

The complaint

Mr P complains that Bank of Scotland plc trading as Halifax won't reimburse him after he lost money to an investment – that he now considers to have been a scam.

What happened

Mr P has explained that he was introduced to an investment opportunity, provided by a firm that I'll refer to as S, by a work colleague. This colleague had already invested with the firm a few months prior, and their investment appeared to be progressing well, based on weekly reports they were receiving. Another investor he knew had also visited the home of S' main trader/director and had told Mr P that they appeared to be living a wealthy lifestyle.

Mr P expressed his interest in the investment and had a video call with the director of S. He's said the director explained his experience in the stock markets and how he's worked out algorithms to make profits. He told Mr P that he could expect profits of around 2-3% a week, although Mr P understood this wasn't guaranteed. However, the director personally guaranteed Mr P's initial investment into the firm and this was stated in the investment contract he received. The director also advised Mr P that S was pending FCA regulation.

Mr P has explained he reviewed S online and found the company was registered on Companies House. Mr P questioned why his contact wasn't included as a key person within this registration and was told that while he is the main trader for the firm, he isn't the main stakeholder, which Mr P considered a valid response.

On this basis, Mr P decided to invest. As the investment minimum was £10,000, Mr P and his friend provided 50% of the initial investment each. Mr P therefore made a payment of £5,000 to an account held in S' name.

Mr P has explained that initially, he received regular correspondence from S by email, alongside the weekly reports on how his investment was doing. However, after a few months, the contact started to become more sporadic, and Mr P has explained he grew concerned. He attempted on a few occasions to withdraw his funds, but was always given a reason for this to be delayed. Mr P then received contact from the Police, advising S was being investigated.

Mr P complained to Halifax, and it considered Mr P's complaint in line with the Contingent Reimbursement Model (CRM) Code, which it is a signatory of. Halifax said it ought to have raised the payment Mr P flagged as a scam sooner to the beneficiary account for review, and so offered to reimburse him 50% of his losses. However, it also considered that Mr P ought to have done more checks, prior to proceeding with the investment and so considered he should be jointly liable.

Mr P remained unhappy and referred his complaint to our service. An investigator considered the complaint and upheld it. He said, on balance, this was a scam and covered by the CRM Code and that none of the exclusions Halifax had relied on applied – so Halifax should reimburse Mr P in full.

In its response to our view, Halifax raised that it now considers this to be a civil dispute between S and Mr P, whereby Mr P has made a high risk investment with a genuine, registered company. Halifax argued that until the Police investigation into S is concluded, it considers this to be a case of a failed investment. Halifax also questioned how a view can be reached by our service until the outcome of the Police investigation is complete.

As Halifax didn't agree with the investigator's view, the complaint has been referred to me for a final decision.

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.

It's important to highlight that with cases like this, in deciding whether there was in fact a scam, I need to weigh up the available evidence and make my decision about what I think is likely to have happened on the balance of probabilities – in other words what I think is more likely than not to have happened in the circumstances.

When considering what is fair and reasonable, I'm also required to take into account: relevant law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

In broad terms, the starting position in law is that a firm is expected to process payments and withdrawals that a customer authorises, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. However, where the customer made the payment as a consequence of the actions of a fraudster, it may sometimes be fair and reasonable for the bank to reimburse the customer even though they authorised the payment.

Halifax is a signatory of the CRM Code. This requires firms to reimburse customers who have been the victims of certain types of scams, in all but a limited number of circumstances. But customers are only covered by the CRM Code where they have been the victim of an authorised push payment (APP) scam – as defined within the CRM Code. So if I am not persuaded that there was a scam then I will not have a basis to uphold the complaint.

Can Halifax delay making a decision under the CRM Code?

In its more recent submissions, Halifax has questioned how our service can fairly view a complaint where there is an ongoing police investigation. There is an exception under the CRM Code (R3(1)(c)) that states that firms should make a decision as to whether or not to reimburse a customer without undue delay but that, if a case is subject to investigation by a statutory body and the outcome might reasonably inform the firm's decision, it may wait for the outcome of the investigation before making a decision.

While this exception provides a reason why firms *may* delay providing a claim outcome under the CRM Code, it doesn't impact that customer's right to refer the complaint to our service – and similarly it doesn't impact our service's ability to provide a complaint outcome when we consider we have sufficient evidence to do so. Additionally, this exception needs to be raised by the firm, prior to it having reached an outcome on the claim under the CRM Code, which Halifax hasn't done in this case.

I've therefore gone on to consider below whether we do have enough evidence to proceed at this time with Mr P's complaint.

Is it appropriate to determine Mr P's complaint now?

I am aware there is an ongoing investigation, and there may be circumstances and cases where it is appropriate to wait for the outcome of external investigations. But that isn't necessarily so in every case, as it will often be possible to reach conclusions on the main issues on the basis of evidence already available. And I am conscious that any criminal proceedings that may ultimately take place have a higher standard of proof (beyond reasonable doubt) than I am required to apply (which – as explained above – is the balance of probabilities).

The Lending Standards Board has said that the CRM Code does not require proof beyond reasonable doubt that a scam has taken place before a reimbursement decision can be reached. Nor does it require a firm to prove the intent of the third party before a decision can be reached. So in order to determine Mr P's complaint I have to ask myself whether I can be satisfied, on the balance of probabilities, that the available evidence indicates that it is more likely than not that Mr P was the victim of a scam rather than a failed investment.

I've reminded myself that Parliament has given ombudsmen the job of determining complaints quickly and with minimum formality. In view of this, I think that it would not be appropriate to wait to decide Mr P's complaint unless there is a reasonable basis to suggest that the outcome of any external investigation may have a material impact on my decision over and above the evidence that is already available.

Halifax has stated that it needs to understand the charges that have been brought and what these relate to, in order to appreciate at what point a genuine business turned bad. However, for the reasons I discuss further below, I don't think it's necessary to wait until the outcome of the police investigation or potential related court case for me to reach a fair and reasonable decision.

Has Mr P been the victim of a scam, as defined in the CRM Code?

The relevant definition of a scam in accordance with the CRM Code is that the customer transferred funds to another person for what they believed were legitimate purposes but were in fact fraudulent.

The CRM Code also says it doesn't apply to private civil disputes, such as where a customer has paid a legitimate supplier for goods or services but has not received them, they are defective in some way, or the customer is otherwise dissatisfied with the supplier.

So, it doesn't cover a genuine investment or a genuine business that subsequently failed.

So in order to determine whether Mr P has been the victim of a scam as defined in the CRM Code I need to consider whether the purpose he intended for the payment was legitimate, whether the purposes he and S intended were broadly aligned and then, if they weren't, whether this was the result of dishonest deception on the part of S.

From what I've seen and what Mr P has told us, I'm satisfied Mr P made the payment with the intention of investing in forex trading. He thought his funds would be used by S to trade and that he would receive returns on his investment.

But I think the evidence I've seen suggests S didn't intend to act in line with the purpose for the payment it had agreed with Mr P.

Mr P made his payment to an account held in S's name. I've reviewed beneficiary statements for this account and while I can't share the details for data protection reasons,

the statements do not suggest that legitimate investment activity was being carried out by S at the time Mr P made the relevant transaction. Whilst there is evidence S initially did carry out trades, it doesn't necessarily follow that it was a legitimate enterprise. S and its linked companies were not authorised by the FCA to carry out trading, so its operations clearly lacked an important element of legitimacy; it was required to be authorised to do the activity it was carrying out and it wasn't.

Further concerns centre around the owner of S (who was bankrupt at the time). From the paperwork provided to consumers, he appears to have "personally guaranteed" the investments (despite forex being a high-risk investment and him never being in a financial position to do so). He also signed contracts on behalf of S despite not officially being listed as the director of the business. He appears to have acted as a 'shadow director', when he would've been disqualified as a director in his own right due to his bankruptcy. Furthermore, S was listed as an 'IT consultancy' business on Companies House and not a financial services firm.

So based on the above, along with the weight of testimony we have seen from other consumers who invested in S, I am satisfied that it is more likely S was not acting legitimately, since its intentions did not align with Mr P's intentions, and I am satisfied that S was dishonest in this regard. It follows that I'm satisfied Mr P was the victim of a scam.

Is Mr P entitled to a refund under the CRM code?

Halifax is a signatory of the CRM Code, which requires firms to reimburse customers who have been the victims of APP scams like this, in all but a limited number of circumstances and it is for Halifax to establish that a customer failed to meet one of the listed exceptions set out in the CRM Code.

Under the CRM Code, a bank may choose not to reimburse a customer if it can establish that*:

- The customer ignored what the CRM Code refers to as an "Effective Warning" by failing to take appropriate action in response to such an effective warning
- The customer made payments without having a reasonable basis for believing that: the payee was the person the Customer was expecting to pay; the payment was for genuine goods or services; and/or the person or business with whom they transacted was legitimate

**Further exceptions outlined in the CRM Code do not apply to this case.*

Halifax has already accepted that it could have done more as the sending bank in this complaint. It also hasn't made any arguments that it provided an effective warning to Mr P. As Halifax has awarded Mr P with a 50% refund already, I've gone on to consider Mr P's own actions as part of this scam.

Did Mr P have a reasonable basis for belief?

I've considered whether Mr P acted reasonably when making this payment, or whether the warning signs ought to have reasonably made him aware that this wasn't a genuine investment. Having considered everything carefully, I don't think Mr P did act unreasonably in the circumstances of this complaint. I've taken into account that Mr P's colleagues had already invested with S and appeared to be making profits, one of which who had personally met with the director and had found nothing untoward.

In spite of this, Mr P still conducted some checks himself, such as reviewing Companies House, and questioning inconsistencies in the names of who was running the firm, as well as having a video call with the director to better understand how such profits were achievable. While Mr P was aware the firm was not FCA regulated, his understanding was that this regulation was 'pending' – and without any advice to the contrary from Halifax, I can understand why this would have reassured him on its legitimacy.

I've thought about the profits Mr P was led to believe his colleagues were making, and what he had been advised to expect. While I accept these were high, Mr P has said he didn't consider anything was guaranteed other than his initial investment. He said the statements he'd seen of his colleague's showed that returns fluctuated week to week and so he was aware that he may not make anything, but was willing to take this risk as his initial investment was guaranteed.

Lastly, Halifax has itself suggested that Mr P has been the victim of a failed investment, rather than a scam. While I disagree on this point, as already explained, I think this evidences that it was not entirely clear whether this was in fact a scam or not, even with the benefit of hindsight and so it doesn't appear reasonable to have suggested Mr P should have identified this, prior to many of these warning flags coming to light.

Overall, for the reasons I've explained above, I think it is fair for our service to consider Mr P's complaint based on the evidence currently available and having done so, I think it is fair and reasonable for Halifax to fully reimburse him under the CRM Code.

My final decision

My final decision is that I uphold Mr P's complaint against Bank of Scotland plc trading as Halifax and I direct it to:

- Refund Mr P in full the payment he made towards the scam (£5,000)
- Apply 8% simple interest, from the time it declined Mr P's claim under the CRM Code until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 13 January 2025.

Kirsty Upton
Ombudsman