

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 gifted some funds by his father and was considering what to do with them. He came across an investment opportunity being advertised online, that I'll refer to as 'S', and made further enquiries about it. Mr P has explained he didn't have previous investment experience and hadn't looked into other available investments. Upon making contact with S, the apparent director of the firm invited Mr P to his home to further discuss the investment. During his meeting with the director, Mr P was told that funds are invested in Forex and Mr P was shown other customer's anonymised statements, showing the types of returns their accounts were seeing. Mr P has explained that from seeing these statements, he believed he could potentially double his initial investment within around a year. Mr P has said that he was apprehensive initially about investing, but was told that S was currently looking for 'FCA (Financial Conduct Authority) clearance' and this sold the opportunity to Mr P.

Therefore, upon receiving an investment contract, in January 2022, Mr P made two faster payments to an account in S's name – the first for £25,000 and a second payment the following day for £5,000.

Mr P has explained that he received weekly reports confirming how his investment was performing. He never attempted to withdraw any funds as the investment appeared to be performing well and he was making notable weekly returns. 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 contact from the Police, advising S was being investigated.

Mr P complained to Halifax. Halifax considered its obligations to refund Mr P under the Contingent Reimbursement Model (CRM) Code, which it is a signatory of. However, it said that Mr P made an investment with a legitimate enterprise and the complaint was therefore a civil dispute, which is not covered by the Code. It also said that if it had intervened on the payments at the time Mr P made them, there was nothing to suggest the investment wasn't legitimate and so Mr P would've proceeded, in spite of any intervention.

Halifax also stated that as the Police are still currently investigating this matter, it is premature and inappropriate to conclude whether these payments satisfy the criteria of a scam for either civil or criminal purposes.

An investigator considered the complaint and upheld it in part. He said, on balance, this was a scam and covered by the Contingent Reimbursement Model (CRM) Code. He didn't think Halifax had done enough to warn Mr P about the payments he was making, or that its interventions went far enough and so considered it was liable under the Code to at least partially reimburse Mr P. However, he also thought that Mr P proceeded with the investment, despite warning signs available at the time. He therefore considered it was fair for Mr P and

Halifax to share liability for Mr P's losses, with Halifax reimbursing 50% of the payments made.

Mr P agreed to the investigator's view, but Halifax didn't. In its response to our view, Halifax said that it doesn't consider it would be fair for further decisions to be made while there is an ongoing Police investigation and maintains that this is a civil matter between Mr P and S.

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 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 whether this was a genuine business turned bad, or whether there was ever an intention to defraud and that cases should be ringfenced, pending clarification. 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 payments 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 transactions. 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?

Halifax has said that due to the time that has passed since the payment was made, it cannot confirm what payment purpose Mr P provided when making this payment – it has only been able to advise that it ran a 'Confirmation of Payee' check, whereby it checked whether the account details and name Mr P provided matched (which they did). It therefore has not advised whether Mr P was provided with a warning, and if so, what this included.

In any event, an effective warning is a minimum requirement expected of firms under the CRM Code. Halifax has not suggested it made any further intervention attempts, prior to processing these payments, such as calling Mr P to query the payment further. Having

reviewed Mr P's statement for the year leading up to these payments, I can see this account was rarely used - Mr P appears to have used it solely for making payments towards a loan. Therefore, a £30,000 credit, followed by two payments to a new payee (the first being for £25,000) were out of character for the account and ought to have triggered intervention on Halifax's side.

Had Halifax done so, I think there were indications present at that time that this may not be a legitimate investment, which Halifax ought to have identified and raised with Mr P. I would have expected Halifax to ask questions to Mr P about how he came across the investment, what checks he's completed to ensure its legitimacy, with advice to check the FCA register, and what returns Mr P had been promised. Had Halifax completed checks along these lines, I think it's more than likely that it would've come to light that Mr P found this investment opportunity online, that he is aware the firm is not FCA authorised and that he hopes to double his initial investment within around a year.

While I appreciate there was other information that may have been uncovered that made this scam more realistic (such as meeting the director personally) I think these above points – in particular the lack of FCA authorisation – would've rang alarm bells with Halifax. Mr P has acknowledged he didn't have investment experience and was apprehensive about investing until he was told that S was planning to become authorised. Had Halifax set out the importance of these regulations – and what it means to be providing services without being them – I think this would've been sufficient for Mr P to reconsider the payments he was making.

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 these payments, or whether the warning signs ought to have reasonably made him aware that this wasn't a genuine investment. As I agree with the investigator's view on this point and Mr P has already accepted the investigator's outcome, I won't cover this in great detail. However to summarise, I agree Mr P ought to have had concerns about this investment opportunity, prior to making the payments because:

- He was made aware from the outset that S wasn't yet authorised by the FCA. Had Mr P looked into what this meant, he would've uncovered that without this authorisation, S shouldn't have been providing the service it was offering Mr P.
- Mr P was told that he would expect to double his investment within one year. His contract also personally guaranteed his initial investment. While Mr P was shown other customers' statements as evidence of this, Mr P didn't know these customers personally to support what he was being told and I think the returns being offered were 'too good to be true' – particularly with the added element of his initial investment being risk-free. Additionally, I think it ought to have been a concern that other customers' statements, even when anonymised, were being shared with other customers, considering the personal nature of such information.

I've also thought about whether Halifax took reasonable steps to recover Mr P's funds once it was made aware he was the victim of a scam. The payments were made by Mr P in January 2022 and the scam didn't come to light for months after this. Based on the time that passed between Mr P making these payments, and the scam being reported, I don't think Halifax could have done anything further to recover Mr P's funds.

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 and Mr P to share liability for Mr P's losses under the CRM Code.

My final decision

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

- Refund Mr P 50% of the payments he made towards the scam (totalling £15,000)
- Apply 8% simple interest, from the time Mr P made each payment, 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 9 December 2024.

Kirsty Upton
Ombudsman