DRN-5048821

Financial Ombudsman Service

The complaint

Mr B complains that Bank of Scotland plc (trading as Halifax) won't refund the money he lost to an investment scam.

What happened

Around 2015, Mr B says he was introduced to an opportunity to invest in gold bullion through a company I'll call 'R' which was based in Dubai. Mr B says he was assured that he'd receive guaranteed returns of 20% which persuaded him to invest £100,000 from his Halifax current account.

Mr B received returns on the investment, but not the full amount expected, so in 2020, he contacted R again and they subsequently cut contact with him.

In September 2023, Mr B complained to Halifax that it didn't do enough to protect him from financial harm.

Halifax declined to refund Mr B's loss, so he referred his complaint to this service.

One of our Investigators looked into things, she noted that Mr B received returns of £68,976 between 2016 to 2019. She didn't agree that there was sufficient evidence that the disputed payment was linked to a scam. She also felt that even if Halifax did intervene, Mr B was persuaded the investment was legitimate and there was no credible adverse information about R at the time of the payment.

On 6 September 2024, I issued a provisional decision not upholding this complaint. 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.

Having done so, I don't intend to uphold this complaint but I've expanded upon the reasons for doing so.

Not every complaint referred to us as an investment scam is in fact a scam. Some cases simply involve high-risk investments that resulted in very disappointing returns or losses. Some investment companies may have promoted products like mini-bonds (which is the subject of this dispute)—which were not regulated by the FCA—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. So, the first question to resolve is whether R was actually a scam.

I think R were more than likely scammers as the FCA published a warning about them in April 2016 (after Mr B invested with them). So I'm satisfied Mr B's disputed payment was most likely made as the result of a scam.

In broad terms, the starting position at law is that a bank is expected to process payments and withdrawals a customer authorises it to make, in accordance with the Payment Services Regulations (in this case the 2009 regulations) and the terms and conditions of the customer's account. That was the case in 2015, and remains so now, and I have taken this into account when deciding what is fair and reasonable in this case. In addition:

- *Regulated firms like Halifax are also required to conduct their 'business with due skill, care and diligence' (FCA Principle for Businesses 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 thematic review paper 'Banks' defences against investment fraud – Detecting perpetrators and protecting victims' ("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"

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 payment in 2015, Halifax 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.*

I am satisfied that Mr B instructed the cheque payment himself in March 2015 and it reached the intended beneficiary. So in this case, taking all of these things into account, I need to decide whether Halifax acted fairly and reasonably in its dealings with Mr B when he made his payment totalling £100,000, or whether it should have done more than it did.

Halifax doesn't seem to dispute that this was the largest payment Mr B made from his account in the year leading up to it. I also think the payment was very unusual for Mr B and it was a substantial amount of money.

I've thought very carefully about whether an intervention from Halifax would have made a difference – taking into account Mr B's testimony – and I don't think it would have. I'll explain why.

I've read through Mr B's paperwork on the investment opportunity, which he said he read carefully before agreeing to invest. R was seeking to raise capital to build buy-to-let properties in the UK. The opportunity was presented as a three-year bond where profits of 20% would be made payable annually after the first 12 months.

R didn't hold themselves out to be regulated in the UK and the documentation stated that the governing law and jurisdiction of the bond would be governed by the laws in Dubai.
I've noted that Mr B explained in his complaint details that he was investing in gold bullion, however, his paperwork on the investment shows that the investment was in property. There's no mention of gold bullion.

I've also noted that the paperwork invited Mr B to take independent advice on the investment before deciding to invest. Mr B doesn't appear to have done this and I think this was because he was persuaded by the investment opportunity.

I think if Halifax had intervened and asked some reasonably probing questions about the purpose of the payment, Mr B would likely have explained that he was investing in property with a company based in Dubai. I think he'd have explained that he was receiving advice on this (from the introducer). Mr B would have likely explained that he had previous investment experience and I think Halifax would have noted the matured investment that credited his account a week prior to his payment towards the R investment. I also think Mr B would likely have explained that he would be receiving high returns.

I accept the rate of return was higher than what a high street bank would've offered, but mini-bonds do often have higher rates of return and I don't think it was 'too good to be true'. I accept the rate of return potentially indicated a high-risk investment, which might not have been suitable for Mr B, but as I've explained, it would not have been Halifax's role to provide him with financial advice. It's also notable there were no warnings at that time about R or mini-bonds as a product.

I've noted that the FCA published more information about mini-bonds in May 2019 and highlighted some risks involved with investing in such instruments. But this information was published more than four years after Mr B made his payment.

The FCA temporarily banned the mass marketing of speculative mini-bonds to UK retail consumers from January 2020, whilst it consulted on permanent rules. It made the temporary ban permanent the following year. So I don't think Halifax could have been

reasonably aware of this given that this information was published several years after Mr B made his payment.

There was no credible adverse information about R at the time of Mr B's investment, so I don't think Halifax would reasonably have been concerned that he could be falling victim to a scam.

Mr B invested a substantial sum of money and I don't think he did so lightly. Mr B also received some substantial returns back (which isn't a common feature of investment fraud). Mr B didn't identify that he'd fallen victim to a scam until around seven years after his initial investment, so I'm not persuaded that he would have had any reasonable concerns about R, even if Halifax had asked him some questions about the purpose of the payment at the time he made it. I don't think Halifax would have been concerned that Mr B was falling victim to a scam.

So overall, for the reasons I've explained, I'm not persuaded intervention from Halifax would've made a difference and prevented Mr B's loss in the particular circumstances of this case.

Because I don't think Halifax could have prevented Mr B's loss, it is unnecessary for me to go on to consider whether Mr B himself was partly to blame for what happened (contributory negligence). Indeed, I have already concluded that he was responsible for his own investment decisions, and that such choices were the proximate cause of his losses.

I do appreciate this decision will be disappointing for Mr B, particularly as he didn't receive his total capital investment back. But I am pleased to see he got a substantial sum back, which isn't a position many customers are in after falling victim to such a scam.

As Mr B made the disputed payment via cheque payment, there would have been no option for Halifax to have recovered it.

Responses to my provisional decision

Halifax didn't respond to my provisional decision.

Mr B responded to my provisional decision and didn't agree. In summary he said:

- The bank failed to carry out the appropriate level of checks on the proposed transaction and/or the recipient in contravention of the FCA regulations.
- The BSI Code of Practice set out examples of suspicious activity that should trigger a bank's intervention and based on the activity, the bank should have intervened.
- He found my decision contradictory when he believed he was investing in gold bullion, but I suggested he would have confirmed to the bank that he was investing in property.
- Had the bank intervened, he would have confirmed that he was transferring funds in respect of an investment in gold bullion. This alone should have given the bank cause for concern, especially coupled with the obvious fact that the documentation provided to him was complex and appeared to be in relation to R generating funds for a property investment.
- As per R's Information Memorandum, 75% of funds received from investors were purportedly to be invested into a property portfolio yield of 18%. While the remaining 25% of funds received from investors was to be invested into bonds with an investment yield of 20%. Given the service has seemingly failed to

understand the purported investment structure of R, which he holds to have been a Ponzi scheme, it would be unfair and unreasonable to expect him to understand the complexity of the same.

- Had the bank intervened and queried his reason for his sudden unusual investment, he would have confirmed that the investment was in relation to gold bullion, seemingly in contrary to the documentation provided to him. This, exasperated by the fact that he was transferring funds overseas and the exceptional high interest rate guaranteed to him should have caused serious concern with the bank.
- He is in agreement that the bank would not have been expected to provide him with investment advice, however an appropriately tailored warning indicating that the context of his high value transaction bears the hallmarks of fraud/scam.
- With regard to the 'substantial returns' received by him in respect of R, he doesn't find this to be relevant to the complaint. It is not a question of what concerns or reassurances the bank may have had after the transaction but rather, what concerns they held, or should have held based upon appropriate questioning with him, at the time of the transaction.

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 don't uphold this complaint, for the reasons I explained in my provisional decision (which forms part of this final decision).

The BSI Code of Practice quoted by Mr B was published in October 2017 – not at the time of his investment in 2015. However, this doesn't change my decision on the standards of due diligence and good practice expected of firms, like Halifax, at the time of Mr B's disputed payment. My provisional decision explains in detail what I think these were.

I acknowledge Mr B says he believed he was investing in gold bullion yet there is no mention of gold bullion within his investment paperwork, and he believes the bank would have been concerned about this. I'm not satisfied that Mr B's belief of the investment opportunity being in that of gold bullion is supported by any of the evidence he has presented. In Mr B's complaint submission, he said he read the investment paperwork very carefully before agreeing to invest. It follows that if Mr B, who had prior experience investing substantial sums of money, believed that he was investing in gold bullion and not the property investment opportunity presented in the paperwork, I don't think that he would have reasonably proceeded with the investment opportunity. This is because, he was investing a substantial sum of money and I think at the very least, he'd have wanted evidence to confirm that what he was investing in was accurate.

I think it's more likely that Mr B was presented with a three-year bond linked to a property investment with R (based overseas) and not regulated in the UK. I think the documentation is clear on this. I think Mr B was persuaded that R would obtain the 20% profits promised to him and proceeded on this basis.

It follows that had the bank intervened and asked some reasonably probing questions about the purpose of the payment, Mr B would likely have explained that he was investing in a bond linked to property with a company based in Dubai. I think he'd have explained that he was receiving advice on this (from the introducer). Mr B would have likely explained that he had previous investment experience and I think Halifax would have noted the matured investment that credited his account a week prior to his payment towards the R investment. I also think Mr B would likely have explained that he would be receiving high returns.

As I explained in my provisional decision, I acknowledge the rate of return was higher than what a high street bank would've offered, but mini-bonds do often have higher rates of return and I don't think it was 'too good to be true'. I accept the rate of return potentially indicated a high-risk investment, which might not have been suitable for Mr B and I also note Mr B's concern that the paperwork explaining the investment was complex, but as I've explained, it would not have been Halifax's role to provide him with financial advice. R's bond paperwork invited Mr B to take independent advice before proceeding and I think if Mr B had difficulty understanding what he was investing in, it would have been reasonable for him to take independent advice. I would not have expected Halifax to provide this advice.

There was no credible warnings at that time about R and there was no requirement for R to be regulated – so the absence of any FCA regulation would not have been a concern to Halifax. There was also no credible adverse information about mini-bonds as a product as the FCA didn't provide warnings about this product until several years after Mr B's payment.

Mr B invested a significant sum of money and I think he did so with careful consideration based on his testimony. And the reason I find Mr B's substantial returns relevant is because he doesn't appear to have been concerned about R at the time of his payment, immediately after or in the years that followed, even though his investment didn't perform as promised. So, I'm not persuaded that he would have had any reasonable concerns about R, even if Halifax had asked him some questions about the purpose of the payment at the time he made it. I also don't think Halifax would have been concerned that Mr B was falling victim to a scam based on what I think Mr B would have told it about the investment.

Overall, for the reasons I've explained, I'm not persuaded intervention from Halifax would've made a difference and prevented Mr B's loss in the particular circumstances of this case.

Because I don't think Halifax could have prevented Mr B's loss, it is unnecessary for me to go on to consider whether Mr B himself was partly to blame for what happened (contributory negligence). Indeed, I have already concluded that he was responsible for his own investment decisions, and that such choices were the proximate cause of his losses.

My final decision

My final decision is, despite my natural sympathies for Mr B's loss, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 25 October 2024.

Dolores Njemanze
Ombudsman