

The complaint

Mr S is unhappy that Marks & Spencer Financial Services Plc ('M&S') won't refund all the money he's lost to a scam.

What's happened?

Mr S made payments totalling £170,000 as part of an investment scam in mid-2019. He says that M&S didn't carry out the correct checks to protect him when processing the payments.

M&S accepted partial responsibility and reimbursed 50% of Mr S' loss (£85,000). The bank acknowledged that it could've done more to protect Mr S, but it said that he could also have done more to protect himself.

Mr S reported the scam to M&S in early October 2019, but the bank didn't begin an investigation straight away. M&S has paid Mr S £300 by way of compensation for this but says its delay has not caused Mr S a financial detriment because the receiving bank has confirmed that no funds remained in the beneficiary account to recover as at October 2019.

What did our investigator say?

Our investigator concluded that M&S should've fully reimbursed Mr S' £170,000 loss. M&S didn't agree and asked for the complaint to be escalated to an ombudsman. It said that Mr S 'invested' a considerable sum, so it would've expected him to carry out some due diligence. But he didn't do any independent research or make any precautionary checks to ensure what he was investing in was legitimate. In addition, he didn't receive any investment documents as you would expect and the returns he was promised were too good to be true, and this should've rung alarm bells.

My provisional decision

I issued my provisional decision on 3 August 2022. I'll set out my findings below.

M&S is a signatory of the Lending Standards Board's Contingent Reimbursement Model ('CRM Code'), which requires firms to reimburse customers who have been the victims of Authorised Push Payment ('APP') scams, like the one Mr S has fallen victim to, in all but a limited number of circumstances. The last two payments Mr S made are covered by the CRM Code, and M&S has acknowledged that it didn't provide an effective warning during the relevant payment journeys – having looked at the warnings the bank provided, I agree that they were ineffective. But it's argued that Mr S made the payments without a reasonable basis for belief that the payee was the person he was expecting to pay, the payments were for genuine goods or services and/or the person or business he was transacting with was legitimate.

So, I've thought about what steps Mr S took to reassure himself about the legitimacy of the investment opportunity.

Mr S says he was persuaded to 'invest' after speaking to the scammer approximately six

times over a two-week period (not face-to-face). He was told that his investment was protected by the Financial Services Compensation Scheme and would provide returns of at least 14%, and he was given written information about the company he was investing in.

I haven't seen copies of any communication between Mr S and the scammer, so I'm unable to comment on how persuasive the scammer was. But Mr S 'invested' a total of £170,000 – a not insignificant amount. And the promised return was unusually high. In the circumstances, I would've expected him to have carried out some independent research to check the legitimacy of the investment opportunity. But he doesn't appear to have carried out any checks or made any attempts to protect himself – for example, by:

- attempting to meet a representative of the company he was investing in in-person at the registered offices.
- ensuring he received appropriate documentation relating to his investment.
- independently verifying that the company he was investing in was legitimate.
- looking at reviews from previous and current investors.
- checking the Financial Conduct Authority's website.
- seeking independent professional advice.

Overall, I'm not persuaded that Mr S had a reasonable basis for belief in this case.

As M&S failed to provide Mr S with an effective warning and that failure is likely to have had a 'material effect' on preventing the scam, but Mr S also lacked a reasonable basis for belief, he should be reimbursed 50% of the last two payments under the provisions of the CRM Code.

M&S has accepted that it could've done more to prevent Mr S' entire loss to this scam and, having looked at everything that happened, I agree that it ought reasonably to have prevented all three payments that Mr S made. But, as I've set out above, I think Mr S should've done more to protect himself too in the circumstances, so I think it's fair for him to bear 50% of the loss he's incurred.

M&S has already refunded 50% of Mr S' entire loss, as I would expect it to. But it's unclear whether the bank has paid Mr S any interest. If it has not yet done so, M&S should now pay interest at a rate of 8% per annum (because I think it's likely Mr S would have used the money he lost to the scam elsewhere if he had not been defrauded, but I can't reasonably be sure what he would have spent the money on) from the date of each payment (because M&S ought reasonably to have prevented the loss) to the date of settlement. In responding to my provisional decision, I would be grateful if M&S could provide evidence that it has already paid the correct level of interest if it says that it has done so.

Finally, I've considered whether M&S took reasonable steps to recover Mr S' funds once he notified it of the scam in early October 2019, and I think it's clear that it didn't. But the receiving bank has confirmed that appropriate and timely action on M&S' part would not have led to the recovery of Mr S' funds, so I don't think the bank's error has caused Mr S financial detriment. And I'm satisfied that the £300 compensation M&S has already paid Mr S for its error is fair and reasonable in the circumstances. So, I don't require the bank to do anything further in this respect.

Responses to my provisional decision

M&S let me know that it has not yet paid Mr S any interest, but it is willing to do so at this stage, in line with my provisional decision.

In summary, Mr S made the following comments:

- He believes that other victims of the same scam have been fully reimbursed by their banks, and he should be treated fairly and equally.
- M&S has admitted failings in its control environment on several occasions. He has asked for call recordings to support this and would like to know if I have reviewed them.
- He did somewhat investigate – he looked at the company's website and the company sent him materials which included brochures on the investment strategies they offered. A professional investor may have been able to validate that the investment opportunity was not credible, but he is not sure that a retail investor, with no knowledge of the industry and without the benefit of financial advice, would have been in the same position. What is reasonable due diligence expected of a retail investor when making an investment 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.

I understand, from what Mr S has said, that other victims of the same scam may have been fully reimbursed by their bank, and I appreciate that this may feel unfair to him. But it is my role to consider the merits of individual cases brought before me and decide what the fair and reasonable outcome is in all of the circumstances.

I would like to reassure Mr S that I took all of the available evidence into account when reaching my provisional decision – including the conversations he had with M&S when the payments were made – and I concluded that the bank did not do enough to protect him from financial harm. I also concluded that Mr S did not do enough to protect himself from financial harm and I set out some of the due diligence I may have expected him to undertake before investing a large sum of money on the promise of unusually high returns.

As M&S has accepted my provisional decision, and neither party has provided any new information or evidence for me to consider, I see no reason to depart from the conclusions set out in my provisional decision of 3 August 2022.

My final decision

For the reasons I've explained, my final decision is that:

- Marks & Spencer Financial Services Plc's 50% refund of Mr S' entire loss is fair and reasonable, but it should now pay interest at a rate of 8% per annum from the date of each payment to the date of settlement.
- The £300 compensation Marks & Spencer Financial Services Plc has paid Mr S for its delay in investigating his fraud claim and attempting to recover the funds he lost to the scam is a fair and reasonable amount in the circumstances.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 20 October 2022.

Kyley Hanson
Ombudsman