

The complaint

Mr L complains that HSBC UK Bank Plc ("HSBC") has refused to refund payments he made to what he believed was a legitimate investments trading company (RTC Finance). Mr L made these payments using his HSBC Visa debit card.

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 short, in 2017, Mr L says he made several payments to what he thought was his trading account with RTC Finance ("RTC"). At the time, Mr L says he believed that RTC were a legitimate investments trading company. However, he says he lost all his money and later discovered that RTC were operating a scam.

The payments in question made from Mr L's HSBC Visa debit card are:

Date	Merchant	Amount
18 September 2017	RTCFIANCE.COM	£200
21 September 2017	RTC FINANCE	£2,000
28 September 2017	RTC FINANCE	£10,000
28 September 2017	RTC FINANCE	£10,000
2 October 2017	RTC FINANCE	£5,000
6 October 2017	RTC FINANCE	£5,000
24 October 2017	RTC FINANCE	£3,000
3 November 2017	RTCFINANCE.COM	£5,000
13 December 2017	RTC FINANCEE	£5,000

Mr L asked HSBC to try to recover his money. As this did not happen, he raised a complaint which he also referred to our Service.

One of our investigators considered the complaint and upheld it in part. He thought that fraud triggers applied to Mr L's payment of £10,000 on 28 September 2017 (third payment in the above chain). He argued that there was no evidence to show HSBC provided Mr L with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he made. The investigator held that this was a missed opportunity for HSBC to intervene, so he asked it to refund Mr L some of the money he says he lost.

Mr L accepted the investigator's findings, but HSBC did not.

In the interest of conciseness, I will repeat HSBC's response here, which it has helpfully summarised its key points in the conclusions section of its submissions:

Overall, we consider that the opinion is unsupportable. As such, we do not accept that we should be held responsible for [Mr L's] loss for the following reasons:

- *The opinion appears to decide the complaint on the basis of more recent standards, and not those which applied at the time (including by reference to your service's contemporaneous decisions). Evidently [Mr L's] complaint would not have been upheld in 2017-2018 and is only being upheld because in the intervening four years since, your service has revised its approach to dealing with such complaints (on more than one occasion);*
- *It appears to be common ground that [Mr L] carried out no research before parting with significant savings despite having no investment experience;*
- *The findings in respect of our actions are unrealistic. [Mr L] was unlikely to agree not to invest on the basis of a single conversation with us and not on the date suggested;*
- *There was no credible evidence that either the merchant or payees were operating a scam at the time of the Payments, such that we could only have given [Mr L] a general investment warning which is unlikely to have had an impact in the circumstances;*
- *[Mr L] is unlikely to have accepted that this was a scam until after the Payments when he was refused withdrawals. Before that time, [Mr L's] account was apparently showing a "healthy profit", and he received substantial withdrawals. The causation position is therefore unsupportable; and*
- *[Mr L] conduct and his clear contributory negligence should be reflected by a percentage reduction of at least 50% on any refund.*

As an agreement could not be reached, the complaint has been passed to me to make a decision.

On 3 August 2022, I issued a provisional decision upholding this complaint in part. 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.

I would like to say at the outset that I have summarised this complaint in far less detail than the parties involved. I want to stress that no discourtesy is intended by this. If there is a submission I have not addressed, it is not because I have ignored the point. It is simply because my findings focus on what I consider to be the central issues in this complaint.

Preliminary issue

There appears to be a discrepancy between the total disputed amount our investigator set out in his findings and the amount HSBC says is correct. Having considered this point, I am of the view that the payments I have set out in the above section (amounting to £45,200) is correct.

Chargeback

I do not consider that Mr L had any chargeback rights under the Visa chargeback scheme regarding his payments to RTC.

Unusual or uncharacteristic activity

HSBC is aware of our general position on a 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 payments were 'authorised' by Mr L for the purposes of the Payment Services Regulations 2009 ('the Regulations'), in force at the time. This is because they were made by Mr L using the legitimate security credentials provided to them by HSBC. These must be regarded as 'authorised payments' even though Mr L 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 bank account, Mr L 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 HSBC 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 common types of scams. 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 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 L's case, the FCA published a warning about RTC on 17 October 2017. I therefore do not think HSBC ought to have automatically blocked Mr L's payments until the one he made 13 December 2017, as sufficient time had passed since the FCA warning had been published.

Notwithstanding this, in light of the odd pattern of Mr L's payments, I do think that by his third payment (see above), there are fraud triggers here – particularly given that this was an international payment for a significant amount (£10,000) to a firm that was not registered with the Gambling Commission. Therefore, it would have been reasonable for HSBC to have properly questioned Mr L before processing his payment in order to satisfy itself that all was well.

If HSBC had fulfilled its duties and carried out due diligence by contacting Mr L and asking suitably probing questions, there is no reason to doubt that they would have explained what they were doing. In such circumstances, whilst the bank had no duty to protect them from a bad bargain or give investment advice, it could have invited them to check whether the

payee was registered with the Gambling Commission. It could have also explained its own customer experiences with merchants like RTC 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 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; the Gambling Commission’s December 2016 scam warning that “an unlicensed operator is likely operating illegally”; and Visa’s business news 26 October 2017 and so forth).

There is no evidence that HSBC provided Mr L with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he was making. It was a missed opportunity to intervene.

Causation

HSBC argues that Mr L did not carry out any due diligence before making the payments in question. In light of this, our investigator asked Mr L what due diligence he carried out at the time. Mr L has confirmed that he did carry out online research before he made his first payment to RTC – and in doing so, he did not see anything wholly untoward. He also says that he, ‘... slipped in a few falsehoods, which he [RTC trader] picked up on, so I felt safe to start.’ With this in mind, and particularly given the fact that the FCA warning concerned was published after Mr L’s payment on 28 September 2017 – I am satisfied he did carry out the necessary due diligence.

If HSBC had asked Mr L what the payments were for and the basic surrounding context, it is likely they would have fully explained what they were doing and that everything had been done over the phone and online with the merchant. HSBC did not need to know for certain whether Mr L 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 obligations under the various regulations and principles of good practice. I consider there were such grounds here and, therefore, that HSBC 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 HSBC had given a warning, I believe that Mr L would have paused and looked more closely into RTC before proceeding. There is no evidence that Mr L 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 binary-options scams and whether or not RTC were regulated in the UK or abroad. They could have discovered they were not and the various regulatory warnings about the risk of binary-options/forex scams (see above). In other words, I am satisfied that a warning from their trusted bank would probably have exposed RTC’s false pretences, causing them to stop ‘trading’ and preventing further 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).

In this case, I do not think that Mr L 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 L could have foreseen the

risk that the company they were dealing with was a scam and the trading account they were viewing was likely to be a simulation.

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

Responses to my provisional decision

Mr L responded to say he agreed with my provisional findings. However, HSBC responded not agreeing with them. Its position, broadly, is:

- RTC were licenced in a foreign jurisdiction at the time of Mr L's payments until 1 January 2018 – so an intervention from HSBC would not have made a difference.
- Mr L's due diligence regarding carrying out research on RTC was inadequate.
- There is online material – pre-dating Mr L's payments – which suggests RTC were operating a scam.

HSBC said the following in its conclusions:

'In conclusion, for the reasons set out above (and in our initial response), we do not accept that we should be liable for [Mr L's] loss. To the extent that any refund should be required, that should be reduced by at least 50% to reflect [Mr L's] contribution towards it.'

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.

Having considered HSBC's response carefully, I am not minded to depart from my provisional findings. I will explain why.

I acknowledge HSBC's submission that RTC were licenced in a foreign jurisdiction at the time Mr L made the payments concerned. However, this does not negate the fact that RTC were not licenced by the Gambling Commission. With that in mind, and when considering intervention, I am of the view that the fact RTC were not licenced by the Gambling Commission supersedes the fact they were licenced in a foreign jurisdiction. Further, when considering the legitimacy of RTC holistically, I place much weight on the FCA warning about them which was published shortly after Mr L's 28 September 2017 payments; and in particular, the fact RTC's licence (in the foreign jurisdiction) was removed thereafter from 1 January 2018.

HSBC says that based on some of Mr L's submissions, he '*... was dishonest towards the scammer in an apparent attempt to catch them out. It would be highly unusual for an individual to behave in that manner unless they harboured suspicions about the merchant.*' I acknowledge that Mr L had some reservations about RTC, however, I am of the view that RTC were able to alleviate Mr L's concerns by using boiler room tactics; methods which HSBC is more than familiar with having dealt with similar complaints of this nature. Further, I am of the view that Mr L's reservations would have been allayed had HSBC intervened on Mr L's first £10,000 payment made on 28 September 2017.

HSBC has referred to an online website which contains negative comments about RTC. HSBC says that this is an example of Mr L carrying out insufficient due diligence, as the comments on the website appear to have been posted before Mr L's payments. Having

considered the website and comments, I do not find them credible – not like, for example, the FCA's warning about RTC – so I will not be taking them into account.

Finally, HSBC appears to be seeking clarification on my view of RTC's jurisdictional status. The Gambling Commission has confirmed that – at the relevant period – regardless of where a firm was based in the world, the firm would require a licence from them if the firm was providing facilities for gambling to consumers in Great Britain online (or through any other means of remote communication). In Mr L's case, RTC provided him with a trading account (a facility for gambling) in Great Britain online where 'bets' were being placed – without the appropriate licence. As there is no evidence to suggest RTC had a licence from the Gambling Commission, I am unable to say they were licenced in this jurisdiction.

Taking all the above points together – I will not be departing from my provisional findings in this matter.

My final decision

For the reasons set out above, my final decision is that I uphold this complaint in part. I therefore direct that HSBC UK Bank Plc:

- Pay Mr L the money he lost – starting from the first £10,000 payment he made to RTC on 28 September 2017 (see above); including any transaction fees (if applicable);
- Pay interest on this amount from the date it was debited from Mr L's account until the date of settlement. The appropriate interest rate should be applied as it appears the source (or at least some) of the money to fund the investment scam came from Mr L's savings account with HSBC UK Bank Plc.
- If HSBC UK Bank Plc deducts tax in relation to the interest element of this award, it should provide Mr L with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 15 September 2022.

Tony Massiah
Ombudsman