

## The complaint

Mr and Mrs S complain that HSBC UK Bank Plc (“HSBC”) has refused to refund payments they made using their HSBC Visa debit card. They made these payments to *Optionstarglobal*, 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.

Between September to December 2017, Mr and Mrs S made several payments to their ‘trading account’ they held with Optionstarglobal. They used their HSBC Visa debit card to make these payments. In short, Mr and Mrs S say that Optionstarglobal prevented them from withdrawing their funds and stole their money. They also say they later discovered that Optionstarglobal were operating as a scam.

Mr and Mrs S asked HSBC to try to recover their money from Optionstarglobal. As this did not happen, they raised a complaint which they also referred to our service.

One of our investigators considered the complaint and upheld it. He said HSBC should have considered the payments in question unusual because a warning about Optionstarglobal had been placed on the Investor Alerts Portal of the International Organization of Securities Commissions (“IOSCO”). This warning was published on 13 December 2016 (which was more than a month before Mr and Mrs S’s first payment to Optionstarglobal on 14 September 2017). The investigator argued that despite this, HSBC did not intervene, provide a warning, or ask Mr and Mrs S any appropriate or probing questions to uncover the scam concerned. He considered that this was a missed opportunity for HSBC to intervene. For these reasons, the investigator asked HSBC to refund Mr and Mrs S their money.

Mr and Mrs S 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 and Mrs S’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 has selectively quoted from the FSA Consultation Paper, and misapplies it to this opinion;*
- The adjudicator’s findings in respect of our actions are unrealistic and unreasonable. In particular, the assertion that we were obliged to act on an IOSCO warning and the amount of information we were expected to obtain from [Mr and Mrs S];*

- *The adjudicator seeks to apply retrospective regulation by the back door – that is not the purpose of your 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 IOSCO warning they would have made this clear. They did not; and*
- *The adjudicator's contributory negligence assessment is fundamentally flawed and unsupportable.*

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

### **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 the conclusions reached by the investigator for reasons I set out below.

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 Financial Conduct Authority ("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 Optionstarglobal 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 and Mrs S. In the absence of evidence to the contrary, I have concluded this because:

- a) Prior to January 2018, binary-options, forex and CFD traders operating in the UK were required to be licensed by the UK's Gambling Commission – whereas Optionstarglobal were not. Nor were they regulated or licensed 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 Optionstarglobal was placed on the IOSCO's Investors Alerts Portal on 13 December 2016. (And on the FCA's website published on 25 June 2018 – albeit this was after the payments concerned were made.)
- c) There are several reports in the public domain – e.g. foreign press and online forum – stating that Optionstarglobal 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.

### Unusual or uncharacteristic activity

HSBC 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 Mr and Mrs S for the purposes of the Payment Services Regulations ("the Regulations"), in force at the time. This is because they were made by Mr and Mrs S using the legitimate security credentials provided to them by HSBC. These must be regarded as 'authorised payments' even though Mr and Mrs S was the victim of a sophisticated scam. So, although they did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of her bank account, Mr and Mrs S 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 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 Mr and Mrs S's case, there was a warning about Optionstarsglobal placed on the IOSCO's Investor Alerts Portal on 13 December 2016 – this warning was more than a month before the first payment on 14 September 2017. It is not unreasonable to expect a large international bank 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 HSBC 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 Mr and Mrs S before processing all the payments in order to satisfy itself that all was well.

If HSBC had fulfilled its duties and carried out due diligence by contacting Mr and Mrs S 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 UK's Gambling Commission. It could have also explained its own customer experiences with merchants like Optionstarsglobal 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; 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 HSBC provided Mr and Mrs S with any meaningful warnings or gave them other reasons to doubt the legitimacy of the payments they were making. It was a missed opportunity to intervene.

#### Causation

If HSBC had asked Mr and Mrs S 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 and Mrs S were 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 and Mrs S would have paused and looked more closely into Optionstarsglobal before proceeding. There is no evidence that they were willing to take high risks or had a history of speculative investments or gambling. It seems more probable that they would have made further enquiries into binary-options scams and whether or not Optionstarsglobal regulated in the United Kingdom or abroad. They 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 their trusted bank would probably have exposed Optionstarsglobal's false pretences, causing them to stop 'trading' and preventing the losses.

As I think the HSBC ought to have blocked all of the transactions, I don't need to conclude whether or not the bank did enough to attempt or pursue chargeback claims.

#### 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 and Mrs S were to blame for what happened; that they did not foresee the risk of this sort of harm or any harm.

I do not think Mr and Mrs S could have foreseen the risk that the company they were dealing with was a scam and the trading account they were viewing was likely to be a simulation.

Therefore, in the circumstances, I do not think it would be fair to reduce compensation on the basis that Mr and Mrs S 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:

- Refund to Mr and Mrs S the money they lost (totaling £24,750);
- Pay 8% interest on this amount from the date it was debited from Mr and Mrs S'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 and Mrs S with the appropriate tax deduction certificate.

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

Tony Massiah  
**Ombudsman**