

The complaint

A company, which I'll refer to as C, complains that Clydesdale Bank Plc trading as Virgin Money ('Virgin') won't reimburse the money it lost in a scam.

Mr and Mrs C are directors of C and bring the complaint on C's behalf.

What happened

Mr and Mrs C were in the process of buying office premises for their business (C). They received an email which provided payment details and paid their solicitor's genuine account £25,000 from C's account on 19 May 2021. Mr and Mrs C then received further emails with additional invoices which gave details of two different accounts. Mr C then made the following payments from C's account:

Date	Amount	Payee
21/05/21	£25,000 (returned)	1
21/05/21	£25,000	2
22/05/21	£25,000	2
24/05/21	£13,060.50	2
Total	£63,060.50 (less £10.68 recovered)	

Mr and Mrs C have explained that the invoice was paid in instalments due to daily limits on C's account. A further payment was sent from a different bank account and doesn't form part of this complaint.

On 24 May 2021 Virgin received a call from payee one in the table above to check the details of the first transaction. Virgin contacted Mr C who in turn contacted his solicitor and established the solicitor's email had been hacked and the second invoice wasn't genuine. Virgin started a fraud investigation and contacted both receiving banks to recover any funds that remained.

Virgin said the transactions were in line with the usual use of C's account and were not deemed to be suspicious, and new payee warnings were provided. It also said that it contacted Mr C to verify the transactions after receiving contact from payee one's bank. Once it was established that Mr C had fallen victim to a scam Virgin said it did what it could to recover C's funds. All of the first payment of £25,000 was recovered plus £10.68 sent to the second payee. These funds have been credited to C's account.

Mr and Mrs C were unhappy with Virgin's response and brought a complaint to this service. They said Virgin should have done more to protect C's funds and that Virgin's investigation took too long and lacked compassion.

Our investigation so far

The investigator who considered this complaint didn't recommend that it be upheld. She said that the transactions pre-dated the Contingent Reimbursement Model Code (CRM Code) and weren't unusual or suspicious given the previous account history.

Mr and Mrs C didn't agree with the investigator's findings and asked for a final decision. In summary, they said:

- The transactions highlighted by the investigator in support of a conclusion the scam payments weren't unusual were either transfers to accounts in their own names or to HMRC – so are different types of transaction. HMRC was an established payee, and the amounts are significantly less than the scam transactions. The previous transactions also weren't made using the mobile app (and the scam payments were).
- Another complaint against a different bank, but involving the same scam and similar sums of money, was upheld by this service.
- The CRM Code should be applied irrespective of the date Virgin signed up to it and if the complaint was considered under it, C would be reimbursed in full.
- The scam has had a massive impact on Mr and Mrs C and on Mrs C's health.

The complaint was passed to me, and I issued my provisional decision upholding the complaint on 20 February 2024. In the "What I've provisionally decided – and why" section of my provisional decision I said:

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

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The CRM Code doesn't apply in this case as the transactions in question were made before Virgin signed up to it and the code can't be applied retrospectively. So Virgin acted fairly in not applying it.

In broad terms, the starting position at law is that a bank is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. And I have taken that into account when deciding what's fair and reasonable in this case.

However, taking into account the law, regulator's rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider Virgin should fairly and reasonably:

- Have been monitoring accounts and any payments made or received to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams.
- Have had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (among other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer.
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or make additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

In this case, I need to decide whether Virgin acted fairly and reasonably in its dealings with Mr C when he authorised payments from C's account or whether it could and should have done more before processing them.

Virgin has told me that C has three business accounts with a unique number and that its fraud detection systems will look at activity across all three accounts, so I've considered statements across all three accounts in the 12 month period before the scam transactions. I can see that there were larger transfers between accounts and that in February 2022 there were two transfers of £25,000 (12 and 15 February). Mr and Mrs C has confirmed that these transactions were to a savings account in the name of C. I can also see a transfer of £22,000 to Mr C's account. I don't consider transactions to an account in C's name or to its directors represent normal account activity.

I've gone on to consider transactions to third parties. The largest transaction to a third party account was for £12,490 and was for tax. In this case, C transferred £25,000 to an external account on 19 May 2022 and then a couple of days later made a further payment of the same amount to a different account. I consider this was very unusual activity and that Virgin ought reasonably to have contacted one of C's directors to discuss the purpose of the payment. If this had happened, I think it likely that Mr or Mrs C would have said that they had paid the solicitors before, but this transaction was to a different account, which should have been a red flag to Virgin that something was amiss. Even if this information wasn't shared, I consider that on hearing the payment related to a bill, Virgin should have asked how Mr and Mrs C were given the account details and whether they had verified the details were correct directly with their solicitor.

I appreciate that the transactions were from a business account and that larger value payments can be made from such an account. But a second £25,000 transaction in a few days to a second third party payee was very unusual given C's usual account history and I consider Virgin missed an opportunity to complete checks to satisfy itself Mr and Mrs C weren't at risk of financial harm.

I'm persuaded that had Virgin intervened and asked the kind of questions I consider it should have, the scam would have been uncovered and all payments prevented. Mr and Mrs C were making substantial payments that were important to their business so I see no reason why they wouldn't have heeded the warnings I consider Virgin ought to have provided.

I've thought about whether C should bear any responsibility for the loss. In doing so, I've considered what the law says about contributory negligence, as well as what I consider to be fair and reasonable in all the circumstances of this complaint. Having done so, I'm satisfied that no deduction should be made. Whilst Mr and Mrs C no longer have the original and fake emails attaching the invoice from their solicitor, they have been able to provide the legitimate and fake invoices. There is nothing about the fake invoice to alert them to the fact anything was wrong. They are identical except for the account details. I also think the reason given for a change of account – because of regulatory changes – would seem reasonable to Mr and Mrs C. And Mr and Mrs C say the language used in all emails was similar.

I'm sorry to hear that Mr and Mrs C think Virgin's handling of this claim lacked compassion and of the impact this has had on Mrs C's health. The eligible complainant under our rules is C, which is a separate legal entity to Mr and Mrs C. Because of this, I can't award C compensation for the distress Mr and Mrs C have suffered or for the impact Virgin's handling of the claim has had on Mrs C's health. Mr and Mrs C have explained that they have had to remortgage and borrow funds for their business. This meant time away from running C. In recognition of this I'm minded to make an award of £200 to C.

Overall, I don't consider Virgin did enough to protect C's funds.

Responses to my provisional decision

Mr and Mrs C, on behalf of C, accepted my decision and said they had nothing further to add. Virgin said it didn't consider my provisional decision was fair and asked me to consider the following points:

- It doesn't believe that intervention would have made a difference. Customers regularly confirm that they are happy with where they received the payment instructions from.
- If Virgin is liable, the loss should be shared with C. It referred to the fact Mr and Mrs C no longer have the real and fake emails from their solicitor and said businesses should be held to a higher standard in respect of record keeping than individuals. Virgin noted that seeing these emails would help to decide whether a deduction should be made for contributory negligence.
- The reason given for the change of bank details – regulatory changes – wasn't plausible and it was negligent of Mr and Mrs C to accept the changes without checking first.
- The solicitor instructed by Mr and Mrs C should have indemnity insurance in place to cover this scenario and Virgin asked if any action had been taken against the solicitor as they were the cause of the fraud.
- Virgin asked if the previous correspondence with the solicitor instructed by Mr and Mrs C contained a disclaimer about scams and how they would be asked to pay.

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.

I've carefully considered the points made by Virgin but nothing it has said persuades me to reach a different outcome. So my final decision is the same as my provisional decision, and for the same reasons.

Virgin says that even if it had intervened the payments would still have been made as most customers simply confirm they are happy with where they received the payment details from. In this case, there was a clear red flag that something was amiss as the first scam transaction was made very shortly after a genuine payment to Mr and Mrs C's solicitor, but to different account details. So I consider Virgin ought reasonably to have been alert to this and asked appropriate questions to satisfy itself C's funds weren't at risk.

I also see no reason why Mr and Mrs C wouldn't have taken appropriate steps to check the information they had been provided with. They were making significant payments that were very important to their business. I consider that if Virgin had provided appropriate warnings and explained the irrevocable nature of the payment Mr and Mrs C would have been happy to call their solicitor to verify the payment information, particularly given the amount involved. I've heard scam prevention calls in which banks have asked the customer to call back once they have called the genuine business on a trusted number to check the details.

I turn now to whether a deduction should fairly be made in respect of contributory negligence. In deciding this I'm mindful of the fact that contributory negligence is derived from law and is a lack of care that goes beyond what we would expect from a reasonable person.

I agree that it would be helpful to compare the legitimate and fake emails with attached invoices. Mr C has explained that the emails deleted after a set period, and he no longer has them. I don't think this explanation is unreasonable. It also seems to me that when Mr C reported the scam to Virgin the emails would have been available but weren't requested.

Without these emails I'm unable to ascertain if the genuine email included any form of disclaimer about scams or the payment process.

Both invoices are available and, as I said in my provisional decision, they are identical except for the account number. I've also seen a record in Virgin's file which says that the emails looked genuine and noted, "*correct format, letter head, language & contact details all correct*". So, I consider it more likely than not that the emails were also similar enough not to arouse suspicion.

Without any advice from Virgin about the prevalence of email intercept scams and what they look and feel like, I don't consider Mr C acted negligently in not checking the payment details when he received what he believed to be emails from his solicitor.

Virgin has asked about the solicitor's indemnity insurance, but this isn't relevant to C's loss. The firm of solicitors Mr and Mrs C engaged hasn't fallen victim to a scam or been negligent and I don't agree with Virgin that the solicitors are the cause of the fraud.

Overall, I'm satisfied the first scam transaction was unusual and out of character and so Virgin should have intervened when it was made. Had it done so, I think the scam would have been uncovered and C's loss prevented. I'm not persuaded a deduction should be made in respect of contributory negligence for the reasons I have discussed.

My final decision

For the reasons stated I uphold this complaint and require Clydesdale Bank Plc trading as Virgin Money to:

- Refund £63,049.82, and
- Pay interest on the above amount at the rate of 8% simple per year from the date of each transaction to the date of settlement; and
- Pay £200 for the inconvenience caused to C.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 16 April 2024.

Jay Hadfield
Ombudsman