

The complaint

Mr M complains that NewDay Ltd won't reimburse money he lost when he says he fell victim to a binary options investment scam.

What happened

Mr M came across a binary options company called 72 Option online. They guaranteed profits and explained investing with them would help improve his credit file. He paid them two payments totalling £3,000 on 21 November 2017. Mr M realised there was a problem when he tried to withdraw his money and was told that he couldn't until he met a certain trading volume. He says this was explained to him at the point of sale.

He approached NewDay for assistance with recovering his money. It processed chargeback claims on Mr M's behalf and temporarily refunded the disputed payments. The chargeback claims were defended by 72 Option. NewDay tried to contact Mr M for further information but didn't receive a reply so decided to hold him liable for the transactions. Mr M referred his complaint to this office.

One of our investigators felt that NewDay should return the payments plus interest. He said based on good industry practice, NewDay should have identified 72 Option as scammers when the initial payment was attempted. He felt that NewDay should treat the payments as though they didn't happen and pay interest to Mr M.

NewDay didn't reply so the case has been passed to me for determination.

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.

NewDay 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.

It is common ground that the disputed payments were 'authorised' by Mr M for the purposes of the Payment Services Regulations 2009 ('the Regulations'), in force at the time. This is because they were made by Mr M using the legitimate security credentials provided to him by NewDay.

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 NewDay 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.

I'm satisfied 72 Option were scammers for the reasons explained by our investigator. 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 International Organization of Securities Commissions (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.

There were several regulator warnings published about 72 Option on International Organization of Securities Commissions (IOSCO) Investor Alert Portal dating back to December 2016 – which is more than a month prior to Mr M's first payment to them. I'm satisfied Mr M's initial payment should have triggered NewDay's fraud detection systems. Therefore, it would have been reasonable for it to have properly questioned Mr M before processing the payment to satisfy itself that all was well.

If NewDay had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that Mr M would have explained what he was doing. In such circumstances, whilst the bank had no duty to protect him from a bad bargain or give investment advice, it could have explained to him the very high risks of getting involved with unregulated and unlicensed binary options dealers. It could have also explained its own customer experiences with unregulated and unlicensed high-risk investment traders 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 trading, 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; 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).

There is no evidence that NewDay intervened in the payments to 72 Option. It was a missed opportunity to intervene.

If NewDay had asked Mr M what the payment was for and the basic surrounding context, it is likely he would have fully explained what he was doing and that everything had been done over the phone and online with his ‘broker’. NewDay did not need to know for certain whether Mr M was dealing with a fraudulent high risk investment 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 NewDay 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 forex and binary options dealers.

If NewDay had given a warning, I believe that Mr M would have paused and looked more closely into 72 Option before proceeding. There is no evidence that he 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 whether or not 72 Option were regulated in the UK or abroad. He could have discovered they were not and the various regulatory warnings about the risk of unregulated investment scams (see above). In other words, I am satisfied that a warning from his trusted bank would probably have exposed 72 Option's smoke and mirrors, causing him not to 'invest' and preventing any losses.

Even if he had not worked out that this was a scam, it is likely that a warning would have alerted him to the common issues arising in relation to binary options and unregulated high risk investment dealers, which in turn would have revealed the truth behind his supposed broker's (mis)representations — i.e. that they were not really regulated UK investments but highly-risky bets more akin to a wager in which the broker must lose if he is to win. So before Mr M's payments were actually processed, he would probably have stopped in his tracks. But for NewDay's failure to act on clear triggers of potential fraud or financial harm, Mr M would probably have not lost any money.

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

My final decision

For the reasons set out above, I uphold this complaint and required NewDay Ltd to:

1. Refund all the payments made to 72 Option totalling £3,000 and rework the account so that all interest and charges caused by those payments are refunded.
2. Pay interest to Mr M on any sums repaid towards the credit card balance arising from those payments, interest or charges, from the date they were paid to the date of settlement. If NewDay is required to deduct tax from the interest it should send Mr M a tax deduction certificate so he can claim it back from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 26 April 2022.

Dolores Njemanze
Ombudsman