

The complaint

Mrs N complains that NewDay Ltd did not refund a transaction she made to a trading website which she says turned out to be a scam.

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.

Mrs N says:

- Before the transaction in question, she deposited monies onto a trading website called Tradefintech.com using one of her credit cards.
- Her trading account was making a profit and Tradefintech.com had credited funds to her bank account.
- ‘The broker’ persuaded/forced her to invest more funds. So, on 29 July 2018, she deposited £3,500 using her NewDay Mastercard credit card.
- Thereafter, she had issues with accessing her trading account. Once she had regained access, she saw all her funds had gone – and then she was blocked from her trading account.
- She later discovered Tradefintech.com were operating as a scam.

As a result of the above, Mrs N asked NewDay to raise a chargeback claim for the £3,500 transaction. However, this was unsuccessful – something which Mrs N complained about. NewDay responded stating that no chargeback rights exist for disputes about stock/trading sites.

Unhappy with this, Mrs N referred her complaint to our service. NewDay responded maintaining its position and adding that the transaction is not covered by section 75 of the Consumer Credit Act 1974.

One of our investigators considered Mrs N’s complaint and upheld it. In short, he held:

- Chargeback rights do not exist for the circumstances of Mrs N’s complaint.
- NewDay should have considered the transaction unusual for several reasons – including the fact that there was a Financial Conduct Authority (“FCA”) warning on its website about Tradefintech.com at the time. Despite this, NewDay did not intervene, provide a warning or ask Mrs N any appropriate or probing questions to uncover the scam. If they had, the scam would probably not have succeeded.
- The actions of Tradefintech.com amounted to a breach of contract and misrepresentation, so the transaction is covered by section 75.

For the above reasons, our investigator directed NewDay to refund Mrs N £3,500; rework her account so that all interest and charges caused are refunded; and pay 8% on any payments Mrs N has made towards her credit card balance.

Mrs N accepted these findings, but NewDay did not. In short, it argues that the transaction neither attracts chargeback rights, nor is covered by section 75.

As an agreement couldn't be reached, the complaint has been passed to me to make a decision.

On 26 November 2021, I issued a provisional decision upholding this complaint. For completeness, I repeat my provisional findings below:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

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 Tradefintech.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 Mrs N. 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 Tradefintech.com were not. 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) *A warning about Tradefintech.com was placed on the FCA website on 21 May 2018; and on the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO") on 23 May 2018.*
- c) *There are several reports in the public domain – e.g. foreign press and online forum – stating that Tradefintech.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.*

Chargeback and section 75

For the avoidance of doubt, I have not considered whether Mrs N had any chargeback or section 75 rights in relation to her payment to Tradefintech.com. This is because I am of the view that NewDay ought to have flagged this payment and carried out some further checks before approving it. I will explain why below.

Unusual or uncharacteristic activity

NewDay is aware of our general position on 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 payment was 'authorised' by Mrs N for the purposes of the Payment Services Regulations ("the Regulations"), in force at the time. This is because they were made by Mrs N using the legitimate security credentials provided to them by NewDay. These must be regarded as 'authorised payments' even though Mrs N was the victim of a sophisticated scam. So, although she did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of her bank account, Mrs N 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 NewDay 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 alerts about traders published by the FCA and/or IOSCO. 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 and/or 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 Mrs N's case, there was a warning about Tradefintech.com on the FCA's website and IOSCO's Investor Alerts Portal from 21 May and 23 May 2018 respectively – these warnings were more than a month before the first payment on 29 July 2018. It is not unreasonable to expect a firm the size of NewDay that regularly updates its internal alerts to include information about payees who had tried to carry out regulated activities without permission. I accept that the warning did not specifically relate to binary-options trading; and it did not necessarily follow from the nature of the warning in isolation that these were fraudsters. Given the timing of the alert relative to the first payment, I think NewDay ought to have automatically blocked it; as it had a fair chance to update and communicate its

watch-list between the warning being published and the payment being made. The bank had constructive if not actual notice that the payee might not be a legitimate merchant — therefore, it would have been reasonable for it to have properly questioned Mrs N before processing all the payments in order to satisfy itself that all was well.

If NewDay had fulfilled its duties and carried out due diligence by contacting Mrs N and asking suitably probing questions, there is no reason to doubt that they would have explained what they were doing. In such circumstances, whilst the bank had no duty to protect them from a bad bargain or give investment advice, it could have invited them to check whether the payee was registered with the FCA. It could have also explained its own customer experiences with merchants like Tradefintech.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 no – 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; and the Gambling Commission’s December 2016 scam warning that “an unlicensed operator is likely operating illegally”, and so forth).

There is no evidence that NewDay provided Mrs N with any meaningful warnings or gave her other reasons to doubt the legitimacy of the payment she was making. It was a missed opportunity to intervene.

Responses to my provisional decision

Mrs N responded to say she agreed with my provisional findings and was happy with the outcome. However, NewDay did not respond.

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.

Given that Mrs N agreed with my provisional findings, but NewDay did not respond – I see no reason to depart from my provisional findings.

My final decision

For the reasons set out above, I uphold this complaint and direct NewDay Ltd pay Mrs N:

- The money she lost (totalling £3,500); plus
- Interest (less any tax properly deductible) – either (i) at the simple rate of 8% per year on the payment from the date it was paid to the date of settlement; or (ii) if the account accrued interest because the relevant statement balances weren’t paid in full, interest should be paid at the rate actually charged for the payment from the date Mrs N reported the fraud to the bank.
- Should an outstanding balance be owed on Mrs N’s credit card account relating to the payment to Tradefintech.com and/or interest on that payment, NewDay Ltd is entitled to repay this balance first from the settlement outlined in the bullets above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 9 March 2022.

Tony Massiah
Ombudsman