

The complaint

Mr M complains that Cumberland Building Society did not do enough to protect him from the financial harm caused by an investment scam company.

What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide a brief overview of some of the key events here.

Mr M was a victim of an investment scam. He was contacted by a broker claiming to work for a company I'll refer to as "B" who he came across online. The broker asked him to first purchase cryptocurrency through a cryptocurrency exchange company and then load the cryptocurrency onto his online wallet. Between 18 April 2021 and 20 May 2021, he made nine payments totalling £10,375.50 to two cryptocurrency exchange companies using his Cumberland Visa debit card. The first two payments of £100 and £500 were made on 18 April to a company I'll refer to as "C". Then between 5 and 20 May, Mr M made seven payments to a company I'll refer to as "M". These payments ranged between £419.77 and £3,764.43.

When Mr M tried to make the payment of £3,764.43, Cumberland sent him a text message asking him to call them, which he did. During the call he confirmed them he'd authorised the payment and the block was lifted. Mr M received a further text when he tried to make another payment the following day, so he contacted Cumberland a second time. During this call he confirmed he'd authorised the payment, explaining it was to purchase cryptocurrency. Again, the block was lifted.

Mr M realised he'd been the victim of a scam when he was unable to withdraw his money from the wallet. He asked Cumberland to raise a request under Visa's chargeback scheme, but it seems nothing was done in this regard.

When Mr M complained to Cumberland, it said it was unable to uphold the complaint. It said the payment on 11 May had flagged and the payment was blocked. It explained that as Mr M had previously purchased cryptocurrency, it wouldn't have questioned the payment, other than to confirm he had authorised it, as it was reasonable to assume that he understood the risks associated with cryptocurrency. Cumberland also said it didn't accept Mr M was the victim of a scam, rather it was a misjudged investment, so the Contingent Reimbursement Model ("CRM") Code didn't apply.

Finally, it accepted it could have delivered a better service and offered £150 compensation as a goodwill gesture.

Mr M wasn't satisfied and so he complained to this service. He said Cumberland had breached its duty of care to protect him from financial loss and that it should reimburse the money he'd lost.

Our investigator thought the complaint should be upheld. He agreed there was no valid chargeback claim against the cryptocurrency exchange companies because they had provided the services as intended, which was to purchase the cryptocurrency.

But he thought Cumberland ought to have asked him more questions during the call on 11 May as, by the time Mr M made the payment, cryptocurrency scams had risen in frequency and it should have had mechanisms in place to detect and prevent this type of fraud. He concluded that Cumberland could have done more to prevent Mr M's loss and recommended it should reimburse the money he'd lost from 11 May onwards.

Cumberland has asked for the complaint to be reviewed by an ombudsman, arguing that it acted in accordance with its security procedures on 11 May. It said Mr M's card was temporarily stopped, and its questions were answered fully and completely during the call, with no indication of increased risk of fraud. Mr M was an experienced purchaser of cryptocurrency having previously made seven payments to cryptocurrency exchange companies, and the transaction wasn't deemed unusual or out of keeping with other transactions. It also said that if further questions had been asked, this wouldn't have changed the outcome, and the funds would still have been transferred.

Cumberland also argued that it would be unfair to suggest it should be responsible for loss after it had executed a customer's request as it would make payment institutions responsible for transactions over which they had little or no knowledge or control.

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've reached the same conclusion as our investigator. And for largely the same reasons.

CRM Code

The CRM Code requires firms to reimburse customers who have been the victims of Authorised Push Payment ('APP') scams, like the one Mr M says he's fallen victim to, in all but a limited number of circumstances. The CRM code didn't apply in this case because the disputed payments were paid to an account in Mr M's own name.

Not every complaint referred to us and categorised as an investment scam is in fact a scam. Some cases simply involve high-risk unregulated investments that resulted in disappointing returns or losses. Some of these investments may have been promoted using sales methods that were arguably unethical and/or misleading. However, while 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).

I've carefully considered the circumstances, and I am persuaded the broker was operating as part of a scam. But, although Mr M didn't intend his money to go to scammers, he did authorise the disputed payments. Cumberland is expected to process payments and withdrawals that a customer authorises it to make, but where the customer has been the victim of a scam, it may sometimes be fair and reasonable for the bank to reimburse them even though they authorised the payment.

Chargeback

I've thought about whether Cumberland could have done more to recover Mr M's payments when he reported the scam to it. Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa's arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. Cumberland) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder (Mr M).

Mr M's own testimony supports that he used cryptocurrency exchanges to facilitate the transfers. Its only possible to make a chargeback claim to the merchant that received the disputed payments and its most likely the cryptocurrency exchanges would have been able to evidence they'd done what was asked of them. That is, in exchange for Mr M's payments, they converted and sent an amount of cryptocurrency to the wallet address provided. So, any chargeback was destined fail, therefore I'm satisfied that Cumberland's failure to raise a chargeback request against either of the cryptocurrency exchange companies didn't represent a missed opportunity to recover the money.

Triggers

Buying cryptocurrency is a legitimate activity and from the evidence I've seen, the payments were made to genuine cryptocurrency exchange companies. However, Cumberland had an obligation to be alert to fraud and scams and these payments were part of a wider scam, so I need to consider whether it ought to have done more to warn Mr M when he tried to make the payments. If there are unusual or suspicious payments on an account, I'd expect Cumberland to intervene with a view to protecting Mr M from financial harm due to fraud.

I agree that the first three payments Mr M made were neither suspicious nor unusual. But on 11 May, he tried to pay £3,764.43 and received a text from Cumberland asking if the transaction was genuine. Mr M confirmed over the phone that the payment was genuine before Cumberland removed the block.

Cumberland did more than seek to confirm the transaction was genuine by text and asked to speak to Mr M, so I do think it considered this particular transaction to be unusual. During the call, Mr M told the agent who he was trying to pay and confirmed the payment was genuine. The agent made no other enquiries and cleared the block.

While the aim of the call had been to establish that Mr M had intended to make the payment, I think the agent should reasonably have identified that it was above Mr M's average monthly spend, it followed a pattern of payments to cryptocurrency exchanges and, crucially, that it was significantly higher than the seven previous payments he'd made to cryptocurrency exchange companies, the highest of which was £536.25.

Having identified that the payment was unusual, and notwithstanding the fact that Mr M had purchased cryptocurrency before, I think it would have been reasonable for the call handler to have made some enquiries such as whether there was a third party involved and, if so, what the third party had told him in the context of how much money he might make from the investment. Had the agent asked these questions, as there's no evidence of Mr M having misled Cumberland in any of its other enquiries, I think it's likely he would've been open about the fact he'd been approached by a third party claiming to work for B.

While there were no warnings about B on the FCA or IOSCO websites, B wasn't regulated by the FCA and Cumberland could have explained to Mr M that this indicated it was probably

a scam. I'm satisfied that, if Mr M was warned he could be the victim of a scam, he would have thought twice about going ahead with the payments as the investment was funded by his own savings, and there's no evidence that he was keen to take risks with his money.

If Cumberland had alerted Mr M to the risk, I'm satisfied he most likely would have reconsidered his decision to make the payment. Consequently, I think that in failing to ask more questions when he called on 11 May, Cumberland missed an opportunity to intervene and prevent the scam. So, it should refund the money he lost from that date onwards. This should include a payment of 8% simple interest, per year, from the respective dates of loss to the date of settlement.

My final decision

My final decision is that Cumberland Building Society should:

- pay Mr M £9839.25
- pay 8% simple interest*, per year, from the respective dates of loss to the date of settlement.

*If Cumberland Building Society deducts tax in relation to the interest element of this award it should provide Mr M with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 15 March 2023.

Carolyn Bonnell
Ombudsman