

The complaint

Mr J complains that Marks & Spencer Financial Services Plc (M&S) won't refund the money he lost when he fell victim to a scam.

What happened

- Mr J was contacted by a company, R, purporting to offer investment services. On 6 August 2019, Mr J attempted to pay them £250 using his credit card. M&S blocked the payment and asked him to call. He rang and confirmed that he had his card in his possession, and that he'd requested the payment. M&S explained it had removed the block but he'd need to remake the payment.
- Following this, Mr J proceeded to pay the following from his M&S debit and credit cards. Some of these payments went direct to R. Others went through C first, which appears to have been a legitimate cryptocurrency merchant. Mr J has explained that he was directed by R to set up an account with C, and that these payments then went straight on to R:

Date	Merchant	Card type	Amount
07/08/2019	R	Debit	£250
12/08/2019	C	Debit	£2,100
16/08/2019	C	Credit	£735
16/08/2019	C	Credit	£735
16/08/2019	C	Credit	-£735
19/08/2019	R	Credit	£250
20/08/2019	R	Credit	£250
		Total	£3,585

- Within a couple of months, Mr J realised it was a scam. He reported this to M&S, but it wouldn't refund him. It said he'd authorised the payments and his dispute didn't meet the criteria for a valid claim through either the voluntary chargeback scheme, or Section 75 of the Consumer Credit Act 1974.
- Unhappy with this, Mr J referred the matter to our service and our investigator upheld the complaint. She didn't think M&S had responded appropriately when it flagged the first payment. If it had done so, she thought it would have uncovered and prevented the scam. She therefore thought M&S was liable for his loss.
- M&S disagreed. It said Mr J had authorised the payments, including calling him to confirm he wanted the credit card payment to R to go through. And that he could have done more to protect himself. The matter was escalated to me to determine. I asked M&S for some further information. As it didn't respond by the deadline I set, I'm proceeding to consider this complaint.

- I issued my provisional decision in May 2022, upholding the complaint but proposing different redress to that recommended by the investigator. I invited both parties to submit any further evidence or comments. They've now responded to confirm that they accept 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.

As both parties have accepted my provisional findings, and neither has submitted anything new, I see no reason to depart from my provisional decision. For the following reasons, I uphold this complaint:

- In line with the Payment Service Regulations and general banking terms, M&S is expected to execute authorised payment instructions without undue delay. So the starting position is that Mr J is liable for the payments he made – even though it's not disputed that he was scammed and tricked into making these.
- Mr J says he authorised all but the last two payments. I can see that he's been consistent on this point since first submitting his dispute to M&S. He's also explained that he sent R a picture of the front and back of his card, which he was told he needed to do to verify his identity. That explains how R could have made these payments without his consent. I asked M&S for further information about these payments, such as the security steps followed. It hasn't provided anything. So in the absence of evidence to the contrary (such as that he was sent an OTP code to his phone to authorise the payments), I accept the last two payments were unauthorised.
- As the unauthorised transactions were paid for using credit, Mr J isn't liable for them unless he gave R consent to take possession of the credit token. And he didn't give R consent to use his credit card. He simply thought the picture was part of its security procedure to verify him. So I don't consider it fair to hold Mr J liable for these transactions.
- Even for the authorised payments, there are some situations where we believe that banks—taking into account relevant rules, codes and best practice—ought to have identified a fraud risk, so should have looked at the wider circumstances surrounding the transaction before making the payment. If they failed to do so, and that failure led to a fraudulent loss for their consumer, it may be fair to hold the bank liable.
- Here, we know M&S *did* flag the first attempted scam payment (£250 directly to R) as suspicious. But I'm not persuaded it took appropriate action in response to the risk it identified, which it says was because it was experiencing a high rate of fraud with this type of retailer. Despite requiring Mr J to call, all M&S checked was that he'd made the transaction. Whereas a key feature of these types of scams is that the consumer is tricked into making the payment, believing the investment to be genuine. So I'm not satisfied it was enough to simply check he knew about the payment.

- If M&S had asked relevant questions of Mr J, I think it likely would have uncovered the scam. He'd been told he could double his money in a short space of time, and was directed to use remote access software to allow R to control his trading account. It also claimed to trade in forex and binary options – but wasn't regulated in the UK, as it was required to be for those activities. M&S ought to have recognised these as common scam indicators and warned Mr J about this. He wasn't an experienced investor and I've no reason to doubt that he would have heeded a firm warning from his bank about this, speaking from a position of knowledge about scams. So, if M&S had responded appropriately, I'm persuaded he wouldn't have re-made this payment – or the other payments that ultimately went to the scammers.
- But for M&S's failure to respond appropriately, it would have been on actual notice that Mr J was going to suffer financial harm from fraud. The losses ought to have been within the contemplation of, and foreseeable to, M&S. So it's fair to hold it liable for this.
- I've also considered if Mr J was partly to blame. Initially, I don't think he foresaw the risk this was a scam. R's contact and website made it appear legitimate. But on 8 August 2019, his request for a £20 withdrawal was denied. He thinks he was either "testing the ground" or trying to withdraw the profit he thought he'd made – and can't remember why it was declined. I think this ought to have been a warning sign that something might be wrong, yet he continued to trade with R. From that point, I therefore think he ought to bear some responsibility for the payments he went on to authorise, and that his compensation should be reduced accordingly. In the circumstances, I find 20% to be a fair reduction.
- I don't need to consider a chargeback or Section 75 claim as Mr J already isn't liable for the unauthorised payments. And but for M&S's error, he wouldn't have authorised the remaining payments – meaning there would have been no payments to recover.

Putting things right

Marks & Spencer Financial Services Plc should refund Mr J the following £3,018, constituting the following:

Date	Merchant	Card type	Payment	Refund	Reasoning
07/08/2019	R	Debit	£250	£250	No contributory negligence
12/08/2019	C	Debit	£2,100	£1,680	20% contributory negligence deduction
16/08/2019	C	Credit	£735	£588	20% contributory negligence deduction
16/08/2019	C	Credit	£735	-	-
16/08/2019	C	Credit	-£735	-	-
19/08/2019	R	Credit	£250	£250	Unauthorised
20/08/2019	R	Credit	£250	£250	Unauthorised
		Total	£3,585	£3,018	

- For the credit card payments, M&S should rework the account so that any interest or charges caused by those payments are refunded. It should also pay 8% simple interest on any sums repaid towards the credit card balance arising from those payments, from the date they were repaid to the date of settlement (less any tax properly deductible);
- For the debit card payments, it should add 8% simple interest to those amounts from the date of payment to the date of settlement.

My final decision

For the reasons given above, my final decision is that I uphold this complaint and direct Marks & Spencer Financial Services Plc to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 4 July 2022.

Rachel Loughlin
Ombudsman