DRN-4549654

The complaint

Mr H complains that Bank of Scotland Plc (trading as "Halifax") won't refund over £77,000 he lost to an investment scam beginning in May 2017.

What happened

The details of this complaint are well known to both parties, so I won't repeat everything again here. In brief summary, Mr H came across an advert for an investment with '23 Traders' ("the scammer") in May 2017. He signed up and created an account on the scammer's website, where he was then encouraged to invest.

Mr H made the following payments to the scammer using his Halifax debit card:

Date	Payee	Amount
12/05/2017	23 Traders.com	500.00
12/05/2017	23 Traders.com	750.00
12/05/2017	23 Traders.com	750.00
12/05/2017	23 Traders.com	750.00
12/05/2017	23 Traders.com	1,000.00
12/05/2017	23 Traders.com	1,000.00
12/05/2017	23 Traders.com	1,500.00
19/05/2017	23 Traders.com	1,000.00
19/05/2017	23 Traders.com	1,000.00
30/05/2017	23 Traders.com	1,000.00
30/05/2017	23 Traders.com	1,400.00
30/05/2017	23 Traders.com	2,400.00
30/05/2017	23 Traders.com	2,400.00
30/05/2017	23 Traders.com	2,400.00

30/05/2017	23 Traders.com	2,400.00
31/05/2017	23 Traders.com	3,900.00
31/05/2017	23 Traders.com	4,500.00
31/05/2017	23 Traders.com	4,500.00
13/06/2017	*23 Traders.com*	*-1,000.00 withdrawal*
14/06/2017	23 Traders.com	5,000.00
14/06/2017	23 Traders.com	5,000.00
14/06/2017	23 Traders.com	5,000.00
21/06/2017	23 Traders.com	5,000.00
21/06/2017	23 Traders.com	5,000.00
21/06/2017	23 Traders.com	5,000.00
21/06/2017	23 Traders.com	5,000.00
21/06/2017	23 Traders.com	5,000.00
26/06/2017	23 Traders.com	1,000.00
26/06/2017	23 Traders.com	1,000.00
26/06/2017	23 Traders.com	1,000.00
26/06/2017	23 Traders.com	1,000.00
26/06/2017	23 Traders.com	1,000.00
	Total:	**£77,150**

Mr H dealt with several different account managers and was under the impression that he was making good profits. However, he realised he had been scammed when his profits grew to £140,000 and the scammer stopped responding to him.

Mr H complained to Halifax as he said it should have done more to protect him from falling victim to the investment scam. He said it spoke to him on two occasions about the payments he was making, but that it didn't go far enough to warn him of the risks of losing his money.

Halifax refused to refund the money he'd lost, however, as it said he had authorised the payments and confirmed they were genuine. Unhappy with this, he referred the matter to our service.

Our investigator upheld Mr H's complaint. She could see that a warning had been published on the International Organisation of Securities Commission (IOSCO) investor alerts portal about 23 Traders a few months prior to Mr H making his first payment to the scam merchant.

The investigator thought Halifax should have automatically blocked the payment on this basis until it made further enquiries and warned Mr H about the risks of him being scammed. If it had done so, she didn't think he would've incurred any loss, so she recommended that it refund all the money paid to the scammer.

Halifax disagreed. In summary, it said:

- IOSCO is not a platform used by Lloyds Banking Group.
- The IOSCO warning is not sufficiently detailed, and it would not be fair or reasonable to draw a conclusion that a UK based bank would be able to act with such limited context and comprehensive evidence.
- These were debit card payments, and the bank has limited ability to stop an authorised payment.
- The FCA has not issued a warning about 23 Traders.
- No consideration has been given to the level of due diligence conducted by Mr H prior to making the payments.

As Halifax disagreed, the matter was escalated to me to determine. I issued my provisional decision on this complaint in December 2023. I said I was minded to uphold it and set out the following reasoning:

> *I am satisfied that 23Traders 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 H. I've concluded this because:*
>
> - *Prior to May 2017 (i.e. at the time of these disputed transactions), and reflecting the risky nature of such products, binary-options traders operating in the UK were required to be regulated by the Gambling Commission — whereas 23Traders were not. Nor were they regulated 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.*
> - *On 23 January 2017, a warning about 23Traders was placed on the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"). The Danish Financial Supervisory Authority reported that they were offering financial services in its jurisdiction without authorisation. This is another potential indicator of dishonest intentions.*
> - *There are several reports in the public domain—e.g. foreign press and online forums—stating that 23Traders 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.*
>
> *I'm satisfied the merchant was therefore likely to have been operating a scam, so I've considered whether Halifax did enough to help prevent Mr H from the risk of financial harm.*

Halifax says that all the payments made to the scam merchant were Visa debit card payments. It says it is legally required to honour Mr H's mandate and ensure the payments were credited in the receiving account by the next business day.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2009) and the terms of Mr H's account is that he is responsible for payments he's authorised himself. And, as the Supreme Court has recently reiterated in Philipp v Barclays Bank UK PLC, banks generally have a contractual duty to make payments in compliance with the customer's instructions.

In that case, the Supreme Court considered the nature and extent of the contractual duties owed by banks when making payments. Among other things, it said, in summary:

- *The starting position is that it is an implied term of any current account contract that, where a customer has authorised and instructed a bank to make a payment, the bank must carry out the instruction promptly. It is not for the bank to concern itself with the wisdom or risk of its customer's payment decisions.*

- *The express terms of the current account contract may modify or alter that position. For example, in Philipp, the contract permitted Barclays not to follow its consumer's instructions where it reasonably believed the payment instruction was the result of APP fraud; but the court said having the right to decline to carry out an instruction was not the same as being under a duty to do so.*

In this case, Halifax's January 2017 terms and conditions gave it rights (but not obligations) to:

- *Refuse any payment instruction if it reasonably suspects it relates to fraud or any other criminal act.*

- *Delay payments while fraud prevention checks take place and explained that it might need to contact the account holder if Halifax suspects that a payment is fraudulent. It said contact could be by phone.*

So, the starting position at law was that:

- *Halifax was under an implied duty at law to make payments promptly.*

- *It had a contractual right not to make payments where it suspected fraud.*

- *It had a contractual right to delay payments to make enquiries where it suspected fraud.*

- *It could therefore refuse payments, or make enquiries, where it suspected fraud, but it was not under a contractual duty to do either of those things.*

Whilst the current account terms did not oblige Halifax to make fraud checks, I do not consider any of these things (including the implied basic legal duty to make payments promptly) precluded the bank from making fraud checks before making a payment.

And, whilst Halifax was not required or obliged under the contract to block payments and make checks, I am satisfied that, taking into account longstanding regulatory expectations and requirements and what I consider to have been good practice at the time, it should fairly and reasonably have been on the look-out for the possibility of fraud and have taken additional steps, or made additional checks, before processing payments *in some circumstances – as in practice all banks, including Halifax, do.*

Overall, taking into account the law, regulators rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider Halifax 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 that its customers were at risk of fraud (among 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.*

- *In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, or provided additional warnings, before processing a payment – as in practice all banks do.*

- *Have been mindful of – among other things – common scam scenarios, the evolving fraud landscape (including for example, binary options and forex scams) and the different risks these can present to consumers, when deciding whether to intervene.*

Should Halifax have fairly and reasonably made further enquiries before it processed Mr H's payments?

It isn't in dispute that Mr H authorised the disputed payments he made to 23Traders. The payments were made by debit card using his legitimate security credentials provided by Halifax, but I've thought about whether the bank should have reasonably intervened in any of these payments.

As explained by the investigator, I'm satisfied it was considered good industry practice for firms to have updated watch-lists with types of scams and potential fraudsters and for those watch-lists to be updated and communicated internally to staff within one month of an alert being posted by the FCA or IOSCO (International Organisation of Securities Commission).

Halifax has argued that the IOSCO investor alerts portal is not a platform used by the Lloyds Banking Group. But that does not mean it can reasonably ignore it if it has information that could help protect its customers from financial harm, particularly as it had been identified by the FSA (the predecessor to the FCA) as a valuable source to achieve this aim.

In the FSA's thematic paper of June 2012 "Bank's defences against investment fraud: Detecting perpetrators and protecting victims" the regulator indicated that it was good industry practice for firms to use the Investor Alerts portal of the IOSCO website to build 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.

In light of this, I don't consider it's unreasonable to expect Halifax to take account of the IOSCO investor alerts portal. A regulated firm has always been obliged, if only as a matter of good practice, to take account of alerts published by the regulators. It is neither onerous nor unfair for a bank to maintain a watchlist of potentially fraudulent or illegally operating payees; nor to pause any payments directed to such persons rather than *simply execute the instructions of lay clients with less knowledge and expertise.*

Halifax has also argued that there is no FCA warning about 23Traders, and that the warning posted on IOSCO is ambiguous and does not contain any information to suggest the merchant is operating a scam. However, most warnings on the FCA watchlist also do not go as far as to say a company is a fraudulent or operating a scam. It will often say it is offering services within the UK when it isn't authorised to do so, and it is this that can often indicate the company may be operating a scam. And this is precisely the sort of warning that was published on IOSCO about 23Traders.

I appreciate the IOSCO warning was referring the to the merchant offering services within Denmark when it isn't authorised to do so. But this should've still been enough information for Halifax to update its watchlist with, as it is not unreasonable to expect a bank that regularly updates its internal alerts to include information about payees who had tried to carry out regulated activities without permissions. Based on this information, Halifax had constructive if not actual notice that the payee might not be a legitimate merchant. I'm therefore satisfied it would have been reasonable for it to have automatically paused any payments being made to 23Traders, pending further enquiry.

In this case, the IOSCO warning about 23Traders was published on 23 January 2017. This was around four months prior to the first scam payment being made on 12 May 2017. Whilst the regulator gave no specific timeframe in which a watch-list should be updated, as I've outlined above, it is not unreasonable in my view to expect a bank to update its watch-list and communicate to staff within one month of an alert being posted by the FCA or IOSCO.

So, given the warning had been published for around four months by the time Mr H made his first payment to the scammer on 12 May 2017, Halifax ought to have automatically blocked it as I'm satisfied there were reasonable grounds to suspect a fraud or scam, and therefore justify an intervention (such as phoning Mr H in order to ask questions about the nature and purpose of the payments).

Even if the IOSCO warning hadn't been published at the time, the frequency of the payments made on 12 May 2017 should in themselves had alerted Halifax to the risk of harm and prompted it to make further enquires, as Mr H made seven separate payments to the same payee in one day. This was a highly unusual and uncharacteristic pattern of spending for Mr H compared with his recent history on the account — and was an indicator that something untoward might be happening (including, for example, an attempt to circumvent the anti-money laundering requirements by making a number of smaller payments in short succession to the same payee.

It also appears that Halifax did have some concern about the payments Mr H was making in any event, as I can see that it requested him to visit his local branch to confirm the payment was genuine. This reinforces my view that there were reasonable grounds for suspicions that could and should have been properly acted on. It's not clear what questions were asked of Mr H however, as the notes about this interaction are limited, and it only sets out that he confirmed the payments were genuine. As a result, I don't think there's enough to suggest that Halifax's intervention went far enough here, because simply asking if the payments were genuinely being made by him is not a proportionate intervention when a merchant could potentially be operating a scam.

<u>If Halifax had made further enquiries before processing the payments, would that have prevented the losses Mr H incurred?</u>

At the time the first payment was made, Halifax ought to have had a good understanding *of how binary options scams commonly work. Indeed, there was enough information in the public domain (see, for example, 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"; City of London Police's October 2017 report noting victims had lost 'over £59m' to binary options fraud; Visa's Business News publication of October 2017 where it expanded its chargeback scheme rules to cover binary options and investment disputes arising from merchants often unlicensed and unregulated deploying 'deceptive practices'; and so forth)*

If, instead of merely confirming Mr H's identity and intention to pay, Halifax had fairly and reasonably carried out its due diligence and asked Mr H about the payments, I've no reason to doubt that he would have explained what he was doing. I've thought carefully about whether the kind of questions that I believe ought fairly and reasonably to have been asked by Halifax and whether they would have made a difference. And on the balance of probabilities, I think they would have.

Whilst I accept Halifax had no duty to protect Mr H from a poor investment choice, or give investment advice, it could have provided information about the steps a customer can take to ensure, as far as is reasonably possible, that they are dealing with a legitimate person – such as checking the payee was authorised with the FCA. And it could have drawn on its own knowledge and information that was within the public domain about binary options scams and the potential for fraud and provided Mr H with a scam warning.

It could have also invited him to carry out further research on the company by looking at the IOSCO alert and the various regulatory warnings about the risk of binary-options scams. Or, it could have simply told him to look at other testimonials online, which would have revealed several negative warnings from other traders that had been published prior to him making his first payment. However, there is no evidence that Halifax provided Mr H with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he was making. It was therefore a missed opportunity to prevent the scam.

And while Halifax may not have known for certain whether Mr H was dealing with a fraudulent binary-options trader, it 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 traders.

Even if Mr H had not worked out that this was a scam, I think it's likely that a warning from Halifax would have prompted greater research, which would have alerted him to the common issues arising in relation to binary options scams, which in turn would have revealed the truth behind the supposed broker's representations. This would have probably stopped Mr H in his tracks. So, but for Halifax's failure to act on clear triggers of potential fraud or financial harm, Mr H probably wouldn't have lost his money. I therefore intend directing Halifax to refund the money he lost to the scam.

<u>*Contributory negligence*</u>

There is a general principle that consumers must take responsibility for their decisions, and I am mindful of the law relating to contributory negligence and the impact a finding of contributory negligence may have to reduce the damages recoverable by a claimant in court proceedings.

I have duly considered whether Mr H should bear some responsibility by way of *contributory negligence, and I'm currently minded to find that he should in the circumstances of this case.*

Mr H has said that he checked reviews of 23Traders online and was saw positive reviews from other clients, which reassured him the merchant was genuine. However, having carried out my own research, I can see there were also many negative reviews that had been posted online from as early as 2016. So, if he was able to find the positive reviews, there's seemingly no reason why he wouldn't have been able to find the negative reviews as well of people warning it was a scam. So, it leads me to believe that he either saw these reviews and chose to ignore them, or that he failed to carry out sufficient due diligence. Either way, I'm satisfied he should fairly and reasonably share responsibility for his loss in these circumstances, so I intend asking Halifax to reduce his compensation by 50%.

I note that Mr H's representatives have said he was vulnerable at the time due to having suffered a bereavement. But while I appreciate he may have been going through a difficult time, I don't consider his circumstances amount to him being vulnerable, or that he would have been prevented from being able to protect himself from falling victim to this scam. Therefore, this has not altered my opinion that Mr H should share responsibility for his loss.

<u>Recovery</u>

I've also thought about whether Halifax could have done more to recover the funds through raising a chargeback. However, in this instance, Mr H did not dispute the payments within 120 days, so I don't think the bank has acted unreasonably by failing to pursue a chargeback claim in these circumstances.

I invited further comments and evidence from Mr H and Halifax. Both parties responded accepting 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.

Given that both parties have accepted my provisional findings and had nothing further to add, I see no reason to depart from the conclusions set out above.

My final decision

For the reasons given above, I uphold this complaint and direct Bank of Scotland Plc (trading as Halifax) to:

- Refund 50% of the payments Mr H made to 23 Traders – totaling £38,575
- Pay 8% simple interest per year on each payment from the date of loss until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 7 February 2024.

Jack Ferris
Ombudsman