DRN-3323748

The complaint

Ms B complains HSBC UK Bank Plc won't reimburse money she lost when she fell victim to a scam.

What happened

Ms B was looking online for an investment opportunity after receiving money from a house sale and came across BinaryOnline. She was contacted by a Customer Success Manager and they drew up an investment plan to build profits on a quarterly review which she could withdraw as and when needed. She started with an initial investment of £500, which was one of three deposits to her binary options trading account that day. She saw her investment grow and made further deposits. In all, she invested £20,001 between 28 November 2017 and 4 January 2018. Between 9 March and 14 June 2018, Ms B received credits totalling £10,290.51 from BinaryOnline.

At the first quarterly review, Ms B says she attempted to make a withdrawal, but this was refused. And BinaryOline's continual refusal aroused her suspicions. She contacted HSBC in May 2018 for help and was told what she'd need to provide to raise a chargeback claim. She requested a cancellation of BinaryOnline's services on 28 June 2018 and provided information to HSBC to raise a chargeback. Included in this was warnings about BinaryOnline and other information suggesting it was operating a scam.

In September 2018, HSBC raised a chargeback for misrepresentation. But it was defended through the merchant's bank. And although HSBC contacted it again, it was further defended – with the merchant showing the service had been provided. HSBC didn't take the matter further as it said there were no further chargeback rights. But it did pay £100 compensation to Ms B because of avoidable delays in that process.

Ultimately, our investigator concluded that all the payments to BinaryOnline ought to have been blocked, as by the time they were made there was a warning about the trader on the International Organisation of Securities Commissions (IOSCO) alert portal, that it had been trading in a jurisdiction without being registered to do so. She concluded HSBC ought to have intervened and had it done so, she was satisfied the scam would have unravelled. She didn't find Ms B should bear any responsibility for the position she found herself in. She asked HSBC to reimburse the transactions, less any credits, and add 8% simple interest.

HSBC disagreed. In summary, it said:

- That Ms B received back more than 50% of her deposit has been ignored by the investigator. This significantly detracts from a suggestion the merchant was fraudulent at the material time.
- The investigator has mis-quoted the FCA paper, and their findings in respect of its action are unrealistic and unfair. The investigator seeks to apply retrospective regulation by the back door. If it was intended for it to be obliged to take steps to block payments one month after a published warning, the regulator would make this clear.
- It doesn't believe the investigator has properly considered contributory negligence.

- It considers 8% interest to be punitive as there is no evidence that she would have obtained interest at such a level or that she had to borrow as a result of the loss suffered.

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.

Under regulations and in accordance with general banking terms and conditions, banks should execute authorised payments without undue delay. The starting position is that liability for an authorised payments rests with the payer even where they have been duped into making that payment, for example as part of an investment scam. There is no dispute that Ms B authorised the payments.

Banks and other payment services providers 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 they don't have to protect customers against the risk of bad bargains or give investment advice. And I'm mindful the regulator has confirmed that providing a fraud warning to a customer, doesn't amount to investment advice. The first question I need to consider is whether this trader was actually a fraudster.

The investigator has already set out the reasons for finding that BinaryOption wasn't a legitimate trader. I agree with those reasons, in summary they were:

- BinaryOnline wasn't regulated by the UK's Gambling Commission when it ought to have been.
- A warning about BinaryOnline was published by IOSCO on 16 December 2016. This noted that it has been operating in another jurisdiction without being registered to do so. The FCA also later published its own warning in May 2018, that BinaryOption was operating in the UK without authorisation.
- There are reports in the public domain about BinaryOnline being scammers.

So I need to consider whether:

- HSBC ought to have intervened in any of the payments?
- Whether intervention would have made a difference?
- Whether Ms B was partly to blame or what happened such that it would be fair and reasonable to reduce compensation proportionately?

HSBC is aware of our general approach to its safeguarding and due-diligence duties to protect customers. As well as decisions being published on our website setting out these principles and which quote the relevant rules and regulations, HSBC itself has also had a number of decisions setting out our position.

We are required, and as provided for in the DISP Rules, to take into account rules and guidance, relevant codes of practice and what I consider to be good industry practice, as well as the law, when reaching a decision. And we're tasked with reaching a fair and reasonable outcome in all of the circumstances of the complaint. In doing so, we're satisfied our approach isn't inconsistent with the law.

I understand all of Ms B's payments that are in dispute went directly to BinaryOnline. The first payment was sent in November 2017. By that time, there had been a warning on the IOSCO investor alert's portal, that BinaryOnline had been operating in a jurisdiction without being registered, for 11 months. I accept, as mentioned by the investigator, that it doesn't necessarily follow that these were fraudsters. But nevertheless, I'm satisfied it's not unreasonable to expect an international bank to update watchlist to includes businesses – payees – that have carried out regulated activities without being licensed. Afterall, a legitimate business carrying out regulated activities would usually submit itself to regulation. The warning posted by the relevant jurisdiction urged caution.

HSBC has said that blocking payments is ineffective as merchants circumvent this by changing the merchant/acquirer code. But HSBC hasn't provided any evidence that is what happened here - that it had a watchlist that BinaryOnline had circumvented in the way described. And the approach for the watchlist is based on the name of the merchant rather than any merchant code.

As the payments from November 2017 were 11 months after the warning was published, I'm satisfied HSBC had sufficient opportunity to update its watchlist, and so I think it should have automatically blocked the first payment to BinaryOnline. Had it done so, and asked appropriate probing questions, I think the scam would have come to light. Had HSBC brought to light that BinaryOnline had been operating without being registered and suggested that Ms B carry out more research, I'm satisfied she would have paused and taken that action. And she could have been advised to check if it was regulated with the Gambling Commission, as it ought to have been. I've no reason to doubt she would have followed any due diligence recommendations given by her trusted bank. I'm satisfied that finding out BinaryOnline had been operating without a license in another jurisdiction, and without being regulated by the Gambling Commission in the UK, is enough to have stopped Ms B in her tracks, therefore preventing any of those losses.

HSBC has argued this approach amounts to retrospective regulation. I disagree. The paper referred to by the investigator, published in 2012, set out that the then regulator said it was good industry practice for businesses to have updated watch lists of potential perpetrators and types of scam. So having a watch list of this type has been considered good industry practice for many years now – and that's something I'm required to take account of in reaching my decision. Furthermore, the IOSCO portal was suggested as a source of information in relation to putting together a watch list, so it was clearly the intention that international information was also supposed to contribute to that. I'm satisfied that updating a watch list within one month of a published warning is reasonable – in the event, here the payments were made 11 months later, plenty of time for any watch list to be updated.

HSBC has said the same consultation paper said that there should be strong grounds for suspicions for payments to be delayed. In my view, given the purpose of the portal, the purpose of a watchlist, and that this was a suggested source of information, that the very appearance of a trader or business on this list, ought to be grounds for such suspicion. After all, jurisdictions post voluntarily in a section of the website designed for investor protection. I don't find the argument the threshold hasn't been met by an appearance on a published warning (IOSCO or FCA) persuasive.

HSBC has also referred to Ms B receiving significant credits back from the merchant which would have detracted from a suggestion that the merchant was fraudulent at the material time. But I don't find this argument persuasive either. The first credit wasn't paid until March 2018, so it wouldn't have factored into any discussions about carrying out due diligence on the merchant, nor persuaded Ms B at the point I think HSBC ought to have intervened, that she was dealing with a legitimate trader. And as HSBC is well aware, scammers use allowing withdrawals as a way to further dupe investors into parting with ever larger sums. It follows that I don't find the credits to be persuasive evidence the trader was legitimate.

I have thought carefully about whether Ms B is partly to blame for what happened. And having done so, I'm not persuaded she is. I accept it doesn't appear that Ms B did much research before she decided to invest. A bank might be knowledgeable about checking for regulation etc, but I don't believe the same could be said for a layperson, particularly when that regulator is the Gambling Commission. And I haven't seen anything else that would lead me to conclude that Ms B was aware, or ought to have been aware, that she might have been at risk of being scammed. Overall, I'm not persuaded Ms B should share the blame for what happened and so I won't be reducing any compensation accordingly.

HSBC has argued that there isn't any evidence that Ms B would have been able to earn 8% interest on the sum lost, or that she had to borrow because of the loss. It says the award for 8% interest is punitive. I do understand the point the bank is making. But I don't agree it's punitive. The 8% interest isn't there to replace interest Ms B might have earnt had the money stayed in her account, but for the loss of use of her money. It has been our approach for many years to add 8% simple interest on loss in these types of situation and I see no reason to depart from that here.

My final decision

For the reasons given, my final decision is that I uphold this complaint. I require HSBC UK Bank Plc to:

- Pay Ms B £9,710.49 representing the loss she suffered; and
- Add 8% simple interest per year to that sum from the date of the date of the payments to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 22 April 2022.

Claire Hopkins
Ombudsman