DRN-3337945

The complaint

Mr A complains that NewDay Ltd (trading as Opus) won't reimburse money he lost when he says he fell victim to a binary options investment scam.

What happened

Mr A came across a binary options company called Golden Markets online. He contacted them and was promised that with their guidance on trading, he would earn large profits. Mr A invested £12,000 on 30 November 2018 using his NewDay Mastercard credit card. He initially saw good profits however realised he may have been scammed when he started to lose money.

Mr A tried to withdraw money from his Golden Markets trading platform in January 2019 but was only permitted to withdraw £100. He contacted NewDay for assistance with processing chargeback claims for him on the grounds that the services were not as described (as it was a scam).

NewDay declined to refund Mr A's payments on the grounds that chargeback claims weren't an option for him as he didn't have enough evidence to substantiate his claim. Mr A referred his complaint to this office.

One of our investigators reviewed the complaint. He didn't think NewDay acted unreasonably by declining to process Mr A's chargeback claim. But he thought NewDay should have suspected fraud based on what was known about Golden Markets at the time of Mr A's payments.

As NewDay didn't respond, the case has been referred to me for determination.

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 uphold this complaint and I'll explain why.

Firstly, I don't think NewDay acted unreasonably in declining to pursue Mr A's chargeback claim. Mastercard significantly limits any chargeback options available for investment or gambling disputes. And I don't think Mr A had any valid dispute rights even though his dispute was that the company was fraudulent because Mastercard doesn't have provisions for specific disputes about companies acting fraudulently.

NewDay is aware of our general position on a PSP's 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 payments were 'authorised' by Mr A for the purposes of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. This is because they were made by Mr A using the legitimate security credentials provided to him by NewDay.

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.

I'm satisfied Golden Markets were scammers for the reasons explained by our investigator. 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 or International Organization of Securities Commissions (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.

An FCA warning was published about Golden Markets on 25 May 2018 – which is more than a month prior to Mr A's first payment to them. I'm satisfied Mr A's initial payment should have triggered NewDay's fraud detection systems.

Therefore, it would have been reasonable for it to have properly questioned Mr A before processing the payment to satisfy itself that all was well.

If NewDay had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that Mr A would have explained what he was doing. In such circumstances, whilst the bank had no duty to protect him from a bad bargain or give investment advice, it could have explained to him the very high risks of getting involved with unregulated and unlicensed binary options dealers. It could have also explained its own customer experiences with unregulated and unlicensed high-risk investment traders 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 trading, 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"; City of London Police's October 2017 report noting victims had lost 'over £59m' to binary options fraud; and so forth).

There is no evidence that NewDay intervened in the payments to Golden Markets. It was a missed opportunity to intervene.

If NewDay had asked Mr A what the payment was for and the basic surrounding context, it is likely he would have fully explained what he was doing and that everything had been done over the phone and online with his 'broker'. NewDay did not need to know for certain whether Mr A was dealing with a fraudulent high risk investment 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 NewDay 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 forex and binary options dealers.

If NewDay had given a warning, I believe that Mr A would have paused and looked more closely into Golden Markets before proceeding. There is no evidence that he was willing to take high risks or had a history of speculative investments or gambling. It seems more probable that he would have made further enquiries into whether or not Golden Markets were regulated in the UK or abroad. He could have discovered they were not and the various regulatory warnings about the risk of unregulated investment scams (see above). In other words, I am satisfied that a warning from his trusted bank would probably have exposed Golden Markets' smoke and mirrors, causing him not to 'invest' and preventing any losses.

Even if he had not worked out that this was a scam, it is likely that a warning would have alerted him to the common issues arising in relation to binary options and unregulated high risk investment dealers, which in turn would have revealed the truth behind his supposed broker's (mis)representations — i.e. that they were not really regulated UK investments but highly-risky bets more akin to a wager in which the broker must lose if he is to win. So before Mr A's payments were actually processed, he would probably have stopped in his tracks. But for NewDay's failure to act on clear triggers of potential fraud or financial harm, Mr A would probably have not lost any money.

In the circumstances, I do not think it would be fair to reduce compensation on the basis that Mr A should share blame for what happened.

My final decision

For the reasons set out above, I uphold this complaint and require NewDay Ltd (trading as Opus) to:

1. Refund all the payments made to Golden Markets totalling £12,000 and rework the account so that all interest and charges caused by those payments are refunded (less any refunds received from Golden Markets).

2. Pay 8% simple interest per year to Mr A on any sums repaid towards the credit card balance arising from the payments at point 1, from the date they were paid to the date of settlement. If NewDay is required to deduct tax from the interest it should send Mr A a tax deduction certificate so he can claim it back from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 27 April 2022.

Dolores Njemanze
Ombudsman