

Complaint

Mr W complains, in summary, that Lloyds Bank PLC did not do enough to help him recover all the money he had paid to a binary options trading platform using his Lloyds VISA debit card.

Background

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought best to resolve it. After considering all the evidence and arguments presented by both sides, I was minded to conclude it would be fair and reasonable for Lloyds to refund the losses that Mr W suffered as a result of this scam, as well as remove any adverse data recorded against his credit file in relation to this matter.

Rather than repeating all I said in my provisional decision about the background and the circumstances of Mr W's complaint again here, I attach a copy of my provisional decision to this final decision. My provisional decision forms part of this final decision and it details in full how and why I reached my preliminary conclusions. It also details in full the redress I was minded to order and why.

I invited both parties to let me have any further comments they wished to make in response to my provisional decision by 26 February 2021.

My Findings

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

Response to my provisional findings

Mr W responded and accepted my provisional decision. Though, he asked if Lloyds could reinstate his business account as this was closed without notice (along with his other accounts) when he could no longer afford to service his overdrawn balance. Our investigator explained that Mr W would need to complain to Lloyds directly about this as it was not included in his original complaint. And Lloyds should be given the opportunity to respond to his concerns.

I queried whether Mr W has since repaid the overdrawn balance on his current account with Lloyds and he explained he couldn't afford to, so the account defaulted. I explained to Mr W that Lloyds would be entitled to repay this debt from the settlement and he wouldn't be entitled to 8% interest on this amount. Mr W accepted this.

Lloyds didn't respond to my provisional decision. In light of this, I see no reason to depart from the resolution I proposed in my provisional decision and include a provision to allow Lloyds to settle the outstanding debt on Mr W's current account.

My Final Decision

For the reasons I have explained, my final decision is that I uphold this complaint. I direct Lloyds Bank PLC to:

- Refund to Mr W all the payments he made to O Ltd (totalling £91,000) within 28 days of receiving notification of his acceptance of my final decision.
- Pay interest to Mr W on the above sums (less any debt owed in relation to Mr W's current account) at an annual rate of 8% simple, from the date Mr W reported the fraud, to the date of settlement. If Lloyds is required to deduct tax from the interest it should send Mr W a tax deduction certificate so he can claim it back from HMRC if appropriate.
- Pay Mr W an additional £300 for distress and inconvenience caused also within 28 days of receiving notification of his acceptance of my final decision, failing which interest will thereafter accrue at 8% simple per year (less any tax) until payment is made.
- Refund any overdraft interest and charges applied to Mr W's current account from the date he reported the fraud to Lloyds to the date of settlement.
- Remove any adverse data that has been recorded against Mr W's credit file as a result of him exceeding his overdraft limit from the date he reported the fraud to Lloyds.
- Should an outstanding debt be owed on Mr W's current account (where payments to O Ltd were paid from) Lloyds Bank PLC is entitled to repay this balance first from the settlement outlined in the first bullet.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 5 April 2021.

Dolores Njemanze
Ombudsman

COPY OF PROVISIONAL DECISION

Complaint

Mr W complains, in summary, that Lloyds Bank PLC did not do enough to help him recover all the money he had paid to a binary options trading platform using his Lloyds VISA debit card.

Background

After seeing an entity offering binary options investment trading, O Ltd, Mr W called them for further information. A representative for O Ltd told him he'd be given a broker who would guide his trades at each step so that he wouldn't lose any money and he would make large profits over a short term. Mr W made 12 payments to them totalling £91,000 in December 2017. He says this was his life savings.

Mr W says he invested a smaller amount to begin with and was provided with a trading platform where he could see his deposits and profits. He says the account manager contacted him daily to ask him to deposit more money onto the platform. As he saw his investments doing well, he was persuaded to deposit more.

Once Mr W's investment had reached approximately £134,000, Mr W attempted to withdraw £60,000 from his trading platform as he needed to pay a debt on a mortgage for a property that had been repossessed during the financial crisis. O Ltd cancelled his withdrawal request because it hadn't been made in accordance with their terms and conditions. He attempted to make the withdrawal request again and O Ltd cancelled it again due to a different condition that hadn't been satisfied. The broker then called Mr W and told him that there would be a very large trade and would be 100% guaranteed and he was persuaded to invest. The broker guided Mr W to place three trades for the entire balance of his trading account which left the account with a zero balance. The broker emailed Mr W the same day explaining the trade was unsuccessful and Mr W had lost everything.

Mr W conducted some further research into O Ltd and found others who said they'd been scammed by them. He says he realised he was not provided with a genuine trading platform and rather a simulation that made it seem as though he was profiting. He also found that O Ltd was unauthorised by the Financial Conduct Authority ('FCA'). That led him to approach Lloyds to ask the bank to retrieve his money.

Here is a list of the disputed payments:

Payment number	Date	Supplier	Payment method	Amount
1	11/12/2017	O Ltd	VISA debit card	£500.00
2	11/12/2017	O Ltd	VISA debit card	£500.00
3	14/12/2017	O Ltd	VISA debit card	£5,000.00
4	20/12/2017	O Ltd	VISA debit card	£10,000.00
5	20/12/2017	O Ltd	VISA debit card	£10,000.00
6	21/12/2017	O Ltd	VISA debit card	£10,000.00
7	22/12/2017	O Ltd	VISA debit card	£10,000.00
8	22/12/2017	O Ltd	VISA debit card	£10,000.00
9	26/12/2017	O Ltd	VISA debit card	£10,000.00
10	26/12/2017	O Ltd	VISA debit card	£10,000.00
11	27/12/2017	O Ltd	VISA debit card	£5,000.00
12	27/12/2017	O Ltd	VISA debit card	£10,000.00
				Total: £91,000.00

Lloyds acknowledge Mr W supplied it a lot of information in support of his claim. But says its specialist team that handles disputes refused to process chargeback claims because Mr W agreed to the terms and conditions. It pointed to a clause that stated O Ltd could decline a withdrawal request at any point if it didn't comply with the necessary instructions. Lloyds acknowledge it could have provided a better service to Mr W and paid him £300 in recognition of the inconvenience caused.

Our investigator concluded, first of all, that O Ltd had operated a 'scam'. She further found that Lloyds ought to have submitted a chargeback claim to VISA given the nature of Mr W's complaint. As a result, she recommended that the bank should refund to Mr W his outstanding money, plus interest and any charges applied to Mr W's account.

Although Mr W accepted the investigator's suggestion, Lloyds did not respond. After a delay of almost seven months – during which time Mr W found it difficult to understand why the bank was taking so long – Lloyds still has not responded.

The case has been passed to me to decide.

My Provisional Findings

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

The starting position in law is that Lloyds are under an obligation to honour payment requests made by Mr W in accordance with the Payment Services Regulations (in this case the 2009 version) and the terms and conditions of his account. However, the regulations allow for payment service providers, like Lloyds, to mandate delays in permitting these transactions if it suspects payments may be unauthorised or fraudulent.

This means that there are circumstances, irrespective of the payment channel used, where a bank should, in my opinion, fairly and reasonably take additional steps, or make additional checks, before processing a payment, or in some cases decline to make a payment altogether, to help protect customers from the possibility of financial harm.

Firms authorised by the FCA have a regulatory duty to counter the risk they might be used to further financial crime. The FCA also has the regulatory remit to tackle investment fraud which prompted its predecessor's paper of 2012 titled; *'Banks' defences against investment fraud'* ('the 2012 paper'). As the paper constituted guidance from the regulator, a consultation period was included. Once this period ended, the regulator said the 2012 paper would be included in its Financial Crime Guide (FCG). I've noted the contents of the paper were added to the 2015 version of the guide and were included in the FTCR 14.1.4G. And whilst the guide did not contain binding rules, it did act as guidance to firms in order to reduce the risk of financial crime. So when considering Lloyds' obligations to follow its customers instructions and balance its regulatory duty – I think having consideration of what its regulator says is reasonable.

The 2012 paper set out concerns of some firms around warning customers about a payment to a prospective investment, as this could be considered investment advice. The regulator felt it was *'perfectly possible to warn customers about the dangers of falling victim to investment fraudsters without providing investment advice.'* And considered not warning customers because of this concern to be an example of poor practice.

The 2012 paper suggested several sources available to building up a 'watch list' for investment fraud, referencing 'boiler room fraud', for the purposes of transaction monitoring. Examples included:

- *'Intelligence from the FSA or City of London Police about unauthorised businesses or the names of suspect shares.'*
- *Intelligence from other banks e.g. from the banks' boiler room forum.*
- *Lists published on the FSA website of UK and overseas unauthorised businesses.*
- *Lists published by other organisations e.g. the International Organisation of Securities Commissions publishes an 'Investor Alert' list on its website covering a number of different jurisdictions.'*

Whilst the 2012 paper was not a prescriptive set of rules, I think it's reasonable for Lloyds to have considered credible data - in line with its regulator's recommendations - when assessing investment fraud risks to it and its customers.

The FCG 2015 contained examples of good and bad practices around investment fraud. Good practice included:

- *'A bank regularly assesses the risk to itself and its customers of losses from fraud, including investment fraud, in accordance with their established risk management framework. The risk assessment does not only cover situations where the bank could cover losses, but also where customers could lose and not be reimbursed by the bank. Resource allocation and mitigation measures are informed by this assessment.'*
- *A bank contacts customers if it suspects a payment is being made to an investment fraudster.*
- *A bank has transaction monitoring rules designed to detect specific types of investment fraud. Investment fraud subject matter experts help set these rules.'*

I looked into what credible data was available prior to and during the period Mr W sent payments to O Ltd. I've noted:

- In June 2016, Action fraud published a warning about binary options investment fraud noting common deceptive practices carried out by fraudsters.¹
- In July 2016 – European Securities and Markets Authority (ESMA) published a warning about CFDs, binary options and other speculative products noting the aggressive marketing by some firms and the risks involved with unauthorised and unregulated entities offering these products.²

¹ <https://www.actionfraud.police.uk/alert/fraudsters-claim-binary-options-are-being-used-for-investment-scams>

² https://www.esma.europa.eu/sites/default/files/library/2016-1166_warning_on_cfds_binary_options_and_other_speculative_products_0.pdf

- In December 2016, the FCA published a paper titled; *Enhancing conduct of business rules for firms providing contract for difference products to retail clients*. In this paper it noted the 'rise in the number of unauthorised firms and investment scams targeting clients by purporting to offer authorised forms of retail CFD products or binary bets'. It further noted a 'significant rise in alleged scams linked to binary bets'.
- In December 2016, the gambling commission issued a scam warning about binary options and stated: *'An unlicensed operator is likely operating illegally.'*³
- The International Organisation of Securities Commissions published investor alerts about O Ltd from the Swiss Financial Market Supervisory Authority on 15 June 2016 and the Financial Market Authority on 27 November 2017.
- In October 2017, The City of London police published a report that noted the number of binary options scam reports and sums involved had significantly increased since 2012. With a total of £59m being reported to it. Of this, numbers of reports and amounts involved significantly increased from the end of 2014.⁴

I have also taken account of VISA expanding its chargeback scheme rules in October 2017. It issued guidance to its clients (card issuers and merchant acquirers) on 26 October 2017 and when explaining the practices of 'deceptive' binary options and investment trading merchants it said:

'These merchants may operate unregulated trading platforms prone to manipulation by the controlling entities'.....

....'To gain consumer confidence, binary options merchants may use sophisticated terminology to emulate legitimate broker/dealers, but are often unlicensed to operate in the countries they target'.

In my view, VISA expanded its rules to counteract the global binary options fraud which was detrimental to cardholders. This was after pressure was placed on it to do so from law enforcement agencies. But this guidance was made available to Lloyds as one of VISA's card issuers, rather than the general public.

In addition, as a matter of good industry practice in December 2017, I consider firms should in any event have taken proactive steps to:

- look to identify and help prevent transactions – particularly unusual or out of character transactions – that could involve fraud or be the result of a scam (something also recognised by the British Standards Institute's October 2017 *'Protecting Customers from Financial harm as a result of fraud or financial abuse – Code of Practice'* (the "BSI Code"), which a number of banks and trade associations were involved in the development of).

Taking all these things into account, I consider that at the time of the payments in December 2017, Lloyds should fairly and reasonably:

- Have been monitoring accounts and any payments made or received to protect it and its customers from investment fraud.
- Have been aware of binary options investment fraud, particularly the practices of unregulated companies and been monitoring transactions to suspected fraudsters, including O Ltd.
- Have had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (among 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.
- In some circumstances, irrespective of the payment channel used, have taken additional steps, to contact its customer if it suspected it was paying money to a fraudster.

³ <http://www.gamblingcommission.gov.uk/news-action-and-statistics/News/binary-options-scams-warning>

⁴ http://news.cityoflondon.police.uk/t/929/police_day_of_action_after_victims_report_losing

- Had a good understanding of the chargeback scheme rules – including the expansion of VISA's rules to cover issues relating to binary options and investment trading merchants blocking cardholders from withdrawing their available balances.

I can see that our investigator queried whether Lloyds made any additional security checks considering Mr W spent a large sum over a short period of time. Lloyds said;

'High value transactions would potentially be stopped. However, it is often seen that high value transactions to investment companies are normal so transactions such as these are less likely to be blocked.'

Having looked at the technical evidence, I don't think Lloyds blocked any transactions to O Ltd and I've thought about whether this was reasonable in light of what I've set out already. And I don't think it was.

I think Lloyds ought to have had concern over Mr W's payments to O Ltd at the point of the first payment. Whilst I appreciate this was for a relatively low amount, Lloyds ought to have had concerns about O Ltd because of the credible adverse data available about it and binary options investment fraud more generally.

I don't think it was in Mr W's contemplation, at the time of his payments to O Ltd, that they could use deceptive software to trick him into believing his deposits were earning profits. Or that his deposits were not safe or secure. After all, Mr W was not placing investment trades independently, he was being guided by O Ltd's account manager – who he believed to be a professional account manager. I consider Mr W was the innocent victim of a sophisticated investment fraudster and I think a warning from his bank would have prevented the losses he suffered. And to be clear, I think it would have been perfectly possible for Lloyds to have warned Mr W without giving him investment advice – as explained by Lloyds' regulator. So, I'm of the view that Lloyds should refund all of Mr W's payments to O Ltd.

I've also considered whether Lloyds could have recovered Mr W's payments through the VISA chargeback scheme when he brought his concerns to it (because this also offered a route to the recovery of his funds).

Chargeback

The chargeback scheme is voluntary, and banks are not under a formal obligation to submit a chargeback claim. However, this service's view is that it is good practice for a bank always to make a chargeback claim unless it is, for example, very evident on the basic facts that it stands no reasonable prospect of success. Lloyds suggested that it couldn't process chargebacks for Mr W because he agreed to O Ltd's terms and conditions. Our investigator didn't agree and felt there were strong grounds for Lloyds to pursue a chargeback claim.

In all the circumstances, therefore, I share the investigator's view that Lloyds should have been more alert to the various adverse indicators about O Ltd at the time it received Mr W's complaint than it apparently was, including when considering its chargeback options.

VISA had already given Lloyds guidance about the 'deceptive' tactics of companies like O Ltd and Mr W had presented a clear case of misrepresentation. I think Lloyds should have attempted a chargeback claim. I'm aware that VISA requires some specific evidence for the 'reason code' that would have been applicable to this dispute. This, amongst other things, would have included a screenshot of his trading account, showing a balance – which of course Mr W didn't have at the point of his complaint. This would have been needed for VISA to have made a determination at arbitration as the final stage of its process. That said, we've seen successful chargeback claims being made in circumstances like Mr W's and Lloyds have not presented any evidence that would suggest O Ltd's bank would have defended a chargeback claim.

It also follows that, as the chargeback scheme is a voluntary one, it is Lloyds' choice whether to process a chargeback. I wouldn't see why a firm like Lloyds would have less ability to process a chargeback claim in absence of all the evidence required (when the merchant has purposefully prevented the cardholder from gathering this evidence), than a merchant acquirer would have to defend the same claim when its customer was operating fraudulently. Which may perhaps be why we've seen examples of merchant acquirers not defending chargeback claims and card issuers succeeding on this basis.

So, I think Lloyds have deprived Mr W a route to getting his funds back through the chargeback scheme.

Even if Lloyds could persuade me that O Ltd's bank would have defended the claim, I consider that if it had intervened, at any point of the 12 payments to O Ltd, he would have stood a better chance to gather the required evidence of the chargeback scheme and before O Ltd had the opportunity to take this chance away. I share our investigator's view that O Ltd's tactics of placing hurdles in the way of withdrawal attempts is a common feature

of this type of scam. This is something Lloyds ought to have more familiarity with through its own customer complaints and the specific insight it has had from VISA, than Mr W would have had.

It's now too late for Lloyds to process chargeback claims for Mr W but I think if it had, his claim could have likely succeeded. And certainly, would have, if Lloyds intervened at any point of his 12 payments to O Ltd. It follows that I think Lloyds should return all 12 payments Mr W paid to O Ltd.

Distress and inconvenience

Our statutory rules provide – at DISP 3.5.8 to 3.5.15 of the FCA Handbook – that we may give case-management directions and fix or extend deadlines; and that we may:

...reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested;

And that....

If a respondent fails to comply with a time limit, the Ombudsman may: (1) proceed with the consideration of the complaint; and (2) include provision for any material distress or material inconvenience caused by that failure in any award which he decides to make.

Although most of Mr W's distress or inconvenience probably resulted from the criminal acts of O Ltd, I think Lloyds could have done more to protect him from the impact of its statutory duty to co-operate with our complaints process (*DISP Rule 1.4.4 of the Financial Conduct Authority Handbook*).

I therefore consider an additional £300 compensation for distress or inconvenience to be appropriate. I recognise Lloyds has already paid Mr W £300 for the poor customer service he received during the course of his complaint. I think this was a fair and reasonable sum for the distress and inconvenience Mr W experienced up until the point of Lloyds responding to his complaint. But I do consider it has caused him further distress and inconvenience in not responding to our deadlines. This would make the total compensation award £600.

Interest and account charges

Our investigator felt it would be reasonable for Lloyds to refund interest and charges applied to Mr W's account. Having reviewed Mr W's bank statements, I can see that prior to his payments to O Ltd, he regularly utilised his agreed £10,000 overdraft facility with Lloyds. But he repaid this facility in November 2017, with his savings. And it's clear that he couldn't service his account in the same way from around January 2018 and exceeded his agreed overdraft limit. I'm persuaded Mr W would have repaid this balance with his savings, rather than continue to utilise his overdraft facility over a long term. So, I think it would be reasonable for Lloyds to refund the overdraft interest and charges from the point he reported the fraud to it.

Equally, if Lloyds have recorded any adverse information against Mr W's credit file as a result of him exceeding his overdraft limit, this should be removed because I don't think he would have exceeded his overdraft limit if Lloyds had helped him recover his loss.

But I do intend to award a different rate of interest here because I think the loss of these funds has cost Mr W more overall. I think it would be reasonable for Lloyds to pay interest at a rate of 8% simple per year from the date Mr W reported the fraud. I recognise the payments to O Ltd originated from Mr W's savings account and the interest rate applicable to that account was much lower. But this money had only been in Mr W's savings account for a short term before he began to make payments to O Ltd. And Mr W had only intended to invest his funds with O Ltd over a short term and had planned to use them to repay the debt on a property. Given the average costs of borrowing over time and the financial difficulty the loss of his life savings left him in, it has long been our approach that this is a suitable rate to compensate for being deprived of the funds and I am satisfied it is fair to apply it in the circumstances of this complaint.

My Provisional Decision

For the above reasons, I intend to uphold this complaint about Lloyds Bank PLC — and I would provisionally require the bank to:

- Refund all the payments made to O Ltd (totalling £91,000).

- Pay interest to Mr W on the above sums, at an annual rate of 8% simple, from the date Mr W reported the fraud, to the date of settlement. If Lloyds is required to deduct tax from the interest it should send Mr W a tax deduction certificate so he can claim it back from HMRC if appropriate.
- Pay an additional £300 compensation to Mr W.
- Refund any overdraft interest and charges applied to Mr W's account from the date he reported the fraud to Lloyds to the date of settlement.
- Remove any adverse data that may have been recorded against Mr W's credit file as a result of him exceeding his overdraft limit from the date he reported the fraud to Lloyds.