

The complaint

Mr W complains that MBNA Limited won't refund credit card payments he was tricked into making towards a fictitious investment.

What happened

The detailed background to this complaint is well known to both parties, so I'll only provide an overview of some of the key events here.

Mr W says he fell victim to an investment scam in early 2019. Relevant to this complaint are three payments totalling just over £5,100 made using his MBNA Mastercard credit card. The payments were made to a cryptocurrency exchange, who I'll refer to as 'J'. Mr W believed he was dealing with an investment firm 'N' who were going to help him invest his money. N's representative persuaded Mr W that N was a genuine broker, the investment opportunity was legitimate and that he'd be making a good return.

Mr W realised he'd likely fallen victim to a scam when he wasn't able to withdraw his funds; the representative ceased communication; and his trading account balance reduced from thousands of euros to cents.

Mr W contacted MBNA. He asked that it reverse or refund the payments taken by J as N was operating a scam. Mr W shared with MBNA some negative Trustpilot reviews about both N and J. He also shared that the Financial Conduct Authority (FCA); other regulators worldwide; as well as consumer protection bureaus had issued warnings about N. He was also unhappy that MBNA failed to intervene and prevent his loss.

MBNA denies liability for what happened, saying that Mr W made authorised payments to a legitimate merchant using the Mastercard credit card it had issued to him. Accordingly, there were no grounds for a chargeback claim under the Mastercard scheme; and nor was it liable to him under either section 75 of the Consumer Credit Act 1974 or any other grounds.

Unhappy with its response Mr W referred his complaint to our service. One of our Investigators considered the complaint but didn't recommend it should be upheld. In summary she didn't think MBNA had acted unfairly when concluding Mr W didn't have a valid chargeback or section 75 claim. She also wasn't persuaded that the payments to J were sufficiently unusual that MBNA should have been concerned enough to intervene. Mr W disagrees and has asked for an Ombudsman to review his complaint.

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.

I realise this will come as a disappointment to Mr W but, having done so, I won't be asking MBNA to do anything further. I've explained my reasons below.

Firstly, in his submissions, Mr W says:

- he was tricked into making payments to J;
- he was unaware at the time he authorised the payments that the broker he was dealing with was a scammer;
- the payments were made under false pretences and through means of coercion; and
- his money was never invested, traded, or used to purchase shares as promised.

I fully appreciate Mr W did not intend for the money to go to scammers and he hasn't received the service he was expecting from N, however, under the relevant regulations, that being the Payment Services Regulations 2017 (PSRs) it still remains that the payments are considered 'authorised' because they were made by Mr W using the legitimate security credentials provided to him by MBNA. Therefore, he is presumed liable for the loss in the first instance. To be clear, simply because Mr W has been the victim of a sophisticated scam doesn't entitle him to a refund. And where (like here) authorised payments have been made using a credit token (MBNA credit card) the possible avenues for recovery through the card issuer is generally limited to a chargeback or section 75 claim and/or where it can be fairly and reasonably concluded that the card issuer has failed to prevent the loss or recover the money.

Chargeback

Chargeback is a voluntary scheme. There is no 'right' to a chargeback. It is for the regulated card issuer (here MBNA) to decide if it has a basis upon which it can raise a chargeback claim. MBNA are bound by the card scheme provider's rules which in this case is Mastercard. It is Mastercard – not MBNA, who 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. MBNA) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.

I think it would be helpful to explain that there is limited protection under the Mastercard scheme rules if a cardholder authorised and engaged in a transaction with the intent to participate in gambling, investment or similar services. Our service has clarified this with Mastercard directly. It explained that, 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. In short, Mastercard consider the purpose of the Mastercard transaction to load funds into the gambling or investment account and not what activities are subsequently done with the funds.

The only chargeback route available in such circumstances is limited to if the merchant does not make available on its platform funds transferred to it. But I agree with what our Investigator has said that this was not the nature of Mr W's claim. His claim is that N is operating fraudulently and wouldn't allow him to withdraw his funds. I appreciate Mr W says the trading platform was not real, it was a simulation and his money has never been credited to the platform. I'm sympathetic to his situation but ultimately Mr W is alleging that N were operating a scam. And this isn't something that the Mastercard chargeback scheme provides a dispute resolution process for.

Notwithstanding Mr W's claim that he's been scammed by N, the fact remains that the three Mastercard payments were made by him to J and not to N. I understand Mr W says N's representative assisted him in making the payments, he was under the impression he was paying N to fund his trading account. I also appreciate Mr W has made submissions, which he feels evidences that J were not legitimate. I've carefully considered what Mr W has provided but I've seen no evidence that persuades me that J were not a genuine cryptocurrency exchange. Whilst I recognise Mr W says he was tricked into making the payment to J. As far as I can see J did not defraud him nor steal his money; they did not pass it onto a third party without his consent; nor put obstacles in the way of his withdrawing any funds. It seems to me that J simply did what was asked of it: in return for Mr W's Mastercard payments, it exchanged and remitted an equivalent amount in bitcoin to the external wallet address that it had been provided with.

Additionally, by the time Mr W contacted MBNA, he was outside the required time limits (120 days) for MBNA to have attempted chargeback claims.

So, for the reasons set out above, I am not persuaded that MBNA acted unfairly or unreasonably in connection with any rights or responsibilities under the Mastercard chargeback scheme, so I cannot uphold this complaint on that ground.

Section 75 of the Consumer Credit Act 1974

Section 75 gives a debtor the right to pursue a 'like claim' for breach of contract and/or misrepresentation against a creditor as he would have against the supplier of goods or services. For a section 75 claim to apply there are a number of criteria that need to be met, one of which is a valid debtor-creditor-supplier (DCS) agreement between the parties.

Mr W's claim is that N didn't provide him with the services it had agreed to. So for the purposes of the DCS agreement N is the 'supplier'. However, the payments Mr W disputes were not made to N – they were made to J. So For Mr W's claim to be covered under the joint liability provision of section 75 I would need to see evidence that would satisfy me that J were a party to the contract between Mr W and N as there is no right under section 75 to pursue a like claim against a third party who was not privy to the debtor-creditor-supplier relationship. I've not seen any evidence linking J to the supplier – N, so it follows that Mr W doesn't have the required DCS agreement in place to make a section 75 claim. So I can't fairly say MBNA ought to have done more under section 75.

And even if I were to consider J to be the 'supplier', as it appears to be the case that it did nothing wrong, there could not reasonably be a successful 'like claim' against MBNA (the creditor).

So, as with the chargeback issue above, I can see no viable grounds under section 75 for upholding the complaint.

Intervention

Mr W has argued MBNA failed to protect him from financial harm as a result of fraud and has referenced BSI: PAS 17271: 2017 Protecting customers from financial harm as a result of fraud or financial abuse – Code of practice. I agree with him that MBNA does have a duty to protect customers against the risk of financial loss due to fraud. So I've thought about whether MBNA could have reasonably done anything more to prevent Mr W's loss at the time the payments were processed. But I don't think it could have. I'll explain why.

I appreciate Mr W's strength of feeling, that MBNA had a responsibility to intervene and contact him before allowing these payments to be made as they were made to a cryptocurrency exchange and this was a new type of activity for him. Additionally, he has argued MBNA ought to have taken reasonable steps to forestall fraud, or at least mitigate its risk by using an effective risk management system and it has failed to demonstrate its ability to respond to questionable transactions responsibly and pre-emptively. He says MBNA's security systems should consider emerging new scams and have mechanisms built in that would identify common fraudulent practices and/or merchants.

I don't entirely disagree with Mr W. I do think due to the rise in cryptocurrency scams in recent years credit card providers, such as MBNA should have mechanisms in place to detect and prevent this type of fraud. But it's not always the case that a payment made to a cryptocurrency exchange is necessarily at risk of fraud. Whilst I acknowledge innocent victims are tricked into utilising these firm's services by a scammer. They are likewise utilised for legitimate transactions. So credit card providers do have to strike a fine balance between convenience for their customers and prevention of fraudulent activity.

Having considered everything carefully, in this specific case I don't think the payments in question would have stood out to MBNA as being suspicious and/or sufficiently unusual where I'd have expected it to intervene. I say this because:

- The mere fact that Mr W was making a payment to a cryptocurrency exchange wouldn't justify MBNA making further enquiries before allowing these payments to be made.
- I've not seen any credible adverse data about J or evidence to support that it was anything other than a legitimate cryptocurrency exchange firm. So it follows that I don't think MBNA ought reasonably to have had triggers in place at the time about J.
- I also don't think MBNA could've reasonably known that the payments debiting Mr W's account were to be passed onto N.
- Of course, in hindsight, now knowing Mr W has likely lost money as a result of a scam it's easy to make the argument that MBNA ought to have done more. But I think it would be too high a burden to expect a credit card provider to become suspicious of fraud or financial crime just on the basis of three credit card payments to a legitimate cryptocurrency exchange of £859.47, £2,568.18 and £1,734.71, which were also a few weeks apart.

Ultimately, Mr W paid a legitimate merchant and in return bitcoins were sent to the wallet of his choice (albeit through manipulation by N's representative). I recognise that some financial firms may now choose not to allow such transactions, particularly using borrowed money—such as credit cards—because of the commercial risks involved. But that is their own commercial decision. It's not something financial firms were required to do, and that MBNA failed to do. The fact remains that purchasing cryptocurrency was and is not an illegal activity. I therefore conclude for the reasons above that I can't fairly say that in these specific circumstances MBNA acted unreasonably by not intervening to ask further questions about the transactions or to give Mr W a scam warning.

My final decision

Despite my natural sympathy for Mr W's loss my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 14 March 2022.

Sonal Matharu
Ombudsman