DRN-4053598

## The complaint

Mr M is unhappy that Metro Bank PLC won't refund money he lost as a result of a scam.

## What happened

On 27 February 2023, I issued my provisional decision on this complaint. I wanted to give both sides the opportunity to present any further evidence and arguments before I issued my final decision. That provisional decision forms part of this final decision and is copied below.

*What happened*

*Mr M was searching for investment opportunities online, specifically government backed bonds. Presumably after providing his contact details, he was contacted by someone representing a property investment company and issuer of loan notes that I'll call Q.*

*Mr M says that the representative informed him that they had a client - a well-known property builder - that needed a loan and that any investment would be low risk because it was secured using first legal charges against the properties being developed.*

*On the basis of promised returns of 9.25%, in May 2019 Mr M made an initial investment of £50,000. In July 2019, Mr M was contacted again, this time about an investment of £500,000. Following the successful transfer of that amount Mr M received regular interest payments for the first year of his investment. By April 2020, Mr M had decided to invest another £500,000, making that payment on 29 April 2020. This payment was made to a Financial Conduct Authority ("FCA") authorised firm that I'll call N. It is this payment which is the subject of this complaint. The other payments were made from bank accounts held at other banks, were paid directly to Q and have already been refunded.*

*In July 2020, Mr M received an email, the first indication that Q was having difficulty repaying investors. That email said a bonus rate would be paid because of the delays. Mr M didn't receive any more payments from Q and, later that month, he received an email suggesting that Q would be going into liquidation.*

*He held a meeting with someone who said they were helping Q. Mr M was told that a significant sum of money was frozen in Q's accounts and that Q was considering putting itself into voluntary liquidation. At that point, he became aware that Q's claims about having charges over property might not have been true.*

*In late 2020 Mr M, along with another creditor of Q, petitioned the High Court for the winding up of Q. In February 2021 Q was placed into liquidation. A letter from the liquidators to all creditors of July 2021, explains that it had found that Q had not entered into any property deals, had misrepresented itself, held no security and had, essentially, been a fraud.*

*Mr M also contacted Metro to report that he'd been the victim of a scam. Metro is a signatory of the Lending Standards Board ("LSB") Contingent Reimbursement Model "CRM Code", which requires firms to refund victims of APP scams in all but a limited number of circumstances. Metro initially said that Mr M hadn't fallen victim to a scam, but rather had a*

*civil dispute with Q. Civil disputes are not covered by the CRM Code. It also advised him that he should bring a complaint about N.*

*After correspondence from Mr M's representatives which argued that Metro was both in breach of its duty of care towards Mr M in allowing the payment to go through without challenge and that it ought to refund him under the provisions of the CRM Code, Metro provided a further response.*

*It said that it had no grounds to suspect fraud and was not obligated to make further enquiries about the payment he made. Metro also argued that the CRM Code was not applicable because the payment had been made to another FCA-authorised firm.*

*The matter was referred to our service.*

*After considerable correspondence between all parties, our investigator recommended that Mr M be refunded in full. The investigator made two key findings: that the circumstances could be considered under the CRM Code and that, under the CRM Code, Mr M was entitled to reimbursement in full. The investigator also recommended Metro pay £300 in compensation. They argued that it had not been clear that Q was operating as a scam at the point Metro made its decision to decline his claim - this had only become apparent later. It was also difficult to establish what Mr M would have done with the money had it been returned. So, they did not make an award of interest. Neither did they ask Metro to pay Mr M's legal fees.*

*As the recommended amount is above the relevant award limit of our service, the investigator suggested that Metro either pay the full amount or make an alternative offer.*

*In support of their conclusion that the CRM Code did cover the payment in dispute, the investigator argued:*

- *While they accepted that N couldn't raise a claim under the CRM Code and neither could Mr M raise a complaint about the payment from N to Q, the Code was still applicable*

- *The investigator was satisfied the payment from Mr M to N met the definition of a scam under DS1(2)(a)(ii)- that is that Mr M transferred funds to another person for what they believed were legitimate purposes but were in fact fraudulent.*

- *They noted that the payment went to another person and for a purpose which turned out to be fraudulent (even if N wasn't involved in that fraud).*

- *The investigator referred to the LSB's November 2021 consultation. They noted that the LSB had specifically included payment journeys which had been 'intentionally elongated to involve more than one individual'. And that the LSB said that consideration should be given to the point at which the consumer lost control of their funds.*

- *The investigator concluded that as Mr M had lost control of his funds once they were sent to N, the matter was covered by the CRM Code.*

*Metro didn't agree. I've summarised their response both to the investigator's assessment and earlier correspondence. It argued that the provisions of the CRM Code were not relevant for the following reasons:*

- *Any payment made directly from Mr M to Q would be considered under the CRM*

*Code.*

*But, the payment in dispute went to N first. N was not party to the fraud and did not benefit from it.*

- *The effect of this is to render the second transaction a second-generation movement of funds, which is specifically excluded under OS2(1)(b).*

- *The view that only the first-generation payment which leaves a customer's control and enters the account of a scammer is to be considered under the CRM Code is supported by UK Finance and the investigator didn't address this point.*

- *The LSB consultation of 5 November 2021, on which the investigator has relied, postdates the scam and therefore isn't applicable.*

*Given the above, no liability assessment was completed under the Code as the payment is not eligible for reimbursement*

*In addition, it argued that in the absence of the CRM Code, it also didn't have any liability for the following reasons:*

*Metro would not have had any concerns about the possibility that Mr M was at risk of financial harm from fraud, given that he was making a payment to an FCA-authorised firm.*

- *The payment also wasn't unusual for Mr M - he made a number of high value payments - even on the same day.*

- *It's not clear what steps Mr M has taken to pursue N in relation to this matter. Metro's position is that he should do this and N had a duty to protect Mr M.*

*It contacted the receiving bank when it was made aware of the scam but was unable to recover Mr M's funds.*

*As no agreement could be reached, the case was passed to me for a final decision.*

*What I've provisionally 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 relevant regulations - the Payment Services Regulations 2017 - explain that a customer is responsible for payments they've carried out themselves, even those made under deception. However, as has already been explained, Metro Bank are signatories to the CRM Code. It also has longstanding obligations to be on the lookout for out of character and unusual transactions that might indicate that its customer was at risk of financial harm from fraud.*

*The central point of dispute here is whether the additional step of Mr M paying N, before the money was passed to Q, means that the provisions of the CRM Code do not apply to the transaction.*

*I will address that point in more detail later in this decision. But, I will begin with what does not appear to be in dispute. The CRM only applies to authorised push payment scams as defined by OS1(2)(a). The starting position is that customers should be reimbursed unless a*

*firm can show that one of the exceptions to reimbursement set out in R2(1) apply.*

*Despite the response to Mr M's initial complaint, Metro has now accepted that Mr M fell victim to a scam and that Q acted fraudulently. I think the evidence, particularly the letter from the liquidator referred to earlier, makes this very clear.*

*Though some of Metro's submissions allude to the fact that Mr M was an experienced investor and the director of several companies, neither has Metro made any substantial arguments that he did not act with a 'reasonable basis for believing' that Q was a genuine business that would provide a genuine service (one of the exceptions to reimbursement). It's apparent to me that this scam had a high degree of sophistication and the steps Mr M took to verify its authenticity were reasonable (including, for example, meeting representatives of Qin person). Nor has Metro suggested that it gave any warning that could be considered 'Effective' (a second exception under the CRM Code). In fact, it argues quite the opposite - that it was in no position to identify the payment as concerning or unusual given Mr M's previous account activity.*

*In the absence of, in my view, any other exception being relevant, it follows that Mr M is entitled to full reimbursement (subject to our service's award limits) if the CRM Code does apply to his circumstances. However, I acknowledge that Metro has previously said it hasn't fully considered this matter under the CRM Code, so if it wishes to make any further submissions about the applicability of the exceptions, it should do so in advance of my final decision.*

*Turning to the central point of dispute - whether the payment is covered under the provisions of the CRM Code. I've considered the position set out by the investigator and I agree that the payment should be considered under the CRM Code, but for slightly different reasons.*

*The CRM Code does not require the initial recipient of a payment to be an account owned by and for the benefit of the fraudster. Neither does it require that account to be controlled by a party which is complicit in the fraud. Instead the relevant test is whether an APP scam has taken place. In this case, I think the payment meets the definition of an APP scam under DS1(2)(a)(ii) in that Mr M transferred his funds to another person (N) for what he believed was a legitimate purpose but was in fact fraudulent. Specifically, Mr M believed that he was making a payment as part of a legitimate scheme but, in fact, he was being defrauded.*

*Should the CRM Code require that the first recipient of funds also be the party that benefits from the fraud, a great many claims would be excluded. For it is the case that many first-generation accounts are not controlled by the fraudster themselves. The use of money mules (complicit or innocent) is well-known and the CRM Code does not require the sending firm to make an assessment of whether the recipient account holder was complicit in the fraud or not.*

*Instead, I need to consider whether the funds were effectively under the control of the fraudster at the point they arrived at N.*

*I've seen evidence that the funds that credited N's account were passed to Q within a few days (seemingly minus a small fee retained by N). Given what is known of the relationship between N and Q it's very likely that this subsequent transaction was carried out under a pre-existing agreement. More importantly, Mr M does not seem to have a customer relationship with N, the funds do not appear to credit an account in his name and he had no significant interactions with it. I'm satisfied N was acting on behalf of Q and not Mr M and he had no reasonable way of preventing the onward transfer of funds to Q.*

*It follows then that the money was both out of Mr M's control at the point it arrived at N and*

*effectively under the control of Q. Consequently, the circumstances in this case are not significantly different from a typical scam scenario - where funds are transferred into an account which is unlikely to be owned by the fraudster, but the recipient has agreed to pass funds on to an ultimate beneficiary.*

*That means that the payment Mr M made is capable of being covered by the provisions of the CRM Code. I'll now go on to address Metro's objections to such a finding and any other reasons why it might not be fair for the CRM to be applicable.*

*Metro principally rely on DS2(1)(b), as well as conversations that they say they've had with UK Finance (a trade body). It's important to note that I haven't seen those conversations, I've only seen Metro's internal emails which refer to them.*

*DS2(1) sets out that:*

*'This Code applies to Customers undertaking Payment Journeys as defined in DS1(2)(k):*

*...(b) to the point of the first reception of funds in an account held by a receiving Firm (the first generation account). Firms whose accounts are utilised in the onward transmission of APP scam funds are out of scope.'*

*Metro interpret this section of the Code as meaning that considerations are limited to a payment from the victim's account to any other third party. I don't think that's right - the LSB's consultation makes clear that certain multi-stage frauds are within the scope of the Code. But, for the reasons I've already outlined, in this case there's no need to consider the payment from N to Q (the onward transmission of funds) as the funds were effectively under the control of Q once they reached N.*

*Finally, I've thought about whether it's fair for the CRM Code to apply in such circumstances. Metro argue that Mr M should complain to N directly and the fact it was FCA authorised (it entered liquidation in August 2021) is in itself enough to disapply the CRM Code. But, for the reasons I've already set out, the involvement of a genuine (or unwitting) intermediary does not exclude the possibility of the CRM Code applying. Neither do I think it is unfair for the Code to apply. As Metro accepts, it would be liable (at least to consider the complaint under the Code) had the payment been made directly to Q. It's fair to say, I think, that the involvement of N was essentially incidental. And, for largely the reasons Metro has set out, whether the payment went directly to Q or to N it's very unlikely it would have found that payment to be unusual and prevented it. The payment wasn't particularly unusual for Mr M and, in any case, it doesn't appear that anyone was aware that Q was a scam at the point at which it was made. So, I'm not persuaded that the fact the payment went first to N has made it materially more difficult for Metro to prevent harm to Mr M.*

*So, while I'm somewhat sympathetic to Metro that it, rather than another financial business, will be solely responsible for Mr M's loss, given that Metro is a signatory to the CRM Code, I don't find that Metro being responsible creates an unfair outcome. Neither can I direct Mr M to pursue the matter solely with N which is, in any case, now in liquidation.*

*Turning to interest, it's necessary for me to consider both the point at which Metro ought reasonably to have considered the claim under the CRM Code and whether Mr M can satisfactorily demonstrate that he has been caused loss by being deprived of the money since that point.*

*I don't think Metro could have identified that a scam was taking place at the point it*

*happened. Nobody appears to have known then that Q was defrauding customers and the transaction wasn't particularly unusual for Mr M. Mr M reported the matter to Metro in November 2020, but it wasn't until July 2021 that the liquidator produced a report which confirmed fraud. But that was after the point the matter was referred to our service and I wouldn't necessarily expect Metro to reconsider its position at that point. But, I think that from the date the investigator issued their recommendation, Metro ought to have been aware that the CRM Code was applicable to this complaint (albeit for slightly different, though no less valid, reasons than I've set out). So I think interest should be paid from that point.*

*Mr M has provided evidence that following the refund of the other payments he made to Q, he, through a limited company of which he is the majority shareholder, invested in rental property. He says that he received rental income from the limited company and has achieved returns of 4-5% on the investment he made with the refund of the other payment. He states that he's likely to have done the same had Metro provided a refund at an earlier point. Given that Mr M is involved in a business which purchases property, I'm minded to think that he would have done this. While I can't be sure of the returns he might have achieved, I don't think 4-5% is unreasonable. I'm certainly of the view that there is likely to have been a cost to him of being without this money and, in the interests of pragmatism, I think an award of interest at 4.5% simple per annum from 7 October 2022 (at which point Metro could have reasonably reconsidered its decision) to the date of settlement is fair.*

*I don't make any award for legal fees. While I have no doubt these have been incurred, it was ultimately Mr M's choice to employ legal representation rather than deal with the matter personally. Our service does not require submissions to be made by legal professionals.*

*Finally, in relation to compensation, I think the majority of the distress and inconvenience caused to Mr M has been due to the fraud itself. As I've explained, I don't think Metro made a mistake in allowing the payment to proceed. Its only mistake was to not reconsider its position in light of new evidence. That said, I recognise that there are quite novel aspects to this case, and I don't think it's appropriate to make an award here simply because it maintained its position to decline a refund.*

*Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £355,000, plus any interest and/or costs/interest on costs that I consider appropriate. If I think that fair compensation is more than £355,000, I may recommend that the business pays the balance.*

*My provisional decision*

*I intend to uphold the complaint. I think that fair compensation is £500,000, as well as interest at 4.5% simple per annum from 7 October 2022 to the date of settlement (less any tax lawfully deductible).*

*My provisional decision is that Metro Bank PLC should pay Mr M £355,000 as well as interest at 4.5% simple per annum from 7 October 2022 to the date of settlement (less any tax lawfully deductible). I think fair compensation is more than £355,000 so I recommend that Metro Bank PLC pays Mr M the balance.*

*This recommendation is not part of my intended determination or award. Metro doesn't have to do what I recommend. Should I continue to recommend this amount in a final decision, it's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M may want to get independent legal advice before deciding whether to accept a final decision. I'd also ask Metro to let me know whether they agree to pay the full balance in advance of my*

*final decision.*

Mr M, through his representatives, said that he'd be minded to accept my provisional decision, though he did wish to state that he felt compelled to instruct solicitors because of Metro's initial lack of explanation, reliance on case law and interpretation of the CRM Code.

Metro didn't agree with my provisional decision. In summary, it said:

- It maintained that under DS1(2)(k) the payment Mr M made was not covered under the CRM Code
- It had no knowledge of Mr M's relationship with Q and Mr M did not mention this fact at any point.
- It did not provide an 'Effective Warning' as it was confident that the destination of the payment was a genuine FCA authorised firm – N.
- It was not known that Q was operating fraudulently at the point Mr M made the payment and Mr M had an existing relationship with Q. So, it is reasonable to conclude that any intervention by it would not have prevented Mr M's loss.
- Mr M failed to mitigate his loss. Q was clearly a high-risk, unregulated investment but Mr M did not seek professional advice and simply placed his trust in representatives of Q itself.
- An article published in September 2019 suggested Q's loan notes were riskier than a diversified stock market fund and that investors should ensure that the asset backed security could be relied on by seeking professional advice.
- Metro had no concerns about the beneficiary account it operated that was linked to N.
- Mr M may be able to seek redress through the Financial Services Compensation Scheme, as it has begun to consider claims about N.
- If its arguments do not change my decision, it believes the complaint should be dismissed under DISP 3.3.4AR (5) and 3.3.4BG (1). It argues that the matter would be better suited to court due to the fact the sums involved exceed our award limit.
- If my decision remains unchanged and I decide not to dismiss the complaint, Metro will consider challenging the decision by commencing Judicial Review proceedings.

**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.

As set out in the detail of my provisional decision above, my reasons for upholding the complaint – which I maintain for the purposes of my final decision – are that I consider the CRM Code applies to the payment by Mr M where it meets the definition of an APP scam under DS1(2)(a)(ii) in that Mr M transferred his funds to N for what he believed was a legitimate purpose but was in fact fraudulent.

Therefore, I don't consider DS2(1)(b), taking into account DS1(2)(k) of the CRM Code on the definition of a payment journey, means that the transaction was out of scope of the CRM Code in the circumstances because it is clear that the transfer of the funds to N was an APP scam as per DS1(2)(a)(ii).
It follows I have not needed to make findings as to the relevance and/or application of the LSB Consultation Paper issued in November 2021 and its clarification of the application of the CRM Code to certain multi-generation scams. In short there's no need to consider the payment from N to Q (the onward transmission of funds) in the circumstances of this matter, and whether this would have fell in scope of the CRM Code. The funds were effectively

under the control of Q once they reached N for the reasons I provided in my provisional decision.

As I also explained in my provisional decision, I do not consider that the application of the CRM Code in the circumstances of this complaint produces an unfair outcome either. Metro is a signatory to the CRM Code, and it is appropriate that I take this into account for the purposes of reaching a fair and reasonable decision in all the circumstances of the complaint even if I do have some sympathy for its position.

Further, I've thought carefully about Metro's response to my provisional decision, but it does not change my decision. I'll explain why.

Metro has made no new substantive submissions about the applicability of the CRM Code. It has just restated that it thinks it can rely on DS1(2)(k) to exclude the payment. It has not challenged my reasoning and I have nothing further to add on this point beyond what I have stated above in my provisional and final decisions.

I have accepted that no intervention by Metro would have made a difference here. This is not in dispute and has no bearing on the outcome under the CRM Code. I highlighted that it didn't provide an 'Effective Warning', not because I think it necessarily should have done, but rather to explain that Metro cannot rely on the exception to reimbursement R2(1)(a) in the CRM Code.

Metro also argues that Mr M failed to mitigate his loss. But the question here concerns Mr M's position under the CRM Code. The test under the CRM Code is not one of mitigation but rather whether Metro can rely on any of the exceptions set out in R2(1). Of particular relevance here is R2(1)(c):

*In all the circumstances at the time of the payment, in particular the characteristics of the Customer and the complexity and sophistication of the APP scam, the Customer made the payment without a reasonable basis for believing that:*

*(i) the payee was the person the Customer was expecting to pay;*
*(ii) the payment was for genuine goods or services; and/or*
*(iii) the person or business with whom they transacted was legitimate.*

Should Metro also be seeking to rely on R2(1)(e), my decision would be no different because Metro would need to establish Mr M acted with gross negligence and in my view that is a higher bar than the test set out in R2(1)(c).

In either case, I'm not persuaded by Metro's arguments about Mr M's conduct. It acknowledges that it was unknown that Q was operating fraudulently at the time and that this only was confirmed after the liquidators had investigated the firm. So, it strikes me as unreasonable to suggest that Mr M could have uncovered this fact several years before (or that he didn't hold a reasonable basis for believing Q was legitimate when he made the payment in dispute).

It's true that Q was unregulated, but it wasn't carrying out any activity that would require regulation. I understand Mr M was fully aware of this fact. I've read the article which Metro highlights and it does detail that any investment with Q was likely to involve a significant amount of risk (despite Q's claims otherwise). But it's important to distinguish the risk of a legitimate business failing with the risk that the business was an entirely fraudulent enterprise. The article does not identify the latter risk and it doesn't seem likely that even a professional adviser would have been able to identify that Q was operating fraudulently.

But, again, the test I'm considering is not whether Mr M could have taken certain steps to verify Q but rather whether, at the time Mr M made the payment, he held a reasonable basis for believing that Q was legitimate. At that point, he'd made payments before and received returns, he'd met representatives of Q in person and had exchanged significant correspondence with them. The fact he might not have had a full understanding of the risk involved, does not mean that he didn't hold a reasonable belief that Q was operating legitimately.

In relation to the FSCS, as far as I'm aware Mr M has not made a claim to it about N and the fact the FSCS are considering these claims does not prevent Mr M from recovering his loss from Metro.

Turning to dismissal, Metro has not previously indicated that it thinks this case should be dismissed by our service. And, we've already considered the merits of this complaint in both an assessment and a provisional decision.

Under DISP 3.3.4AR, it is for the Ombudsman to decide whether a complaint should be dismissed. Metro argue that dealing with this complaint would, under DISP 3.3.4AR(5), *'otherwise seriously impair the effective operation of the Financial Ombudsman Service',* and under DISP 3.3.4BG (1) (which sets out examples of types of complaint that might seriously impair the effective operation of our service) *'it would be 'more suitable for the complaint to be dealt with by a court'* because the amount in dispute is more than the statutory award limit.

I don't find the argument by Metro that I should exercise my discretion to dismiss the complaint on that basis persuasive. There is nothing within the DISP rules or guidance which prevents our service considering complaints that involve a loss above the statutory award limit. Mr M may decide that he wishes to reject our final decision in order to pursue the matter through the courts as we've upheld his complaint but his loss exceeds the statutory award limit. However, I'm not satisfied deciding this complaint seriously impairs our effective operation.

Further, I'm satisfied that our service does not need any of the additional powers a court has in order to decide this complaint, so I will not dismiss it.

Finally, while I understand why Mr M chose to instruct legal representatives, he was able to refer his complaint to our service free of charge. So, I continue to make no award for legal costs.

**My final decision**

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £355,000, plus any interest and/or costs/interest on costs that I consider appropriate. If I think that fair compensation is more than £355,000, I may recommend that the business pays the balance.

I uphold the complaint. I think that fair compensation is £500,000, as well as interest at 4.5% simple per annum from 7 October 2022 to the date of settlement (less any tax lawfully deductible).

My decision is that Metro Bank PLC should pay Mr M £355,000 as well as interest at 4.5% simple per annum from 7 October 2022 to the date of settlement (less any tax lawfully deductible).

I think fair compensation is more than £355,000 so I recommend that Metro Bank PLC pays Mr M the balance.

This recommendation is not part of my determination or award. Metro doesn't have to do what I recommend. It's unlikely that Mr M can accept my decision and go to court to ask for the balance. Mr M may want to get independent legal advice before deciding whether to accept a final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 4 August 2023.

Rich Drury
**Ombudsman**