DRN-4893582

The complaint

Mr G is unhappy that Bank of Scotland plc trading as Halifax (Halifax) wont refund him after he fell victim to an investment scam.

What happened

In March 2021, Mr G came across an opportunity to invest in a company - I will refer to as K in this decision. He understood he was investing in property development. He says he was told he'd be guaranteed to receive the agreed fixed rate of interest and his initial investment amount back at the end of the term. The investment was made via a third party (I will refer to as N) - a legitimate regulated entity at the time.

Mr G said he carried out his research about N and could see everything seemed legitimate. On 25 March 2021 Mr G transferred £15,000 via N for the investment with K.

In January 2023, Mr G logged into his online portal for the investment and was unable to see any detail of his investment. At that point he realised that he might have fallen victim to a scam and reported the matter to Halifax.

Halifax declined the claim. It felt Mr G invested with a legitimate company that had fallen into difficulty and gone into liquidation. It also said it didn't need to intervene as the payment wasn't unusual and, even if it had, the payment would have looked genuine at the time. It said a warning would have been given but due to the passage of time, it no longer has that evidence.

Our investigator upheld the complaint. She found this was a scam and Mr G had a reasonable basis for believing this was a legitimate investment opportunity. The investigator therefore recommended Halifax refund Mr G in full.

Halifax did not agree. It says:

- K was a genuine business, evidence by its entry on Companies House.
- K is in liquidation and there are ongoing insolvency investigations.
- Although Action Fraud referred the matter to the Police, there is no criminal investigation into the actions of K or its directors.
- There is no evidence to suggest K misled investors about the high-risk nature of the investment.

Halifax also says:

- Based on the information from other investigations/statutory bodies, it can't agree there is sufficient evidence to conclude K intended to defraud Mr G.
- Investigations into K are ongoing, and the Official Receiver has not confirmed that K did not use investor funds broadly in line with what Mr G understood to be the purpose of the payment.

- The current information does not meet the burden of proof of fraud, and it considers any decision should be deferred until the Official Receiver had completed its investigations and confirmation as to whether K was acting fraudulently and, if it was, whether this was the case from the outset.

- There is a website with reviews from customers stating they have taken out bridging finance through K.

Whilst it acknowledges the failure of the Directors to co-operate with the liquidation process is of some concern, it cannot agree that their failure to co-operate can be considered as evidence of an intention to defraud investors.

As the complaint could not be resolved informally, it had been passed to me for a 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.

When considering what is fair and reasonable, I'm 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.

It's important to highlight that with cases like this I can't know for certain what has happened. So, I need to weigh up the evidence available and make my decision on the balance of probabilities – in other words what I think is more likely than not to have happened in the circumstances.

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.

Of particular relevance to the question of what is fair and reasonable in this case is the Lending Standards Board's (LSB) Contingent Reimbursement Model (CRM Code) for authorised push payment scams. The CRM Code was a voluntary code for reimbursement of authorised push payment scams which required firms to reimburse customers who have been the victims of APP scams - in all but a limited number of circumstances. Halifax was a signatory to the CRM Code at the time the payments in question in this case were made.

Where a firm was a voluntary signatory of the LSB's CRM Code, I need to see whether it is a relevant consideration for my decision. And, where it is a relevant consideration, I must carefully consider the provisions of the LSB's code itself that the firm has agreed to and any guidance the LSB has provided on its application.

In order for me to conclude whether the CRM Code applies in this case, I must first consider whether the payment in question, on the balance of probabilities, meet the CRM Code's definition of a scam

An “APP scam” is defined in the Definitions and Scope section of the CRM Code:

> “Authorised Push Payment scam, that is, a transfer of funds executed across Faster Payments, CHAPS or an internal book transfer, authorised by a Customer in accordance with regulation 67 of the PSRs, where:
>
> (i) The Customer intended to transfer funds to another person, but was instead deceived into transferring the funds to a different person; or
>
> (ii) The Customer transferred funds to another person for what they believed were legitimate purposes but which were in fact fraudulent.”

If I, fairly and reasonably, make a balance of probabilities conclusion that it does, then the provisions of the CRM Code apply. In that event, unless Halifax is able to show that the consumer is not entitled to reimbursement due to any the CRM’s Code exceptions at R2(1) and the vulnerability considerations are not relevant, then the consumer is likely to be entitled to reimbursement.

Can Halifax delay making a decision under the CRM Code?

In its recent submissions, Halifax says there is an ongoing investigation, and suggests we should wait the outcome of that before reaching a final decision.

The CRM Code says firms should make a decision as to whether or not to reimburse a customer without undue delay. There are however some circumstances where I need to consider whether a reimbursement decision under the provisions of the CRM Code can be stayed. If the case is subject to investigation by a statutory body and the outcome might reasonably inform the firm’s decision, the CRM Code allows a firm, at R3(1)(c), to wait for the outcome of that investigation before making a reimbursement decision. By asking to wait for the outcome of the current investigation, I take that Halifax considers that R3(1)(c) applies in this case.

In deciding whether R3(1)(c) is applicable in this case, there are a number of key factors I need to carefully consider:

- Where a firm has already issued a reimbursement decision - for example by telling the consumer they will not be reimbursed because they are not the victim of an APP scam – then R3(1)(c) has no further application. The LSB confirmed in its DCO letter 71 to firms dated 6 November 2024 that “a firm should not seek to apply this provision where it believes that the case is a civil dispute and therefore outside of the scope of the CRM Code”.
- The Financial Ombudsman Service does not have the power to restart R3(1)(c) – so where a firm has made a reimbursement decision a consumer is entitled, under the DISP Rule, for our service to decide the merits of the complaint about the payment(s) they made fairly and reasonably on the balance of probabilities.

So, this provision only applies before the firm has made its decision under the CRM Code. So, Halifax can’t seek to delay a decision it’s already made. And Halifax only raised this point (or asked for a decision to be delayed) after the case was referred to our service. It had already reached a decision on Mr G’s claim in its final response letter to him, when it said the complaint appeared to be the subject of a civil dispute between Mr G and K.

So, I don’t think Halifax can now rely on this provision.

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

I ultimately have to decide whether it is fair and reasonable for Halifax not to have upheld Mr G's claim for reimbursement of his losses.

There may be circumstances and cases where it is appropriate to wait for the outcome of external investigations and/or related court cases. 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.

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 G'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 G 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 G's complaint unless there is a reasonable basis to suggest that the outcome of the insolvency investigation may have a material impact on my decision over and above the evidence that is already available.

It's not clear if Halifax is concerned that administration outcome regarding K's actions may lead to Mr G being compensated twice for the same loss, i.e. by Halifax and by the liquidators. But I don't know how likely it is that any funds will be recovered as part of those proceedings.

But I agree that, if Halifax has already paid a refund, it would not be fair or reasonable for those recovered funds to be returned to Mr G as well. And I would also expect Mr G to divulge to Halifax anything he received in connection with K at any point now or in the future. In order to avoid the risk of double recovery Halifax is entitled to take, if it wishes, an assignment of the rights to all future distributions under the administrative process before paying the award. So I'm not persuaded that this is a reasonable barrier to it reimbursing him in line with the CRM Code's provisions.

So, I don't think it's fair or necessary to wait for the administration process to complete. All in all, I don't think it's fair for Halifax to delay making a decision on whether to reimburse Mr G any further.

For the reasons I discuss further below, I don't think it's necessary to wait until the outcome of the investigation for me to reach a fair and reasonable decision. There doesn't need to be 'conclusive' evidence – as I said at the start I reach my decision on the balance of probabilities. And with that in mind, I don't think it would be fair to wait for that investigation to complete before making a decision on whether to reimburse Mr G.

Has Mr G been the victim of a scam, as defined in the CRM code?

Halifax has signed up to the voluntary CRM Code, which provides additional protection to scam victims. Under the CRM Code, the starting principle is that a firm should reimburse a customer who is the victim of an APP scam (except in limited circumstances).

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 wouldn't apply to a genuine investment that subsequently failed.

And the CRM Code only applies if the definition of an APP scam, as set out in it (and as I have set above), is met.

I've considered the first part of the definition, and having done so I'm satisfied that Mr G paid the account he was intending to send the funds to. And I do not think there was any deception involved when it comes to who he thought he was paying. So, I do not think the first part of the definition set out above affects Mr G's transaction.

I've gone on to consider if Mr G's intended purpose for the payment was legitimate, whether the intended purposes he and the company (K) he paid were broadly aligned and, if not, whether this was the result of dishonest deception on the part of K.

From what I've seen and what Mr G has told us, I'm satisfied Mr G made the payment with the intention of providing an investment to K that would be passed on to other small to medium sized businesses in the UK property finance industry. This was supposed to be by way of short-term bridging loans to companies involved in property development. Mr G understood he would receive annual returns and profit by the end of the investment term. And I haven't seen anything to suggest that Mr G didn't think this was legitimate.

I've considered whether there is convincing evidence to demonstrate that the true purpose of the investment scheme was significantly different to this, and so whether this was a scam or genuine investment.

The Insolvency Service has said it hasn't found any evidence of bridging loans being provided by K - which was exactly what K told investors it would be doing. This statement was made in May 2023, when The Insolvency Service said that its investigation was ongoing. Even after extensive investigations, the position hasn't changed. It also had concerns over the trading of K and said it was acting as a Ponzi scheme. It hasn't found any evidence that K conducted any investments.

I've considered the reviews on the third-party website which show feedback purportedly left by K's borrowers. But I'm not persuaded the evidence shows that the verification process for that site was robust enough to prevent manipulation by a company like K, which may have sought to use it to build false credibility. It's also significant that, despite extensive investigation by the Insolvency Service, no evidence of a single loan has been found. Its investigation includes the period in which Mr G's bond was still active. So it seems unlikely that those reviews were left by genuine borrowers.

The Insolvency Service and the insolvency practitioner involved in the liquidation process, have both confirmed the directors of K continue to fail to co-operate with the Insolvency Service's investigation into the company. The directors have also failed to attend court for a private examination. They have said this is frustrating the liquidation process. I accept that on its own this isn't evidence of an intention to defraud, but I've considered it alongside the other available evidence.

According to Companies House, K's principal activities are listed as 'buying and selling of own real estate and other-letting and operating of own or leased real estate', which is different to how it purported to be using investors' money.

Other concerns are that Mr G says the website closed and K then became uncontactable - which is unusual with a genuine organisation.

Halifax says there is no active police investigation. Whilst K may not have been subject to a criminal investigation, I am conscious that any criminal proceedings would require a higher standard of proof (beyond reasonable doubt) than I am required to apply (which - as explained above - is the balance of probabilities).

I considered Halifax's argument that no warning about K has been posted on the FCA warnings list. It is not the role of the FCA to issue warnings about every limited company that might be operating fraudulently. It does so where it has reason to believe that a company is providing financial services requiring authorisation without being authorised to do so. As I understand it, K would not be required to be authorised for the activities it was undertaking. In any event, this alone doesn't outweigh all the other evidence supporting the claim that this was a scam.

Overall, there is a lack of any evidence that K was operating as a genuine and legitimate company. Most consumers invested a large amount of money and received very small monthly returns for a short period before this stopped – typical of how a Ponzi scheme operates.

Ultimately, I've not been provided with any evidence to show that the business was operating in line with the way it described to, and agreed with, its investors prior to their investment. So based on the evidence I have, and on balance, I am satisfied this was a scam.

And so, I think the circumstances here meet the definition of a scam as set out under the CRM Code.

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

Under the CRM Code the starting principle is that a firm should reimburse a customer who is the victim of an APP scam, like Mr G. The circumstances where a firm may choose not to reimburse are limited and it is for the firm to establish those exceptions apply. R2(1) of the Code outlines those exceptions.

One such circumstance might be when a customer has ignored an effective warning.

A second circumstance in which a bank might decline a refund is, if it can be demonstrated that the customer made the payments without having a reasonable basis for belief.

There are further exceptions within the CRM Code, but they do not apply in this case.

The CRM Code also outlines the standards a firm is expected to meet. And it says that when assessing whether the firm has met those standards, consideration must be given to whether compliance with those standards would have had a material effect on preventing the APP scam that took place.

Halifax has not challenged our investigator's view that, none of the exceptions to reimbursement under the CRM Code. But for completeness, I'm satisfied no exception to reimbursement applies. Halifax cannot evidence any warning it might have provided and therefore cannot show that any warning was 'effective' and ignored by Mr G.

The fact that there continues to be debate about the legitimacy of the scheme years after the payment strongly suggests Mr G held a reasonable belief that the scheme was legitimate at the point he made the payment. And there's no other evidence I've seen which indicates it wasn't reasonable for him to hold this belief.

And so, I don't think Halifax has established that any of the exceptions to reimbursement under the CRM Code apply here, and so it should refund the money Mr G lost in full.

Putting things right

Mr G says he didn't receive any interest payments back from K and Halifax hasn't provided all Mr G's bank statements. But if it transpires that he did, I think it would be fair for any returns to be deducted from the amount Halifax has to refund him.

In order to put things right for Mr G, Bank of Scotland plc trading as Halifax must*:*

- Refund Mr G the payments he made as a result of this scam (£15,000), less any payments he received (if applicable)

- Pay Mr G 8% interest on that refund, from the date it declined his claim until the date of settlement

As K is now under the control of administrators, it's possible Mr G may recover some further funds in the future. In order to avoid the risk of double recovery Bank of Scotland plc trading as Halifax is entitled to take, if it wishes, an assignment of the rights to all future distributions under the administrative process before paying the award.

If Bank of Scotland plc trading as Halifax considers that it's required by HM Revenue & Customs to deduct income tax from the interest award, it should tell Mr G how much it's taken off. It should also provide a tax deduction certificate if Mr G asks for one, so the tax can be reclaimed from HM Revenue & Customs if appropriate.

My final decision

My final decision is that I uphold this complaint and I require Bank of Scotland plc trading as Halifax to put things right for Mr G as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 18 April 2025.

Kathryn Milne
Ombudsman