

The complaint

Mr J complains that HSBC UK Bank Plc (“HSBC”) didn’t help recover the money he lost to an investment scam.

What happened

Mr J fell victim to an investment scam and disputes several payments he made to XtraderFX. Two payments were made to Finproduct.Trade which Mr J also disputes – he says he only had dealings with XtraderFX and these were also arranged through it.

By way of background, Mr J came across an advertisement on social media for XtraderFX which appeared to be endorsed by a well-known TV programme. He left his contact details on a webform and was subsequently contacted by a representative of XtraderFX. Mr J says that he didn’t have any previous investment experience and the representative, who was later became his account manager, sold him a trading opportunity. Mr J did some research on the company and it looked legitimate, so he opened a trading account with a small deposit. Over the next few months, he continued making deposits into his trading account and made some withdrawals. Mr J has told this service that he had access to the online trading platform and was able to track the movements of the trades.

Mr J eventually realised he had been scammed when XtraderFX wouldn’t let him make further withdrawals or close his trading account. Then one day, he couldn’t access his trading account. Mr J says that he couldn’t get hold of XtraderFX and subsequently learnt that its employees were in jail for fraud. He reported the matter to HSBC. However, it declined to refund the money Mr J lost. But HSBC offered £250 for the inconvenience he experienced when he reached out to it for assistance.

Unhappy with this, Mr J referred his complaint to our service and our investigator upheld it. She concluded that HSBC ought to have blocked the initial payment in dispute and asked Mr J suitably probing questions to satisfy itself that all was well. And had it done that, she thought Mr J wouldn’t have gone ahead with the payment – or indeed the subsequent payments. The investigator didn’t think Mr J should share the blame for what happened and recommended HSBC to refund all the disputed payments along with transaction fees. She also asked HSBC to add 8% simple interest.

Mr J accepted the investigator’s view, but HSBC didn’t. It provided a comprehensive response which it helpfully summarised in its conclusion and I now repeat:

‘Overall, we consider that that the adjudicator’s view is unsupportable. As such, we do not accept that we should be held responsible for Mr J’s loss for the following reasons:

- There is a striking lack of detail as regards the background of this complaint and only limited information on key issues has been provided in support, which raises further concerns;*
- The adjudicator seeks to apply retrospective regulation by the back door – that*

is not the purpose of the ombudsman service. If the regulator intended that we be obliged to take steps to block payments to merchants one month after they were the subject of an FCA or IOSCO warning, or indeed to automatically block transactions on a blanket basis, they would have made this clear. They did not; and

- *The adjudicator's contributory negligence assessment is fundamentally flawed and unsupportable. Mr J's losses were directly referable to his failure to carry out any research and his actions were objectively reckless and inconsistent with how a reasonable person would have behaved.'*

As an agreement could not be reached, the complaint was escalated to me for review and determination.

The following transactions were made using Mr J's debit card:

Date (on bank statement)	Type	Merchant	Amount
26 October 2018	Debit	XtraderFX	£266.52 (plus £7.32 non-sterling charge)
29 October 2018	Debit	XtraderFX	£4,664.37 (plus £128.27 non-sterling charge)
6 November 2018	<u>Credit</u>	XtraderFX	£174.25 (plus £4.79 non-sterling charge)
16 November 2018	Debit	XtraderFX	£5,017.91 (plus £137.99 non-sterling charge)
23 November 2018	Debit	XtraderFX	£1,784.95 (plus £49.08 non-sterling charge)
29 November 2018	Debit	XtraderFX	£7,846.38 (plus £215.77 non-sterling charge)
20 December 2018	Debit	XtraderFX	£9,042.82 (plus £248.67 non-sterling charge)
20 December 2018	Debit	XtraderFX	£5,877.83 (plus £161.64 non-sterling charge)
24 December 2018	<u>Credit</u>	XtraderFX	£1,571.79 (plus £43.22 non-sterling charge)
11 February 2019	Debit	XtraderFX	£1,048.67 (plus £28.83 non-sterling charge)
14 February 2019	Debit	Finproduct.Trade	£4,102.12 (plus £112.80 non-sterling charge)
14 February 2019	Debit	Finproduct.Trade	£7,917.45 (plus £217.72 non-sterling charge)
		Total debits	£47,569.57 (plus £1,308.09 non-sterling charge)
		Total credits	£1746.05 (plus £48.01 non-sterling charge)
		Total loss	£47,083.61

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.

It is common ground that the disputed payments were 'authorised' by Mr J for the purposes of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. This is because they were made by Mr J using the legitimate security credentials provided to him by HSBC. These must be regarded as 'authorised payments' even if Mr J was duped into making the payments. Under the Regulations, and under the terms and conditions of his account, Mr J is presumed liable for the loss in the first instance.

Banks and other payment services providers 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. But they don't have to protect customers against the risk of bad bargains or give investment advice. And I'm mindful the regulator, the Financial Conduct Authority ("FCA"), has confirmed that providing a fraud warning to a customer doesn't amount to investment advice.

I've first considered whether XtraderFX was a legitimate trader. I'm satisfied that it wasn't. In the absence of evidence to the contrary, I've concluded this because:

- In 2018, binary options, forex and CFD traders operating in the UK were required to be regulated by FCA – XtraderFX was not. I'm also not aware of it being regulated in any other jurisdiction. This indicates it was operating illegally with dishonest intentions; legitimate businesses tend to submit themselves to regulatory oversight.
- On 6 July 2018, the FCA published a warning about XtraderFX that it was offering financial services in its jurisdiction without authorisation.
- On 4 March 2019, a warning was published on the Investor Alerts Portal of the International Organisation of Securities Commissions ("IOSCO") by the Financial Market Authority in Austria.
- In June 2020, the High Court of England and Wales wound up GPay Ltd – of which XtraderFX was a trading name – after it lost a substantial amount of client money. In doing so, the Insolvency Service commented on the scam nature of the online platform. While this information wasn't available at the time of Mr J's payments, it helps build an overall picture of scammers dishonestly seeking gains at the expense of others.

Intervention

HSBC is aware of our general approach to its safeguarding and due-diligence duties to protect customers. As well as decisions being published on our website which set out these principles, and which quote the relevant rules and regulations, HSBC itself has also had several decisions setting out our position. We are required, and as provided for in the DISP Rules, to take into account the regulator's rules and guidance, relevant codes of practice and what we consider to have been good industry practice, as well as the law, when reaching a decision. And we're tasked with reaching a fair and reasonable outcome in all of the circumstances of the complaint. In doing so, we're satisfied our approach isn't inconsistent with the law.

Suffice to say, HSBC 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 customer from possible financial harm from fraud.

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; and to regularly share “*timely and detailed intelligence*” with other banks, UK and overseas regulators, the police etc. I'm aware that the contents of this paper didn't specifically reference binary options or cryptocurrency scams. But I don't think the intention was to limit the types of investment fraud that firms ought to focus on.

While the regulator didn't give any indication of when those watch-lists ought to be updated, it's not unreasonable to expect an international bank (like HSBC) to update those lists, and communicate with staff, within a month of a warning being published by the FCA or IOSCO. And I consider that any watch-list should reasonably include parties who are carrying out regulated activities without being authorised to do so.

Such alerts should automatically trigger the bank's 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 XtraderFX published by the FCA on 6 July 2018. That was over three months before Mr J made his first payment to XtraderFX. While the warning didn't specifically refer to binary-options, forex or CFDs, it did specify that it was offering services in the FCA's jurisdiction without its permission.

I accept that it didn't follow from the nature of the FCA warning in isolation that XtraderFX was not a legitimate company. But given the timing of the warning and when the first payment was made, HSBC ought to have automatically blocked it – in my view it had sufficient time to update and communicate its watch-list. The bank had constructive if not actual notice that the payee might not be a legitimate merchant.

HSBC has argued that this approach amounts to retrospective regulation. I disagree. The paper published in 2012, that the investigator and I have referred to, set out that the then regulator said it was good industry practice for businesses to have an updated watch-list of potential perpetrators and types of scam. So, having a watch-list of this type has been considered good industry practice for many years now – and that's something I'm required to take account of in reaching my decision. I'm satisfied updating a watch-list within one month is reasonable. Here, the payments were made over three months later; in my view this is plenty of time for any watch-list to be updated.

HSBC says that although it can apply blocks to certain merchant, these can be circumvented by those merchants by changing merchant/acquirer codes. But it hasn't explained how this applies to Mr J's case. I would also add that if the regulator is satisfied that its own warning lists, along with IOSCO's warnings lists, are sources available for building up a watch-list for investment fraud, I think this satisfies the threshold for strong grounds for suspicions enabling HSBC to delay payments to payees published on these lists. If HSBC has the capabilities of delaying payments to particular merchants, I'm not sure why it wouldn't be in a position to do so for others – and from the first payment.

In the context of Mr J's case, I'm satisfied that HSBC ought to have blocked payments to XtraderFX based on credible warning published by the FCA, along with its own customer complaints about this merchant. It would have also been reasonable for HSBC to have asked Mr J appropriate probing questions before processing any payment to this payee.

Had HSBC carried out its due diligence and duties and asked Mr J about the initial payment, I've no reason to doubt he would have explained what he was doing. And while I accept that HSBC didn't have a duty to protect Mr J from a poor investment choice, or give investment advice, it 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 merchant – such as checking that it was authorised with the FCA.

HSBC could have also explained its own customers' experiences with unregulated and unlicensed high-risk investment traders in that customers would often be prevented from withdrawing available balances and trading accounts could be manipulated. 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 and CFDs, 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 FCA's consultation paper of December 2016; the Gambling Commission's scam warning of December 2016; City of London Police's October 2017 report noting victims had lost 'over £59m' to binary options fraud; Visa's Business News publication of October 2017 where it expanded its chargeback scheme rules to cover binary options and investment disputes arising from merchants often unlicensed and unregulated deploying 'deceptive practices'; and so forth).

Causation

If HSBC had asked Mr J what the payment was for and the basic surrounding context, it is likely he would have fully explained what he was doing, including mentioning the TV programme endorsement he came across on social media which prompted him to leave his contact details. HSBC did not need to know for certain whether Mr J was dealing with a fraudster 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 that there were such grounds here and, therefore, that HSBC 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, forex and CFD trading. As I've mentioned, a fraud warning wouldn't constitute unauthorised investment advice. So, I don't think the bank would have acted out of line had it warned Mr J.

Had HSBC done so, I'm satisfied that Mr J would have looked into the investment opportunity further and discovered more information about this type of investment, how high-risk it was and whether XtraderFX was regulated here or abroad. Indeed, it's likely he would have come across the warning published by the FCA himself and that would have been enough to give him second thoughts such that he wouldn't have traded at all. It's my judgement that HSBC ought to have intervened at the first payment. And had it done so, Mr J would likely have not made the first trade and so preventing his overall losses.

The last two payments Mr J has disputed went to Finproduct.Trade. HSBC says that there's no evidence these were made to XtraderFX. I can see that Mr J forwarded emails received from XtraderFX to HSBC when he asked for its assistance. There are two emails dated 13 February 2019 with the subject, 'XtraderFX – Deposit Confirmation'. They confirm the amounts that were recently deposited into Mr J's trading account. The amounts are in Euro, but they match the Euro amounts that appear on Mr J's HSBC bank account statement for payments to Finproduct.Trade. I understand the point HSBC is making, but what I've noted supports Mr J's position that his dealings were only ever with XtraderFX. In any event, for the reasons given above, I'm satisfied Mr J wouldn't have gone ahead with these payments if HSBC had intervened and asked suitably probing questions when Mr J authorised the initial payment to XtraderFX.

Contributory negligence

There's a general principle that consumers must take responsibility for their decisions.

I've duly considered whether Mr J should bear some responsibility by way of contributory negligence. But he was drawn into the scam by someone purporting to be a legitimate trader, in much the same way as other people have been. Mr J saw his trading account performing well and it was being managed by a broker who he thought was a professional. He started with smaller payments and was encouraged to deposit more money after seeing his returns.

I don't think he could earlier have foreseen the risk that the company he was dealing with was a scam. I think HSBC had better insight into this type of fraud, for example; through its own customer complaints and information provided to it by Visa to understand the level of sophistication involved with these types of scams. Notably, simulated trading platforms and merchants preventing cardholders from withdrawing their available balances.

I do appreciate that there was a warning about XtraderFX in the public domain at the time of Mr J's payments. But I don't think he saw this, and I also don't think he could have reasonably known the operation of this type of scam unless prompted by, for instance, his trusted bank. I think the onus was on HSBC to inform Mr J of the risk that he would likely lose all of his money if he made payments to XtraderFX. And that responsibility fell upon HSBC from the initial payment based on what it ought to have known about XtraderFX.

All in all, I'm satisfied that there was no contributory negligence on this occasion and Mr J was simply the unwitting and blameless victim of a clever fraudster. The bank was the professional in financial matters; Mr J was a layperson.

Putting things right

As I've concluded that HSBC should have done more to protect Mr J from financial harm, I require it to reimburse Mr J £47,083.61 – the loss incurred because of the transactions in dispute. This takes into account the credits Mr J has already received directly from XtraderFX during this period.

HSBC also needs to add simple interest at 8% per year (less any tax properly deductible), calculated from the respective date of loss to the date of refund.

HSBC has argued that applying this rate is inappropriate as Mr J didn't borrow any sums to fund the payments and wouldn't have achieved this in any safe and reliable investment. But this isn't to replace interest that Mr J might have earned had the money stayed in his account or was invested into cash-based investments. It simply represents a notional average cost of consumer borrowing to cover someone being without their money as a result of wrongdoing for which we are holding a firm liable.

It has long been our approach that simple interest at 8% per year is a suitable rate to compensate for being deprived of the funds, and I remain satisfied that it is fair to apply it in this case.

HSBC has recognised that there was some breakdown in service when Mr J reached out for its assistance in recovering his money. It's offered £250 for this, which I think is a fair gesture.

My final decision

For the reasons given, my final decision is that I uphold this complaint.

I require HSBC UK Bank Plc to:

- reimburse Mr J £47,083.61;
- add simple interest at 8% per year (less any tax properly deductible), calculated from the respective date of loss to the date of refund; and
- pay £250 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 16 March 2022.

Gagandeep Singh
Ombudsman