

The complaint

Mr C complains that Barclaycard Bank UK PLC (trading as “Barclaycard”) have failed to refund money he says he lost to an investment scam.

What happened

The details of this complaint are well known to both parties, so I won’t repeat everything again here. Instead, I will provide a brief summary and focus on giving the reasons for my decision.

Mr C claims to have lost money to a scam orchestrated by Finteractive Ltd (trading as “FXVC”). The firm was regulated by the Cyprus Securities and Exchange Commission (CySEC) as well as by the Financial Conduct Authority (FCA) at the time under the Temporary Permission Regime. However, its permission was later withdrawn by the FCA in April 2021 due to its business practices.

Between September and November 2020, Mr C made payments to FXVC collectively totalling over £109,000 from his Barclays bank account, debit card and Barclaycard credit card (the transaction of which form the subject of this complaint). Mr C unfortunately lost the money he invested. He has since had around £35,000 refunded by FXVC after pursuing a complaint about it with the Financial Ombudsman based in Cyprus. But he is now claiming the £20,500 loss sustained from his credit card, as he says Barclaycard should have warned him or offered advice when he was making the payments to FXVC.

Barclaycard refused to refund the money Mr C paid to FXVC from his credit card, as it said he failed to carry out sufficient due diligence. Our investigator also didn’t uphold Mr C’s complaint. She thought Barclaycard should have intervened and questioned Mr C about one of the larger payments he made but didn’t think this would have ultimately stopped him given FXVC was regulated at the time. Mr C disagreed, so the matter was escalated to me to determine.

I issued my provisional decision on this complaint in July 2023. I said I was minded not to uphold it and set out the following reasons:

- *The relevant regulations and industry guidance makes it clear that banks ought to protect consumers from the risk of financial harm, including fraud and scams. But the obligation to warn customers of the risk of such financial harm will only reasonably have been engaged if there were sufficient grounds for suspecting the payee was a fraudster; meaning that Barclaycard could have delayed the payments while concerns about the payee were discussed with Mr C.*
- *So, I would need to be satisfied that Finteractive Limited (trading as FXVC) was operating a scam when the disputed payments were made from September 2020 onwards in order to expect Barclaycard to have done anything further here. When determining this, I’ve borne in mind that certain high-risk investment traders (such as CFD merchants) may use sales methods, or communication styles that can be seen to be unfair. Especially, when considering the financial losses incurred because of a*

disappointing return on an investment that's been promoted. Even so, not all complaints to us involving CFD merchants are in fact a scam. While the ways and means of these businesses can be viewed as unreasonable or even unethical – that doesn't necessarily mean they amount to the high legal threshold or burden of proof for fraud.

- I've consulted the official organisations that publish warnings about merchants that operate in the UK and abroad, including the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"), as well as the FCA's own warning list. These watchlists, along with other reputable sources, lead me to believe that there were no warnings about FXVC at the time these payments were made. The investment firm was also regulated by the Cyprus Securities and Exchange Commission (CySEC) at the time and was also authorised by the Financial Conduct Authority (FCA) under the Temporary Permission Regime.*
- I appreciate an FCA supervisory notice was later published in April 2021 stating the regulator had stopped FXVC from offering CFDs to UK investors due to its business practices. But this notice does not state that FXVC was operating a scam, and I note that the investment firm has since referred the supervisory notice to the Upper Tribunal, which would be a highly unlikely course of action to be taken by a scammer. I note that Mr C also had around £35,000 awarded by the Financial Ombudsman of Cyprus, who found that FXVC should not have categorised him as a professional client. This award has since been paid to Mr C by FXVC in accordance with that decision. But illegitimate or illegal firms set up with the intention of scamming consumers are highly unlikely to submit themselves to regulatory oversight or comply with an Ombudsman's decision to pay compensation.*
- Even if I were to accept that the FCA's notice could constitute a scam warning, it was still published after Mr C had made his payments between September and November 2020. So, even if Barclaycard had intervened at the time to ask questions about the payments, there would have been very little to suggest that the investment firm was operating a scam. Mr C said he had carried out his own due diligence and checked that FXVC was authorised by the FCA, meaning that any warning from Barclaycard to carry out further research on the investment firm's legitimacy would have been unlikely to yield any results that would have ultimately prevented the payments from being made.*
- I've taken into consideration the concerns Mr C has raised about the techniques FXVC employed and the unethical manner in which it operated. But overall, I'm not persuaded the investment firm can be said to have been fraudulent or operating a scam at the time in question. As a result, Barclaycard's duty to intervene wasn't triggered. There was the inevitable risk of Mr C's investments returning a loss, based on market performance. Mr C says if Barclaycard had offered any advice, then he wouldn't have invested his money. But Barclaycard isn't required to give any such advice or protect its consumers from the risk of financial loss from investments or bad bargains. Therefore, I don't consider it acted unfairly by failing to intervene in these payments.*
- I can see that Barclaycard also submitted chargeback claims for the three payments Mr C made from his credit card, but these were successfully defended by the merchant. And given there is no clear basis on which a chargeback would have otherwise succeeded, I don't consider it ought to have pursued the chargeback claim any further.*
- Given Mr C made the disputed payments on his credit card, there is also the*

possibility that he could seek to recover his funds via a claim under section 75 of the Consumer Credit Act 1974, for breach of contract or misrepresentation by the merchant. I can see that Barclaycard asked Mr C to provide evidence, such as contracts, invoices, and correspondence he had with FXVC so it could consider a claim. But unfortunately, it doesn't appear that Mr C had any such evidence to provide. And without evidence of a breach of contract or misrepresentation, there wouldn't be any basis on which to proceed with the claim. As a result, I don't think Barclaycard has acted unfairly by failing to pursue a section 75 claim for Mr C either.

- I understand that Mr C is also unhappy with the way Barclaycard handled his claim. He said it didn't tell him that the amount credited to his account as part of the chargeback was only temporary, and that it also failed to respond to his letters. I can see that Barclaycard's communication could have been better, and I appreciate the service Mr C received would have been frustrating at times. However, Barclaycard has offered £75 compensation in recognition of its poor handling of Mr C's claim which, overall, I'm satisfied is fair and in line with the sort of award our service would make in these circumstances. So, I don't intend making any further award of compensation.*

I invited further comments and evidence from both parties. Mr C responded disagreeing with my provisional findings. In summary, he maintains that Barclaycard failed to carry out sufficient due diligence before processing the payments he made to FXVC and says it should have questioned him about the payments he was making. Mr C also felt that FXVC should be considered as a scam given it had been stopped from offering its services by the FCA.

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.

I would also like to assure Mr C that I have carefully considered the further points he has raised. But having done so, I'm afraid it does not change the conclusions set out in my provisional decision.

I appreciate Mr C continues to believe that FXVC was a scam, and I accept that it had its authorisation removed from the FCA due to its questionable business practices. But having permissions removed by the FCA does not necessarily mean a company was fraudulent or operating a *scam*. As I've already explained, while I accept that FXVC's business practices led to a supervisory notice being issued by the FCA – and that its practices could be viewed as unreasonable or even unethical – that doesn't necessarily mean they amount to the high legal threshold or burden of proof for *fraud*. And I'm not persuaded there is enough evidence to demonstrate that FXVC was acting fraudulently or had intent to deceive Mr C at the time he made his payments when it was authorised to operate by the FCA.

I also understand that Mr C feels strongly that Barclaycard failed to carry out sufficient due diligence. It isn't clear what else exactly Mr C considers Barclaycard ought to have done, other than question him about the payments he was making. But in any event, in the context of these payments, the bank's obligation was to promptly execute its customer's payment instructions. That was its duty, and given the validity of the instruction was not in doubt, it duly and properly fulfilled that duty by carrying out the transaction. As I've already made clear in my provisional decision, Barclaycard wasn't required to carry out any 'due diligence' in these circumstances or to question Mr C about the nature of the payments as he asserts. And it wasn't required to provide advice or to protect him from the risk of financial loss from investments or bad bargains.

Therefore, while I appreciate this will come as a disappointment to Mr C, I'm still not persuaded there was any cause for Barclaycard to intervene in these payments, and I won't be asking it to take any further action.

My final decision

For the reasons given above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 25 August 2023.

Jack Ferris
Ombudsman