

## **The complaint**

Mrs W complains that Marks & Spencer Financial Services Plc (trading as M&S Bank) has refused to reimburse money she lost when falling victim to a scam.

## **What happened**

Where the facts of this case are well known to both parties, I won't detail them again here. This is not a discourtesy to Mrs W or M&S Bank. Rather, it reflects the informal nature of our service. In my decision, I've focused on what I find to be the key points to determining my outcome – our rules allow me to do that.

In short, Mrs W decided to invest in what she thought was a genuine online trading platform called Golden Markets. She paid this seemingly legitimate firm a total of £3,000 using her M&S Bank credit card; made up of £500 and then £2,500, both on 23 October 2018.

Unbeknown to Mrs W at the time, Golden Markets was actually operating a fraudulent scheme. There were in fact no trades undertaken using her money – but the individual(s) used software to present her with a bogus platform that superficially showed her that the 'investments' were performing well. This, together with sales techniques employed, convinced Mrs W that everything was above board.

When Mrs W later realised she had been scammed, she asked M&S Bank to help recover her money. Ultimately, the bank said this had been unsuccessful and when Mrs W raised a complaint, M&S Bank disagreed that it was responsible for her loss.

Mrs W asked our service to consider the complaint. One of our investigators found that M&S Bank ought to offer a refund of the £3,000, considering there was information about Golden Markets that M&S Bank should have taken account of before it allowed the payments to be let go. Mrs W agreed with this assessment.

M&S Bank doesn't agree. All things considered, it argues it could not fairly held liable for offering a refund. Because M&S Bank 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 our investigator that the complaint should be upheld. I say so for the following reasons:

- 1) Not all complaints referred to us about investing in binary options, or CFDs are in fact scams. 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. And whilst some traders promoted these products using methods that could arguably be unethical or misleading – that does not necessarily meet the high legal threshold for fraud (in accordance with the Fraud Act 2006).
- 2) Banks and other Payment Services Providers (PSPs) have duties to protect customers against the risk of financial loss due to fraud. That said, PSPs are not expected to guard against poor investment choices or give investment advice when executing customer payments. Accordingly, the first question I need to consider is whether Golden Market was operating fraudulently.
- 3) It appears common ground between the parties that Mrs W was the victim of a sophisticated scam orchestrated by this firm. But for the avoidance of doubt, the material available in the public domain, along with the information the regulator has shared, satisfies me that Golden Markets wasn't a legitimate trading company.
- 4) Having concluded this was a scam, I next need to determine whether M&S Bank ought to have intervened with these two disputed payments. And if it should have, whether this would have prevented Mrs W's loss here.
- 5) M&S Bank 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 rehearse them again here.
- 6) 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 prominent types of scams and potential scammers.
- 7) Whilst the regulator didn't give any indication of when those watchlists ought to be updated, it's not unreasonable to expect a bank, like M&S Bank, to update those lists, and communicate with staff, within a month of a warning being published by the Financial Conduct Authority (FCA). 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.
- 8) Here, there was a warning about Golden Markets published on the FCA website on 25 May 2018 – at least *four months* before Mrs W made these payments. Whilst the warning did not specifically refer to binary-options or CFDs, it did specify that it was offering services in the UK without being authorised. I consider any watch-list should reasonably include parties who are carrying out regulated activities without being authorised to do so.
- 9) Given the timing of this warning and when both these payments were instructed by Mrs W, M&S Bank ought to have automatically blocked them. By then, M&S Bank had had ample time to update and communicate its watch-list. Therefore, it should have asked Mrs W appropriate probing questions before processing the payments.

- 10) Had M&S Bank carried out its due diligence and duties and asked Mrs W about these intended payments, I've no reason to doubt she would have explained what she was doing. And whilst I accept it had no duty to protect Mrs W 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 person – such as checking the trader was authorised with the FCA. I find it could have drawn on its own knowledge and information from other parties about the high risks associated with binary-options and CFDs, and the potential for fraud.
- 11) I haven't seen any evidence that M&S Bank intervened or provided a scam warning. Had it done so, I'm satisfied Mrs W would have looked into the supposed investment opportunity further and discovered more information about this type of venture, how high-risk it was and whether the trader was regulated here or abroad. Indeed, it's likely she would have come across the warning published by the FCA herself and that would have been enough to give her second thoughts such that she wouldn't have 'traded' at all.
- 12) I do consider the level and depth of questioning ought to be proportionate to the situation. I accept that there is a balance for M&S Bank to strike – and I'm not suggesting Mrs W should've been subjected to an interrogation by bank staff. Still, I'm not persuaded that an overbearing line of questioning needed to be brought about by M&S Bank in the particular circumstances of this case.
- 13) On the contrary, querying some basic information about the beneficiary and/or discreetly asking for some background about how this so-called investment came about would've revealed that Mrs W was not an experienced investor and was relying on what she thought was credible marketing from a TV programme. When in truth, this was actually a bogus endorsement from a celebrity who was not in any way involved with Golden Markets. In my judgment, a PSP of M&S Bank's size and experience in tackling varying types of fraud ought reasonably to have identified this had the hallmarks of a scam.
- 14) Overall, had M&S Bank carried out appropriate questioning here, it seems probable that Mrs W would've become credulous about the scam in time and stopped the payments in their tracks. The fraud would've failed; and Mrs W would not have lost £3,000. It follows that M&S Bank should fairly and reasonably reimburse Mrs W for the loss she suffered, together with ensuring she was charged no corresponding fee or interest on her credit card account for either of these two transactions.
- 15) Finally, I have thought about whether Mrs W should bear some responsibility for the situation in which she found herself. She says – and I accept – that she was drawn into the scam by someone purporting to be a legitimate trader, in much the same way as other people have been. This was clearly a sophisticated scam, with clever techniques and persuasive material. All in all, I haven't seen anything in what Mrs W has described that would lead me to safely conclude she ought to have been on notice she might be being scammed such that I think it would be fair to reduce any redress accordingly.

### **My final decision**

For the reasons given above, my final decision is that I uphold this complaint and require Marks & Spencer Financial Services Plc (trading as M&S Bank) to:

- Reimburse Mrs W a total of £3,000, being the loss incurred as a result of the transactions in dispute; and
- To ensure that any interest or fees charged for these two transactions are refunded to her (less any tax lawfully deductible).

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

Matthew Belcher  
**Ombudsman**