card. So, when he raised this matter with Nationwide, there were potentially two means of recovering the payments lost; what's known as a 'chargeback' and, separately, a claim under Section 75 of the Consumer Credit Act (CCA).

I'll go on to explain why I don't find it necessary to focus on the payments made to RB Options via these two methods of recourse. Therefore, I've first concentrated on whether Nationwide took appropriate recovery action for the money lost to Wilkins Financial.

Chargeback is a voluntary scheme run by VISA where it ultimately arbitrates disputes between merchants and customers. There are scheme rules which apply which, put simply, mean there are limited grounds on which a chargeback can succeed. One of which, is the requirement to raise a claim *within a set time*. Ultimately, Mr W raised this dispute once the relevant timescales had already expired. Nationwide therefore didn't attempt to chargeback the transactions to Wilkins Financial. And, having reviewed the scheme rules, I do not find this unreasonable – as its fair to say that Mr W did not have a valid claim.

Likewise, under these circumstances, I'm satisfied that the requisite conditions were not met for a Section 75 claim to succeed for these three payments to Wilkins Finance. There are certain requirements for a claim to be valid according to the CCA, and I can't safely conclude that Mr W was able to provide the necessary evidence for a claim to be successful. It follows that I do not find that Nationwide acted unfairly by not recovering these payments by either means of chargeback, or Section 75.

intervention

Nationwide is aware of our position on PSP's safeguarding and due-diligence duties to protect customers from the risk of financial harm due to fraud. There are many published decisions on our website setting out these principles, relevant rules and regulations. I therefore don't consider it necessary to set them out again here.

Suffice to say, taking these into account, Nationwide ought to have been monitoring accounts to counter various risks, have systems in place to identify unusual transactions, or other indicators, that its customers were at risk of fraud. And in some situations, make additional checks before processing payments, or declined them altogether, to protect its customers from possible financial harm from fraud. In line with this, I've thought about whether Nationwide should've stepped in before these transactions were let go.

Turning first to the two payments made to RB Options in 2015. As long ago as June 2012, the then regulator, indicated – in its consultation paper *Banks' Defence Against Investment Fraud; detecting perpetrators and protecting victims* – that it was good industry practice for firms to put together an updated watch-list of types of scams and potential scammers. Whilst the regulator didn't give any indication of when those watchlists ought to be updated, it's not unreasonable to expect an international society, like Nationwide, to update those lists, and communicate with staff, within a month of a warning being published by the FCA or IOSCO (the International Organisation of Securities Commission).

Such an alert should automatically trigger its fraud prevention systems and lead to payments being paused, pending further intervention – such as making enquiries of the customer about the payment or giving a scam warning. Here, there was a warning about RB Options published on the IOSCO alert portal as early as January 2014. This was of course at least 14 months before Mr W made his first payment to RB Options. Furthermore, from the IOSCO website, this warning specifically referred to binary-options and made it clear that *"extreme causation"* should be taken with RB Options. The warning message also stated that RB Options was known to be an unregistered online trading platform.

I consider any watch-list should reasonably include parties who are carrying out activities without being registered/regulated to do so. Given the timing of the warning and when the first payment was made to RB Options on 26 May 2015, Nationwide ought to have automatically blocked it, and the following payment to RB Options taken from Mr W's account. By then, Nationwide had had ample time to update and communicate its watch-list and, accordingly, it should have asked Mr W appropriate probing questions before processing the payments.

Besides, Nationwide didn't need to know for certain whether Mr W was dealing with a fraudulent binary options 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. Overall, I am satisfied Nationwide ought to have intervened with this first payment to RB Options.

Conversely, I am not convinced that Nationwide should've made an intervention with any of the subsequent transactions to Wilkins Financial. So as far as I am reasonably aware, at the time of these three payments in late 2017/early 2018 there was no such cautionary notice available. Unlike RB Options, I'm not compelled to believe that there was sufficient warning or information available in the public domain that ought reasonably to have alerted Nationwide that these credit card payments were likely given rise to a scam. With that in mind, I don't think that Nationwide should've automatically blocked them on account of its watchlists being triggered.

<u>*unusual or uncharacteristic activity*</u>

That said, in accordance with Payment Services Regulations (PSRs), alongside established good practice, Nationwide has a responsibility to monitor accounts and payments made to (amongst other things) prevent fraud and scams. Aside from maintaining the sort of watchlists I've already mentioned, Nationwide should have systems in place to identify unusual transactions or other signs that might indicate its customers are at risk of fraud.

These commonly include ways to spot payment instructions that are particularly unusual or uncharacteristic compared to how a consumer typically operates their account. With this in mind, I've considered whether the payments to Wilkins Financial should have given Nationwide sufficient grounds for suspecting fraud to warrant an intervention.

When doing so, I've borne in mind that the fundamental purpose of a credit card is to facilitate purchases. Most consumers tend to shop around, which means that noticing an out of character payment amongst a host of new beneficiaries (or 'payees') is not straightforward. This rings true with Mr W's credit card; it's not in question that he made purchases frequently. Indeed, looking at his statements leading up to and including 2017, there were a number of payments made to new payees (including those abroad) for varying amounts. To that end, I can't accept that these particular account movements represented a sudden change in the way Mr W was using his card – he often made a series of card purchases, to different online merchants.

When considered against this backdrop, I don't find that these three payments to Wilkins Financial were for large enough sums to have attracted suspicion. It's also important to respect that the PSRs are not only designed to protect consumers – but also to ensure that banks provide services without undue delay. So, there is a balance to be struck between bankers identifying payments that could potentially be fraudulent, and minimising disruption to legitimate payments.

What's more, if Nationwide were expected to intervene for every payment of a similar amount, I have to respect that it would risk grinding the banking/payment system to a halt. So, all in all, I am not satisfied that the Nationwide could reasonably have been expected to have taken further steps to contact Mr W before these particular payments were let go.

causation

Having concluded that Nationwide ought to have questioned Mr W about some of the payments in question here (i.e. the ones to RB Options), next I need to determine what difference (if any) such an intervention would've made. So, would the loss being claimed for have occurred but for Nationwide taking appropriate action? This can otherwise be referred to as 'causation'.

Thinking about this carefully, I've come to the conclusion that, had Nationwide carried out its due diligence and duties and asked Mr W about the initial payment to RB Options, I've no compelling reason to doubt that he would have explained what he was doing. And whilst I accept it had no duty to protect Mr W from a poor investment choice, or give investment advice, Nationwide could have provided information about the steps a customer can take to ensure, as far as is reasonably possible, that they are dealing with a legitimate person. Such as, checking the recognised domestic and international watchlists, like the one provided by IOSCO.

On the evidence, if Nationwide had intervened, I'm satisfied Mr W would have looked into the investment opportunity further and discovered more information about this type of investment, how high-risk it was and whether the 'trader' was registered here or abroad. Indeed, its likely he would have come across the warning published by the IOSCO himself and that would have been enough to give him second thoughts such that he wouldn't have traded at all. It follows that I find that Nationwide ought to have intervened at the first payment to RB Options in May 2015.

Had it done so, I'm persuaded that Mr W would likely not have made what he thought was the first trade and so prevented his overall losses to this firm (i.e. the second transaction made to RB Options on 22 June 2015). Hence, why I don't deem it necessary to comment on whether Nationwide should've recovered both these payments – instead, I think they ought reasonably to have counteracted them from being made in the first place.

Where I judge that Nationwide should not have made an intervention for the Wilkins Finance transactions, I do not need to determine whether such action would've made a difference. Even so, I've considered whether the prevention of the earlier payments in 2015 to RB Options would've naturally averted the subsequent loss Mr W incurred, i.e. had Nationwide stopped the first set of payments, would this have saved Mr W from being scammed by the so-called Wilkins Financial.

I accept that Mr W may have just written off his losses with RB Options as a poor investment choice and therefore not foreseen the risk of being scammed by trading with Wilkins Finance. This would explain why he decided to invest with this firm and did not draw the connection between being scammed before by a similar trading scheme.

In any event, it is not enough that a respondent failed to act fairly or reasonably; its wrongful acts or omissions must be the proximate (so the dominant and effective) cause of losses of a type that were reasonably foreseeable to the wrongdoer at the time of the breach. So, in this case, I would need to be satisfied that the losses Mr W suffered because of Wilkins Financial in 2017/2018 were reasonably foreseeable to Nationwide in 2015.

It's my view that it would be unfair to find that they were. As I see it, preventing Mr W from falling victim to a scam does not necessarily mean Nationwide could be expected to anticipate that this would mean he'd also not suffer a loss to fraudsters some eighteen months later. There are too many intervening factors (such as Mr W himself identifying that he had lost out before, for example) that mean the relationship between cause and effect is not satisfied in my opinion. I can't safely say Nationwide's failures were the dominant and effective cause of Mr W losing this money to Wilkins Financial. Consequently, I am not holding Nationwide liable for these later payments.

contributory negligence

The concept of "contributory negligence" is an important consideration in a dispute of this nature, whereby an award of compensation is being asked of a respondent such as Nationwide. In fairness, I must consider whether Mr W's actions (or inactions) has contributed towards his losses – he may have exhibited "contributory negligence" and should be held responsible as well as Nationwide (to an extent) for those losses.

In terms of the earlier payments to RB Options, I have thought about whether Mr W should bear some responsibility for the situation in which he found himself. But at the time of making these 2015 payments, I'm satisfied he was drawn into what seemed to be genuine trades by someone purporting to be a genuine trader.

It's not in question that this was a sophisticated scam where RB Options had spent time gaining Mr W's trust in order to defraud him of his money. And Mr W has provided copies of some of the documentation he was sent to reinforce that this was a legitimate investment venture. All of the circumstances manufactured by RB Options made everything appear genuine to him.

So, I don't think Mr W was blameworthy for being taken in by this scam, and I am satisfied that he simply did not foresee the type of loss that was unfolding in 2015 – he just didn't realise what was happening. All in all, I haven't seen anything in what Mr W has described that would lead me to conclude he ought to have been on notice that he might be being scammed such that I think it would be fair to reduce any compensation accordingly.

Finally, where I've decided that Nationwide do not need to return the payments to Wilkins Financial, it's not necessary for me to consider whether any deduction should be made.

Putting things right

In light of my findings, I find it fair and reasonable that Nationwide refund the two payments Mr W made to RB Options. Where this was a credit card account, Nationwide should reconstruct the account from the respective dates of loss to the date of refund, refunding any interest that might've been charged as a result of the two payments.

My final decision

My final decision is that I partially uphold this complaint and require Nationwide Building Society to:

- Refund the two payments Mr W made to RB Options in 2015; and;
- Rework Mr W's credit card account so that all interest and charges caused by these two payments are refunded.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 1 April 2022.

Matthew Belcher
Ombudsman