

The complaint

Mr S complains that NewDay Ltd (“NewDay”) has refused to refund transactions he believed he was making to a legitimate binary options company called Golden Markets, which he says turned out to be fraudulent. He made these transactions using his NewDay (Debenhams) Mastercard credit card.

What happened

The circumstances of this complaint are well known to both parties, so I will not repeat them all again here in detail. But I will provide an overview of events below.

In short, Mr S has told our service, amongst other things:

- Golden Markets contacted him and, ‘... convinced me that I would make very big profits if I deposited with them.’
- He made several payments to his Golden Markets’ ‘trading account’ using his NewDay (Debenhams) Mastercard credit card.
- He realised Golden Markets were operating a scam when, ‘... they had not ever loaded my deposits onto the financial markets. As they could not. They have no license or regulation and therefore they could never have invested the money.’
- He attempted to withdraw his money but could not: ‘I no longer can access any account. They have run away with my money.’

Mr S asked NewDay to recover the money he lost. As this did not happen, he raised a complaint which was also referred to our service.

In short, NewDay says that Mr S’s payments are not covered by chargeback or section 75 of the Consumer Credit Act 1974.

One of our investigators considered Mr S’s complaint and upheld it in part. She thought that some of the payments concerned were covered by section 75, and so NewDay should refund these sums to Mr S.

Mr S accepted the investigator’s findings, but NewDay did not respond. So, the complaint has been passed to me to make a decision

On 22 March 2022, I issued a provisional decision upholding this complaint in part. For completeness, I repeat my provisional findings below:

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

From what I can see, Mr S, NewDay and the investigator: have all set out different amounts in terms of the payments concerned – including different names of the merchants involved. Because of this, I asked NewDay to provide me with a copy of Mr S’s statements.

Since receiving the statements, I have identified the following payments made using Mr S's NewDay (Debenhams) Mastercard credit card (amounts in italics are transaction fees):

Date	Merchant	Amount
3 January 2018	Company C	£382.85
<i>3 January 2018</i>		<i>£10.53</i>
3 January 2018	Company C	£382.85
<i>3 January 2018</i>		<i>£10.53</i>
3 January 2018	Company C	£382.85
<i>3 January 2018</i>		<i>£10.53</i>
3 January 2018	Company O	£222.18
<i>3 January 2018</i>		<i>£6.11</i>
3 January 2018	Company Z	£370.30
<i>3 January 2018</i>		<i>£10.18</i>
3 January 2018	Company Z	£370.30
<i>3 January 2018</i>		<i>£10.18</i>
23 January 2018	Company Z	£4,668.90
<i>23 January 2018</i>		<i>£128.39</i>
28 February 2018	Company B	£726.02
<i>28 February 2018</i>		<i>£19.97</i>
28 February 2018	Company Z	£1,815.05
<i>28 February 2018</i>		<i>£49.91</i>

The investigator held that NewDay should refund Mr S all the payments he made from 23 January 2018, including any transaction fees. This would mean, the refund would start with Mr S's payment to Company Z for £4,668.90.

I agree that NewDay should refund Mr S all the payments he made from 23 January 2018. However, for different reasons to those put forward by the investigator.

For the avoidance of doubt, based on the evidence before me, I think, prima facie, that Mr S has established a valid claim for breach of contract and misrepresentation under section 75 for some of the disputed payments. Therefore, I think a claim under section 75 for either action mentioned would likely succeed with regards to those payments. However, taking into account the particular circumstances of this case – I have considered whether NewDay should have intervened based on fraud triggers.

Not every complaint referred to us and categorised as a binary-options scam is in fact a scam. Some cases simply involve high-risk investment 'bets' on the performance of (e.g.) commodities or stocks that resulted in very disappointing returns or losses. Some binary-options traders promoted these products – which were not regulated by the Financial Conduct Authority ("FCA") or its predecessor at the time – using sales methods that were arguably unethical and/or misleading. However, whilst customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud, i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

Banks and other Payment Services Providers ("PSPs") have duties to protect customers against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering (see below). But when simply executing authorised payments, they do not have to protect customers against the risk of bad bargains or give investment advice – and the FCA has confirmed that a fraud warning would not constitute unauthorised investment advice (see its predecessor's 2012 consultation paper on

investment fraud, below). So, the first question to resolve is whether this particular retailer/trader was actually a fraudster.

I am satisfied that Golden Markets 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 S. In the absence of evidence to the contrary, I have concluded this because:

- a) *After 13 January 2018, binary-options, forex and CFD traders operating in the UK were required to be regulated by the FCA – whereas Golden Markets 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.*
- b) *On 25 May 2018, a warning about Golden Markets was published on the FCA's website.*
- c) *There are several reports in the public domain – e.g. foreign press and online forum – stating that Golden Markets 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.*

Having concluded that this was a scam rather than just a bad bargain or poor investment advice, I need to consider the following:

- a) *Did NewDay deal with Mr S's chargeback claims fairly?*
- b) *If so, were any of the disputed transactions still so unusual or uncharacteristic for Mr S and/or their account that NewDay fraud alerts ought reasonably to have triggered some sort of intervention?*
- c) *If triggered, would NewDay's intervention have made a difference and prevented or reduced the loss?*
- d) *And if so, was Mr S partly to blame for what happened such that it would be fair and reasonable to reduce compensation proportionately?*

Chargeback

Based on the evidence before me, I am not satisfied Mr S has any rights under the Mastercard chargeback scheme. So, NewDay declining to pursue a chargeback claim any further on Mr S's behalf – where there were no reasonable prospects of success – was neither an unfair nor unreasonable exercise of NewDay's discretion in my view.

Unusual or uncharacteristic activity

NewDay is aware of our general position on a PSPs' 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 S for the purposes of the Payment Services Regulations 2009/2017 ('the Regulations'), in force at the time. This is because they were made by Mr S using the legitimate security credentials provided to them by NewDay. These must be regarded as 'authorised payments' even though Mr S was the victim of a sophisticated scam. So, although he did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, Mr S is presumed liable for the loss in the first instance.

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.*

*First, regulated firms ought reasonably to take notice of common types of scams. 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 on the Investor Alerts Portal of the 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.*

In Mr S's case, there was no warning published about Golden Markets on the FCA's website until about three months after he made his final payment. Moreover, although Mr S believed he was paying Golden Markets – his payments were in fact made to Company Z and Company B. I therefore do not think NewDay ought to have automatically blocked the payments.

Notwithstanding this, in light of the significant amount of Mr S's payment on 23 January 2018 (£4,668.90), I do think that by this payment, there are fraud triggers here – particularly given this was a payee trading in binary options without being registered with the FCA (as required at the time).

Therefore, it would have been reasonable for NewDay to have properly questioned Mr S before processing this payment in order to satisfy itself that all was well.

If NewDay had fulfilled its duties and carried out due diligence by contacting Mr S and asking suitably probing questions, there is no reason to doubt that he would have explained what he was doing. In such circumstances, whilst NewDay had no duty to protect Mr S from a bad bargain or give investment advice, it could have invited him to check whether the payee was registered with the FCA. It could have also explained its own customer experiences with merchants like Golden Markets 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 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; the Gambling Commission’s December 2016 scam warning that “an unlicensed operator is likely operating illegally”; and Visa’s business news 26 October 2017 and so forth).

There is no evidence that NewDay provided Mr S with any meaningful warnings or gave him other reasons to doubt the legitimacy of the payments he was making. It was a missed opportunity to intervene.

Causation

If NewDay had asked Mr S what the payments were for and the basic surrounding context, it is likely they would have fully explained what they were doing and that everything had been done over the phone and online with the merchant. NewDay did not need to know for certain whether Mr S was dealing with a fraudulent binary options 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, overseas binary options.

If NewDay had given a warning, I believe that Mr S would have paused and looked more closely into Golden Markets before proceeding. It seems more probable that Mr S would have made further enquiries into binary-options scams and whether or not Golden Markets were regulated in the UK or abroad. He could have discovered they were not and the various regulatory warnings about the risk of binary-options/forex scams (see above). In other words, I am satisfied that a warning from NewDay would probably have exposed Golden Market’s false pretences, causing Mr S to stop ‘trading’ and preventing further losses.

Contributory negligence

Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000). I do not place too much weight on general but arcane information in the public domain for reasons previously alluded to about the information imbalance between financial professionals and ordinary consumers.

In this case, I do not think that Mr S was to blame for what happened; that he did not foresee the risk of this sort of harm or any harm. I do not think Mr S could have foreseen the risk that the company they were dealing with was a scam and the trading account they were viewing was likely to be a simulation.

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

Responses to my provisional decision

Mr S responded to say he agreed with my provisional findings and was happy with the outcome. However, NewDay has not responded.

What I have 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 Mr S agreed with my provisional findings, but NewDay did not respond – I see no reason to depart from them.

My final decision

For the reasons set out above, I uphold this complaint in part. I therefore direct that NewDay Ltd:

- Pay Mr S all the money he lost **from 23 January 2018**, including associated transaction fees (as set out above) – within 28 days of receiving notification of his acceptance of my final decision; plus
- Interest (less any tax properly deductible) – either (i) at the simple rate of 8% per year on the payments from the date they were paid to the date of settlement; *or* (ii) if the account accrued interest because the relevant statement balances were not paid in full, interest should be paid at the rate actually charged for the payments from the date Mr S reported the fraud to NewDay Ltd.
- Should an outstanding balance be owed on Mr S's credit card account relating to the payments and/or interest on the payments, NewDay Ltd is entitled to repay this balance first from the settlement outlined in the bullets above.
- If NewDay Ltd deducts tax in relation to the interest element of this award, it should provide Mr S with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 7 May 2022.

Tony Massiah
Ombudsman