

## **The complaint**

Mr P complains about his bank Metro Bank PLC. He says it didn't help recover the money he lost to a fraudulent company. Mr P also complains that Metro Bank didn't warn him about the potential risk of fraud when he made the payments.

## **What happened**

Mr P says that he was interested in foreign exchange trading and was looking for a broker.

In March 2020, Mr P came across an advertisement for a company – I'll call it "A" – on social media. He says that before registering his interest, he checked as best as he could that A was a legitimate company. His checks showed that A was regulated in a different jurisdiction and he assumed it was also regulated in the UK, given it accepted deposits in pound sterling.

Between 20 March and 27 March 2020, Mr P made four small deposits (£100-£200) totalling £500 using his Metro Bank debit card. On 1 April, he sent £5,000 using the same method. And there was a further deposit of £200 on 14 April.

Mr P says that his account manager at A did the trading on his behalf and kept pushing him to invest more money. He says he was given offers of protection as long as he deposited a certain amount. After a while, Mr P became suspicious that his account manager wasn't acting in his best interests. He says he found it strange that he was only dealing with one person despite A's presence in several countries.

Mr P did further research into A and in May 2020, he contacted the Financial Conduct Authority ("FCA"), the financial services regulator in the UK. The FCA told him that A wasn't regulated by it and asked him not to contact A, and to report the matter to the police and his bank.

Mr P reported the matter to the police and contacted Metro Bank for assistance with recovering the money. Metro Bank said it wouldn't attempt a chargeback for the disputed payments as the card scheme's rules excluded such transactions. Unhappy with this response, Mr P contacted our service. He complained that Metro Bank didn't provide any warnings when he made payments to A. Mr P also told us that he'd been unable to withdraw any funds from his trading account and requests to close it had also been ignored.

Our investigator thought Mr P had been scammed by A. He concluded that Metro Bank hadn't acted unfairly by not raising a chargeback. But he also considered whether it could have done more to prevent the money from being sent in the first instance. The investigator thought that the first four – smaller – payments weren't unusual or suspicious, but the fifth payment of £5,000 should have triggered an alert. He thought that it was unlikely that Mr P would have gone ahead with the payment – as well as the subsequent payment – had Metro Bank intervened. The investigator asked Metro Bank to refund the two payments along with interest.

Mr P accepted the investigator's view, but Metro Bank didn't think it should be held liable for the two transactions. I issued my provisional decision in January 2022. I said I didn't intend upholding this complaint, and set out the following reasoning:

*Not every complaint referred to us and categorised as a binary options, contracts for difference ("CFD"), or foreign exchange scam is in fact a scam. Some complaints simply involve high-risk investments that resulted in disappointing returns or losses. Some traders may have promoted these products using sales methods that were arguably unethical or misleading.*

*However, while 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. But when simply executing authorised payments, they don't 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).*

So, the first question I need to consider is whether A was a fraudster.

#### Were the disputed payments fraudulent?

*Our investigator's assessment was that A wasn't carrying out legitimate trades and it was dishonestly defrauding customers. Amongst other things, he noted that A wasn't regulated by the FCA which was a requirement at the time of Mr P's disputed payments. And, as far as he was aware, it wasn't regulated in any other jurisdiction either.*

*I've done my own research into A and I can see that it was regulated in another jurisdiction at the time of the disputed payments. Mr P has also confirmed this as he told us that the basic checks he did prior to opening a trading account with A showed that it was regulated in another country. He also informed our service that he'd already been in contact with A's regulator following his discussion with the FCA.*

*While it's true that A was operating in the UK without the FCA's authorisation, this doesn't automatically mean that it's an illegitimate company, or that it was set up with the express intention of defrauding its customers. Businesses that submit themselves to regulatory requirements tend to be legitimate.*

*Regulatory standards vary in different jurisdictions, and some may fall below what might be considered acceptable in the UK. But this doesn't necessarily mean that a company that is subject to regulatory requirements in another jurisdiction and isn't regulated in the UK is running a scam.*

*I acknowledge that the FCA issued a warning about A in June 2020 and said that it was operating in the UK without its permission. While this is a strong indication that A had been wrongly operating in the FCA's jurisdiction (and so there's lesser protection if something were to go wrong), the warning doesn't sufficiently prove that A was set up to dishonestly defraud customers.*

*I've looked at other third-party evidence, to determine whether A may fairly and reasonably be regarded as fraudulently seeking gains at the expense of others. I haven't seen adverse information about A from the material time. I've seen some negative reviews since Mr P made the payments, including delays with processing withdrawal requests and customers losing money. But I can't ignore that, while this could be seen as circumstantial evidence that helps build an overall picture of A, this is not in itself sufficient evidence of fraud.*

*I must follow the evidence and, essentially, I have no credible evidence to persuade me with any degree of certainty that A was operating a scam and the evidence I have seen suggests that it was indeed regulated – albeit in a different jurisdiction – at the time it offered services to Mr P. By his own account, the payments Mr P made from his Metro Bank account appeared on his trading account with A (albeit the bank statements showed a different merchant name). And trades were executed from Mr P's trading account.*

*Taking everything into consideration, I'm not persuaded that A was in fact a fraudulent company. Rather, it is my judgement that Mr P has lost his money as a result of investing in a high-risk investment or bad bargain.*

*Mr P submits that Metro Bank didn't provide any warnings and failed to identify the payments as unusual or out of character. Metro Bank has a duty to protect its customers from the risk of financial loss due to fraud. But given I've concluded that the payments Mr P authorised weren't fraudulent, this duty to intervene was not triggered here. As I've explained, banks and other PSPs aren't required to protect customers from the risk of financial loss due to poor investment advice or bad bargains. Metro Bank is required to guard against money laundering and other financial crime. I accept that in some circumstances, undertaking normal due diligence for this reason might – inadvertently and incidentally – prevent a customer from financial loss due to a bad bargain or poor investment advice. But if a firm has failed to meet its statutory or regulatory requirements, that is a matter for the FCA as the regulator – and the omission does not in itself fix the firm with liability to customers for losses that are unconnected with the real 'mischief' which the regulations were designed to combat, i.e. financial crime or fraud.*

I invited further comments from both parties. Metro Bank said it had nothing further to add. Mr P didn't agree and provided his objections to my provisional findings, which I now summarise:

- He strongly disputes that there's no proven fraud on A's part. Mr P says that A is making false representations to potential customers regarding both its operating status and locations of operation. He's forwarded an email from the financial regulator in Malta which he says shows that A is not a registered company in Malta, nor does it hold a license to operate within its jurisdiction. Mr P has also forwarded an email from A which includes an address in Malta. He says this shows that A is based in or operating out of an address in Malta, and this is a clear breach of the Fraud Act 2006.
- Mr P says that if A was operating legitimately, then it ought to have either refused payment from him on the grounds that it wasn't regulated to accept payments from the UK, or informed him that its regulatory status doesn't cover payments from UK bank accounts.

- Mr P strongly disagrees with my judgement that he's lost his money as a result of investing in a high-risk investment or bad bargain. He says he did at the time understand the risks associated with trading; his trading positions were producing an excellent return and losses were never his objection to A. He was simply concerned about the security of his money and whether he could recover any funds.

## 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 thank Mr P for his recent submissions and would like to reassure him that I've carefully considered everything he's provided – recently as well as before – in its entirety. Having done so, my conclusions as set out in my provisional decision remain unchanged. I'll explain why.

The email from Malta Financial Services Authority ("MFSA") that Mr P has forwarded states that A isn't registered in Malta, nor is it licensed or otherwise authorised by it to provide financial services which require a license or authorisation under Maltese law.

The email signature in A's emails to Mr P does include an address in Malta. I appreciate it's possible that Mr P inferred from this that A was registered in Malta and/or regulated by the MFSA. But I can't see that any claims were made in the email signature (or disclaimer) about A being registered in Malta or being licensed – or otherwise authorised – to provide financial services to Maltese residents.

What I can see is that the email signature/disclaimer includes the name of A's regulator (it's not the FCA or the MFSA), as well as the license number. This part of the email wasn't included in the snippet that Mr P recently shared, but it's there in A's emails which have been previously forwarded to us.

I accept that it's possible A was/is not operating in a way that the FCA and MFSA approve of. I also accept that it's likely that they have concerns about A's marketing practices, possibly including representations made by it. But this isn't sufficient evidence that A is fraudulent or operating a scam. It was regulated in another jurisdiction and, to the best of my knowledge, continues to be so. Illegitimate or illegal firms set up with the intention of scamming customers are highly unlikely to submit themselves to regulatory oversight. So, I've still not seen credible evidence to conclude that A is a fraudulent company and is operating a scam.

In response to my provisional decision, Mr P said that he was advised by A's representative that A was regulated in the UK. But that is not what he told us in July 2020 when he first contacted us. At the time, Mr P told us that he had asked the representative if A was regulated and was advised that it was – the representative's response wasn't untrue as A was regulated. In the same phone call, Mr A told us that he had checked where A was regulated and knew that it was regulated in a different jurisdiction. He went on to say that he didn't know A wouldn't be regulated in the UK; he *assumed* that it was since it accepted payments in pounds sterling. [my emphasis]

Mr P submits that A wasn't regulated to accept payments from the UK. And that A should have disclosed to him that its regulatory status doesn't cover payments from UK bank accounts. But I've not been provided with any evidence that shows A's regulator has specifically restricted it from accepting payments from the UK. And I haven't seen anything

to suggest that A's terms of business or indeed its regulator requires it to disclose when payments from certain countries (in this case, the UK) aren't covered.

If Mr P's argument is that A can't accept payments from the UK or accept payments in pounds sterling because it isn't regulated here, it's akin to suggesting that overseas merchants or retailers who aren't registered in the UK can't accept payments from UK cardholders or accept payments in pounds sterling. In other words, UK residents can't buy goods and services from non-UK retailers if they're not registered here. In my experience, purchasing items from international retailers is ever increasing. And nowadays, it's also possible to pay international retailers in the cardholder's local currency.

Mr P says that his trading positions were providing excellent returns, and losses weren't his objection to A. I'm happy to withdraw my comment regarding Mr P's losses. But if his concerns only relate to A's conduct, I question what losses he seeks to hold Metro Bank liable for. I've not seen credible evidence to conclude that A was operating a scam and, as explained in my provisional decision, Metro Bank's duty to intervene wasn't triggered here. I would also add, for the sake of completeness, that there was and is no duty on a PSP like Metro Bank to check the regulatory status of a merchant before executing a transaction.

In summary, having considered the matter very carefully, I've found no reason to depart from my provisional findings. I realise that this will come as a considerable disappointment to Mr P. Not least because the complaint has been ongoing for some time now and our investigator previously upheld it. But I'm not persuaded that Metro Bank acted unfairly or unreasonably in its dealings with Mr P.

### **My final decision**

For the reasons set out above, and in my provisional decision, 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 P to accept or reject my decision before 18 March 2022.

Gagandeep Singh  
**Ombudsman**