

The complaint

Mr P complains that Bank of Scotland plc trading as Halifax won't reimburse him after he lost money to an investment – that he now considers to have been a scam.

What happened

Mr P has explained that he was introduced to an investment opportunity, provided by a firm that I'll refer to as S, by a work colleague. This colleague had already invested with the firm, was making good profits and had withdrawn roughly double his initial investment. Mr P has explained he watched how this colleague got on, before wishing to become involved himself. Another colleague then also joined the investment, was also able to withdraw substantial returns, and was reinvesting further on behalf of his wife.

After watching this second colleague seemingly do well from the investment for around 12 months without issue, Mr P decided he would invest also. He explained that before doing so, he insisted on speaking with the director of the firm directly to question it further. During this conversation, Mr P asked further information on how specifically trades were executed and about the director's experience. He also queried why S wasn't regulated by the Financial Conduct Authority (FCA), which he's explained he understood to be the 'gold standard' for investment firms. The director explained that the firm would soon be regulated, but that there was a process to this and that this was expensive.

Mr P also explained he reviewed both S and the director online on search engines and social media, but found nothing of concern. Therefore, upon receiving an investment contract, in October 2021, Mr P made a payment of £10,000 by faster payment to an account in S's name. Mr P has explained that one of the reassuring factors in deciding to invest was that S' director had personally guaranteed his initial investment on the contract. Mr P has said that from researching him online, he appeared to live a wealthy lifestyle, for example, owning multiple luxury cars.

Mr P has explained that he received weekly reports confirming how his investment was performing. However in June 2022, he received an email from a solicitor, advising that members of S had falsified reports and an investigation was taking place - but that Mr P would receive his initial investment back. He later received an email from the Police, advising S was being investigated.

Mr P complained to Halifax but Halifax didn't consider it was liable to reimburse him. It said that as S was not regulated, this should have been a significant 'red flag' to Mr P. It also said that when Mr P made the payment, he was provided with the following warning regarding investment scams:

*'Mr [P], make sure this investment is real
Deals that look too good can be scams
Do lots of research – good deals don't find you
See what your friends and family think
Use the FCA to check an advisor or company
Find out how to stay safe from scams on our Fraud Hub'*

An investigator considered the complaint and upheld it. He said on balance this was a scam and covered by the Contingent Reimbursement Model (CRM) Code and that none of the exclusions Halifax had relied on applied – so Halifax should reimburse Mr P in full.

In its response to our view, Halifax raised that it now considers this to be a civil dispute between S and Mr P, whereby Mr P has invested in a high risk investment, rather than a scam. It stated this was supported by:

- S being a registered company on Companies House
- Investments being made to Forex, which is, by definition, higher risk
- Mr P receiving correspondence after the failing of the investing, confirming he will be reimbursed his initial investment, and while this hasn't happened, this suggests there is an intention of the firm to satisfy its creditors

As Halifax didn't agree with the investigator's view, the complaint has been referred to me for a final 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.

It's important to highlight that with cases like this, in deciding whether there was in fact a scam, I need to weigh up the available evidence and make my decision about what I think is likely to have happened on the balance of probabilities – in other words what I think is more likely than not to have happened in the circumstances.

When considering what is fair and reasonable, I'm also required to take into account: relevant law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

In broad terms, the starting position in law is that a firm is expected to process payments and withdrawals that a customer authorises, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. However, where the customer made the payment as a consequence of the actions of a fraudster, it may sometimes be fair and reasonable for the bank to reimburse the customer even though they authorised the payment.

Halifax is a signatory of the Lending Standards Board's Contingent Reimbursement Model (the CRM Code). This requires firms to reimburse customers who have been the victims of certain types of scams, in all but a limited number of circumstances. But customers are only covered by the CRM Code where they have been the victim of an authorised push payment (APP) scam – as defined within the CRM Code. So if I am not persuaded that there was a scam then I will not have a basis to uphold the complaint.

Can Halifax delay making a decision under the CRM Code?

In its more recent submissions, Halifax has questioned how our service can fairly view a complaint where there is an ongoing police investigation and has suggested that cases against S should be temporarily ringfenced. There is an exception under the CRM Code (R3(1)(c)) that states that firms should make a decision as to whether or not to reimburse a customer without undue delay but that, if a case is subject to investigation by a statutory body and the outcome might reasonably inform the firm's decision, it may wait for the outcome of the investigation before making a decision.

While this exception provides a reason why firms *may* delay providing a claim outcome under the CRM Code, it doesn't impact that customer's right to refer the complaint to our service – and similarly it doesn't impact our service's ability to provide a complaint outcome when we consider we have sufficient evidence to do so. Additionally, this exception needs to be raised by the firm, prior to it having reached an outcome on the claim under the CRM Code, which Halifax hasn't done in this case.

I've therefore gone on to consider below whether we do have enough evidence to proceed at this time on Mr P's complaint.

Is it appropriate to determine Mr P's complaint now?

I am aware there is an ongoing investigation, and there may be circumstances and cases where it is appropriate to wait for the outcome of external investigations. But that isn't necessarily so in every case, as it will often be possible to reach conclusions on the main issues on the basis of evidence already available. And I am conscious that any criminal proceedings that may ultimately take place have a higher standard of proof (beyond reasonable doubt) than I am required to apply (which – as explained above – is the balance of probabilities).

The Lending Standards Board has said that the CRM Code does not require proof beyond reasonable doubt that a scam has taken place before a reimbursement decision can be reached. Nor does it require a firm to prove the intent of the third party before a decision can be reached. So in order to determine Mr P's complaint I have to ask myself whether I can be satisfied, on the balance of probabilities, that the available evidence indicates that it is more likely than not that Mr P was the victim of a scam rather than a failed investment.

I've reminded myself that Parliament has given ombudsmen the job of determining complaints quickly and with minimum formality. In view of this, I think that it would not be appropriate to wait to decide Mr P's complaint unless there is a reasonable basis to suggest that the outcome of any external investigation may have a material impact on my decision over and above the evidence that is already available.

Halifax has stated that it needs to understand the charges that have been brought and what these relate to, in order to appreciate at what point a genuine business turned bad. However, for the reasons I discuss further below, I don't think it's necessary to wait until the outcome of the police investigation or potential related court case for me to reach a fair and reasonable decision.

Has Mr P been the victim of a scam, as defined in the CRM Code?

The relevant definition of a scam in accordance with the CRM Code is that the customer transferred funds to another person for what they believed were legitimate purposes but were in fact fraudulent.

The CRM Code also says it doesn't apply to private civil disputes, such as where a customer has paid a legitimate supplier for goods or services but has not received them, they are defective in some way, or the customer is otherwise dissatisfied with the supplier.

So, it doesn't cover a genuine investment or a genuine business that subsequently failed.

So in order to determine whether Mr P has been the victim of a scam as defined in the CRM Code I need to consider whether the purpose he intended for the payments was legitimate, whether the purposes he and S intended were broadly aligned and then, if they weren't, whether this was the result of dishonest deception on the part of S.

From what I've seen and what Mr P has told us, I'm satisfied Mr P made the payments with the intention of investing in forex trading. He thought his funds would be used by S to trade and that he would receive returns on his investment.

But I think the evidence I've seen suggests S didn't intend to act in line with the purpose for the payments it had agreed with Mr P.

Mr P made his payment to an account held in S's name. I've reviewed beneficiary statements for this account and while I can't share the details for data protection reasons, the statements do not suggest that legitimate investment activity was being carried out by S at the time Mr P made the relevant transaction. Whilst there is evidence S initially did carry out trades, it doesn't necessarily follow that it was a legitimate enterprise. S and its linked companies were not authorised by the FCA to carry out trading, so its operations clearly lacked an important element of legitimacy; it was required to be authorised to do the activity it was carrying out and it wasn't.

Further concerns centre around the owner of S (who was bankrupt at the time). From the paperwork provided to consumers, he appears to have "personally guaranteed" the investments (despite forex being a high-risk investment and him never being in a financial position to do so). He also signed contracts on behalf of S despite not officially being listed as the director of the business. He appears to have acted as a 'shadow director', when he would've been disqualified as a director in his own right due to his bankruptcy. Furthermore, S was listed as an 'IT consultancy' business on Companies' House and not a financial services firm.

So based on the above, along with the weight of testimony we have seen from other consumers who invested in S, I am satisfied that it is more likely S was not acting legitimately, since its intentions did not align with Mr P's intentions, and I am satisfied that S was dishonest in this regard. It follows that I'm satisfied Mr P was the victim of a scam.

Is Mr P entitled to a refund under the CRM code?

Halifax is a signatory of the CRM Code, which requires firms to reimburse customers who have been the victims of Authorised Push Payment (APP) scams like this, in all but a limited number of circumstances and it is for Halifax to establish that a customer failed to meet one of the listed exceptions set out in the CRM Code.

Under the CRM Code, a bank may choose not to reimburse a customer if it can establish that*:

- The customer ignored what the CRM Code refers to as an "Effective Warning" by failing to take appropriate action in response to such an effective warning
- The customer made payments without having a reasonable basis for believing that:

the payee was the person the Customer was expecting to pay; the payment was for genuine goods or services; and/or the person or business with whom they transacted was legitimate

**Further exceptions outlined in the CRM Code do not apply to this case.*

Did Halifax meet its obligations under the CRM Code and did Mr P ignore an effective warning?

I've considered the warning referenced earlier in my decision, that Halifax has said it provided to Mr P. However I don't consider it to be 'effective' under the CRM Code. For a warning to be considered effective, the Code requires it to be (among other things) impactful, clear and provide the customer with the potential consequences of proceeding. I don't think this warning met these criteria – it doesn't cover most of the key hallmarks we see in these scams, and there's no explanation of what may happen to Mr P's funds, should this turn out to be a scam.

In any event, an effective warning is a minimum requirement expected of firms under the CRM Code. In this case, the payment Mr P was making was among the highest he'd made that year, as well as to a new payee, and Halifax ought also to have contacted Mr P prior to the payment being made, to ensure he wasn't at risk of financial harm from fraud.

Therefore I'm not satisfied that Halifax can rely on this exception of the Code as a reason to not reimburse Mr P.

Did Mr P have a reasonable basis for belief?

I've considered whether Mr P acted reasonably when making this payment, or whether the warning signs ought to have reasonably made him aware that this wasn't a genuine investment. Having considered everything carefully, I don't think Mr P did act unreasonably in the circumstances of this complaint. I've taken into account that Mr P personally knew two other individuals who had successfully invested, and had waited for over a year after they initially made their investments to first see how they went.

When deciding to invest himself, I accept that Mr P had identified that S wasn't regulated. His understanding was that this was a 'gold standard' for investing and that S was in the process of becoming regulated. I can therefore understand, without a fuller understanding of the implications of not being regulated, why this would not have stopped him from investing, once reassured by the director on his credentials. In addition, the warning provided by Halifax, while referencing the FCA register, also didn't provide further context on what it means should a firm *not* be regulated.

Mr P has explained he researched both S and its director online and found nothing untoward. Mr P has also explained the director appeared, from what he saw, to be quite wealthy, which reassured Mr P that he could meet his obligations to guarantee the investment should it not be successful.

I've thought about the profits Mr P had seen his colleagues receive and what S' director had suggested Mr P would also receive. I accept these were very high, and arguably ought to have raised red flags that this investment was too good to be true. However, I don't think it would be fair to argue that Mr P ought to have considered these returns unrealistic, when he had personally seen two people who he knew achieving them and successfully withdrawing the funds.

Lastly, Halifax has itself suggested that Mr P has been the victim of a failed investment, rather than a scam. While I disagree on this point, as already explained, I think this evidences that it was not entirely clear whether this was in fact a scam or not, even with the benefit of hindsight and so it doesn't appear reasonable to have suggested Mr P should have identified this, prior to many of these warning flags coming to light.

Overall, for the reasons I've explained above, I think it is fair for our service to consider Mr P's complaint based on the evidence currently available and having done so, I think it is fair and reasonable for Halifax to fully reimburse him under the CRM Code.

My final decision

My final decision is that I uphold Mr P's complaint against Bank of Scotland plc trading as Halifax and I direct it to:

- Refund Mr P in full the payment he made towards the scam (£10,000)
- Apply 8% simple interest, from the time it declined Mr P's claim under the CRM Code until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 4 December 2024.

Kirsty Upton
Ombudsman