

The complaint

Mr D complains that MBNA Limited (MBNA) is refusing to refund him the amount he lost as the result of a scam.

What happened

In my provisional decision sent in April 2023, I said:

“MBNA considered Mr D’s claim under Section 75 of the Consumer Credit Act and concluded no section 75 rights existed because Mr D transferred funds to an account rather than purchased goods or services. This isn’t correct as in exchange for Mr D’s payment, X would have made a series of promises to Mr D to obtain that money – which included the ability to load those funds onto a trading account and withdraw them whenever he wishes.

Whilst I’m satisfied MBNA didn’t appropriately consider Mr D’s section 75 claim, I don’t need to make a finding on section 75 as I’ve first considered whether MBNA should have processed the payments altogether and for reasons I’ll explain, I don’t think it should have.

Was X operating a scam and if so, should MBNA have stepped in to prevent it taking place?

Our Investigator explained that he thought it was unlikely that X was operating a scam as it provided a refund of Mr D’s remaining account balance when he requested a withdrawal. It’s not uncommon in scams like this for consumers to receive refunds as a way of legitimising the scam, so I don’t find this all that unusual because Mr D received back substantially less than he put in.

At the time Mr D made the payments to X alerts had been published on the International Organization of Securities Commissions (IOSCO) Investor alert portal, and this had been available for some time. The IOSCO is a well recognised source and we would expect firms like MBNA to have updated its internal watchlist within one month of the publication of the alert. And because of this, I think MBNA should have intervened at the first payment to X.

MBNA say that at the time of the payments contact was made with Mr D by way of a telephone conversation and a text message before the payments were approved. Due to the passage of time, there is now limited information available about the communication, but I am persuaded these took place.

Even with the above in mind I think it’s unlikely MBNA explained to Mr D that the payments he was making were to a business that it ought to reasonably have suspected as a fraudster based on the adverse IOSCO alerts, and what this meant for the security of the payments he was making. I think if MBNA had made this clear to Mr D he would have at least carried out some research on X before continuing with his investment. For example, MBNA could have directed Mr D to check whether X was licensed (as required) at the time of his payments and he would have likely discovered X were not licensed in the UK or any other jurisdiction – as far as I’m reasonably aware.

So, I think MBNA should have stepped in and had a meaningful conversation with Mr D, and

if it had I think it's unlikely he would have made any payments to X. So, it is responsible for Mr D's loss.

Did Mr D contribute to his loss?

I think this was a sophisticated scam and Mr D couldn't have reasonably foreseen that he was dealing with a scammer. Mr D was able to see balances on his trading account with X, and I don't think he could have reasonably known that the trading balance was likely fake or a simulation – unless prompted by his trusted bank.

Overall, I don't think Mr D contributed to his losses, so I don't suggest the overall settlement be reduced."

I gave both Mr D and MBNA time to respond.

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.

MBNA did respond with further comments. MBNA first explained why it was unable to facilitate a section 75 claim. I appreciate its comments but as I said in my provisional decision this was not the reason the complaint was upheld.

MBNA has mainly focused its response on its belief that it should not have been expected to update its systems to include information recorded on the IOSCO and that the information recorded was not significant enough to cause concerns anyway.

MBNA is aware of our general position on a PSP's 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.

Despite MBNA's comments, considering the law, regulatory rules and guidance, relevant codes of practice and what I consider having been good industry practice at the time, I consider HSBC should fairly and reasonably update its internal watchlist to include information from credible sources within a month of any adverse publication. Credible sources include information published on the IOSCO Investor Alerts Portal.

I appreciate MBNA Limited feel the comments on the portal were limited but the fact the X was on the portal should have raised concerns and triggered a meaningful conversation to take place.

As I said in my provisional decision, I think MBNA should have stepped in and had a meaningful conversation with Mr D, and if it had I think it's unlikely he would have made any payments to X. So, it is responsible for Mr D's loss and the comments MBNA have raised have not changed my decision.

Putting things right

I've explained why I think, if MBNA Limited had done what it reasonably ought to have done, Mr D would not have lost out to this scam.

MBNA Limited should refund Mr D the payments he made to X less the refund he received directly from X.

To compensate Mr D for having been deprived of this money, MBNA Limited should also pay Mr D interest on the loss at 8% simple per year, calculated from the date they were paid, to the date of settlement.

My final decision

I uphold this complaint and require MBNA Limited to put things right by doing what I've outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 17 July 2023.

Terry Woodham
Ombudsman