DRN-4249207

The complaint

Mr T complains that Lloyds Bank PLC refuses to refund the money he lost to an investment scam.

What happened

Mr T came across an advertisement online for a binary options company I'll call 'D', he said their website looked professional and they had a lot of positive reviews, so he filled out an online form. A representative of D called Mr T and explained how the investment worked and that they would guide and advise him on what to do. Mr T was provided with a trading platform and from November 2016 to January 2017, Mr T made four payments totalling £4,400 to D.

When Mr T tried to withdraw his profits, D's representative asked him to pay more money into the account. Mr T realised it was a scam and didn't pay them anymore money. Mr T contacted Lloyds to assist with recovering his money in 2018 but it advised that he was out of time for it to process any chargeback claims.

Mr T formally complained to Lloyds in October 2022. The bank declined to refund Mr T, so he referred his complaint to this service. One of our Investigators looked into things and felt Lloyds ought to have been alert to D potentially operating as a scam because of a regulator warning published by the International Organization of Securities Commissions (IOSCO). He suggested that Lloyds refund the disputed payments together with interest.

Mr T accepted but Lloyds did not. It said in summary;

- It does not consider itself an international bank and nearly all of its retail business is conducted within the UK.
- It does not have the skills to assess the quality of each regulator around the world.
- Alerts issued by IOSCO are not vetted by IOSCO and it's not realistic for it to vet each issuing organisation.
- It can only 'see' the information about the merchant entity as provided by the card scheme.
- It takes fraud prevention very seriously and uses a wide and deep range of data to inform how it protects its customers and it continuously updates the information it has where there are known concerns about a particular destination or merchant, relying upon trusted information sources.
- The Payment Services Regulations (PSR) 2009 mean it was legally required to honour Mr T's authorised payment instructions, had it not honoured the payment reaching D by the next business day, it would have failed to fulfil Mr T's mandate.
- The PSR allows for refunds in certain circumstances, but only where certain criteria are met.
- Mr T was contacted by D and after a few conversations, without any evidence of any due diligence or receiving any documentation, he took what they said at face value. He could have done more to protect himself.

- It notes the good and poor industry practice examples provided within the FSA Consultation paper from 2012 but they do not carry forward any further note that IOSCO alerts must be used as a source of information. The guidance advises the guide should be applied in a risk-based, proportionate way, which includes taking into account the size, nature and complexity of a firm when deciding whether a certain example of good or poor practice is appropriate to its business.
- The BSI Code of Practice was launched after the Relevant Period and so should not be applied in this case.
- It does not believe there was sufficient information to provide the level of detail needed to categorically have altered Mr T's decision making. Its normal course would be to direct the customer to the FCA's website; however, there was no warning against D.

The complaint was therefore referred to me for determination.

I wrote to Lloyds acknowledging its points of contention and in summary I explained;

- The FSA's thematic review, Banks defences against investment fraud, published in 2012 ('the 2012 paper'), continued to be referenced as good practice by the FCA over the years.
- The FCA, as well as IOSCO's warning lists are good sources of credible alerts for potential investment scammers – according to Lloyds' regulator. It was at its discretion whether it chooses to use information contained within these lists and I thought one month from the date of publication provided sufficient time for firms (like Lloyds) to update its own internal systems.
- This was a sophisticated scam and D was not licenced (as required) by the UK's Gambling Commission, nor were they licensed or regulated elsewhere.
- Visa fundamentally changed its approach to chargeback when it came to unauthorised/unregulated binary options merchants to account for the global rise in binary options scams. Lloyds would have had more information about the general operation of this type of scam than the average consumer, particularly as it would have received complaints from customers repeating the same descriptions of the operation of these scammers.
- Interest should be applied from the date of the payments rather than Mr T's scam report.

Lloyds replied and repeated some of its earlier comments. I'll summarise any new points it raised below:

- Whilst it appreciates the thematic review was referenced on 13 December 2018, the reference to IOSCO warnings isn't drawn out specifically as examples of good or bad industry practice in any further publications from the initial review. It believes the substance of my judgement which relies on this is limited and doesn't reflect a fair and reasonable conclusion and carries an unfair balance influenced with the benefit of hindsight.
- Due to companies having very similar names there is a heightened risk of mis-identification, when you type in the name of D on Mr T's statement, numerous entries are highlighted which adds to the complexity of identifying incorrect companies making it harder to provide warnings.
- In a recent Supreme Court judgement the court highlighted the bank's strict obligation to honour authorised transactions.

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 uphold this complaint and I'll explain why.

Lloyds 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.

In broad terms, the starting position at law is that a bank is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the PSR (in this case the 2009 regulations) and the terms and conditions of the customer's account. That was the case from November 2016 to January 2017, and remains so now. I want to stress that I am aware of the case Lloyds has directed me to. And notwithstanding what the court decided, we have a duty to resolve complaints based on what we think is fair and reasonable in all the circumstances of the case, taking into account not just the law and I have taken this into account when deciding what is fair and reasonable in this case. In addition:

- Regulated firms like Lloyds are also required to conduct its 'business with due skill, care and diligence' (FCA Principle for Business 2) and to 'pay due regard to the interests of its customers' (Principle 6).

- Firms also have a longstanding regulatory duty 'to take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime' (SYSC 3.2.6R, which has applied since 2001). And over the years, the FSA and its successor the FCA have published a series of papers setting out non-exhaustive examples of good and poor practice found when reviewing measures taken by banks to counter financial crime:

    - The 2012 paper sets out such non-exhaustive examples. And I am satisfied that the findings of this thematic review and SYSC 3.2.6R are of relevance to both sending and receiving banks. For example, the 2012 paper considered banks' efforts to counter fraud where both the customer is the fraudster and also where the customer is the victim, in light of the regulatory obligation to counter the risk that regulated firms might be used to further financial crime, including fraud.

    - The FSA also explained in the 2012 paper that whilst it focused on investment fraud it was of some relevance to other types of fraud as well. Specifically, it said

      "we have a regulatory remit to tackle investment fraud, which has prompted our particular interest in this area, although the lessons of this report can be applied to banks' handling of other types of fraud and criminal conduct affecting their customers".

Further, the FCA issued a press release (16 March 2021) ahead of their prosecution of another bank for alleged failure to exercise due diligence with regard to the requirements of regulations 8(1), 8(3) and 14(1) of the Money Laundering Regulations 2007 between 11 November 2011 and 19 October 2016:

> “These regulations require the firm to determine, conduct and demonstrate risk sensitive due diligence and ongoing monitoring of its relationships with its customers for the purposes of preventing money laundering.”

It seems clear from this that standards of due diligence and good industry practice have existed for a long time – including at the time of the disputed events in our case here. Taking all of these things into account, I consider that at the time of the payments in 2016/2017, Lloyds should fairly and reasonably have:

- monitored accounts – and any payments made or received – in order to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams;

- maintained systems to look out for unusual and uncharacteristic transactions, or other indicators that its customers were at risk of fraud (amongst other things), particularly given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer;

- taken additional steps or made additional checks in some circumstances – irrespective of the payment channel used – before processing a payment; or in some cases, to have declined to make a payment altogether in order to help protect customers from the possibility of financial harm from fraud.

The 2012 paper indicated—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 a large bank to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA or 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.

I’ve taken on board Lloyds comments about not considering itself an international bank. But I’ve also taken into account that it advertises itself in the following way; ‘*Since 1765, we have been providing expert support and guidance to households, businesses and communities of Britain. Our expertise and understanding are built on this experience, providing financial confidence and peace of mind for our customers of every generation’*. And so, based on Lloyds’ size and establishment, I don’t think it’s unreasonable for me to suggest that the 2012 paper ought to have been relevant to it at the material time.

To be clear, I don’t think Lloyds should have been trawling through each regulator’s warning lists in every possible jurisdiction. But I do think the FSA (as it was when the 2012 paper was published) highlighted that its own warning list, as well as IOSCO’s were good sources of credible data to assist banks with account monitoring and I agree.

There was a regulator warning published about D on IOSCO’s Investor Alert Portal dating back to July 2016 – which is more than a month prior to Mr T’s first payment to them. The name of D appears in a number of different formats on the IOSCO alert but I’m satisfied the name on the alert matches the name that appears on Mr T’s statement. I also carried out a search of Mr T’s statement with details of the warning and it only brought up the payments to D, rather than multiple payments as described by Lloyds. I’m satisfied Mr T’s initial payment should have triggered Lloyds’s fraud detection systems because of this.

Therefore, it would have been reasonable for Lloyds to have properly questioned Mr T before processing the payment to satisfy itself that all was well.

If Lloyds had fulfilled its duties by asking suitably probing questions, there is no reason to doubt that Mr T 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 and August 2016 warnings and the European Securities and Markets Authority's July 2016 warning; and so forth).

I've further noted that binary options fraud was an international problem, not just restricted to the UK. And UK customers were being targeted by unregulated and unlicensed companies mainly based overseas and this information is available within the public domain – and was at the material time.

Taking all of this into account, I am satisfied Lloyds ought fairly and reasonably to have intervened by calling Mr T to ask some questions about the nature and purpose of the first payment before agreeing to process it.

If Lloyds had asked Mr T 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 D's representatives. Lloyds did not need to know for certain whether Mr T 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 Lloyds 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 binary options dealers.

If Lloyds had given a warning, I believe that Mr T would have paused and looked more closely into D 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 D 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 D'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 representative's (mis)representations — i.e. that they were not licensed or 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 T's payments were actually processed, he would probably have stopped in his tracks. But for Lloyds's failure to act on clear triggers of potential fraud or financial harm, Mr T 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 T should share blame for what happened. This was a sophisticated scam and I don't think Mr T could have reasonably been aware (unless prompted by his bank) that he was dealing with a scammer.

My final decision

For the reasons set out above, I uphold this complaint and require Lloyds Bank PLC to:

1. Refund all the payments made to D totalling £4,400.

2. Pay interest to Mr T on the above sums, at an annual rate of 8% simple, from the respective dates of loss, to the date of settlement. If Lloyds is required to deduct tax from the interest it should send Mr T a tax deduction certificate so she can claim it back from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 27 October 2023.

Dolores Njemanze
Ombudsman