

The complaint

Mr C complains about the actions of John Lewis Financial Services Limited when he was tricked into making a payment on his credit card as a result of a scam.

What happened

In April 2019 Mr C made a payment on his credit card of £765.21 (with £21.04 in fees) to a merchant who promised him a return on his investment by purchasing cryptocurrency.

Almost immediately after making the payment Mr C became suspicious and contacted John Lewis to see if the payment could be cancelled. But John Lewis said they were unable to assist Mr C by raising a chargeback under the Mastercard rules. But they did apologise for the length of time it took to process the payment and gave Mr C some loyalty points as a gesture of goodwill.

The investigator said the complaint should be upheld. He said Mr C had been the victim of a binary options scam, but John Lewis hadn't treated him fairly when it decided not to raise a chargeback. The investigator added that the merchant who contacted Mr C had been placed on the Investor Alerts Portal of the International Organization of Securities Commissions (IOSCO), the Financial Market Authority of Austria had reported the merchant was operating without its authorisation and the Financial Conduct Authority (FCA) had published a warning about the merchant in February 2019. As a result of this, the investigator said John Lewis should've been on the look out for suspicious transactions and its systems should've been updated with the latest alerts about scam merchants. If it had, the payment should've been blocked, and John Lewis should've spoken to Mr C about the payment and asked some questions about why he was making it. At this point, it's likely the scam would've been uncovered.

So, the investigator said John Lewis should refund Mr C the full transaction, the transaction fee and any associated interest and charges. It should also pay 8% interest on any payments made by Mr C towards the credit card balance arising from that payment, fees, interest or charges, from the date they were paid to the date of settlement.

John Lewis didn't agree and has asked for an Ombudsman's review. It said Mr C was responsible for the transaction and that it couldn't comprehend why he decided to make the payment in the circumstances. So, it felt Mr C was careless. John Lewis said that it wasn't up to it to interrogate Mr C about the payment and to ask who the merchant was. And that it's not unreasonable for any bank to believe that, given the circumstances, its customers would've carried out a degree of due diligence on the merchant before making a payment. It added that its security system isn't designed to catch scams, instead it will detect unusual spending. And if this had triggered an SMS message would've been sent to Mr C's mobile asking him to validate the transaction where he would've likely confirmed the transaction. John Lewis said that the investigator had only speculated that a warning would've made a difference here and Mr C should've conducted more research into the broker before making the payment which isn't John Lewis' fault.

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'm going to uphold this complaint. And for largely the same reasons.

I've read and considered the whole file. But I'll concentrate my comments on what I think is relevant. If I don't mention any specific point, it's not because I've failed to take it on board and think about it, but because I don't think I need to comment on it to reach what I think is a fair and reasonable outcome.

I've considered whether John Lewis should've processed the payment to the merchant in light of what was known about them – as I've set out above. The investigator has already set out the relevant reasons why this service thinks John Lewis should've stopped the transaction in this instance. So, I won't repeat those in full.

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 for me to consider is whether this particular merchant was actually a fraudster.

I'm satisfied the merchant here wasn't carrying out legitimate binary-options trades but were instead dishonestly defrauding customers. This is because from January 2018, binary-options traders operating in the United Kingdom were required to be regulated by the FCA – whereas the merchant here wasn't. Nor were they regulated or licensed in any other jurisdiction so far as I am reasonably aware. I've also noted that the European Securities Markets Authority banned the sale of binary options to retail customers in the EU (including the UK) on 2 July 2018. This indicates they were operating illegally, probably with dishonest intentions. Legitimate firms tend to comply with regulatory requirements.

There were also several warnings about the merchant on the IOSCO website which were placed in January 2019 – more than two months before Mr C made the payment. There was also a warning on the FCA's website which was placed in February 2019 – again before Mr C made the payment. I've also considered the several reports in the public domain which state the merchant were scammers. Although this isn't as persuasive as the warnings I've previously mentioned, this helps build an overall picture of the scammers dishonestly seeking gains at the expense of others.

Unusual or uncharacteristic activity

John Lewis 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.

John Lewis has said that Mr C authorised the payment and failed to carry out sufficient due diligence before making the payment. But it is common ground here that the disputed payment was 'authorised' by Mr C for the purposes of the Payment Services Regulations ("the Regulations"), in force at the time. This is because they were made by Mr C using the legitimate security credentials provided to him by John Lewis. This must be regarded as an

'authorised payment' even though Mr C 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 account, Mr C 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 John Lewis 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.

John Lewis has said its system won't detect scammers/merchants only suspicious patterns of payments. 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 credit card provider such as John Lewis 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. I believe, 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 C's case there were several warnings about the merchant, including the one on the website of IOSCO which was there more than a month before the payment was made. It is not unreasonable to expect a large firm 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 Mr C's payment, I think John Lewis 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. John Lewis had constructive if not actual notice that the payee might not be a legitimate merchant – therefore, it would've been reasonable for it to have properly questioned Mr C before processing the payment in order to satisfy itself that all was well.

As a result, I'm satisfied that if John Lewis had fulfilled its duties and carried out due diligence by stopping the transaction and speaking to Mr C, I'm satisfied it is more likely than not he would've explained who had contacted him and why he was making the payment. This would've led John Lewis to explain its own customer experiences of similar and common types of scams. It also could've asked Mr C to check whether the merchant was regulated by the FCA.

Overall, there is no evidence that John Lewis intervened in the disputed payment before agreeing to process it, when I believe it ought to have. It was a missed opportunity to intervene.

Causation

I'm satisfied that if John Lewis has spoken to Mr C along the lines I've set out above, he would've quickly discovered the scam. When Mr C made the payment, he was quick to call John Lewis to explain that it didn't seem right and to ask to see if his money could be returned. I can't see any evidence he was willing to take high risks or that he had a history of speculative investments. So, a clear warning and asking Mr C to look at the FCA's website would've led Mr C to the FCA warning about this merchant that was active on its website at the time of the payment.

Contributory negligence

In this case, I do not think that Mr C was to blame for what happened. That is, he did not foresee the risk of this sort of harm or any harm. I do not think Mr C could've foreseen the risk that the company he was dealing with was a scam. Therefore, in the circumstances, I do not think it would be fair to reduce compensation on the basis that Mr C should share blame for what happened.

Putting things right

So, I'm satisfied John Lewis needs to refund Mr C with the money he's lost to this scam.

My final decision

For the reasons set out above, I'm upholding this complaint. I therefore propose that John Lewis Financial Services Limited:

- Pay Mr C all the money he lost (totaling £756.21) – including any transaction fees – within 28 days of receiving notification of his acceptance of my final decision; 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 were not paid in full, interest should be paid at the rate actually charged for that payment from the date Mr C reported the fraud to John Lewis.
- Should an outstanding balance be owed on Mr C's credit card account relating to the payment to the merchant and/or interest on that payment, John Lewis is entitled to repay this balance first from the settlement outlined in the bullets above.
- If John Lewis deducts tax in relation to the interest element of this award, it should provide Mr C with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 7 April 2022.

Mark Dobson
Ombudsman