

The complaint

Mr W complains Clydesdale Bank Plc trading as Virgin Money (Virgin Money) registered a fraud marker at CIFAS, the national fraud database. He doesn't think it's treated him fairly.

What happened

Mr W held an account with Virgin Money which was opened in August 2021.

On 28 September 2021 a payment intended for Mr W's account was identified as fraudulent - the bank where the funds were coming from told Virgin Money that their customer had been the victim of a scam. Virgin Money blocked Mr W's account and following a review closed it.

Mr W later discovered Virgin Money had also placed a 'misuse of facility' marker against him with CIFAS which was preventing him from opening an account. He contacted Virgin Money to complain, but it didn't think it had done anything wrong. It said it had considered the impact carefully before taken the steps it had and declined to remove the loading. Unhappy with this, Mr W referred his complaint to us.

One of our adjudicators considered the complaint. She asked Mr W for some background information. In summary Mr W said: a friend of his had approached him to see if he wanted to make money from investing in crypto currency. He put him in touch with an acquaintance who I shall call 'J'. J said he'd arrange to send money to Mr W's account which he'd then need to invest in buying crypto currency. For this purpose, Mr W also had a crypto currency wallet to send money onto. Mr W added that as part of the arrangement, both he and J would make money from gains in the investment.

Mr W didn't think Virgin Money had treated him fairly. He said, the reason noted for his account being closed suddenly without warning was because there had been suspicious activity, which was unexplained. But Virgin Money hadn't contacted him so he could explain what had happened. Had it done so, he said he would have been able to explain he was unaware that the funds being transferred and paid to him were stolen.

Having considered the information, the adjudicator concluded that there was enough evidence to suggest Mr W knew that what he was doing wasn't completely legitimate. Because when asked about whether there was an incentive to complete the crypto currency activity, he had said yes (as the purpose would've been for him and J to make money). The adjudicator said the available evidence suggested to her that it was more likely than not that Mr W was or would've been complicit in receiving fraudulent payments into his account, which was a misuse of facility and when considered with other activity this justified the loading with CIFAS.

Mr W didn't agree – he asked that his case be passed to an ombudsman for a decision. In doing so, he said he accepted he had made some poor decisions because he needed money but he had no knowledge the money he'd be receiving and investing was from a fraud or scam. He didn't think the adjudicator had done enough to establish he had full

knowledge of the situation that Virgin Money could confidently report the matter to the Police. He questioned why Virgin Money didn't report the matter to the police if this was the case.

He accepted the decision to close his account was reasonable but not in relation to the loading of the marker.

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.

The marker that Virgin Money has filed is intended to record that there's been a 'misuse of facility' – relating to using the account to receive fraudulent funds. In order to file such a marker, it isn't required to prove beyond reasonable doubt that Mr W is guilty of fraud or a financial crime, but it must show that there are grounds for more than mere suspicion or concern.

The relevant guidance says:

- "There must be reasonable grounds to believe that an identified fraud or financial crime has been committed or attempted; [and]
- The evidence must be clear, relevant and rigorous such that the member could confidently report the conduct of the subject to the police."

What this means in practice is that a bank must first be able to show that fraudulent funds have entered Mr W's account, whether they are retained or pass through the account.

Secondly, the bank will need to have strong evidence to show that Mr W was deliberately dishonest in receiving the fraudulent payment and knew it was, or might be, an illegitimate payment. This can include allowing someone else to use their account to receive an illegitimate payment. But a marker should not be registered against someone who was unwitting; there should be enough evidence to show complicity. To meet the standard of proof required to register a fraud marker, the bank must carry out checks of sufficient depth and retain records of these checks. This should include giving the account holder the opportunity to explain the activity on their account in order to understand their level of knowledge and intention.

Virgin Money received a report from the third-party bank that a payment intended for Mr W's account was from a fraud. And while Virgin Money don't appear to have asked Mr W for more information about what he knew, this isn't the end of the matter. As there are further considerations. In order to determine Mr W's complaint, I need to consider whether I think having regard for what we know there's enough evidence to show fraudulent funds entered the account (or were intended to) and that Mr W's actions suggest he was complicit in this. And having considered everything, I don't think Virgin Money have treated Mr W unfairly in recording the fraud marker here. I'd like to explain why in a little more detail.

The funds in question, which were intended to enter Mr W's account did so because of fraudulent activity. I have seen the report dated September 2021 from the sending bank about the payment. Mr W says he wasn't aware of a fraud at the time and genuinely believed this to be an investment opportunity. I thought very carefully about this and requested information from Mr W to support what he understood to be the case at the relevant time. But despite a number of attempts to contact him before the deadline to reply, he's not responded. This means I don't have any corroborating evidence to demonstrate why he

genuinely believed the arrangement to be legitimate. Thinking about this and crucially the fact that Mr W doesn't appear to have questioned why he'd be getting a financial incentive for using money that wasn't his and why J would need to use his account instead of his own, doesn't in my opinion make what Mr W says very plausible.

I'm afraid that the available evidence together with Mr W being unable to provide anything at all to corroborate his version of events means that I can't reasonably conclude he was an unwitting participant here. Instead, I think it's more likely than not he was aware of an attempt to credit his account with funds that weren't legitimate.

Of course, Virgin Money should have asked further questions as per CIFAS's guidance to its members. But as set out above, I'm satisfied from looking at the evidence Virgin Money hasn't treated Mr W unfairly in recording it. Finally, Mr W asks why Virgin Money didn't report the matter to the police if they were confident he'd committed a financial crime however I must explain that the guidance says that the member '*could*' report when referencing the standard of proof rather than it must or should.

It follows that I don't think Virgin Money has treated Mr W unfairly and so I won't be asking it to remove the marker.

For completeness, I'm also satisfied Virgin Money closed Mr W's account in line with its terms and conditions given the account activity. So, I find it made no mistake here either.

I recognise that Mr W feels strongly about his complaint and he'll be disappointed with my decision. But I hope that he'll understand, given all that I've explained, why I've made the decision that I have.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 13 February 2023.

Sarita Taylor
Ombudsman