

The complaint

Mr M complains that HSBC UK Bank Plc (“HSBC”) has refused to refund payments he made using his HSBC Visa debit card. He made these payments to *365markets.com*, which turned out to be a fraudulent binary options company.

What happened

The circumstances of this complaint are well known to both parties, so I will not repeat them all again here in detail. But I will provide an overview of events below.

In April 2018, Mr M made several payments to his ‘trading account’ he held with *365markets.com* (totalling £17,000). He used his HSBC Visa debit card to make these payments. In short, Mr M discovered that *365markets.com* were not regulated in UK, so he asked them to close his account and return his funds. As this did not happen, Mr M asked HSBC to try to recover his money. HSBC initially refunded the funds to Mr M’s account. But, following chargeback claims, it re-debited the funds, which Mr M raised a complaint about and referred to this service.

One of our investigators considered the complaint and upheld it.

He issued two assessments. In his second, he concluded that fraud triggers applied to Mr M’s first payment to *365markets.com*. He argued that there was no evidence to show HSBC provided Mr M with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he made. He considered that this was a missed opportunity for HSBC to intervene, so he directed HSBC refund Mr M his money less credits.

Mr M accepted the investigator’s findings, but HSBC did not. In the interest of conciseness, I will repeat HSBC’s response here, which it has helpfully summarised its key points in the conclusions section of its submissions:

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 M’s] loss for the following reasons:

- There is only basic detail as regards the background of this complaint, which originates from [Mr M]. It appears to be common ground that he carried out no research, which was careless;*
- The findings in respect of our actions are unrealistic and unreasonable.*
- We would not have been able to determine that the Payments were being routed to a binary options merchant which was not regulated by the FCA when the Payments were being processed;*
- It is more likely than not that [Mr M] would not have accepted that this was a scam until he started suffering losses and/or could not withdraw his funds. The causation*

position is therefore unsupportable; and

- *The contributory negligence assessment is formulaic and unsupportable. [Mr M's] losses were directly referable to his failure to carry out any research before making the Payments. His actions were objectively reckless and inconsistent with how a reasonable person would have behaved. The obligations on consumers to take responsibility for decisions are entirely relevant here and should be applied.*

As an agreement could not be reached, the complaint has been passed to me to make a decision.

What I have 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 conclusions reached by the investigator for reasons I set out below.

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.) commodities 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 365markets.com 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 – with initial token pay-outs – in order to induce further 'investments' from victims such as Mr M. In the absence of evidence to the contrary, I have concluded this because:

- a) After 13 January 2018, binary-options, forex and CFD traders operating in the UK were required to be regulated by the FCA – whereas 365markets.com were not during the relevant period. 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 17 August 2018, a warning about 365markets.com was published on the FCA's website. And one on 20 February 2019 on the Investor Alerts Portal of the

International Organization of Securities Commissions (“IOSCO”) – published by Belgium’s Financial Services and Markets Authority.

- c) There are several reports in the public domain – e.g. foreign press and online forum – stating that 365markets.com 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 need to consider the following:

- a) Did HSBC deal with Mr M’s chargeback claims fairly?
- b) If so, were any of the disputed transactions still so unusual or uncharacteristic for Mr M and/or his account that HSBC fraud alerts ought reasonably to have triggered some sort of intervention?
- c) If triggered, would HSBC’s intervention have made a difference and prevented or reduced the loss?
- d) And if so, was Mr M 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 Visa 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 or be deemed a ‘valid claim’. Our role in such cases is not to second-guess Visa’s arbitration decisions or scheme rules, but to determine whether the regulated card issuer (i.e. HSBC) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.

Having considered Visa’s rules, the possible chargeback ‘reason codes’ did cover binary-options/investment trading at the time of Mr M’s payments. Visa expanded its rules to cover situations whereby binary options/investment traders prevented cardholders from withdrawing their available balances from on or after 14 October 2017.

The applicable misrepresentation ‘reason code’ was 53 (later re-coded by Visa to 13.5) and it required very specific evidence. Mr M needed to present dated evidence that he had an available balance (in the form of a screenshot or confirmation from the merchant) and that he tried to withdraw sums equal to, or less than, his available balance on the same day. Based on the evidence before me, I cannot see that Mr M provided this.

HSBC could only have successfully presented a chargeback claim if Mr M had produced this evidence. I am aware that in these types of cases, consumers only realise there is a problem when they no longer have available balances, or their balances have dramatically reduced. This might be because the merchant manipulates the trading software and whilst this is unfortunate, it doesn’t change Visa’s chargeback rule requirements. And should HSBC process a chargeback under this reason code without the required evidence, Visa would deem it ‘invalid’ and it would not succeed in at Visa’s final stage of arbitration.

HSBC did attempt a chargeback claim but this was defended by 365markets.com. So, declining to pursue a chargeback claim any further on Mr M's behalf where there were no reasonable prospects of success was neither an unfair nor unreasonable exercise of HSBC's discretion in my view.

In summary

Taking all the above factors together, I consider that Mr M did not have any valid chargeback rights at the time.

Unusual or uncharacteristic activity

HSBC is aware of our general position on a PSPs' 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 M for the purposes of the Payment Services Regulations 2009/2017 ('the Regulations'), in force at the time. This is because they were made by Mr M using the legitimate security credentials provided to them by HSBC. These must be regarded as 'authorised payments' even though Mr M 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 M 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, I consider HSBC 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.

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 on the Investor Alerts Portal of the 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 M's case, there were no warnings published about 365markets.com on the FCA's website or on the Investor Alerts Portal of the IOSCO until after he made the payments concerned. I therefore do not think HSBC ought to have automatically blocked the payments.

Notwithstanding this, in light of the odd pattern of these payments, I do think that by the first payment made to 365markets.com on 3 April 2018 (£5,000), there are fraud triggers here – particularly given this was a payee trading in binary options without being registered with the FCA (as required at the time):

Date	Merchant	Amount
3 April 2018	365markets.com	£5,000 (debit)
3 April 2018	365markets.com	£2,000 (debit)
25 April 2018	365markets.com	£5,000 (debit)
25 April 2018	365markets.com	£5,000 (debit)
30 April 2018	365markets.com	£950 (credit)
19 June 2018	365markets.com	£950 (credit)
	Total amount debited:	£17,000
	Total less credits:	£15,100

Therefore, it would have been reasonable for HSBC to have properly questioned Mr M before processing all his payments in order to satisfy itself that all was well.

If HSBC had fulfilled its duties and carried out due diligence by contacting Mr M and asking suitably probing questions, there is no reason to doubt that he would have explained what he was doing. In such circumstances, whilst HSBC had no duty to protect Mr M from a bad bargain or give investment advice, it could have invited him to check whether the payee was registered with the FCA. It could have also explained its own customer experiences with merchants like 365markets.com 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 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; the Gambling Commission's December 2016 scam warning that "an unlicensed operator is likely operating illegally"; and Visa's business news 26 October 2017 and so forth).

There is no evidence that HSBC provided Mr M with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he was making. It was a missed opportunity to intervene.

Causation

If HSBC had asked Mr M what the payments were for and the basic surrounding context, it is likely they would have fully explained what they were doing and that everything had been done over the phone and online with the merchant. HSBC did not need to know for certain whether Mr M 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. I consider 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, overseas binary options.

If HSBC had given a warning, I believe that Mr M would have paused and looked more closely into 365markets.com before proceeding. There is no evidence to show he was willing to take high risks or had a history of speculative investments or gambling. It seems more probable that he would have made further enquiries into binary-options scams and whether or not 365markets.com were regulated in the UK or abroad. Mr M could have discovered they were not and the various regulatory warnings about the risk of binary-options/forex scams (see above). In other words, I am satisfied that a warning from his trusted bank would probably have exposed 365markets.com's false pretences, causing him to stop 'trading' and preventing further losses.

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). 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.

In this case, I do not think that Mr M was to blame for what happened; that he did not foresee the risk of this sort of harm or any harm. I do not think Mr M could have foreseen the risk that the company they were dealing with was a scam and the trading account he was viewing was likely to be a simulation.

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

My final decision

For the reasons set out above, my financial decision is that I uphold this complaint. I therefore direct HSBC UK Bank Plc:

- Pay Mr M the money he lost, less the amounts 365Markets.com credited to his account (that would mean £15,100);
- Pay 8% interest on this amount from the date it was debited from Mr M's account until the date of settlement; and
- If HSBC UK Bank Plc deducts tax in relation to the interest element of this award it should provide Mr M with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 15 March 2022.

Tony Massiah
Ombudsman