

The complaint and what happened

Ms L complains NewDay Ltd won't refund the money she lost when she fell victim to a scam.

The full details of this complaint are well known to both parties, so I won't repeat them here. Instead, I'll summarise the key points and focus on giving my reasons for my decision:

- In 2018, Ms L came across a social media advert for a merchant called 365 Markets, which were purporting to offer investment services. She submitted her details and an agent got in touch. She was directed to deposit \$250 to start trading, which she was told could produce around \$3,000 profit. She was persuaded to pay a further \$1,000 to maximise her profits. She says this was traded to make around £5,000 profit. Then, on 5 November 2018, she paid £900.50 from her NewDay credit card, also incurring a £24.76 transaction fee. Please note, the other payments were made from different accounts.
- Following this, the profits Ms L thought she'd made were largely wiped out, and the merchant tried to pressure her to make further deposits to recoup this. She asked to withdraw her funds. She was initially ignored, then told to pay c.£850 (from another account) as a withdrawal fee. But 365 Markets only returned around £1,000, despite the account showing an available balance around £2,900.
- Suspecting it was a scam, Ms L reported the matter to NewDay. It said the payment had flagged as suspicious, but she'd confirmed that she wanted to proceed. And there were no chargeback rights under the relevant scheme provider (Mastercard) for investment transactions. So it wouldn't refund her.
- Our investigator upheld the complaint. They weren't satisfied NewDay did enough in response to the risk it identified. If it had, they thought Ms L's loss could have been prevented.

It's been over four months since our investigator upheld the complaint. As NewDay still hasn't confirmed its response, the matter has been referred 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.

Having done so, I'm upholding this complaint for the following reasons:

- It's not in dispute that Ms L was scammed. For completeness, on balance, I'm satisfied she was. She's provided emails showing she was dealing with 365 Markets, which the FCA have issued a warning about for operating without the required authorisation. That indicates they were operating illegally, probably with dishonest intentions – as legitimate firms tend to comply with regulatory requirements. And the behaviour Ms L has reported – such as that they controlled her accounts, refused her withdrawal requests, and the level of initial profit – is indicative of a scam.

- It's also not in dispute that Ms L authorised the transaction. So the starting position is that she's liable for the resulting loss. But there are some situations where we believe that banks—taking into account relevant rules, codes and best practice—ought to have identified a fraud risk, so should have looked at the wider circumstances surrounding the transaction before making a payment.
- Here, we know NewDay *did* identify the payment as suspicious. So the key question is whether it responded proportionately to the risk it identified. We haven't been given a record of the contact about this – NewDay has simply told us Ms L confirmed “*the transaction was genuine and that she wanted it to be authorised*”. Based on the information it's provided about why the payment flagged and NewDay's response, I'm not persuaded it did enough. A key feature of these scams is the consumer is tricked into making the payment, believing the investment to be genuine. So checking she knew about the payment wasn't enough for NewDay to satisfy itself all was well. I think it should have looked into the circumstances further.
- If NewDay had asked Ms L relevant questions, I think she would have explained she was acting on the instructions of 365 Markets – which had an active FCA warning published against them. And from what she's told us, there were some other signs I'd reasonably have expected the bank to realise could indicate a scam. Such as that she found it via a social media advert, how they were controlling the trading account, and the level of profit they led her to expect. I've seen nothing which makes me doubt that Ms L would have heeded a firm warning from her bank that this sounded like a scam – breaking the spell and preventing her from proceeding.
- I'm conscious the payments didn't clearly show on the statement as going directly to 365 Markets. But Ms L has told us they did, and I can't see NewDay has disputed this. In any event, it's clear that, from Ms L's perspective, she was paying 365 Markets – so that's who she was likely to have mentioned in the call. As set out above, but for NewDay's failure to make appropriate enquiries, it would have been on actual notice that Ms L was likely going to suffer financial harm from fraud. The loss therefore ought to have been within the contemplation of, and foreseeable to, NewDay. So I'm persuaded it's fair and reasonable to hold it liable for this.
- I've also considered whether Ms L was partly to blame for what happened. I don't think she reasonably foresaw the risk this payment was part of a scam. As a layperson, she was unfamiliar with these types of scams and their warning signs, and there's nothing to suggest she knew to check the merchant's details on the FCA's warning list. She was persuaded by her contact with 365 Merchants, and the sophisticated techniques it used to appear as though she'd made a profit – likely to convince her to deposit more. She didn't experience any problems until after she made this payment. Given the sophisticated nature of the scam, I'm satisfied there was no contributory negligence.
- I've found that, but for NewDay's mistake, Ms L wouldn't have made this payment. So I don't need to consider if it could have recovered this.

My final decision

For the reasons given above, my final decision is that I uphold this complaint. I require NewDay Ltd to:

- Refund Ms L for the £900.50 payment, and put her credit card account in the position it would have been in had the payment never been made – including any interest and charges applicable to those (such as the transaction fee); and

- Add 8% interest on any repayments Mr G made towards the credit card balance in respect of those transactions, from the date of the payments to the date of settlement, less any lawfully deductible tax.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms L to accept or reject my decision before 1 June 2022.

Rachel Loughlin
Ombudsman