DRN-4117357

Complaint

H, a limited company, complains that Starling Bank Limited hasn't reimbursed its losses after it fell victim to what it describes as fraud. H is represented by its director, Ms F. For simplicity's sake, I've generally referred to Ms F in the text of this decision.

Background

In 2019, Ms F was contacted by a company that specialises in finding investors to buy new build properties, typically off-plan. It was marketing a specific residential block that was to be built in a large city. No work had been started on the development at this point, but Ms F was told that she could make a series of monthly payments which would eventually constitute a deposit for purchasing one of these properties to rent out. She could then obtain a buy-to-let mortgage and make the property available to tenants.

She signed a reservation form which said that the estimated completion date was in late 2020. That document included the following terms:

> *"23. Please note the Reservation Deposit and paid deposit is non-refundable if you decide not to proceed for any reason.*
>
> *24. However, a full refund of all payments will be made in the following circumstances:*
>
> - *If the developer withdraws from the project.*
> - *If the apartment reserved is materially different in terms of size (+/- 10%), orientation and/or floor level once full planning is granted.*
> - *If full planning permission for the Development is not secured.*

She made payments towards this investment using her Starling account, as well as making other payments using credit cards she holds with other financial businesses. She was told that, for administrative simplicity, she should use the developer's nominated firm of solicitors to carry out the conveyancing and all work preparatory to the transfer of the property to her company. Ms F was uncomfortable with doing this and so hired a different solicitor to assist her.

In June 2020, an employee of the developer contacted Ms F to say that, due to a change in the planning permission that had been granted, the specific unit that she'd contracted to purchase was no longer available. He told her that she wouldn't be able to have her funds returned to her, but that she could put them towards an alternative unit in the same development (albeit now marketed under a different name). From the evidence I've seen, Ms F agreed verbally to proceed with investing in a different unit and was sent the relevant paperwork.

However, it was at this point that she began to have more general concerns about the proposal. She had initially thought that the developer was authorised and regulated by the

Financial Conduct Authority (FCA). There is an authorised firm with a similar name. However, it turned out to be unconnected with this arrangement she had entered into.

In addition, the revised contract seemed to involve different parties to the ones she'd thought she was dealing with and the Report on Title prepared by her solicitor suggested that the length of the lease differed from what she'd previously been told.

As she was concerned about these inconsistencies, she wasn't happy to sign any further documentation or proceed with the investment. By this point, she had paid over £40,000 to the developer. The developer told her that it wouldn't return her funds in full but that, as a gesture of goodwill, it would offer her a partial refund of her investment (it offered £14,175.51) and that it would hold the remainder of her funds on account should she change her mind or want to invest the funds at a different development.

She took legal advice on her options. Her solicitor wrote to her and said that:

> *… if you withdraw from the Second Agreement your reservation deposit and reservation fee are non-refundable. As far as I am aware you do not fall under any of the exceptions under clause 24. You have the following options:*
>
> 1) *Agree to their proposal as set out in their email dated 19 February 2021 (refund of deposit less cancellation fee). Please note I do not have the breakdown of their cancellation fees*
>
> 2) *Continue with the purchase; or*
>
> 3) *Writing to [the developer], stating that the Second Agreement is void and unenforceable as the agreement fails to state who the contracting party is/define the Developer. This creates uncertainty and therefore you could possibly argue the agreement is void.*
>
> *In respect of 3 above, please note my view is that the prospect of succeeding on this point is low…*

The following month, her solicitor wrote to the investment company and said that *"…our client contends that the Agreement lacks certainty due to the fact that the Developer, the party to the contract is not defined on the Agreement and therefore the Agreement is void."* The letter said that, if Ms F wasn't fully reimbursed within 14 days, a claim would be brought against the developer. No claim was ever issued, and Ms F ended her relationship with the solicitor in May 2021.

According to Ms F, by December 2021 there had been no activity on the site. She was concerned that she'd fallen victim to a scam and so she notified Starling. She pointed out that it has agreed to abide by the terms of the Lending Standards Board's Contingent Reimbursement Model (CRM) Code. This Code says that, where a customer falls victim to an authorised push payment (APP) scam, the bank should refund their losses. Starling investigated but said it wouldn't pay her a refund. It said that the Code explicitly states that it doesn't apply to private civil disputes. The dispute that Ms F was now involved in was therefore not covered.

Ms F didn't agree with that conclusion. She has conducted extensive research on the developer, one of its directors and that director's other business interests. She argues that the public records on the Companies House register show that client funds haven't been used appropriately. She says that the director of the developer has withdrawn money from the company accounts by way of a loan and *"laundered it through personal bank accounts."*

She's also pointed to a significant number of reviews posted on a third-party website suggesting that there are many people who have had a similar experience with the developer to her own.

Finally, she instructed a debt collection agency to visit the company to attempt to recover her losses. It told her that the company's registered addresses didn't have any staff present. In short, Ms F says that there is an abundance of evidence to support her contention that the conduct of the developer meets the legal definition of fraud and that Starling therefore has to reimburse her.

The case was looked at by an Investigator who didn't uphold it. He wasn't persuaded that Ms F's complaint was covered by the CRM Code because he too thought it was likely that it was a civil dispute. He said that a genuine firm may fail to meet its contractual obligations for a range of reasons – that failure alone isn't enough to show an intent to defraud. He noted that work on the site in question did appear to be progressing according to the developer's quarterly updates.

He also observed that the developer had made a partial offer to settle the dispute and had engaged in correspondence with Ms F's solicitors. This wasn't something he'd have expected from a fraudster. On balance, he was persuaded that this suggested this was a civil dispute, rather than a scam.

Ms F disagreed with the Investigator's opinion. She said it doesn't make sense to say that this wasn't a scam when the property sold to her hasn't been built and has since been resold. She said that the contract says that the flats would be completed in 2022. Despite that, by 2023 the work hadn't even commenced on the foundations. As Ms F disagreed with the Investigator's opinion, the complaint has been passed to me to consider and come to a final decision.

Findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

There's no dispute here that Ms F authorised the payments. Under the Payment Services Regulations 2017, that means she's liable for them at first instance. However, Starling was under a range of other duties and obligations at the time. Broadly summarised, it was expected to be on the lookout for payments that were unusual or out of character with the aim of preventing customers from falling victim to fraud and scams. It's also agreed to comply with the Lending Standards Board's Contingent Reimbursement Model ("CRM") Code. In certain circumstances, that code can entitle a customer to be reimbursed by the bank after they've fallen victim to a scam.

My role here is only to reach a determination on whether Starling has an obligation to reimburse her. This service doesn't have the power to conduct a criminal investigation into the director of the development company or to hold an individual personally accountable for the accusations Ms F has made.

Before I consider whether any of those obligations come into play, I must first consider whether Ms F is a victim of fraud. The CRM code is explicit that it doesn't apply to *"private civil disputes, such as where a Customer has paid a legitimate supplier for goods, services … but has not received them, they are defective in some way, or the Customer is otherwise dissatisfied with the supplier."*

This isn't a straightforward question to address. To be satisfied that Ms F fell victim to fraud, I'd need to be persuaded that the company she dealt with had a settled intention to defraud her. Obviously, I cannot know what was in the minds of the individuals at that company at the time they entered into this agreement with her. As a result, I must infer what their intentions were based on what the available evidence tells me.

Overall, I'm unpersuaded that Ms F fell victim to fraud here. The fact that the developer has kept her money is no demonstration of fraud. Ms F entered into a contract which set out in advance how it could be brought to an end and what would happen to the money she'd paid up until that point. As I understand it, Ms F thinks either that the contractual terms entitle her to a full refund or that the contract was void for uncertainty. The developer disagrees. It would be for a court to decide the proper interpretation of the contract in the event that Ms F were to bring a civil claim.

Ms F has also argued that it's clear that she's been defrauded because the property hasn't been built. I've looked at the page on an online forum where updates are posted about this particular development. Ms F shared this as evidence of the lack of progress. But the same page today clearly shows that work has progressed much further than she's acknowledged.

Ms F's own research into the activities of the director and the conclusions she's drawn from them are speculative and certainly aren't enough for me to make a finding that she's likely a victim of fraud. Ultimately, she has presented one hypothesis without hard evidence. The limited available evidence could equally point to other hypotheses.

I can't rule out the possibility that there are legitimate concerns about the conduct of the director. However, the police haven't seen fit to take any further action despite Ms F alleging criminal activity worth millions of pounds. If Ms F had taken legal action against the company, the director might have been required to give oral testimony under oath and be subject to cross-examination by counsel. However, this service isn't a court of law and we do not have such powers.

As I explained above, my role here is only to determine whether Starling is required to reimburse Ms F under the terms of the CRM Code. That means that the evidence needs to demonstrate that it is more likely than not that Ms F is a victim of fraud. The evidence supporting that proposition is simply not strong enough for me to uphold her complaint.

Final decision

For the reasons I've explained above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 31 August 2023.

James Kimmitt
Ombudsman