

The complaint

Mr B complains that NewDay Ltd (“NewDay”) has refused to refund payments he made to Torooption using his NewDay (Opus) Mastercard credit card. Mr B says that Torooption were operating a scam and stole his money.

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.

In September 2017, Mr B made two payments of £250 and £2,500 to Torooption. He did this using his NewDay (Opus) Mastercard credit card. In short, Mr B says he believed he was making these payments to a company called *Bitcoin* which he thought he had a ‘trading account’ with. However, he says he lost his funds and then discovered he was in fact dealing with Torooption – who were operating a scam.

Mr B asked NewDay to try to recover his money. As this did not happen, he raised a complaint which he also referred to our service.

In summary, NewDay told our service, amongst other things, Mr B’s purchases were not made fraudulently and it believes Mr B is unhappy because he did not receive the return/profit he had anticipated; and then he tried to recover his money by way of a fraud case.

One of our investigators considered the complaint. He thought had a chargeback been raised, there would have been no reasonable prospect of success through Mastercard’s chargeback scheme due to the nature of Mr B’s claim. However, he argued that in his view, Mr B did have a valid claim for misrepresentation and breach of contract under section 75, so he suggested NewDay refund Mr B’s money.

Mr B accepted the investigator’s findings, but NewDay did not respond. As an agreement could not be reached, the complaint has been passed to me to make a decision.

On 2 March 2022, I issued a provisional decision upholding this complaint. For completeness, I repeat my provisional findings below:

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 think the complaint should be upheld. But for different reasons to those put forward by the investigator. I will set out my reasons below.

For the avoidance of doubt, I am not persuaded Mr B has established a valid claim for breach of contract or misrepresentation under section 75 of the Consumer Credit Act 1974. Mr B says that his contract was with a company called Bitcoin. However, the recipient of his disputed payments was Torooption, rather than Bitcoin. Mr B did not have an agreement with

Toroption, and so the debtor-creditor-supplier chain (which is required to be intact for the purposes of section 75) cannot be demonstrated. Therefore, a claim under section 75 for either breach of contract or misrepresentation would inevitably fail.

However, I have considered whether NewDay should have processed the payments to Toroption in light of what was known about them.

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 Toroption 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 B. 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 United Kingdom were required to be licensed by the UK’s Gambling Commission – whereas Toroption 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) Several warnings about Toroption were placed on the Investor Alerts Portal of the International Organization of Securities Commissions (“IOSCO”). These warnings were placed in May and September 2017; May 2018; and September 2019. Further, the FCA published a warning about Toroption on 7 March 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 Toroption 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

NewDay 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 B for the purposes of the Payment Services Regulations (“the Regulations”), in force at the time. This is because they were made by Mr B using the legitimate security credentials provided to him by NewDay. These must be regarded as ‘authorised payments’ even though Mr B 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 B 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 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.*

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 B's case, there were several warnings about Toroption placed on the IOSCO's Investor Alerts Portal (as set out above) – some of these warnings were placed more than a month before Mr B's payments to Toroption in September 2017. 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 B's payments, I think NewDay 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. NewDay 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 B before processing all the payments in order to satisfy itself that all was well.

If NewDay had fulfilled its duties and carried out due diligence by contacting Mr B and asking suitably probing questions, there is no reason to doubt that he would have explained what he was doing. In such circumstances, whilst NewDay had no duty to protect Mr B from a bad bargain or give investment advice, it could have invited him 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 Toroption 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 no – 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 NewDay intervened in the disputed payments before agreeing to process them, when I think it ought to have. It was a missed opportunity to intervene.

Causation

If NewDay had asked Mr B what the payments were 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 the merchant. NewDay did not need to know for certain whether Mr B was 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/firm'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, overseas binary options.

If NewDay had given a warning, I believe that Mr B would have paused and looked more closely into Toroption 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 Mr B would have made further enquiries into binary-options scams and whether or not Toroption regulated in the United Kingdom or abroad. He could have discovered they were not and the various regulatory warnings about the risk of binary-options/forex scams (see above). I am also satisfied that Mr B would have had concerns that the payments were being made to a company other than Bitcoin. In other words, I am satisfied that a warning from Mr B's credit card provider would probably have exposed Toroption's false pretences, causing him to stop 'trading' and preventing the losses.

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 B 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 B could have 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 B should share blame for what happened.

Responses to my provisional decision

Neither Mr B nor NewDay have responded to my provisional findings.

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.

Given that neither party have responded to my provisional findings – I see no reason to depart from them.

My final decision

For the reasons set out above, my final decision is that I uphold this complaint. I therefore direct that NewDay Ltd:

- Pay Mr B all the money he lost (totalling £2,750); including any transaction fees (if applicable) – 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 payments from the date they were 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 the payments from the date Mr B reported the fraud to NewDay Ltd.
- Should an outstanding balance be owed on Mr B's credit card account relating to the payments to Toroption and/or interest on the payments, NewDay Ltd is entitled to repay this balance first from the settlement outlined in the bullets above.
- If NewDay Ltd deducts tax in relation to the interest element of this award, it should provide Mr B with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 18 April 2022.

Tony Massiah
Ombudsman