

The complaint

Mr A complains that NewDay Ltd (“NewDay”) has refused to refund payments he made to XMarkets using his NewDay (Debenhams) Mastercard credit card. Mr A says that XMarkets 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.

Mr A says:

- He came across an advert for XMarkets via social media. This appealed to him as he had an interest in trading and Xmarkets’ advertisement, ‘... *promised easy and passive profits because the broker would trade on my behalf and take a commission from profits.*’
- ‘*They were very smart and knew, how to push their victims for investment - promised big profits before Christmas and the possibility to withdraw my funds at any time. I decided to make the first initial investment of 5,000 GBP.*’
- He did not know his broker’s name, as he was told that all his trades were being conducted by Xmarkets’ professional brokers.
- ‘*As I saw, how my account growing up in a couple of days, they bombarded me with phone calls and emails, proposing to make another investment to multiple my profits. Unfortunately, I didn’t realize that all this was just a scam and I made a couple of more investments to their platform, hoping to get my funds with profits back, as by that time it was more than 200,000 GBP on my account.*’
- After unsuccessful attempts to withdraw his funds, he did some research online and discovered XMarkets operated a scam.

Mr A made payments to XMarkets using his NewDay (Debenhams) Mastercard credit card. The payments in dispute are as follows:

- £5,000 (16 November 2018)
- £5,000 (12 December 2018)
- £4,750 (14 December 2018)
- £5,000 (8 January 2019)
 - **Total: £19,750**

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

NewDay told our service, amongst other things, that it is unable to process chargeback claims for trading of any kind, as it is not covered under the relevant scheme rules. It explained that it is unable to consider that a deposit made for trading can or should benefit from this protection; deposits, it says, are not purchases. NewDay added Mr A was responsible for his payments to Xmarkets as an investment and should have researched the company prior to making payment, as there is ample information about Xmarkets online.

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

Mr A accepted the investigator's findings, but NewDay has not responded.

Because of this, the complaint has been passed to me to make a decision.

On 3 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, based on the evidence before me, I am satisfied that Mr A has established a valid claim for breach of contract and misrepresentation under section 75 of the Consumer Credit Act 1974. Therefore, I am of the view that a claim under section 75 of either action mentioned would likely succeed. However, taking into account the particular circumstances of this case – I have considered whether NewDay should have processed the payments to XMarkets in light of what was known about them, rather than consider a claim under section 75.

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 XMarkets 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 A. In the absence of evidence to the contrary, I have concluded this because:

- a) *In 2018, binary-options, forex and CFD traders operating in the UK were required to be regulated by the FCA – whereas XMarkets 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) *The FCA published a warning about XMarkets in February 2018 – more than a month before Mr A made his payments to XMarkets in November/December 2018 and January 2019. Further, there are two warnings about XMarkets placed on the Investor Alerts Portal of the International Organization of Securities Commissions (“IOSCO”). One in April 2018, and the other in January 2019; the former warning being placed on the Investor Alerts Portal more than a month before Mr A’s payments.*
- c) *There are several reports in the public domain – e.g. foreign press and online forum – stating that XMarkets 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 A for the purposes of the Payment Services Regulations (“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. These must be regarded as ‘authorised payments’ even though Mr A 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 A 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 A's case, there were several warnings about XMarkets placed on the IOSCO's Investor Alerts Portal (as set out above) – some of these warnings were placed more than a month before Mr A's payments to XMarkets. 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 A'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 A 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 A 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 A from a bad bargain or give investment advice, it could have invited him to check whether the payee was regulated by the FCA. It could have also explained its own customer experiences with merchants like XMarkets 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 A 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 A 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 A would have paused and looked more closely into XMarkets 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 A would have made further enquiries into binary-options scams and whether or not XMarkets 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 A 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 A's credit card provider would probably have exposed XMarkets'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 A 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 A 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 A should share blame for what happened.

Responses to my provisional decision

Mr A responded to say he agreed with my provisional findings and was happy with the outcome. However, NewDay has not responded

What I have 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 Mr A agreed with my provisional findings, but NewDay has not responded – 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 A all the money he lost (totalling £19,750) – 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 A reported the fraud to NewDay Ltd.
- Should an outstanding balance be owed on Mr A's credit card account relating to the payments to Xmarkets and/or interest on these 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 A with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or

reject my decision before 18 April 2022.

Tony Massiah
Ombudsman