

Complaint

Mr H is unhappy that Tor Currency Exchange Limited ("TorFX") didn't reimburse him after he fell victim to a scam.

Background

In early 2022, Mr H fell victim to an investment scam. He'd been researching potential investment opportunities and found one online that interested him. He made an initial inquiry and, shortly afterwards, was contacted by an individual who invited him to invest in a bond which offered an attractive rate of return.

He was told that he was investing in two separate publicly listed companies by purchasing bonds. Both bonds had a term of two years – the claimed yield on the bonds was 7.375% and 9.25% respectively. Unfortunately, Mr H wasn't dealing with a legitimate company but a fraudster. He was told that, in order to invest, he'd need to transfer funds to an account with TorFX. Mr H didn't realise it at the time, but an account was set up with TorFX in his name using the personal information he'd shared with the fraudster. As part of the account opening process, the fraudster spoke with an employee of the business and pretended to be Mr H.

Mr H transferred his funds into a TorFX account that was in his name, but under the control of the fraudster. The fraudster used that control to transfer his funds on to another account. In total, Mr H transferred £340,000 to the account and the fraudsters were able to transfer on £170,000 of this. The rest was returned to Mr H.

Around the time Mr H was weighing up whether to proceed with his investment, he received a letter in the post from TorFX regarding the new account that had just been set up in his name. From the perspective of TorFX, Mr H was simply a new customer who had knowingly set up a new account. On 22 March 2022, he called TorFX to ask about this letter and to get advice on whether he should be concerned about this investment opportunity. I've transcribed the relevant sections of the call below:

- C: I've got a letter this morning saying I've been registered with you, which is fine... erm, I'm just about to do a transaction to [investment company] ... do you do a lot of business with them? I want to make sure that the people I'm dealing with are kosher and it's not a scam or anything like that.*
- B: I'm not sure of the background of your requirements ... so you're sending money to [investment company]?*
- C: Yeah, I've just been dealing with a guy called [Mr T] ... and they've sent me some info on the bonds that they want me to buy and, erm, I just wanted to know if you'd ever heard of that person, [Mr T].*
- B: No, I can't say that I have but I would certainly encourage you to conduct your own due diligence there and make sure that you're happy with who you're sending the funds to. We deal with third-party property companies on a daily basis but there are so many of them about.*

[...]

C: *Who's opened the account on my behalf? I mean, I'm just interested to know how they've opened the account on my behalf.*

B: *So you you've not opened this account?*

C: *Well, I did say that I wanted to do the transactions and they sent me a letter saying 'you can now proceed with payments to settle your account ... details for you to authorise payment are ... account name, which I'd never heard of before, Tor Currency Exchange Limited ... that's yourselves, obviously*

[...]

Yeah, it's [the account] been opened, don't know how it was opened.

B: *So, did you not open the account yourself?*

C: *No, I didn't open it with Tor Currency Exchange Limited. It's the first I've heard of them yesterday when I got the letter.*

B: *Right, ok ... so nobody should really be able to open an account on your behalf with us.*

C: *No, that's what I'm thinking ... yeah, I don't know how they've managed to open it ...*

The employee of TorFX agreed to look into things and said he'd come back to Mr H once he'd done so. As far as I understand it, there was no follow up call. The next conversations that TorFX had regarding this account were with the fraudster.

Once Mr H realised he'd fallen victim to a scam, he complained to TorFX. It looked into things, but it didn't agree to uphold his complaint. It said:

- The call handler told Mr H that he needed to conduct due diligence and ensure he was happy to transfer his funds. It said he confirmed that he would undertake the necessary due diligence before taking any further action.
- The contact number Mr H had for the scammer was associated with a different company entirely – something which would've been apparent if he'd conducted an online search for it. The company in question was the subject of a scam warning posted on the website of the Financial Conduct Authority (FCA).
- TorFX's services are typically used to send large sums of money. Transferring greater sums in one go can often lead to a more favourable exchange rate. In other words, the mere size of the payment wouldn't have been a useful or reliable fraud indicator.

Mr H was unhappy with the response he received from TorFX and so he referred his complaint to this service. It was looked at by an Investigator who upheld it. Broadly speaking, the Investigator concluded that the call on 22 March 2023 put TorFX on notice of the risk that Mr H might be about to fall victim to a scam. He said it should've taken steps to protect him from that risk and it didn't. As a result, he thought it needed to reimburse his losses.

TorFX didn't agree with the Investigator's opinion. It said:

- TorFX shouldn't be liable unless the police have confirmed that Mr H was a victim of fraud.
- Mr H failed to carry out basic due diligence and should've sought financial advice before making such a large investment.
- Mr H didn't register any alarm about the fact that the account was set up on his behalf. He accepted that his agent had set it up for him and was happy to proceed on that basis.
- The Investigator had said that it should've called Mr H on the number he used to contact them on 22 March. However, it said that it would only ever use a contact number other than the one on the customer's records in exceptional circumstances.
- Mr H should've checked the register of companies at Companies House. If he'd done so, he'd have found that the company he believed he was investing with had only been incorporated in January 2022. This should've been a cause for concern.
- Mr H transferred funds to his TorFX account from his account held with another bank. TorFX argues that that bank should be primarily liable for his losses.
- The recent judgement of the Supreme Court in the case of Phillip v Barclays Bank vindicates its view that TorFX's primary obligation was to carry out client instructions and the onus was on Mr H to carry out checks to protect himself from fraud.

As TorFX didn't agree with the Investigator's view, the complaint has been passed to me to consider.

Findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I issued a provisional decision on this complaint on 7 March 2024. I wrote:

Jurisdiction

Before I go on to set out any substantive findings, I must first be satisfied that I have the power to consider the complaint. The rules that define the powers of this service are known as the DISP rules and can be found on the FCA website.

DISP 2.7.1R says that this service can only consider a complaint if it is brought by or on behalf of an "eligible complainant." DISP 2.7.6R goes on to say that, in order for a person to be an eligible complainant, their complaint must arise from matters relevant to a particular type of relationship with the firm responding to the complaint.

There are around twenty of these and I'm satisfied the one listed at DISP 2.7.6R (2B) is applicable here. This says that a valid relationship between the consumer and the firm includes one where "the complainant is a person that has transferred funds as a result of an alleged authorised push payment fraud and [...] the respondent is (or was) involved in the transfer of funds ..."

TorFX is an authorised electronic money institution. The regulator, the FCA, has confirmed that all e-money firms "must comply with legal requirements to deter and detect financial crime, which includes money laundering and terrorist financing."

Although TorFX was operating an account that was used to receive and move on fraudulently obtained funds, it doesn't automatically follow that Mr H is entitled to a refund or that it reasonably failed to prevent his loss. In circumstances such as these, where there is no direct relationship between Mr H and TorFX (aside from the fictitious one that was fabricated by the fraudster) I can only ask it to refund his loss if I think it has failed in such a way that it can fairly and reasonably be concluded that its act or omission was the cause of that loss.

I've taken into account the information that was inadvertently shared with an employee of TorFX on 22 March 2022. That call is partially transcribed above. I've also kept in mind that the terms and conditions of the account that received Mr H's funds included the following term, which I've edited for brevity:

"19.2 TORFX may stop or suspend any Onward Payment (in whole or in part) and/or the Client's use of the Payment Services and the Online System and/or the API including cancelling all Personalised Security Credentials if it has reasonable grounds for doing so relating to ... the suspected unauthorised or fraudulent use of the Online System, the API, the Personalised Security Credentials or an Onward Payment ..."

In other words, TorFX reserved for itself under the terms of its agreement with customers the right to stop payments from being made or its accounts being used where there is a suspicion of fraud. I'm persuaded that the contents of the call were sufficient to put it on notice that there was an elevated risk of fraud associated with this account. The call handler told him that nobody should be opening an account on his behalf and Mr H was clear that he was not involved in setting it up. He was told that someone would look into things and call him back. However, the evidence I've seen suggests no follow-up call took place.

I accept that Mr H didn't express alarm at learning that someone had set up an account in his name without his involvement. I think the significance of that may not have been obvious to him at the time. Instead, I think Mr H came across as being confused as to whether the arrangement was above board. It's also clear that he had a background concern about the prospect of falling victim to a scam. The call handler told him to carry out due diligence before transferring his funds. From what Mr H has told us, he called the number for the scam company to inquire as to whether the person he'd been speaking to was a genuine employee. He was told that he was.

From Mr H's perspective, he had therefore taken a basic step to protect himself from the risk of a scam – unfortunately, he didn't have enough knowledge to know what sort of checks he'd need to carry out to protect himself from financial harm from fraud. While I accept that TorFX is unlikely to have the same level of exposure to scams as a large high-street bank, there was still an asymmetry of knowledge between it and Mr H. Asking a layperson to conduct due diligence isn't a helpful piece of advice. Ultimately, I'm persuaded TorFX ought fairly and reasonably to have been able to arm Mr H with enough information about the risk of financial harm from fraud for him to have understood what steps he'd need to take in order to determine the investment opportunity was legitimate. For example, in responding to the Investigator's view, TorFX has set out steps Mr H could have taken. These steps were not recommended to him at the time he asked whether the investment was "kosher" and when TorFX understood Mr H hadn't set up the account.

TorFX has argued that it would only communicate with a customer using contact details other than those on its file in exceptional circumstances. But I would argue that these circumstances were exceptional – Mr H had shared information with TorFX

that suggested something was not above board regarding his account. Large transactions into and from that account then followed – I'd argue that protecting a customer from a six-figure fraud loss would meet any reasonable person's threshold for exceptional circumstances.

This would not have been a particularly difficult scam to uncover once that information (i.e., that Mr H had no involvement in the creation of the account) became known to TorFX. Identifying potential discrepancies between phone numbers or email addresses wouldn't have been a time-consuming task and would've enabled TorFX to appropriately warn Mr H. Overall, I'm persuaded that it ought to have recognised the potential for misuse of the account, investigated and warned him appropriately. If it had done so, it would've prevented him from making any transfers to the account and putting his money under the control of fraudsters.

Other issues

I've also considered whether Mr H can be considered partially responsible for his own losses. In doing so, I've taken into account what the law says about contributory negligence but also kept in mind that I'm required to decide this case based on what I consider to be fair and reasonable in all the circumstances. Having done so, I don't think Mr H can be said to have acted carelessly here and so I don't intend to make any deduction for contributory negligence. The scammers were able to present themselves as a plausible investment company with a professional looking website and credible promotional literature. Furthermore, while the return that Mr H was promised on his money was higher than one would typically expect from a bond marketed to a retail investor, it wasn't so high that it ought to have made him suspect it might not be a legitimate investment.

TorFX has argued that Mr H should've sought third-party professional financial advice before making such a large investment. However, he believed he was investing via a third-party and purchasing bonds offered by publicly listed companies. Unfortunately, from Mr H's perspective, he was already dealing with what he thought was a trustworthy financial advisor.

TorFX has speculated about what Mr H would've found if he'd carried out more online research – for example, looking up the company on the Companies House register. It says that he would've found the company was only incorporated in January 2022. I think there's some confusion here – there are several companies with similar names on the Companies House register. The closest match to the one Mr H believed he was dealing with was incorporated in the 1950s and is a subsidiary of a company that dates back to the 19th century. It operates from the same postal address as the scammers used on their promotional literature. It's a legitimate company which continues to trade today, so it seems likely that the fraudsters imitated a genuine registered company to diffuse the risk of potential victims looking them up online.

I also don't think it's reasonable to say that Mr H should have no entitlement to reimbursement unless there is confirmation by the police that he's a victim of fraud. Policy, operational and financial constraints often mean that only a small proportion of scams are substantively investigated by the police. That doesn't mean that Mr H is a self-declared victim of fraud. I have to be persuaded that the available evidence shows that it's more likely than not that he is a victim of fraud. I don't think this is a particularly contentious point on the facts of this case. The account was set up by a third party without Mr H's knowledge and there are multiple recordings of conversations with an individual who isn't Mr H but is pretending to be him. In

addition to that, Mr H was clearly comfortable with reporting the matter to the authorities since it seems he's discussed it with Action Fraud and the National Fraud Intelligence Bureau has contacted TorFX to request information about his case.

TorFX has argued that the firm providing Mr H's bank account should be primarily responsible for his losses here. From what Mr H has told us, he hasn't made a separate complaint about that bank. It's true that a bank may be in an advantageous position when it comes to fraud detection – it has a far greater amount of data on typical customer account usage which makes it more straightforward for it to spot activity that's unusual or out of character. However, I've not found that TorFX needed to have a wealth of data on Mr H's spending patterns to allow it to spot the risks associated with this account activity. The information that should've allowed it to identify that risk came into its possession fortuitously and it didn't act on it.

Finally, I've take into account the significance of the Supreme Court's judgement in the case of Phillip v Barclays Bank and its clarification of the Quincecare duty. I've considered TorFX's representations on that case carefully, but I'm not persuaded that they affect the outcome here. As set out above, Mr H wasn't a customer of TorFX. He is only able to bring a complaint because TorFX was the recipient of funds that he transferred in connection with an authorised push payment fraud. The onward transfer of his funds was carried out by the fraudster. In this case, I'm satisfied that TorFX ought to have recognised the risk that Mr H's account wasn't under his control and should've done so before he made the transfer. The judgement in Phillip makes it clear that a bank, if put on inquiry, should not act without checking that a payment instruction from its customer is a valid one. I'm satisfied that TorFX had been put on inquiry here for the reasons that I've set out above.

I explained that I intended to uphold Mr H's complaint and ask TorFX to reimburse his losses and add 8% simple interest per annum to that sum.

TorFX didn't agree with the outcome proposed in the provisional decision. It said it doesn't agree that it was put on inquiry. It considers it was reasonable for it to accept the instructions they received as coming from the genuine customer. It also reiterated its point that, in the absence of a police investigation, there's no proof that Mr H is a victim of fraud. It also raised wider public policy concerns about the impact of firms such as TorFX being required to reimburse victims in circumstances such as these. It says it means the police are unlikely to investigate such cases and leaves firms vulnerable to customers acting in bad faith and colluding with fraudsters in the hope of being reimbursed by this service.

I've considered these additional representations but I'm afraid I'm not persuaded to depart from the position I set out in my provisional findings. Fundamentally, I think the risk that Mr H was falling victim to a scam was sufficiently clear to TorFX following the phone conversation discussed above. If it had responded to the information it received in that call differently, the loss could've been prevented.

I'm sympathetic to some of the other concerns TorFX has expressed. I'm equally mindful of the risk posed by an errant customer fabricating a claim that they've fallen victim to fraud. In this case, as with all similar cases referred to this service, I have to be persuaded that Mr H has fallen victim to a scam. The relevant evidential standard that this service applies in these cases is the balance of probabilities – i.e., whether it is more likely than not that the customer has fallen victim to a scam. I won't unnecessarily reiterate the reasons I felt that standard had been met. But the fact that Mr H was willing to report what had happened to the police was one of the factors that persuaded me he was, on balance, a victim of fraud. I don't know whether any meaningful police investigation into this scam has been carried out. Unfortunately, that's a matter that is outside of Mr H's control and I don't think that it affects

the outcome here.

Final decision

For the reasons I've explained above, I uphold this complaint.

If Mr H accepts my decision, Tor Currency Exchange Limited needs to refund the money he lost to the scam. It also needs to add 8% simple interest per annum to that sum calculated to run from the date the payment was made until the date any settlement is paid.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 25 April 2024.

James Kimmitt
Ombudsman