

The complaint

Mr W complains that HSBC UK Bank Plc (trading as “First Direct”) have failed to refund over £26,000 he lost as part of an investment scam.

What happened

The details of this complaint are well known to both parties, so I will not set out everything again in detail here. In summary, Mr W fell victim to an investment scam, where he made around 10 payments between October 2017 and April 2018 that totalled over £26,000. The payments were made by bank transfer and debit card as a result of discussions Mr W had with two fraudulent investment/binary options merchants (“Braxton Knight” and “Millennium FX”) whom the FCA have published warnings about. The following payments were made by Mr W from his First Direct account:

Date	Merchant	Payee	Amount
3 October 2017	Braxton Knight	Faster payment to SVV Enterprise	£,1000
20 February 2018	Braxton Knight	Faster payment to CIBA LTD	£8,000
8 March 2018	Braxton Knight	Faster payment to CIBA LTD	£10,000
13 March 2018	Braxton Knight	Faster Payment to Valiant Consultancy	£1,000
3 April 2018	Millennium FX	Debit Card transaction to BO Trader Podgorica	£71.38
3 April 2018	Millennium FX	Debit Card transaction to BO Trader Podgorica	£285.52
3 April 2018	Millennium FX	Debit Card transaction to BO Trader Podgorica	£1,427.61
3 April 2018	Millennium FX	Debit Card transaction to BO Trader Podgorica	£1,712.42
3 April 2018	Millennium FX	Debit Card transaction to BO Trader Podgorica	£1,713.14
3 April 2018	Millennium FX	Debit Card	£1,713.14

		transaction to BO Trader Podgorica	
			Total: £26,923.21

Mr W realised he had been scammed when he was unable to withdraw the money he had invested, where he also discovered warnings about the merchants had been published by the FCA. He raised a dispute with First Direct in April 2018 for assistance in recovering his lost funds. The bank was able to recover £2,997.83 from the receiving bank of the faster payments that had been sent but said that no other funds remained. First Direct refused to provide Mr W with a refund as he had authorised the payments.

Our investigator upheld the complaint. He thought that First Direct ought to have intervened from the payment Mr W made on 20 February 2018, which would have likely prevented any further loss. However, the investigator didn't think that First Direct should refund the Millennium FX payments as a result of Mr W's contributory negligence towards the loss. Mr W agreed with the investigator's assessment, but First Direct failed to respond. As a result, the matter has been escalated to me for a final decision.

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 agree with the conclusions reached by the investigator and have decided to uphold it. I'll explain why.

First, it isn't in dispute that Mr W has been the victim of a scam. Both Braxton Knight and Millennium FX have had warnings published by the FCA on the 31 January 2018 and 7 May 2019 respectively. And there are several reports in the public domain also stating that these merchants were scammers.

It also isn't in dispute that Mr W authorised the disputed transactions which were requested by him using his legitimate security credentials provided by First Direct. And the starting position is that banks ought to follow the instructions given by their customers in order for legitimate payments to be made as instructed.

However, I've considered whether First Direct should have done more to prevent Mr W from falling victim to the scam, as there are some situations in which a bank should reasonably have had a closer look at the circumstances surrounding a particular transfer. For example, if it was particularly out of character for him.

In Mr W's case, I don't think the first payment would have appeared unusual, as it was for £1,000, which wasn't out of character for him to spend from his account. There also wasn't any warning in place about Braxton Knight at the time he made this payment in October 2017.

However, in terms of the second payment of £8,000, Mr W called First Direct where he spoke to an agent to instruct her to make the payment from his account. Mr W said he wanted to put some money into an account that he had paid into last year, as he had some money with this firm and wanted to add to it. The First Direct agent asked for the company name, to which Mr W responded "Braxton Knight". The agent could not find any payee of that name listed on the account that had been paid previously, so Mr W gave them the account details, but said the payee name was "CIBA Ltd".

Given the size of the payment, along with the fact that it was being sent to a different payee compared to the name Mr W gave (i.e. Braxton Knight, whom he said he had paid before but was not listed on his account), I think this ought to have struck First Direct as unusual, such that they should have probed further into the nature of the payment he was making.

If First Direct had asked further questions about the payment, and for more of the basic surrounding context, I think it's likely Mr W would have explained what he was doing and that he was making an investment after being told to send money to a third party broker, which did not match the name of the account he was attempting to pay – all of which can be typical features of these sorts of investment scams. First Direct could have asked Mr W to check the legitimacy of the broker on the FCA website, where he would have discovered a warning about Braxton Knight that had been in place since 31 January 2018.

Overall, I'm satisfied that a warning to Mr W from his trusted bank would have probably led him to discover the various scam warnings online and exposed the broker's false pretences. First Direct had a clear opportunity to prevent Mr W from falling victim to the scam when he phoned them on 20 February 2018, where it could have made further enquiries about the payment and asked more probing questions. But they failed to do so, despite the unusual circumstances described above, which ought to have put them on notice that something was not right, and that Mr W was at risk of financial harm. Had they have intervened and issued a scam warning, I'm satisfied they would have prevented Mr W from sending any further payments to this merchant. Therefore, I consider First Direct should refund the payments Mr W made to Braxton Knight from 20 February 2018 onwards.

In terms of the Millennium FX scam, Mr W made several online payments using his debit card on 3 April 2018 to payee "BO Trader Podgorica", which totalled around £7,000. When Mr W reported the scam, First Direct declined to pursue a chargeback claim for the payments he made. As the investigator has explained, Mr W did not have the necessary evidence required for a successful chargeback claim to have been made under Visa reason code 53 (later re-coded to 13.5). So, I don't think First Direct acted unreasonably by failing to pursue a chargeback for the debit card payments Mr W made to Millennium FX in these circumstances. So, I've gone on to consider whether the bank ought reasonably to have prevented the payments.

At the time Mr W made the payments, no active warning had been published about the merchant by the FCA, so I would not have expected First Direct to have blocked the payments automatically. Even if there was a warning, the payee name did not match the name of the merchant in any event. However, I think the unusual pattern of spending ought to have alerted First Direct to the risk of fraud, given that six separate payments were made to the same merchant within the same day. By at least the third payment of £1,427.61, for example, First Direct ought to have intervened by blocking the payment and questioning Mr W further, which I consider would have also prevented any further loss if the bank had intervened. There is also strong cause to suggest that Mr W wouldn't have fallen for the scam with Millennium FX in the first place if First Direct had intervened from the second payment made to Braxton Knight, as he would have been more aware of investment/binary options scams and how they tend to operate.

So, in theory, First Direct would also be liable to refund the payments made to Millennium FX as well. However, I've also got to consider whether Mr W contributed to his overall loss and, if so, whether a deduction would be appropriate.

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). And in this case, I do think that Mr W should bear some responsibility for what happened, as I think there were various signs that he was being scammed, which he appears to have ignored.

First, I note that he didn't question why the name of the company he was paying ("CIBA Ltd") did not match the name of the merchant ("Braxton Knight"), despite the fact that he had supposedly paid money to the broker before. This ought reasonably to have raised concerns with Mr W, or he should have at least looked into who the payee was or why the payment wasn't going directly to Braxton Knight.

Second, I can see that Braxton Knight were promising returns of between 12-20% in their promotional literature (as well as saying that he wouldn't ever stand to lose any more than 5% of his total investment). This all seems quite unrealistic. Even those with limited background knowledge of investing would have likely known that investments haven't enjoyed anything over a few percent in growth per year since the financial crash of 2008. So, I think this ought to have led Mr W to question whether the growth promised by the merchant was realistic or too good to be true, such that he ought to have considered whether it was a legitimate opportunity.

As a result of Mr W's contributory negligence, our investigator recommended that First Direct only refund the payments he made to Braxton Knight on 20 February 2018 (£8,000) 8 March 2018 (£10,000) and 13 March 2018 (£1,000), resulting in a total deduction of £6923.21 (being the payments made to Millennium FX, for which First Direct would also otherwise be liable to repay). This works out to be a reduction of around 25% of Mr W's total loss. Mr W has accepted this proposal, and I also consider it to be a fair reduction in light of his contributory negligence in these circumstances.

I also note that First Direct were able to recover £2,997.83 from the beneficiary banks of the transfers Mr W made to Braxton Knight, so this amount would also need to be deducted from the total award.

My final decision

For the reasons given above, I uphold this complaint and direct HSBC Bank UK Plc (trading as First Direct) to:

- Refund the payments Mr W made on 20 February 2018, 8 March 2018, and 13 March 2018 (totalling £19,000) less any funds recovered by First Direct.
- As this was a current account, First Direct should pay 8% simple interest per year to this sum from the respective dates of loss to the date of settlement.

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

Jack Ferris
Ombudsman